NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 26, 2024

OPINION LETTER

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Re: ***Jane Doe v. Fairfax County School Board***
Case No. CL-2024-3171
Hearing Date: July 26, 2024

Dear Counsel:

This matter is before this Court on Respondent Fairfax County School Board's ("School Board") Motion to Dismiss for Mootness. For the following reasons, the Court grants the School Board's motion and dismisses Petitioner Jane Doe's claims for declaratory and injunctive relief.[1]

[1] On August 15, 2024, while this motion was under advisement, the Petitioner filed an Amended Petition. As the Amended Petition does not substantively alter the Petitioner's request for declaratory and injunctive relief, the Court's ruling in this Letter Opinion and accompanying Order pertains and applies to both the initial Petition and the

BACKGROUND AND PROCEDURAL HISTORY

On March 4, 2024, the Petitioner, Jane Doe, a senior in the Fairfax County Public Schools system ("FCPS"), commenced a civil rights action by filing a petition in this Court against the School Board claiming violations of her rights under the Constitution of Virginia and the Virginia Code. Specifically, she alleged violations of: (1) the Free Exercise of Religion Clauses under Article I, Section 16 of the Constitution of Virginia and Virginia Code Section 57-1; (2) the right to exercise religious freedom under Virginia Code Section 57-2.02; (3) the prohibition against viewpoint and content discrimination under Article I, Section 12; (4) Due Process under Article I, Section 11; (5) the right to be free from religious discrimination under Article I, Section 11; and (6) the right to be free from sex discrimination under Article I, Section 11. She prayed that this Court award her nominal damages and attorneys' fees in addition to granting declaratory and injunctive relief. Since filing, the Petitioner graduated from FCPS.[2]

In response to the petition, the School Board filed a demurrer and plea in bar. On July 25, 2024, the demurrer was overruled as to Jane Doe's Counts I, II, III, and IV, but sustained on Counts V and VI. The same day, the plea in bar was sustained on attorney's fees and overruled on nominal damages and sovereign immunity. This Court now hears the School Board's Motion to Dismiss for Mootness as to Petitioner's claims for declaratory and injunctive relief.

ANALYSIS

The School Board argues that Jane Doe's claims for declaratory and injunctive relief are moot because she graduated from the FCPS system and is no longer subject to the policies at issue. Jane Doe counters that her claims survive the motion to dismiss for three reasons. First, claims for actual damages survive mootness challenges. Second, facial challenges for overbreadth cannot be moot. Third, a public interest exception to the mootness doctrine applies to this case. This Court finds that none of these arguments save Jane Doe's claims for declaratory and injunctive relief.[3]

Amended Petition. *See Commonwealth v. Browne*, 303 Va. 90, 91, 899 S.E.2d 616, 618 (2024) ("Whenever it appears . . . that there is no actual controversy between the litigants, or that, if it once existed, it has ceased to do so, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case.") (quoting *Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 452, 739 S.E.2d 636, 639 (2013)); *see also Franklin v. Peers,* 95 Va. 602, 603, 29 S.E. 321 (1898).

[2] On July 12, 2024, during this Court's Calendar Control hearing regarding setting a briefing schedule and hearing date for the Motion to Dismiss, counsel for the Petitioner stipulated to the Court that the Petitioner had graduated from FCPS. Then again in open court during oral argument on the present motion on July 26, 2024, Petitioner's counsel confirmed that she graduated. The Petitioner is no longer subject to the School Board's policies.

[3] The Court has not, in this instant action, been asked to dismiss the Petitioner's claim for nominal damages and therefore proceeds solely as to declaratory and injunctive relief. *See e.g., Am. Humanist Ass'n v. Greenville Cnty Sch. Dist.*, 652 Fed. Appx. 224, 228 (4th Cir. 2016) (injunctive relief and nominal damages are two separate analyses and a court may proceed on each claim individually) ("When a student challenges the constitutionality of school policies, her claims for injunctive relief generally become moot upon her graduation, because she lacks an interest in

A motion to dismiss requires this Court to "treat the factual allegations in the [complaint] as we do on review of a demurrer." *Bragg v. Bd. of Supervisors*, 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018). Accordingly, this Court must "accept the truth of all material facts that are . . . expressly alleged, impliedly alleged, and those that may be fairly and justly inferred from the facts alleged." *Id.* The analysis on the present motion to dismiss for mootness centers on whether a live case or controversy exists. This is not to be confused with the sufficiency of a pleading standard on a demurrer. *Compare Barber v. VistaRMS, Inc.*, 272 Va. 319, 327, 634 S.E.2d 706, 711 (2006) (articulating the demurrer standard) *with Godlove v. Rothstein*, 300 Va. 437, 439, 867 S.E.2d 771, 772 (2022) (articulating the mootness standard).

Article VI, Section 1 of the Constitution of Virginia vests the "judicial power of the Commonwealth" in the judicial branch. That power, however, "does not authorize [Virginia courts] to 'issue advisory opinions on moot questions[.]'" *Godlove*, 300 Va. at 439, 867 S.E.2d at 772. An action is moot and must be dismissed "when the issues presented are no longer alive or the parties lack a legally cognizable interest in the outcome." *McCarthy Holdings LLC v. Burgher*, 282 Va. 267, 275, 716 S.E.2d 461, 465 (2011) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S. Ct. 1202, 1209 (1980)). "A claim may become moot during the course of litigation." *Berry v. Bd. of Supervisors*, 302 Va. 114, 129, 884 S.E.2d 515, 521 (2023).

I. Petitioner's Claims for Declaratory and Injunctive Relief Are Moot Regardless of Her Allegation of Actual Damages Because She is No Longer Subject to the School Board's Policies.

This Court finds that the Petitioner's graduation from the FCPS system renders her claims for declaratory and injunctive relief moot as such requested relief will not remedy her alleged injuries. Virginia law holds that a claim for prospective relief predicated on an actual injury becomes moot if the requested relief does not redress the petitioner's injury. *Wallerstein v. Brander*, 136 Va. 543, 546, 118 S.E. 224, 225 (1923) ("When . . . an event occurs which renders it impossible for the court to grant him any *effectual relief whatever*, the court will . . . dismiss the [claim]") (emphasis added); *Bd. of Supervisors v. Ratcliff*, 298 Va. 622, 622-23 842 S.E.2d 377, 378 (2020) (finding that a dispute regarding the interpretation of an active zoning ordinance was moot once the petitioner sold the property); *Hallmark v. Pers. Agency, Inc. v. Jones*, 207 Va. 968, 970, 154 S.E.2d 5, 6 (1967) (finding that petitioner's claim was rendered moot because the injunctive relief requested would no longer apply to the petitioner). The Petitioner alleges that she was injured by the School Board's policies in that they (1) forced her to engage in self-censorship and (2) prevented her from feeling safe in the FCPS's communal bathrooms. The

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the future application of school policy. However, a student who graduates typically continues to have a live claim for damages against a school for a past constitutional violation.") (citations omitted); *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003) ("Although the Plaintiffs' claims for declaratory and injunctive relief are moot, their damage claim continues to present a live controversy") (*citing Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) ("A student's graduation moots claims for declaratory and injunctive relief, but it does not moot claims for monetary damages")).

Petitioner's prayer for declaratory and injunctive relief, asking this Court to find that the School Board's policies are unconstitutional and to enjoin the School Board from enforcing the policies, would not redress the Petitioner's alleged injury because she is no longer subject to those policies. As a result, her prayer has become moot.

Virginia courts have not previously analyzed whether a student's graduation renders moot his or her challenge to a school policy; however, numerous federal courts have. While federal courts conduct a mootness analysis under Article III, Section 2, Clause 1 of the United States Constitution, and Virginia courts conduct a mootness analysis under Article VI, Section 1 of the Constitution of Virginia, this Court finds the consistency of federal court jurisprudence on mootness persuasive. *See e.g.*, *McCarthy Holdings LLC,* 282 Va. at 275, 716 S.E.2d at 465 (quoting *United States Parole Comm'n*, 445 U.S. at 396, 100 S. Ct. at 1209, to define mootness). The United States Supreme Court found that once a plaintiff challenging a school policy graduates or transfers from that school system, the case is moot for want of a case or controversy between the parties. *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129, 95 S. Ct. 848, 850 (1975).

In *Jacobs*,[4] six named plaintiffs purported to bring a class action lawsuit challenging school policies preventing the distribution of certain written materials. 420 U.S. at 129, S. Ct. at 850. The school board in *Jacobs* argued that the case was moot as the named plaintiffs had graduated and were no longer subject to the challenged policies. *Id.* The plaintiffs contested the argument stating that they were bringing the case "on behalf of all high school students attending Indianapolis public schools." *Id.* at 131, 95 S. Ct. at 851 (dissent). The Supreme Court found that because the plaintiffs failed to comply with the federal rules of civil procedure, there existed no duly certified class to challenge the school policies, and therefore the only claim or controversy that could be reviewed was the claim between the named plaintiffs and the school board. *Id.* at 129, 95 S. Ct. at 850. The Court then held that because the named plaintiffs already graduated from the school system, they no longer had an active controversy against the school board and dismissed the case as moot. *Id.* Numerous federal circuit courts have reached this same conclusion.[5]

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[4] Petitioner argues that *Jacobs* is inapplicable to the case at hand because it pertained to a failure of class certification and not mootness. This misses the point. Under Fed. R. Civ. P. 23, claims in a certified class action are not moot even when the named plaintiff's claims *are moot* because the controversy remains "very much alive for the class of persons [the named plaintiff] has been certified to represent." *Sosna v. Iowa*, 419 U.S. 393, 401, 95 S. Ct. 553, 558 (1975). So, when plaintiffs do not represent a certified class, only their individual claims remain. And when plaintiffs cannot be afforded the relief they seek, their claims are moot. That was the case in *Jacobs*. The plaintiffs were no longer subjected to regulations and rules they sought to enjoin and declare unconstitutional. *See Jacobs*, 420 U.S. at 129, 95 S. Ct. at 850 ("The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23 . . . .").Therefore, the plaintiffs' claims were moot.

[5] The Court agrees with the Respondent's contention that all federal circuit courts of appeals that have addressed the issue have held that a student's claims for injunctive and declaratory relief against a school's policies became moot upon the student's graduation. *See e.g.*, *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. at 129, 10 S. Ct. at 1209 (1975); *Harris v. Univ. of Mass. Lowell*, 43 F.4th 187, 191-93 (1st Cir. 2022); *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 140 (2d Cir. 1994); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216-17 (3d Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003); *Pederson v. La. State Univ.*, 213 F.3d 848, 874-75 (5th Cir. 2000);

Several federal circuit courts have found that, upon graduation, a student's petition for injunctive and declaratory relief was moot despite the petitioner allegedly suffering an actual injury. For example, in *Mellen*, the Fourth Circuit determined that the plaintiffs' graduation from the Virginia Military Institute mooted their petition to enjoin a mandatory daily "supper prayer" despite their allegation of self-censorship. 327 F.3d at 363-64. Similarly, in *American Humanist Association*, the Fourth Circuit found that because the plaintiffs moved out of the school district, the plaintiffs no longer had an interest in the outcome of the case, despite their allegation that they were subject to sectarian prayers. 652 Fed. Appx. at 229. In *Harris v. University of Massachusetts Lowell*, the plaintiff alleged that she was not allowed to come to campus without a COVID-19 vaccine, which she alleged violated her religious liberty. 43 F.4th 187, 190 (1st Cir. 2022). The First Circuit found that, as the plaintiff completed her classes at the University remotely and had transferred to a different school, her claim was moot, despite suffering an actual injury of being unable to come to campus. *Id.* at 193. In *Fox v. Board of Trustees of the State University*, the Second Circuit dismissed a case as moot where the school prevented the plaintiffs from hosting sponsored cookware demonstrations in their dormitories as the plaintiffs had graduated from the school, despite the plaintiffs suffering a monetary injury. 42 F.3d 135 (2d Cir. 1994). These cases establish that the test for mootness is whether the requested relief would redress the petitioner's injury, not whether the plaintiff has sufficiently pled prospective harm or actual injury. Therefore, this Court finds that, having graduated, the Petitioner's claims for injunctive and declaratory relief against the School Board's policies have become moot.

II. A First Amendment Overbreadth Claim Does Not Override Mootness.

Regardless of whether the Petitioner has sufficiently pled standing to bring a First Amendment overbreadth claim for purposes of surviving a demurer,[6] her claims for declaratory and injunctive relief are now moot. Mootness and standing are not the same. *Lebron v. Rumsfeld*, 670 F.3d 540, 561 (4th Cir. 2012). "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.*

Generally, a Court determines whether a litigant has standing by analyzing whether the litigant suffered an actual or potential injury in fact. *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 361, 798 S.E.2d 164, 168 (2017). An exception to this rule for standing is the First Amendment overbreadth doctrine. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S. Ct. 3028, 3037 (1989), *Jaynes v. Commonwealth*, 276 Va. 443, 458, 666 S.E.2d 303, 310-11 (2008). Under the overbreadth doctrine exception, a litigant who lacks standing to raise

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Hooban v. Boling, 503 FR.2d 648 n.1 (6th Cir. 1974); *Stotts v. Cmty. Sch. Dist. No. 1*, 230 F.3d 989, 991 (7th Cir. 2000); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000).

[6] In a demurrer hearing on July 25, 2024, this Court found that the Petitioner sufficiently stated a claim for a facial challenge to the School Board's policies in Counts I, II, III, and IV of the Petition. As aforementioned, a demurrer tests the sufficiency of the pleading, while the instant Motion to Dismiss analyzes whether the Petitioner's claims for declaratory and injunctive relief are moot. As such, this Court's ruling in the July 25, 2024 demurrer hearing is not dispositive to the Court's analysis on the present motion.

an as-applied challenge may nevertheless proceed on facial grounds. *Id.* This exception is distinct from the exception to mootness which analyzes whether the harm is "capable of repetition, yet evading review." *Commonwealth v. Browne*, 303 Va. 90, 95, 899 S.E.2d 616, 620 (2024).

Significantly, as one federal circuit court of appeals clarified, the First Amendment overbreadth doctrine standing exception does not also serve as an exception to mootness. The Eighth Circuit in *Sisney v. Kaemingk* made clear that under "no circumstances" does the overbreadth doctrine "permit a federal court to adjudicate an issue that has become moot." 15 F.4th 1181, 1194 (8th Cir. 2021) (citing *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1311-12 (8th Cir. 1997)). Likewise, the First Circuit in *John Doe v. Hopkinton Public Schools* held that the plaintiffs' "facial overbreadth and vagueness claims" as to a school bullying policy were moot because they graduated. 19 F.4th 493, 509-11 (2021). The plaintiffs needed to show that an exception to mootness—not standing—applied to their case in order to save their claims. *Id.* Because they could not, their claims were moot. *Id.*

Petitioner suffers from the same fate as the plaintiffs in *John Doe v. Hopkinton Public Schools*. Petitioner argues that this Court should deny the School Board's motion as the Petitioner has challenged the School Board's policies on facial grounds, not just as applied to her. Essentially, Petitioner argues that the overbreadth doctrine exception to standing saves her claims from the perils of mootness. As explained, this cannot be done. Once an issue is moot, save an applicable mootness exception, it is nonjusticiable. It does not matter whether the Petitioner alleges actual injury such that she may have **standing** to challenge the School Board's policies under the First Amendment overbreadth doctrine when the Petitioner has not shown any Virginia court precedent that extends this doctrine to **mootness**. The Court thus declines to extend the overbreadth doctrine's exception to standing to its mootness analysis. The fact that Petitioner graduated effectively makes her an outsider to the case. She may no longer seek declaratory and injunctive relief.

III. Petitioner Failed to Establish That There is an Applicable Exception to Mootness.

When a claim appears moot, the petitioner has the burden of showing the application of an exception to mootness. *See e.g.*, *Lighthouse Fellowship Church v. Northam*, 20 F.4th 156, 165 (4th Cir. 2021). This Court finds that the Petitioner failed to meet this burden and finds that there are no applicable exceptions to the mootness doctrine in this case.

The Petitioner argues that this Court should deny the School Board's motion to dismiss and adopt the "public interest" exception to mootness. The public interest exception has not been adopted as binding precedent in Virginia.[7] The exception "requires that the question (1) be of a

[7] Petitioner cites *Commonwealth of Virginia, ex rel., State Water Control Board v. Appalachian Power Company*, 12 Va. App. 73, 402 S.E.2d 703 (1991) as a Virginia Court of Appeals ruling that adopted the "public interest" exception to mootness. This misstates the finding of the Court of Appeals. In *Appalachian Power Company*, the Court of Appeals majority opinion never mentions the "public interest" exception. Rather, the Court found that the

public nature, and (2) be such as to require authoritative determination for future guidance of public officers, and (3) have a likelihood of future occurrence." *Morelli v. Loudoun County School Board*, 17 Va. Cir. 282 (1989) (citing *State ex rel. M.C.H. and S.A.H. v. Jack Kinder, Magistrate, etc., et al.*, 173 W. Va. 387, 317 S.E.2d 150 (1984); *Kohan, et al. v. Rimland School for Autistic Children, et al.*, 102 Ill. App. 3d 524, 430 N.E.2d 139 (1981)).

In the absence of controlling Virginia precedent, this Court declines to adopt the "public interest" exception to mootness. The Court must utilize "the judicial power of the Commonwealth" as vested in it by Article VI, Section 1 of the Constitution of Virginia and is not authorized to "issue advisory opinions on moot questions[.]" *Godlove*, 300 Va. at 439, 867 S.E.2d at 772.

Virginia jurisprudence does recognize a narrow exception to mootness, namely, the exception of being "capable of repetition, yet evading review." *Commonwealth v. Browne*, 303 Va. 90, 95, 899 S.E.2d 616, 620 (2024). "Capable of repetition, yet evading review" is a "narrow exception [that] applies when '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978, 988 (1998)). This exception does not apply in the present case.

A student wishing to exercise his or her rights may only challenge the constitutionality of school policies within a limited time frame. Otherwise, his or her claim will succumb to mootness. The Petitioner graduated from the FCPS system, and thus there is no "reasonable expectation that the same complaining party will be subject to the same action again." *Browne*, 303 Va. at 95, 899 S.E.2d at 620; *see e.g.*, *Mellen*, 327 F.3d at 364 ("Graduated students do not ordinarily qualify for this exception to the mootness doctrine because . . . they will never again be subject to the school's policies"). As such, the "capable of repetition, yet evading review" exception to mootness does not apply.

CONCLUSION

This Court is called upon to decide whether the Petitioner Jane Doe's graduation from the FCPS system renders her petition moot, and whether there exists an exception to the mootness doctrine that could maintain her seeking declaratory and injunctive relief.

The Court holds that Jane Doe's graduation does render her request for injunctive and declaratory relief moot. A claim is moot if the requested remedy would not redress the Petitioner's injury. Because the Petitioner graduated and is no longer subject to the School Board's policies at issue, her alleged injury would not be remedied by an injunction on those policies or by a declaratory judgment finding the policies unconstitutional. This Court also finds

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issue in the case was not moot, as the validity of the challenged regulations "remains a viable and justiciable issue between the parties." *Id.* at 75, 402 S.E.2d at 704. The Court found that, in the alternative, the "capable of repetition, but evading review" exception applied. *Id.* at 75-76, 402 S.E.2d at 705.

that the Petitioner's pled exceptions to mootness are inapplicable to the case at hand. While the First Amendment overbreadth doctrine may be relevant to an issue of standing, this Court declines to extend the doctrine to the issue of mootness. Similarly, this Court declines to adopt the "public interest" exception. Finally, this Court finds that the "capable of repetition, yet evading review" exception to mootness is inapplicable as there is no reasonable expectation that the Petitioner will be subject to the School Board's policies in the future.

Consequently, this Court dismisses the Petitioner's claims for injunctive and declaratory relief. This Opinion Letter shall be attached to and incorporated in an Order of today's date.

Sincerely,

[redacted]

Manuel A. Capsalis
Judge, Fairfax County Circuit Court

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE DOE,	)	
	)	
Petitioner	)	
	)	
v.	)	**CASE NO: CL-2024-3171**
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

ORDER

THIS MATTER came before the Court on July 26, 2024, on the Respondent Fairfax County School Board's Motion to Dismiss the Petitioner Jane Doe's claims for declaratory and injunctive relief; and

FOR THE REASONS set forth in the Court's Opinion Letter of today's date, which is incorporated herein as if fully set forth, the Court grants the Respondent's motion; it is therefore

ORDERED that the Petitioner Jane Doe's claims for declaratory and injunctive relief, as set forth in her Petition and subsequently filed Amended Petition, are hereby dismissed with prejudice.

Entered this 26th day of August, 2024.

[redacted]

Manuel A. Capsalis, Judge
Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY THE PARTIES OR BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA.