

02-089

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

COUNTIES, CITIES AND TOWNS: DILLON RULE.

Fairfax County School Board has no authority to add sexual orientation as category in its nondiscrimination policy, absent enabling legislation.

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates
November 8, 2002

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

Issue Presented

You ask whether the Fairfax County School Board has the authority to amend its nondiscrimination policy to include sexual orientation.

Response

It is my opinion that, without enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy.

Facts

You relate that the Fairfax County School Board is considering an amendment to its policy of nondiscrimination to include sexual orientation as a category for nondiscrimination. You inquire whether the school board has the authority to include this category in its policy. You further relate that the school board has not voted on this proposed change.

Applicable Authorities and Discussion

The Fairfax County School Board policy provides:

No student, employee, or applicant for employment in the Fairfax County Public Schools shall, on the basis of age, race, color, sex, religion, national origin, marital status, or handicapping condition, be excluded from participation in, be denied the benefits of, or be

subjected to discrimination under any education program or activity, as required by law. It is the express intent of the School Board that every policy, practice, and procedure shall conform to all applicable requirements of federal and state law.^[1]

You advise that a proposed amendment to the policy inserts the phrase "sexual orientation" after the words "marital status" and deletes the words "as required by law."²

Virginia adheres to the Dillon Rule of strict construction, which provides that "[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable."³ Any doubt as to the existence of a power must be resolved against the locality.⁴ The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth,⁵ which, in turn, rests on the foundation of Article I, § 14 of the Constitution of Virginia.⁶

This Office previously has concluded that, without enabling legislation, Fairfax County has no authority to prohibit discrimination based on sexual orientation, and, further, that such authority cannot be either "fairly or necessarily implied" from discrimination based on sex.⁷ Fairfax County has authority to adopt an ordinance "prohibiting discrimination in ... employment ... and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status or disability."⁸

As the Supreme Court of Virginia has noted, "[s]chool boards ... constitute public quasi-corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other."⁹ The Fairfax County School Board is subject to the Dillon Rule as is Fairfax County. As such, the school board may exercise no greater authority than that authorized by statute.¹⁰ Thus, without enabling legislation, the school board has no authority to add sexual orientation as a category in its nondiscrimination policy.

Conclusion

Accordingly, it is my opinion that, absent enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy.

¹Fairfax County Sch. Bd. Policy of Nondiscrimination (rev. Apr. 11, 1991) [hereinafter Sch. Bd. Policy] (quoting Policy 1450.2).

²Draft Sch. Bd. Policy, *supra* note (quoting proposed Policy 1450.3).

³Arlington County v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting City of Virginia Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

⁴2A Eugene McQuillin, The Law Of Municipal Corporations § 10.19, at 369 (3d ed. 1996); see 2000 Op. Va. Att'y Gen. 75, 76.

⁵"County government ... is ... one of the instruments or agencies through which the State performs its functions of government. It is an arm of the State." Board of Supervisors v. Cox, 155 Va. 687, 710, 156 S.E. 755, 762 (1931).

⁶Article I, § 14 guarantees "[t]hat the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This language is identical to Article I, § 14 of the 1902 Constitution and remains unchanged from § 14 of the Declaration of Rights, adopted June 12, 1776.

⁷Op. no. 02-029 to Hon. Kenneth R. Plum, H. Del. Mbr. (Apr. 30, 2002) *available at* <http://www.vaag.com/media%20center/Opinions/02-029.htm> (quoting *White*, 259 Va. at 712, 523 S.E.2d at 708).

⁸Va. Code Ann. § 15.2-853 (Michie Repl. Vol. 1997). Chapter 8 of Title 15.2, §§ 15.2-800 to 15.2-858, contains Virginia's laws governing the urban county executive form of government. Fairfax County has adopted this form of government. See Va. Ass'n Counties, Virginia County Supervisors' Manual, at 3 - 10 (6th ed. 1998).

⁹Kellam v. School Board, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960).

¹⁰Fairfax Zoning Board v. Cedar Knoll, 217 Va. 740, 743, 232 S.E.2d 767, 769-70 (1977); see also Commonwealth v. Arlington County Bd., 217 Va. 558, 578-79, 232 S.E.2d 30, 43, (1977) (holding that express statutory authority is necessary to confer collective bargaining power to local boards when General Assembly has not conferred such power by implication or otherwise).

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