NO. 22-2294

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LISA M.F. KIM, Individually and as Parent and Next Friend of J.K., a minor; and WILLIAM F. HOLLAND, and on behalf of all those similarly situated,

Plaintiffs-Appellants,

– v. –

BOARD OF EDUCATION OF HOWARD COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, Northern Division
Case No. 1:21-cv-655-DKC, Hon. Deborah K. Chasanow

BRIEF OF APPELLANTS

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May 8, 2023

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-2294 Caption: Lisa M.F. Kim et al. v. Board of Education of Howard County

Pursuant to FRAP 26.1 and Local Rule 26.1,

Lisa M.F. Kim, individually and as Parent and Next Friend of J.K., a minor
(name of party/amicus)

who is Plaintiffs-Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Michael F. Smith Date: May 8, 2023

Counsel for: Plaintiffs-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-2294 Caption: Lisa M.F. Kim et al. v. Board of Education of Howard County

Pursuant to FRAP 26.1 and Local Rule 26.1,

William F. Holland
(name of party/amicus)

who is Plaintiff-Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s/ Michael F. Smith Date: May 8, 2023

Counsel for: Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and 42 U.S.C. § 1983, and under 28 U.S.C. § 2201. On November 18, 2022, the district court entered its Memorandum Opinion. JA51.

Appellants timely filed their Notice of Appeal on December 19, 2022. JA79. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Does a Complaint that alleges that the election of the Student Member of the Howard County Board of Education, a public official, by an electorate consisting only of Howard County Public School System ("HCPSS") students in grades 6-11, to the exclusion of all other Howard County voters who do not attend HCPSS schools, sufficiently state an Equal Protection violation under *Hadley v. Junior College District of Metro. Kansas City*, 397 U.S. 50 (1970).

2. Does a Complaint state a violation of Plaintiff's First Amendment rights to the free exercise of religion and the right to direct a child's education when the procedures for electing the Student Member of the Howard County Board of Education bar Plaintiff and county students homeschooled or attending private school for religious purposes from participation in the election process.

STATEMENT OF THE CASE

I. Introduction

Registered voters elect seven adult Members to Defendant, the Board of Education that runs Howard County, Maryland's public-school system. An eighth Member, a student in Howard County Public School System (hereinafter "HCPSS") with significant voting rights, is elected to the Board not by registered voters, or via appointment by any individual or body even remotely accountable to voters. Rather, the Student Member is elected by the district's 6th through 11th-grade schoolchildren, to the exclusion of both registered voters and students whose families have exercised their fundamental right to the free exercise of their religion and to educate their child in a religious setting.

Plaintiffs' Complaint properly alleges violations of both the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment relating to the Student Member's election. But the district court dismissed these claims under FRCP 12(b)(6), misconstruing applicable law and making erroneous, outcome-determinative factual assumptions – prior to discovery and at the

pleading stage, when courts must assume that Plaintiffs' factual allegations are true. The court's dismissal should be reversed, and this matter reinstated for discovery and trial.

II. Material facts and proceedings.

Because the district court granted dismissal under FRCP 12(b)(6), the facts arise from Plaintiffs' Complaint and Board public records.

A. The parties

Defendant Board of Education of Howard County ("Board") is established by Maryland law to run Howard County's public schools. JA9; Md. Code Educ. §§ 3-102 through 3-104. When the complaint was filed, HCPSS had 58,868 students in 77 schools, and combined operating/capital budgets of nearly $1 billion. JA8, JA13.[1]

[1] More than two years after the Complaint's filing, there now are 57,948 HCPSS K-12 students. https://www.hcpss.org/schools/ enrollment-reports/ (accessed May 4, 2023). This brief will cite figures from the Complaint, though where they are available this Court may judicially notice current population, enrollment and other figures under FRE 201(d). *Martin v. Duffy*, 858 F.3d 239, 253 n.4 (4th Cir. 2017).

Plaintiff Lisa M.F. Kim is a Howard County resident and registered voter. JA9. She sued for herself and as Next Friend of J.K., her son, at the time a 6th-grade student at a Catholic school in Howard County. *Id*. J.K. soon will finish 8th grade at a Christian school in the county, ECF 35 Errata, and will matriculate at that school's high school later this year.

Plaintiff William F. Holland is a Howard County resident, registered voter, and the parent of two HCPSS students. JA9.

B. The vast majority of Howard County voters are denied the right to vote for the Student Member of the Board of Education.

Geographically the smallest of Maryland's 23 counties, Howard County is the sixth largest in population, increasing from 287,075 residents in the 2010 Census – the most recent at the Complaint's filing – to 335,411 in July 2022. JA13; *Quick Facts: Howard County, Maryland* (U.S. Census Bureau), https://www.census.gov/quickfacts/fact/table/howardcountymaryland/PST045222 (accessed May 4, 2023).

Its public-school system is run by an elected Board comprising seven adult Members and one Student Member. JA9; Md. Code Educ. §

3-701(a)(l).[2] Registered voters elect the seven adult Members in primary and general elections: one Member from each of the county's five councilmanic districts, and two at-large. JA10; Md. Code Educ. § 3-70l(a)(2). Board members must be county residents and registered voters. JA10; Md. Code Educ. § 3-70l(b). When the Complaint was filed in early 2021, the five councilmanic districts contained between 52,086 and 62,435 residents. JA13, JA39.[3]

The eighth Board Member is a "Student Member," who must be a "bona fide resident of Howard County and a regularly enrolled junior or senior year student from a Howard County public high school." JA10; Md. Code Educ. § 3-70l(f). The Student Member serves a one-year term beginning July 1, with voting rights on most (though not all) issues. *Id.* The Student Member is elected only by HCPSS students in grades 6-11,

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[2] Md. Code Educ. § 3-701 is reprinted in the Addendum.

[3] Based on reapportionment following the 2020 census, the five districts now contain between 63,979 and 67,480 residents. *See* https://cc.howardcountymd.gov/sites/default/files/2023-04/FINAL%202020_CouncilDistrict_PopChange%20%281%29.pdf (accessed May 4, 2023).

in a process that excludes registered voters (unless any happen to be high schoolers below 12th grade). When the complaint was filed, 27,304 of the county's 58,868 students were eligible to vote in the 2021 Student Member election: 13,648 middle-schoolers (grades 6-8) and 13,656 in grades 9-11. https://www.hcpss.org/f/schools/monthly-enrollment-2021-mar-31.pdf (accessed May 4, 2023). The 4,433 12th-graders were ineligible to vote.[4]

C. The Student Member election process.

The Student Member election process is authorized by Md. Code Educ. § 3-701(f), Board Policy 2010 and its Implementation Procedures ("IPs"). Addendum; *see also* JA25-37.

1. Students express interest in running for Student Member, and classmates narrow the field to two.

The Student Member nomination and election process is approved by the Board and overseen by the Superintendent, 32 secondary-school

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[4] In the 2023 Student Member election, of the county's 57,948 students, 27,082 are eligible to vote: 13,152 in grades 6-8 and 13,930 in grades 9-11. https://www.hcpss.org/f/schools/monthly-enrollment-feb-28-2023.pdf (accessed May 4, 2023).

principals, various administrators, and other HCPSS employees. JA10, JA18; Md. Code Educ. § 3-70l(f)(3)(i); JA25-31, Policy 2010; JA33-37, IPs. The pool of electors, who directly elect the Student Member, is fixed and defined by statute – "any student in grades 6 through 11 enrolled in a Howard County public school." Md. Code Educ. § 3-701(f)(3)(iii).

As the Complaint alleges, the Student Member election process in its preliminary stages involves oversight from various HCPSS employees and administrators. JA11. These include the HCASC Advisor,[5] high-school and middle-school principals, a counselor/advisor from each secondary school, and the Superintendent. JA11.

The Student Member election process begins each winter, when 10th and 11th-grade HCPSS students interested in running submit a completed application and parent letter by February 15. JA34. The

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[5] Each HCPSS secondary school has a representative student assembly. At high schools it's called "Student Government Association" (SGA), and "Student Council" at middle schools. JA25-26. HCASC, the Howard County Association of Student Councils, is a student group comprising representatives from each SGA and Student Council; it is advised by an adult HCPSS employee, the "HCASC Advisor." JA11, *see also* JA33.

HCASC Advisor reviews all applications, but only "for completeness and accuracy of information." *Id*. If an application is complete, accurate and has the parent letter, the student may not be kept from running. *Id*.

A Student Convention, made up of Student Delegates from each HCPSS secondary school is convened to winnow the interested candidates to two finalists. JA34. Student Delegates are chosen at each school by a committee comprising the principal, student-council advisor or counselor, and three students the principal selects. That committee selects one Student Delegate per grade per school; each high school also sends three additional at-large Delegates. JA34.

Student Delegates attend the Student Convention and choose two finalists for Student Member, along with two alternates. JA34-35. No Board employee participates in the Student Delegates' vote to select the two finalists and alternates. *Id*.[6]

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[6] During the 19 months the Board's motion to dismiss was pending, the Board revised Policy 2010 and its IPs; the changes included having the Student Convention choose two alternates, rather than one.

2. Public schoolchildren elect the Student Member.

Once Student Delegates vote at the Student Convention and select two finalists, the finalists provide their campaign materials to secondary-school principals and adult Advisors, who arrange for all eligible student voters to view them. JA11-12; JA35. All HCPSS students in grades 6-11 then elect by ballot one of the two as the Student Member. JA12.[7]

HCPSS employees oversee the election but are not authorized to vote, interfere, or participate. JA12; JA35. By statute, the grade 6-11

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[7] Recognizing that Student Member elections have become proxy battles among adults and political factions, the 2021 Policy and IP amendments now impose detailed "Campaign Expectations and Candidate Preparedness" on each candidate and his/her "Team," along with procedures for grievances and possible disqualification by the Superintendent. *Policy 2010 Implementation Procedures – Student Representation*, (Jan. 13, 2022), https://policy.hcpss.org/2000/2010/implementation/ (accessed May 4, 2023) ("Revised IPs"). The Revised IPs also direct each candidate and his/her Team to "manage family, friends and school support to remain positive and constructive to the campaign process." *Id*, § II-F.

This Court may judicially notice the amended Policy and Revised IPs. FRE 201(d); *Martin*, 858 F.3d at 253 n.4; *see also Flickinger v. School Bd. of Norfolk*, 799 F. Supp. 586, 589 n.8 (E.D. Va. 1992) (school-board policy).

students "vote directly for one of the two student member candidates." Md. Code Educ. § 3-701(f)(3)(iii).

Upon the students' election of the Student Member, the Superintendent certifies to the Board that the election was conducted in accordance with Policy 2010 and its IPs. The Student Member takes office for a one-year term at the Board's first July meeting. JA12; JA35. The Superintendent must provide "assistance, support, and guidance" to the Student Member in carrying out his/her Board duties and responsibilities. JA12, JA29.

3. Howard County students not attending HCPSS schools are prohibited from nominating, voting, or running for the Student Member position.

Howard County residents attending religious schools, or being home-schooled for religious reasons, are not eligible to be Student Convention Delegates, or run or vote in the Student Member election. JA 10, JA12, Md. Code, Educ. §§ 3-70l(f). J.K., who since the Complaint's filing has attended religious middle school in Howard County, has never been allowed to participate, and in spring 2023 is being excluded for the third time. *Id*. No registered voter may vote for

the Student Member unless he or she is also a HCPSS student in 11th grade or below. JA13.

D. Student Member powers.

Maryland law bestows full voting rights on Howard County's Student Member, except in 14 discrete areas including determining geographic attendance areas, architects' employment, collective bargaining, suspensions and expulsions, and other areas. Md. Code Educ. § 3-701(f)(7); *see also* HCASC, "Student Member of the Board of Education," https://sites.google.com/a/inst.hcpss.me/hcasc/smob (accessed May 4, 2023) ("[u]nlike other Maryland jurisdictions, the HCPSS grants the SMOB full status as a board member and can vote on all issues except issues pertaining to budget, personnel, or other restricted matters"). When the Student Member votes, five votes are needed, not four, to pass a measure. Md. Code Educ. § 3-701(g).

Since the position began in 2007, Student Members have exercised substantial powers. When a majority of the seven adult Board Members wanted to reopen Howard County schools to in-person learning in late 2020, the Student Member voted no, preventing full reopening for an

additional eight months until the next school year. ECF 41 at 15-16[8], *see also* ECF 38-1, *Spiegel v. Bd. of Educ. of Howard Cnty.*, 281 A.3d 663, 664 (Md. 2022). The Student Member also proposed a controversial measure to remove all police officers from county schools. ECF 41 at 15-16.[9]

When Howard County residents expressed displeasure with the Student Member's blocking schools' full reopening, the Superintendent denounced their "unconscionable acts of bullying by adults" who "felt empowered to harass, demean, and aggressively bully" the Student Member, in a manner the Superintendent found "reprehensible." Michael J. Martirano, Superintendent's Report, (Dec. 22, 2020), p 3, https://go.boarddocs.com/ mabe/hcpssmd/Board.nsf/files/

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[8] *Citing* Meyer, *Howard County school board rejects hybrid model, votes to stay with virtual learning through mid-April*, Baltimore Sun (Nov. 17, 2020), https://www.baltimoresun.com/maryland/howard/cng-ho-virtual-hybrid-vote-20201117-bmrlj4vuvngqbmjb7ey2644zte-story.html.

[9] *Citing Howard County Board of Education votes against removing School Resource Officers*, (CBS Baltimore, Sept. 11, 2020), https://www.cbsnews.com/baltimore/news/howard-county-public-schools-school-resource-officers-vote/.

BWJTFF772657/$file/12%2022%202020%20Superintendent%20Report.pdf (accessed April 14, 2023).

Separate from the Student Member, the Board maintains a nonvoting "Student Representative" position, allowing students from each secondary school to participate in Board meetings and serve as a liaison between the Board and students. JA26, JA37.

E. Procedural background

Plaintiffs filed their Complaint in March 2021, alleging that the process for electing the Student Member violates the Equal Protection Clause and First Amendment. JA7.

In April 2021, the Board moved to dismiss under FRCP 12(b)(6). ECF 18. Plaintiffs responded, ECF 20, and the Board replied. ECF 22.

Separately, in December 2020, two HCPSS parents filed a state-court challenge to the Student Member under Maryland law only. *Spiegel v. Bd. of Educ. of Howard Cnty.* After the trial court rejected their claims, the *Spiegel* plaintiffs appealed and sought bypass review

from the Maryland Supreme Court.[10] Supreme Court briefing in *Spiegel* concluded in October 2021.

On Jan. 27, 2022, eight months after briefing in this case concluded on the Board's motion to dismiss, the district court proposed to stay its consideration of the motion pending the Maryland Supreme Court's *Spiegel* ruling. JA46. Plaintiffs opposed a stay because *Spiegel* involved only state-law issues. ECF 34, 35. On Feb. 9, 2022, the district court stayed this matter. JA47-48.

On Aug. 24, 2022, the Maryland Supreme Court held that the Student Member did not violate Maryland's Constitution. *Spiegel v. Bd. of Educ. of Howard Cnty.*, 281 A.3d 663 (Md. 2022), ECF 38-1 ("*Spiegel*"). The parties to this action filed supplemental briefs regarding *Spiegel*'s relevance, or lack thereof. ECF 40, 41.

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[10] Known as the Court of Appeals since 1776, Maryland's highest court in December 2022 became the Maryland Supreme Court. This brief uses its current name.

F. The district court dismisses the Complaint without discovery, failing to accept the pleadings' factual allegations and misstating or disregarding applicable law.

In a 27-page Memorandum Opinion issued without oral argument in November 2022, the district court found one-person, one-vote inapplicable. It disregarded the well-pleaded complaint allegations and analogized the Student Member to positions that are "'basically' selected by the governmental entity (through its chosen delegates) rather than 'the people.'" JA59, quoting *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 107 n.2, 109 n.6, 111 (1967). Citing Board control over various stages of the election process, it held that "the Student Member is effectively chosen by the Board rather than 'the people.'" JA60. That is factually incorrect, for as noted above, Student Convention Delegates nominate, and grade 6-11 schoolchildren elect, the Student Member – HCPSS employees do not. The district court described the Maryland Supreme Court as concluding that the Student Member is not "elected" for purposes of Maryland law and discounted the General Assembly's own repeated descriptions of the Student Member's "election." JA66-JA67 (citing *Spiegel*).

The court also dismissed Plaintiffs' Free Exercise claim, again substituting its own view for the Complaint's factual allegations. It disregarded the Complaint's allegation that the procedures for conducting the election of the Student Member penalize religious activity by denying students like J.K. the right to vote and/or run for Student Member, JA21. Instead, the court simply declared that the law "does not bar students from attending religious school or punish them for doing so," JA73 – in the absence of any discovery as to whether any religiously schooled student, or parent, feels punished or coerced.

The court also misstated the law in ignoring the Complaint's allegations. For instance, Plaintiffs allege that while the Student Member makes decisions on things like transportation for religious-school students, those students have no say in the Student Member's election. JA21. The court dismissed that, incorrectly asserting "the Student Member wields no such power…the Student Member may not vote on matters related to the 'transportation of students.'" JA73-74, citing Md. Code Educ. § 3-701(f)(7)(vi). But that provision only bars the Student Member from voting on transportation *relating to school*

buildings post-consolidation, under Md. Code Educ. § 4-120. By the statute's plain terms, the Student Member has a full vote on all other transportation issues, which are governed by Md. Code Educ. § 7-801, including whether to transport religious-school students. (Other errors in the court's description of Student Member voting powers are discussed in Argument Section I-B, *infra*).

The court made no mention of controversial votes the Student Member actually cast on issues of public concern, JA 8, such as successfully keeping schools closed to in-person learning an additional eight months, the failed proposal to kick police officers out of schools, or other matters. It denied as moot Plaintiffs' class-certification motion and dismissed the case. JA72-78.

Plaintiffs timely appealed. JA79.

SUMMARY OF ARGUMENT

The Complaint states an Equal Protection claim relating to the election of the Student Member, a public official, by an electorate consisting only of HCPSS students in grades 6-11, to the exclusion of all other Howard County voters who do not attend HCPSS schools. Under

Hadley v. Junior College Dist. of Metro. Kansas City, 397 U.S. 50 (1970) ("*Hadley*"), the Student Member selection is subject to Equal Protection because the position is filled by "popular election" and the Student Member is a public official who performs "governmental functions." Yet the election of the Student Member is conducted without adherence to the Equal Protection Clause and the First Amendment.

The district court disregarded both the Complaint's allegations and the Maryland Code, both of which state unambiguously that the Student Member is directly elected by "Howard County residents enrolled as students in HCPSS grades 6 through 11." JA12; *see also* Md. Code Educ. § 3-701(f)(3) & (4). The court substituted its own facts, finding that the Student Member is chosen by Board employees, which simply does not occur. The court also eschewed *Hadley* in favor of a state court's conclusion that the position is permissible under Maryland law, a point irrelevant to the Federal issue presented here. When the Student Member is properly analyzed as a popularly elected public official, the Complaint states several Equal Protection claims.

The Complaint also states a First Amendment claim. The Student Member statute is not neutral and generally applicable, but rather imposes substantial burdens on the fundamental rights of Free Exercise and directing one's child's education – burdens the Complaint plausibly alleges, but which the district court disregarded. The Student Member framework cannot survive strict scrutiny.

STANDARD OF REVIEW

This Court reviews de novo dismissal under FRCP 12(b)(6), accepting the Complaint's factual allegations as true and drawing all reasonable inferences from them in favor of Plaintiffs. *Annappareddy v. Pascale*, 996 F.3d 120, 127 (4th Cir. 2021).

"[W]hen as here, a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, 'we must be especially solicitous of the wrongs alleged' and 'must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the facts alleged.*'" *Edwards v. City of Goldsboro,* 178

F.3d 231, 243-244 (4th Cir. 1999), quoting *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988) (court's emphasis).

The party seeking dismissal has the burden of showing no claim has been stated. 2 Moore's Federal Practice – Civil § 12.34 (2023) (citing cases). The district court "must examine the complaint and determine whether it states a claim as a matter of law." *Id*. Moreover, the plausibility requirement of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies only to the complaint's factual allegations, not to the legal theories a plaintiff asserts or omits. *Id*. In addition to the Complaint's allegations, the appellate court may "'consider "implications from documents" attached to or fairly "incorporated into the complaint," and "facts" susceptible to judicial notice.'" *Lyman v. Baker*, 954 F.3d 351, 360 (1st Cir. 2020) (citations omitted).

ARGUMENT

I. The Complaint properly alleges an Equal Protection claim arising from the popular election of a voting Student Member who performs governmental functions.

Over a "long series of cases," the Supreme Court has identified two key inquiries in determining whether a local election is subject to

Equal Protection principles. *Hadley*, 397 U.S. at 54 n.7 (collecting cases). "[I]n each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out government functions." *Id.* at 54. Thus, there are two inquiries: 1) whether a position is filled through "popular election" and 2) whether the elected official performs a "governmental function." *See also Vander Linden v. Hodges,* 193 F.3d 268, 275 (4th Cir. 1999); *ARC Students for Liberty Campaign v. Harris*, 732 F. Supp. 2d 1051 (E.D. Cal. 2010).

The Complaint plausibly alleges both, and the district court erroneously dismissed it. The court strayed beyond the Complaint's allegations and created its own facts in finding the Student Member is not chosen via "popular election." And it completely skipped analyzing whether the Student Member performs a governmental function.

A. The Student Member is "popularly elected."

The district court found the election of the Student Member exempt from Equal Protection, concluding that the position it is not

filled through popular vote but through a system that is "basically appointive." *See* JA57-62. That is legally and factually incorrect.

1. The Student Member is elected by a legislatively defined class.

The Equal Protection Clause requiring "the guarantee of equal voting strength for each voter applies in *all* elections of government officials." *Hadley*, 397 U.S. at 58 (emphasis added). The correct inquiry at *Hadley*'s first step is whether, to fill the position, a "class of voters is chosen and their qualifications specified…." *Hadley*, 397 U.S. at 59 (cleaned up). Once that happens, there is "no constitutional way by which equality of voting power may be evaded." *Id*. The Complaint concisely pleads such a distinct, qualified class: "Howard County residents enrolled as students in HCPSS grades 6 through 11 are eligible to vote for the Student Member." JA12; *see also* Md. Code. Educ. § 3-701(f)(3)(iii). The district court noted the Student Member is not chosen by Howard County registered voters, JA60, but missed the legal significance of that point.

ARC, *supra*, shows the district court's error in requiring the "distinct class of voters" to which *Hadley* refers to be *registered voters* –

they need not be, and in *ARC* they were not. *ARC* arose from a California statute that mandated the election by community-college students of a Student Trustee to the governing Board of each community-college district, alongside regular members elected by registered voters. 732 F. Supp. 2d at 1056-57. The statute directed that the Student Trustee "shall be chosen…by the students enrolled in the community colleges of the district," and did not require student voters to be registered voters. *ARC*, 732 F. Supp. 2d at 1058 n.4, quoting Cal. Educ. Code § 72023.5. After polling-place irregularities arose during one student election, the Board invalidated the results and had a group of "student leaders" pick the Student Trustee, prompting a student group to sue. *Id*. at 1053. Defendants moved to dismiss the constitutional claims, arguing that the Student Trustee was not popularly elected and thus was exempt from constitutional scrutiny. But the district court held that under *Hadley* there was "no question that the Student Trustee is popularly elected." *ARC Students*, 732 F. Supp. 2d at 1060.

The court found dispositive that the legislature "decided to have Student Trustees selected by popular election *by a class of voters*

determined by their enrollment in a community college." *Id.* at 1060 (emphasis added). It rejected as contrary to *Hadley* the same analysis the district court used here, that "because this class is not the same class from which the other trustees are elected, a so-called 'general public election,' the Student Trustee is not publically [*sic*] elected." *Ibid.* As the court noted, "[t]his argument simply fails under *Hadley*. The [Supreme] Court specifically held that *an election is popular when a legislature defines a class of voters*." *ARC*, 732 F. Supp. 2d at 1060 (emphasis added).[11]

The Complaint here alleges that the Howard County Student Member seat is filled by a "particular group or class of people" the legislature defined – HCPSS students in grades 6-11. *See* JA12; *see also* Md. Code Educ. § 3-701(f)(3)(iii). An election does not lose its status as popular depending on how the legislature defines a class. *ARC*, 732 F. Supp. 2d at 1060 (holding that if "'a State . . . limit[s] the right to vote to

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[11] *ARC* cites *Hadley* at 59-60 for this point, but those pages contain Justice Harlan's dissent on a different point. The cite should be *Hadley*, 397 U.S. at 58-59.

a particular group or class of people,' such an election does not cease being popular."). In other words, whenever government defines a specific group of persons to select someone to carry out governmental functions, such officials "are elected by popular vote," and Equal Protection requires equal treatment of voters, regardless of the purpose of the election or the officials selected. *Hadley*, 397 U.S. at 55-56. Under *Hadley*, Plaintiffs properly pleaded a "popular election."

2. Popular elections are not limited to those including the entire general electorate.

The district court incorrectly described *Hadley* as limiting "popular election" to when "a local officer is chosen 'by the people' – that is by the county's 'qualified voter' base." JA58, citing *Hadley*, 397 U.S. at 55-56. But *Hadley* does not require selection to be "by the county's 'qualified voter' base" to be a "popular election." Instead, *Hadley* holds that once a state or local government decides to select persons by popular election to perform governmental functions,

> …the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that

> will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

Hadley, 397 U.S. at 56.

In other words, "once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.'" *Id.* at 59, quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

Thus, it is of no relevance in determining the "popular election" issue that Maryland General Assembly did not subject the Student Member to a "county-wide 'popular vote.'" JA62. Rather, "*an election is popular when a legislature defines a class of voters*." *ARC*, 732 F. Supp. 2d at 1060 (emphasis added), citing *Hadley*.

3. Whether a position is filled by "popular election" is a question of federal law.

The district court also erred in relying on a Maryland state court's determination that the Student Member is permissible under Maryland law. JA66-67. Whether a position is filled via "popular election" is a

question of Federal law. *Vander Linden*, 193 F.3d at 276; *see also Smith v. Allwright*, 321 U.S. 649, 664 (1944).

For purposes of the Civil War Amendments, the term "election" encompasses "any election in which public issues are decided, or public officials are selected." *Terry v. Adams*, 345 U.S. 461, 468 (1953) (plurality opinion) (citation omitted); *accord Rice v. Cayetano*, 528 U.S. 495, 523 (2000); *see also Davis v. Guam*, 932 F.3d 822, 830 (9th Cir. 2019) (noting "the *Rice* majority adopted the formulation of the *Terry* plurality – that the Fifteenth Amendment applies to 'any election in which public issues are decided or public officials selected'") (citations omitted). Those constitutional protections apply to all elections, "whether the voting on public issues and officials is conducted in community, state or nation. Size is not a standard." *Terry*, 345 U.S. at 469; *see also id.* at 484 (Clark, J., concurring) ("Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, *in whatever disguise*, takes on those attributes of government which draw the Constitution's safeguards into play.")

(emphasis added, citations omitted). Regardless of the State-applied label, these elections are subject to constitutional requirements. *Allwright*, 321 U.S. at 664.

4. "Popular election" status is bestowed on the selection process of public officials "in whatever disguise."

Relatedly, the labels a state applies to its election practices in trying to evade Equal Protection are irrelevant, as shown by the Texas "white primary" cases that culminated in *Allwright*. There, a 1923 Texas statute barred non-whites from voting in primary elections. After it was declared unconstitutional, *Nixon v. Herndon*, 273 U.S. 536 (1927), Texas enacted another statute allowing political parties to determine primary participation – and the Texas Democrat Party limited its primaries to whites. The Court invalidated that, too. *Nixon v. Condon*, 286 U.S. 73 (1932). Ultimately it ruled that elections held by private individuals with limited electorates qualify as "elections," regardless of the State-applied label, and are subject to Constitutional requirements. *Allwright*, 321 U.S. at 664 ("[t]his grant to the people of the opportunity for choice is not to be nullified by a state through

casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.") (Fifteenth Amendment), citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *accord Terry*, 345 U.S. at 466 (plurality opinion) (invalidating Texas scheme that let all-white Jaybird Association select candidates for primary elections).

These cases settle conclusively that state characterization of its election-related procedures cannot trump the Civil War amendments and their associated federal statutory protections. *Spiegel*'s determination that, for purposes of Maryland law, the election of the Student Member is permissible is irrelevant to the issue presented here. The district court erred in citing it in support of its ruling. JA66.

The court also erred in using *Spiegel* to trump Plaintiffs' well-pleaded allegations about the many times Maryland's General Assembly, and the Board itself, refer to the Student Member's "election" by a "vote" of students. In the court's view, *Spiegel*'s conclusion under Maryland law renders irrelevant "what state lawmakers and employees

called the (election) of the Student Member" before *Spiegel*. JA66. However, *Spiegel* never held that the selection of the Student Member was not an election. *Spiegel*, 281 A.3d at 669 (General Assembly "simply amended [the statute] to recognize a new type of member – a 'student member' – who was chosen through a different *election* process"). (emphasis added). It merely found that the Maryland General Assembly possessed a vast grant of legislative authority from the Maryland Constitution to design public education in Maryland, and that authority devoured the state-based claims of the plaintiff challenging the student board member. Article VIII, Section I of the Maryland Constitution vested vast authority in the General Assembly to design a school system, *Spiegel* reasoned, and the establishment of the student board member could not violate other election related provisions of the Maryland Constitution. *Spiegel*, 281 A.3d at 672-674.

But while the White Primary cases instruct courts to disregard what a state calls its selection procedures when it is trying to *avoid* having an unlawful scheme deemed an "election" covered by Equal Protection, the converse is not true. In deciding whether something is a

"popular election" under *Hadley*, it is certainly relevant – though not dispositive – that a state and the Defendant Board of Education repeatedly call it an "election." *See* 397 U.S. at 55.

5. Maryland's Education Code calls for the "direct election" of the Student Member.

Section 3-701(f)(4) mandates "the direct election" of the Student Member by students. It directs that the "nomination and election process" "[s]hall allow" any HCPSS student in grades 6-11 "to vote directly" for one of the two finalists. Md. Code Educ. § 3-701(f)(3)(iii). Policy 2010 defines the Student Member as an HCPSS junior or senior and Howard County resident "elected by student voters to serve on the Board, in accordance with Maryland statute." JA26. The "student voters" who "elect" the Student Member are those in grades 6-11. *Id.* Once the Student Convention nominates two finalists, "Election Procedures" call for both to submit their "campaign materials" for viewing by "all eligible voters." JA35. The actual "[e]lection of the Student Member" is carried out "by confidential ballot," with "voting" administered by Student Council Advisors and governed by HCASC "election rules," with "additional election rules" being developed as

necessary. *Id.* The Student Member garnering a majority of "votes cast" is "elected." JA27. Once "elected to be the Student Member," he or she becomes "Student Member-*Elect*." JA33 (emphasis added). The Superintendent certifies to the Board "that the Student Member-Elect was elected." JA 35.

The district court disregarded the Complaint's citations, the *Spiegel* opinion's characterization of the challenged procedure as an "election" no fewer than six times, and the Maryland legislature's repeated references to the Student Member process as an "election." The Court dismissed the language as "irrelevant" to the issue of whether it is a "popular election" subject to Equal Protection. JA62-63. But *Hadley* makes clear that the relevant inquiry is not whether the county electorate at large can vote on the Student Member – of course the Student Member fails that test, that's the point of this action. Rather, the relevant inquiry in determining if a post is filled by "popular election" is whether the state has defined a particular group or class of people as the ones who fill it. *ARC*, 732 F. Supp. 2d at 1060, citing *Hadley*. The Maryland General Assembly and the Board not only

have done so, but they also repeatedly refer to the process as an "election." Had they intended to create an appointed Student Member, they would have used far different terminology.

The statute, Policy 2010 and IPs all support the conclusion that under *Hadley*, the Student Member selection process is a popular "election." *See Hadley*, 397 U.S. at 54; *Vander Linden*, 193 F.3d at 273-274; *ARC*, 732 F. Supp. 2d at 1060.

6. The district court relied on appointment cases that are inapposite.

The lower court leaned heavily on *Sailors*, 387 U.S. 105, to hold that the selection of the Student Member is "basically appointive," not an election. JA58-68. But that is an incorrect reading of *Sailors* and ignores an entire body of Supreme Court precedent regarding the need for political accountability when appointing government officials, to maintain the compatibility of those appointments with the Civil War Amendments and the separation of powers.

a. Caselaw upholds appointments only by elected officials or bodies.

In *Sailors*, the Supreme Court found Equal Protection inapplicable because selection of the county school board "did not involve an election." 387 U.S. at 111. The court held there was no constitutional bar on appointment to non-legislative posts "by *the governor, by the legislature, or by some other appointive means* rather than an election." *Id.* at 108 (emphasis added, citing cases). But in not one case of which Plaintiffs are aware has the Supreme Court approved of a non-legislative "appointment" by someone other than an elected official or a body comprising them – in other words, a person or entity ultimately accountable to voters.

The district court held that "the Constitution permits a school board with 'combined…elective and appointed systems.'" JA67, quoting *Sailors*, 387 U.S. at 111 (ellipsis in district-court opinion). But the court's failure to grasp that the "appointing" must be done by an elected body, or one or more individuals – who themselves are accountable to voters – was a fundamental misreading of *Sailors* that led directly to its error in this case. *Sailors* in no way approved a school board containing

even a single member appointed by a person or group lacking any political accountability whatsoever.

Sailors involved a Michigan education system with two tiers of local and countywide school boards. Voters elected local board members, who then chose members among them to serve as delegates to a county convention, where they chose members for the countywide board. While the Supreme Court blessed that as "basically appointive," and thus permissible, *Id.* at 109, the appointing was done by elected officials accountable to the electorate. *Sailors*, 387 U.S. at 106–107, 109 n.6.

Neither the Supreme Court nor this Court has ever upheld the appointment of a public official by individuals or groups completely divorced from or accountable to the electorate. And this Court should not do so now.

b. Constitutionally acceptable appointed positions maintain political accountability.

This Court has held that "the concept of an appointment presumes the existence of an appointing authority." *Vander Linden*, 193 F.3d at 273. No one involved in selection of the Student Member has any of the indicia of political accountability that accompany the power to make an

"appointment." The Student Member is not selected by the Board, but by students through election. These students are certainly not appointing authorities who are politically accountable. Delegates to the convention that puts forward the only two choices for Student Member are chosen by a committee of the principal, an employee who works for the principal, and three students selected by the principal. JA34. The principal is not an appointing authority and is neither elected nor appointed. Although subject to the authority of the Board, he/she is nothing more than a Board employee. The Superintendent also is not an appointing authority – indeed, the Board does not even have unfettered discretion to fire him. Md. Code Educ. § 4-201(e). Simply put, nobody who plays any role in the Student Member selection process in any way answers or is politically accountable to Howard County voters.

The entire body of precedent upholding appointments to government positions hinges on political accountability. *See Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (giving President authority to remove head of the Federal Housing Finance Agency at will "is essential to subject Executive Branch actions to a degree of electoral

accountability"); *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2197 (2020) (statutory provision allowing removal of CFPB head only for inefficiency, neglect or malfeasance unconstitutionally impinged President's removal authority; "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else"), quoting *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010); *see also Id.* at 497-498 ("[t]he diffusion of power carries with it a diffusion of responsibility…Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall'"), quoting The Federalist No. 70, p. 476 (J. Cooke ed. 1961) (A. Hamilton).)

While each of those cases involve the President's authority under the Appointments Clause of the Constitution, the concept of political accountability is not exclusively a federal issue that is irrelevant to state and local appointments. Instead, the Supreme Court's reasoning – that the insulation of those appointments from political accountability

renders such appointments illegitimate – applies equally here. *See Free Enterprise Fund*, 561 U.S. at 495-496.

c. The Court's determination that the Student Member is effectively chosen by the Board contradicts the Complaint and the statute establishing the Student Member election process.

The district court compounded its error by asserting that "the Student Member is effectively chosen by the Board rather than 'the people.'" JA60. That contravenes the Complaint's allegations and the statute establishing the Student Member, ignores *Hadley*, and presumes a fictitious Student Member process, rather than the actual election process for it.

The court proclaimed without support that "ample control" by the Board over the selection process means that "the Student Member is effectively chosen by the Board rather than 'the people,'" JA60. It described nonexistent "end-to-end Board control [which] shows that the Board has not relinquished its inherent authority to choose the Student Member." JA61.

The Complaint certainly alleges "input, oversight and direction" from HCPSS employees at stages of the Student Member election process, and that the Board retains discretion to at any time change "*the process* for nominating and conducting the election of the Student Member…." JA10-11 (emphasis added). It describes the significant gatekeeping function the Superintendent and secondary-school principals and counselors have at the stage of selecting Delegates to the Student Convention. JA10-11; *see also* JA34.

But as the Complaint also pleads, Board employees play only a brief ministerial role in screening potential candidates for Student Member, reviewing applications for completeness, accuracy, and a signed parent letter. JA11, JA34. And as it further pleads, once students are chosen as Delegates for the Student Convention, Board employees have zero control over the two final votes culminating in the Student Member's election. They have no say in who Delegates pick as the two finalists at that convention. JA11, JA33-34 ("A Student Convention attended by student delegates from each secondary school will be convened to select two nominated candidates, and one identified

alternate for each…."); JA33 (defining "Student Delegate" as student in grades 6-11 who at the convention "select[s] two candidates and one alternate candidate for Student Member…."). Further, once the Student Convention narrows the field to two finalists, Board employees merely distribute their campaign videos and enforce election rules – the actual voting is done by the 6th through 11th graders "*by confidential ballot* in each secondary school." JA35 (emphasis added); JA12. And once the votes are in and counted, the Superintendent simply certifies to the Board by June 30 that the election took place in accordance with applicable rules and regulations. JA35.

These procedures represent an "election" by any credible definition, governed by *Hadley* and the long line of Equal Protection cases – not an appointment governed by *Sailors*' exception to those general principles. Nothing in the statute, Policy 2010, or its IPs even hint that the Board or its employees have ever "chosen" the Student Member, nor is there any authority allowing them to do so.

In shoehorning its description of the Student Member into the Equal Protection safe-harbor *Sailors* created for "basically appointed"

seats, the court ignored *Hadley*, which cabins *Sailors* to instances "where a State chooses to select members of an official body by appointment rather than election," 397 U.S. at 58, citing *Sailors*. As noted above, in *Sailors* the Michigan legislature did not fill the county-board seat by an election from a defined "class of voters" – it left it to local elected boards to choose delegates from among their own elected members to fill the spot. In contrast, the statute here *has* assigned the job of choosing the Student Member to a specific, defined class – all HCPSS students in grades 6-11. Md. Code Educ. § 3-701(f)(3)(iii). And while *Hadley* reaffirmed *Sailors*' endorsement of "innovations" and "flexibility," in filling positions, *Id.* at 58-59, it made clear that where a "popular election" *is* involved, Equal Protection stops the experimenting. "[O]nce a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.'" *Hadley*, 397 U.S. at 59 (citation omitted).

"In the election context, the Equal Protection Clause requires that 'having once granted the right to vote on equal terms, the State may

not, by later arbitrary and disparate treatment, value one person's vote over that of another.'" *Baten v. McMaster*, 967 F.3d 345, 368 (4th Cir. 2020 (Wynn, J., dissenting) (cleaned up) (citation omitted). "And so, states must 'ensure that each person's vote counts as much, insofar as it is practicable, as any other person's' and protect each person's vote 'against dilution or debasement.'" *Id.* (cleaned up), quoting *Hadley*, 397 U.S. at 54. While *Sailors* indeed endorses experimentation, *Hadley* shuts down the chemistry set before it incinerates the Constitution.

d. The court's conclusion that the system for choosing the Student Member is "basically appointive" runs counter to this Court's precedent.

This Court's opinion in *Vander Linden* highlights the district court's error in declaring the system for selecting the Student Member "basically appointive." In *Vander Linden,* South Carolina voters brought a one-person, one-vote claim alleging malapportionment of the legislative delegation system. 193 F.3d at 270. Legislators were elected from districts containing parts of more than one county and automatically became members of each county's legislative delegation,

making governmental decisions affecting each regardless of how many constituents they had. *Id.* at 271.

The district court found them "appointed" under *Sailors*, rendering one-person, one-vote inapplicable, but this Court reversed. There was no appointment process nor any appointing authority; rather legislators were chosen by the electorate. *Id.* at 273. The district court alternatively reasoned that the members "are not elected to the delegations as that term is understood," but rather joined as part of their job as legislator, without an independent election. *Id.* (citations omitted.) This Court rejected that, too, noting it was "decisively repudiated" by *Board of Estimates v. Morris,* 489 U.S. 688 (1989). *Id.* at 274. Just as popular election as one of New York City's five borough presidents automatically made one a member of the Board of Estimates, popular election as a legislator automatically put lawmakers on the legislative delegation – both jobs were elected, not appointed, and Equal Protection applied to each. *Id.* at 273-74.

Vander Linden's reasoning applies equally here. No "appointment process" puts the Student Member in office, and the Board has not been

delegated that authority by the Maryland General Assembly. Instead, as the Complaint alleges, child delegates attend the Student Convention and via ballot select two finalists. JA11. Then every HCPSS student in grades 6-11 casts a secret ballot to make their preferred finalist the Student Member. JA12. As in *Vander Linden*, "nothing in the record even suggests that any official or body exercises the power to appoint" the Student Member. 193 F.3d at 273.

7. There is no political accountability under the district court's novel theory.

There is a more fundamental distinction between the Student Member and the appointments *Sailors* blesses. With both a gubernatorial appointment and the two-stage Michigan process, registered voters still wield ultimate, albeit indirect, control over the person selected. Thus, in *Sailors*, while local school-board members chosen as delegates to the countywide convention were not bound to support the county-board candidate local voters may have wanted them to, JA59, citing 387 U.S. at 109 n.6, one who failed to do so could be unseated by voters at the next local school board election. The same holds true for gubernatorial, county executive or county board

appointees – anyone unhappy with the selection can make that known to the appointer, and/or work against her in the next election. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 n.7 (1969) (citation omitted) ("…if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for mayor.").

Indeed, Maryland provides for gubernatorial and/or county-board or executive appointees to several county school boards, and no one challenges that system's constitutionality. On two county education boards, one or more gubernatorial appointees sit alongside elected members. Md. Code Educ. §§ 3-2B-01(b) (Baltimore County); 3-3A-02(b)(3) (Caroline). On the two others, the County Executive and/or County Council appoint members to serve alongside elected ones. Md. Code Educ. §§ 3-6A-01(d) (Harford); 3-1002(f) (Prince George's) (until July 1, 2024). In every instance, a county resident unhappy with the appointee can make his or her displeasure known to the Governor, County Executive, or County Council, and/or work against them at the

ballot box. There is *some* indirect electoral control – as there also was in *Sailors*.

But as the Complaint here pleads, there is no way for Howard County residents to exert *any* electoral pressure on the Student Member, even indirectly. JA17-19. They have no way to impact who Student Convention Delegates nominate as the two finalists, and no way to affect the votes of the 6th through 11th graders who choose one for a voting seat on the Board. As a result, the Student Member acts with no accountability whatsoever. Not only did the Student Member block for eight months the wish of the majority of adult members to fully reopen schools, but when residents exercised their First Amendment right to complain and/or lobby the Student Member, the Superintendent lashed out with his "bullying" charge. This is not how representative self-government is supposed to work; rather it is a perversion of it. The uncrossable chasm between the Student Member and Howard County's registered voters makes *Sailors*' examples of acceptable, "basically appointed" positions inapplicable. The district court erred in analogizing to them.

8. The lower court opinion has no limiting principles and would enable private seats on legislative bodies.

The district court's endorsement of a Student Member "appointment" rather than a "popular election" invites extraordinary mischief. Under its rationale, Maryland could designate a "Construction Contractor Member" for the Board of Education – or "Teachers' Union Member," "Farm Bureau Member," "Proud Boys Member," or "Black Lives Matter Member" – completely exempt from Equal Protection guarantees because it is chosen only by construction contractors, the Farm Bureau, teachers, etc. To articulate the concept is to expose the incompatibility of the court's ruling with representative democracy. That a public official is placed on the Howard County school board and given a vote on most issues, with zero accountability to county voters, is an affront to representative self-government.

B. The Student Member performs government functions.

In determining whether constitutional protections extend to an elected position, the second inquiry is whether it "performs

governmental functions." *Vander Linden*, 193 F.3d at 275. The district court did not reach this issue, but it requires only brief discussion.

"The Supreme Court has consistently held that the establishment and regulation of a public school system lies at the core of a state's historic police powers; it is quintessentially a governmental, not a proprietary, function." *Association of Mexican-American Educators v. California*, 231 F.3d 572, 605 (9th Cir. 2000), citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public school ranks at the very apex of the function of a State."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Public education in our Nation is committed to the control of state and local authorities."); and *Hadley*, 397 U.S. at 56 ("Education has traditionally been a vital government function.").

The Student Member undeniably performs government functions. The position is invested with significant authority: except for attending closed sessions (which a Board majority may invite him or her to anyway), and 14 narrow voting restrictions, the Student Member has the same rights and privileges as an adult Member in running the billion-dollar HCPSS. Md. Code Educ. §§ 3-701(f)(5), 3-701(f)(7).

Even the voting exceptions are not as limiting as they may appear. The district court claimed, incorrectly, that the Student Member "may not vote on matters related to the 'transportation of students.'" JA73-74. But as noted above, the provision it cited, Md. Code Educ. § 3-701(f)(7)(vi), only bars voting on transportation relating to school buildings post-consolidation, under § 4-120. Beyond that limited circumstance, rarely implicated in burgeoning Howard County, the Student Member has a full vote on all transportation issues. Md. Code Educ. § 7-801.

Similarly, the court said the Student Member "cannot vote on 'school construction,' or on 'the acquisition and disposition of real property.'" JA74 (cleaned up). But the statutory limitation, Md. Code Educ. § 3-701(f)(7)(ii), only bars the Student Member voting on such matters "under [Md. Code. Educ.] § 4-115." Otherwise, the Student Member has a full vote on all issues impacting construction and property acquisition/ disposition, such as conveying title or disposing of surplus land, or leasing school property to a private entity, under § 4-114, and the selection of school sites under § 4-116.

And the district court further erred in describing limitations on the Student Member voting on "'[a]ppointment and promotion of staff.'" JA74. That limitation, in Md. Code Educ. § 3-701(f)(7)(x), restricts the Student Member's vote only on staff appointment and promotion "under [Md. Code Educ.] § 6-201," which deals with other matters in addition to staff appointment and promotion. Nothing restricts the Student Member from voting alongside other Board members on significant items covered by that statute – for example, "the qualifications, tenure, and compensation of each appointee." Md. Code Educ. § 6-201(f).

C. The popular election of the Student Member, a public official, by students only violates Equal Protection.

"The right to vote is 'fundamental,' and once that right 'is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'" *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 337, 340 (4th Cir. 2016). Correction of the district court's erroneous analysis of the "popular election" question requires reversal and reinstatement of the Complaint.

The Complaint need only plead one plausible Equal Protection violation to warrant reversal and remand. It pleads several:

1. Malapportionment/violation of "one person/ one vote"

A unit of local government with general legislative powers over a specified geographical area cannot be apportioned unequally. It cannot grant one legislative seat to a number of citizens and another legislative seat to a small fraction thereof. A political subdivision is a "'division of a state that exists primarily to discharge some function of local government.'" *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 194, 206 (2009) (quoting BLACK'S LAW DICTIONARY 1197 (8th ed. 2004)). The Board of Education of Howard County is empowered by statute to run the county's public schools. The Supreme Court has specifically identified school boards as political jurisdictions for purposes of election laws. *See, e.g., Dougherty Cty. Bd. of Educ. v. White*, 439 U.S. 32, 44 (1978) (School board actions subject to preclearance under formerly operative Section 5 of Voting Rights Act).

In the context of legislative districts, district population may deviate slightly from perfect population equality to accommodate

traditional districting objectives. Where the maximum population deviation between the largest and smallest district is less than 10 percent, a state or local legislative map presumptively complies with the one-person, one-vote rule. *Evenwel v. Abbott,* 136 S. Ct. 1120, 1121 (2016).[12] Howard County uses total-population numbers from the decennial census when drawing legislative districts. Howard County Councilmanic Redistricting Commission 2021, available at https://nginx.main.hococouncil-dpl.us2.amazee.io/sites/default/files/migrate/files/2021%2520Councilmanic%2520Redistricting%2520Co

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[12] For state and local offices, one person, one vote requires the jurisdiction to make "an honest and good faith effort" to construct districts with as near to equal population as is practicable; population equality is determined by calculating a district's deviation from ideal district size. Ideal district size is determined by dividing the total population by the number of seats involved. Deviation is determined by calculating the extent to which an actual district is larger (has a "+" deviation) or smaller (has a "-" deviation) than the ideal district size. Plans with a total population deviation (the sum of the largest plus and minus deviations) under 10 pecent are presumptively regarded as complying with one person, one vote. *Redistricting Manual* (ACLU Voting Rights Project 2010), available at https://www.aclu.org/sites/default/files/field_document/2010_REDISTRICTING_GUIDE_web_0.pdf (accessed May 8, 2023) at 8-9, citing, *inter alia*, *Reynolds*, 377 U.S. at 577.

mmission%2520Final%2520Report.pdf (Nov. 22, 2021), accessed May 5, 2023. U.S. Census total population counts all residents within the county and each district. This resident population counts include all people (citizens and noncitizens) who are living in the County at the time of the census. People are counted at their usual residence, which is the place where they live and sleep most of the time. https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html. Such population counts are not limited to those eligible to vote, known as voting-age population. https://www.census.gov/topics/public-sector/voting/about/faqs.html.

Defendant Board has eight members. Two are elected at large, by eligible voters within the entire County electorate. The five members elected from single-member residency districts are elected by the qualified voters in a specific district electoral unit, JA39, and the Student Member is elected without regard to district residence within an electorate consisting of HCPSS students only. As the Board itself acknowledged, "the Howard County electorate does not select the Student Member," ECF 18-1 Memorandum, pg. 18.

The Howard County Board of Education's district plan violates the "one person one vote principle" enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964), as it fails to include the population comprised in the electorate of the Student Member. JA39. Consistent with Constitutional requirements, the five single-member Districts are of similarly equal population of approximately 60,000 residents. The total population of Howard County is approximately 300,000 residents according to the 2010 Census. *Id*.

The central assumption of a properly proportional representative seat is that an elected official represents the general populace of its designated electoral unit without regard to voting age. Therefore, Howard County residents living in a particular district who are not eligible to vote would still be represented by the district member elected to represent their district. The same is true of Howard County residents not eligible to vote for the at-large member. They are already included in the total population of the County and represented by the at-large members, for example children. Both the district and at-large adult elected members already represent all HCPSS students who reside

within their district and in Howard County as a whole. The Student Member eligibility requirements do not include any geographic district residency requirement. There is no geographic residency requirement for the HCPSS students who are eligible to vote for the Student Member. Because the Student Member is not elected by district, he/she is elected at-large within an electorate *limited* to HCPSS students. As Defendant admitted, the Student Member "electorate" is not "the people of the County," but only the "HCPSS student body." ECF 18-1 Memorandum, pg. 13. He/she represents not only those HCPSS students eligible to vote in grades 6-11, but also those HCPSS students not eligible to vote.

It is this limited electorate of the Student Member that underlies the Plaintiffs' malapportionment claim. Defendant's argument below that the Student Member represents all residents in Howard County is wrong as all residents do not get to vote for the seat. It is doubly wrong because only a fraction of all residents – children – do vote for the seat. The Student Member is limited in his/her representation to students in HCPSS and no policy written by HCPSS can change that fact.

Consistent with the constitutional principle of one person one vote, the Student Member can only represent HCPSS students, *i.e.* those within its designated student electorate. The population in that electorate is approximately 57,000. In contrast, the other at-large members of the Board elected at large represent approximately 300,000 residents.

This is a textbook violation of the one person one vote principle enunciated in *Reynold v. Sims*.

2. Malapportionment dilutes the voting rights of all non-HCPSS Howard County residents.

The resulting malapportionment alleged by Plaintiffs violates the Fourteenth Amendment yet another way. Namely, that each person's vote must be weighted equally. The limiting of the Student Member's electorate to HCPSS students results in each HCPSS student enjoying representation *from four elected members* of the Howard County Board of Education: one District Member, two at-large members and the Student Member. However, every other resident of Howard County who is not an HCPSS student enjoys representation from only *three elected members* of the Board; one District member and the two at-large

members. Despite only comprising 20 percent of the County's population, HCPSS students are represented by 50 percent of the Board membership. This is another separate and unmistakable violation of the "one person, one vote" protections afforded by the Fourteenth Amendment as alleged in the Complaint. Different residents cannot be afforded unequal representation on a legislative body without violating the Fourteenth Amendment, period. As the Supreme Court has long recognized, an apportionment statute that "contracts the value of some votes and expands that of others", is unconstitutional. *Wesberry v. Sanders,* 376 U.S. 1, 7 (1964).

3. Unequal voting power granted to 18-year-old HCPSS students results in vote dilution.

Every other year, when adult Board members run for election, any HCPSS high-school student below grade 12 who also is 18 years of age and a registered voter gets to vote in four contests: the two at-large Board contests, his/her single district's Board contest, and the Student Member contest. This, too, contravenes one-person/one-vote. JA16-17; *Gray*, 372 U.S. at 379 ("[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the

election are to have an equal vote…."); *Id.* at 381-382 (Stewart, J. concurring) ("[w]ithin a given constituency, there can be room for but a single constitutional rule – one voter, one vote."); *Reynolds*, 377 U.S. at 562 ("[i]t would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once.").

The Board insists registered-voter participation in the Student Member election occurs only when "the stars align." ECF 18-1 Memorandum, pg. 20 n.6. That tacitly admits that it happens. And in fact, the fewer registered voters who vote in the Student Member race, the greater the malapportionment and one-person, one-vote violations when they do. At a minimum, this is a factual inquiry, and should have been developed through discovery.

II. The Complaint properly pleads a Free Exercise claim.

The First Amendment's Free Exercise Clause secures the right to religious faith and living according to that faith, and is applicable to the States through the Fourteenth Amendment. *Carson v. Makin*, 142 S.

Ct. 1987, 1996 (2022). The Free Exercise Clause protects religious observers against unequal treatment and laws that impose disabilities on the basis of religious status. *See Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017). Dismissing Plaintiffs' free-exercise claim, the district court held that they failed to plausibly allege a burden on religion and that § 3-701 is neutral and generally applicable. JA72-77. It erred in both conclusions.

A. The Student Member statute that bars religious students from all participation in the Student Member process is not neutral and generally applicable.

The district court dismissed the Free Exercise claim using the wrong legal standard, rejecting the issue by saying that the inability of religious school students to participate in the Student Member election is an incidental burden on religion arising from a neutral policy of general application, and therefore does not implicate the Free Exercise Clause. JA74, citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) and *Employment Div. v. Smith,* 494 U.S. 872 (1990). The court entirely sidestepped the on-point precedents of *Trinity Lutheran, Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246 (2020), and – most

recently and most important – *Carson*, 142 S. Ct. 1987, by assigning an overly narrow scope to their holdings, claiming that they only apply to public-aid programs. JA76.

The Supreme Court's holding in *Carson* is far broader than the lower court admitted. "The Free Exercise Clause of the First Amendment protects against *indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson*, 142 S. Ct. at 1996 (internal quotation marks omitted) (emphasis added). The district court found it "unclear" how the election of the Student Member could indirectly coerce Plaintiffs. JA73. Yet, the coercion is pleaded right in the Complaint: a student who wants a religious education in Howard County, whether from a religious school or by home-schooling, and who also wants to participate in nominating, electing or running for the Student Member – and reap the many benefits the Board attributes to that – must choose between the two. JA20-21. The only way J.K. can participate in the Student Member nomination/election process, and perhaps one day run for Delegate and/or Student Member, is to abandon his religious schooling and attend public school.

Moreover, the district court claimed the statute's application to religious students to be neutral and of general applicability. JA74, citing *Fulton*, 141 S. Ct. at 1876. However, even neutral laws violate the Free Exercise Clause if administered in a manner that disadvantages religious beliefs or practices. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018).[13]

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[13] Further, even a neutral, generally applicable law will fall where a free-exercise claim is coupled with one or more other important rights. *Smith*, 494 U.S. at 881 ("[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections [including]….the right of parents…to direct the education of their children"), citing, *inter alia*, *Yoder*, 406 U.S. 205 (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Section 3-701 implicates multiple fundamental rights: not only the right to vote, but J.K. and Lisa Kim's free exercise of religion, and Lisa's fundamental right to direct J.K's education. *See Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 210 (4th Cir. 2019) ("to be sure, there are decisions that recognize the power of parents to control the education of their own children, and the fundamental right to make decisions concerning the rearing of one's children") (cleaned up), quoting *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) and *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

B. The procedures for electing the Student Member do not survive strict scrutiny.

Policies that are not neutral or generally applicable trigger strict scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–532 (1993). Here, there is at least an indirect penalty on families who send their children to religious schools or who homeschool, therefore strict scrutiny applies.

Under strict scrutiny, the government's challenged policies are "presumptively unconstitutional and may be justified only if the *government proves* that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (emphasis added); *accord Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (Free Exercise). Not only that, but the burden on the government is *evidentiary* to show the facts in its favor. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

Strict scrutiny's "standard is not watered down; it really means what it says." *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (per curiam) (internal quotation marks omitted). If the government can achieve a compelling interest in a manner that does not burden religion,

it must choose that route to survive strict scrutiny. *Fulton*, 141 S. Ct. at 1881. Moreover, strict scrutiny requires government to show that "measures less restrictive of the First Amendment" will not achieve the compelling interest it seeks to achieve. *Tandon*, 141 S. Ct. at 1296 (per curiam). Courts applying strict scrutiny do not give the government "the benefit of the doubt." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Rather, a court is required to invalidate the government's action unless it is clear that the government has carried its burden. *Id.* at 827.

The facts alleged in the Complaint plead a Free Exercise violation. *Fulton* struck down Philadelphia's adoption policy because the city had the ability to include faith-based adoption providers in its pool of eligible providers, but refused to do so. *Fulton*, 141 S. Ct. at 1881. Here, there is no reason to exclude religious-schooling and religiously homeschooled students from the Student Member nomination and election process. Even if the Student Member election process complied with Equal Protection – and it does not – all county children in grades 6-11 settings must be included on equal terms. Absent that inclusion,

both the adults and children of those families are being penalized for exercising their religious rights, in violation of the Free Exercise Clause. *Carson*, 142 S. Ct. at 1996; *see also Espinoza,* 140 S. Ct. at 2254-57 (2020) ("[t]o be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges inevitably deters or discourages the exercise of First Amendment rights.") (cleaned up), quoting *Trinity Lutheran*. "The Free Exercise clause protects against even 'indirect coercion,' and a State punishes the free exercise of religion by disqualifying the religious from government aid as Montana did here." *Id*. (cleaned up), citing *Trinity Lutheran*.

It does not matter for this Free Exercise challenge whether the process for picking the Student Member is considered an election for purposes of Equal Protection, versus an appointment. The critical point is that religious students and religious parents are subjected to a disadvantage, an indirect penalty for making the choice to school or home school their children for religious reasons. They cannot participate in the process like public-school students can, and the Board

easily can devise a system that gives these children and their parents equal rights of participation that public-school families enjoy. Unless the Board can show that this disadvantage is narrowly tailored to achieve a compelling public interest, it violates the Free Exercise Clause.

The Complaint properly pleads a free-exercise claim. It should be reinstated.

CONCLUSION

The Complaint properly pleads violations of the First and Fourteenth Amendments resulting from the procedures for electing the Student Member to the Howard County Board of Education. This Court should reverse the district court and remand for discovery and trial.

REQUEST FOR ORAL ARGUMENT

This appeal involves significant Equal Protection and Free Exercise issues, going to the heart of our system of representative self-government and protection of fundamental rights. Appellants believe oral argument would assist the Court, and they hereby request it.

Respectfully submitted,

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Dated: May 8, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, and attachments) this brief contains 11,634 words.

I further certify this brief complies with the typeface and type-style requirements because it has been prepared using Microsoft Word 2013 in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/ Michael F. Smith
Counsel for all Appellants

May 8, 2023

ADDENDUM – RELEVANT STATUTORY PROVISION

Md. Code. Educ. § 3-701

(a)

(1) The Howard County Board consists of:

(i) Seven elected members; and

(ii) One student member.

(2) The seven elected members shall be elected as follows:

(i) One member from each of the five councilmanic districts in the county, elected by the voters of that district; and

(ii) Two members at large, elected by the voters of the county.

(b)

(1) A candidate who becomes an elected member of the county board shall be a resident and registered voter of Howard County.

(2)

(i) Any elected member who no longer resides in Howard County may not continue as a member of the board.

(ii) Any member elected from a councilmanic district who no longer resides in that district may not continue as a member of the board.

(3) If the boundary line of a Howard County Council District is changed, the term of an incumbent member of the county board

who no longer resides in that councilmanic district because of the change is not affected during this term.

(c) The seven elected members of the Howard County Board shall be elected:

(1) Beginning in 2020, at the general election every 2 years as required by subsection (d) of this section; and

(2) As specified in subsection (a) of this section.

(d)

(1)

(i) The terms of the elected members are staggered as provided in this subsection.

(ii) Each term of office begins on the first Monday in December after the election of a member and until a successor is elected and qualifies.

(2)

(i)

1. The term of office of each member elected from a councilmanic district, beginning at the 2020 election, is 4 years.

2. The term of office of each member elected at large, beginning at the 2022 election, is 4 years.

(ii) The successors to the offices elected at the 2020 and 2022 elections, respectively, shall serve for a term of 4 years.

(3) Except as provided in paragraph (4) of this subsection and subject to the confirmation of the County Council, the County

Executive of Howard County shall appoint a qualified individual to fill any vacancy for an elected member on the county board for the remainder of that term and until a successor is appointed and qualifies.

(4) If a vacancy for an elected member occurs before the date that is 1 year following the date of the member's election, the individual appointed under paragraph (3) of this subsection shall serve only until a successor is elected by the voters at the next general election.

(5) Candidates for the vacated office may be nominated at a primary election in the same manner as for any other position on the county board.

(6) The candidate receiving the vacated position shall take office on the first Monday in December after the election and shall continue to serve for the remainder of the vacated term and until a successor is elected and qualifies.

(7) Except as provided in this subsection, an election to fill a vacancy on the Howard County Board of Education shall be governed by §§ 8-801 through 8-806 of the Election Law Article.

(e) When making an appointment to the county board, the County Executive of Howard County shall endeavor to ensure that the county board reflects the race, gender, and ethnic diversity of the population of Howard County.

(f)

(1) The student member shall be a bona fide resident of Howard County and a regularly enrolled junior or senior year student from a Howard County public high school.

(2) The student member shall serve for a term of 1 year beginning on July 1 after the member's election, subject to confirmation of the election results by the county board.

(3) The nomination and election process for the student member:

(i) Shall be approved by the Howard County Board of Education;

(ii) Shall include a provision that provides for the replacement of one or both of the final candidates if one or both of them are unable, ineligible, or disqualified to proceed in the election; and

(iii) Shall allow for any student in grades 6 through 11 enrolled in a Howard County public school to vote directly for one of the two student member candidates.

(4) The student member candidate who receives the second highest number of votes in the direct election:

(i) Shall become the alternate student member; and

(ii) Shall serve if the student member who is elected is unable, ineligible, or disqualified to complete the student member's term of office.

(5) Except as provided in paragraphs (6) and (7) of this subsection, the student member has the same rights and privileges as an elected member.

(6) Unless invited to attend by the affirmative vote of a majority of the county board, the student member may not attend a closed session addressing a matter on which a student member is prohibited from voting under paragraph (7) of this subsection.

(7) The student member shall vote on all matters except those relating to:

(i) Geographical attendance areas under § 4-109 of this article;

(ii) Acquisition and disposition of real property and matters pertaining to school construction under § 4-115 of this article;

(iii) Employment of architects under § 4-117 of this article;

(iv) Donations under § 4-118 of this article;

(v) Condemnation under § 4-119 of this article;

(vi) Consolidation of schools and transportation of students under § 4-120 of this article;

(vii) Appointment and salary of a county superintendent under §§ 4-201 and 4-202 of this article;

(viii) Employee discipline and other appeals under § 4-205(c) of this article;

(ix) Budgetary matters under Title 5 of this article;

(x) Appointment and promotion of staff under § 6-201 of this article;

(xi) Discipline of certificated staff under § 6-202 of this article;

(xii) Collective bargaining for certificated employees under Title 6, Subtitle 4 of this article;

(xiii) Collective bargaining for noncertificated employees under Title 6, Subtitle 5 of this article; and

(xiv) Student suspension and expulsion under § 7-305 of this article.

(8) The student member may not receive compensation but, after submitting expense vouchers, shall be reimbursed for out-of-

pocket expenses incurred in connection with official duties, in accordance with the procedures and regulations established by the county board.

(g) Passage of a motion by the county board requires the affirmative vote of:

(1) Five members if the student member is authorized to vote; or

(2) Four members if the student member is not authorized to vote.

(h)

(1) The State Board may remove a member of the county board for:

(i) Immorality;

(ii) Misconduct in office;

(iii) Incompetency; or

(iv) Willful neglect of duty.

(2) Before removing a member, the State Board shall send the member a copy of the charges against the member and give the member an opportunity within 10 days to request a hearing.

(3) If the member requests a hearing within the 10-day period:

(i) The State Board promptly shall hold a hearing, but a hearing may not be set within 10 days after the State Board sends the member a notice of the hearing; and

(ii) The member shall have an opportunity to be heard publicly before the State Board in the member's own defense, in person or by counsel.

(4) A member removed under this subsection has the right to a de novo review of the removal by the Circuit Court for Howard County.