



COMMONWEALTH of VIRGINIA

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The Honorable David Englin
Member, House of Delegates
301 King Street, Box 65
Alexandria, Virginia 22314

Dear Delegate Englin:

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

Issue Presented

You ask whether a school board that employs janitors to clean public schools is pursuing a governmental or proprietary function for purposes of immunity from tort liability arising out of a janitor's "misconduct." Specifically, you ask whether a school board is liable for negligent injury to a member of the public or a third party resulting from a janitor's "misconduct."

Response

It is my opinion that a school board that employs janitors is pursuing a governmental function for purposes of immunity from tort liability.

Applicable Law and Discussion

A "governmental function" is one expressly or impliedly authorized by constitution, statute, or other law and carried out for the benefit of the general public. Generally, "[w]here a local government exercises powers delegated or imposed, it performs a governmental function."¹ A function is governmental if it "directly [is] tied to the health, safety, and welfare of citizens."² Conversely, a "proprietary function" is performed for the benefit of the municipality³ rather than the general public. A function is proprietary if it primarily is performed for the "private" benefit of the municipality.⁴ The doctrine of sovereign immunity extends to municipalities in the exercise of governmental, rather than proprietary, functions.

¹Edwards v. Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989).

²*Id.*

³For purposes of this opinion, the term "municipality" also encompasses the corporate creations of a municipality, *e.g.*, a school board. *See* Kellam v. Sch. Bd., 202 Va. 252, 254-55, 117 S.E.2d 96, 97-98 (1960) (noting that school board is governmental agency and corporation).

⁴Hoggard v. City of Richmond, 172 Va. 145, 148-50, 200 S.E. 610, 611-12 (1939) (noting that test is whether act is for common good of all without element of special corporate benefit or pecuniary profit).

Article VIII, § 1 of the Constitution of Virginia imposes upon the General Assembly the obligation to “provide for a system of free public elementary and secondary schools” throughout the Commonwealth. Article VIII, § 7, provides that the “supervision of schools” “shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.”⁵ Pursuant to these mandates, the General Assembly has established school boards to act as agencies of the state to carry out these obligations.⁶ Thus, school boards constitute public bodies “that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.”⁷ School boards have specific functions, including a general duty to keep school property in reasonably good repair.⁸

Because a school board is considered a governmental agency or municipal corporation and acts in a governmental capacity, it ordinarily is immune from liability for negligent acts in the performance of its duties.⁹ A school board operating a school is not, in the absence of a contrary statute, liable for personal injuries sustained on account of the condition of the school premises.¹⁰ Further, a local ordinance providing that school boards “may sue and be sued” does not affect their governmental immunity for tortious personal injury, unless specified as such.¹¹

I find no Virginia case law that addresses directly whether a school board that employs janitors is performing a governmental or proprietary function. A municipality by itself or through its corporate creations that embarks on an enterprise, which is commercial in character or usually performed by private individuals, could be considered to be engaged in a proprietary function.¹² However, the facts you present

⁵“The power to operate, maintain and supervise public schools in Virginia is, and has always been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education.” *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972).

⁶*See* VA. CODE ANN. § 22.1-2 (2006) (providing that schools are administered by [State] Board of Education, Superintendent of Public Instruction, division superintendents, and [local] school boards); § 22.1-28 (2006) (providing that supervision of schools in each school division is vested in school board).

⁷*Kellam*, 202 Va. at 254, 117 S.E.2d at 98.

⁸*See* § 22.1-79(3) (2006).

⁹*See Kellam*, 202 Va. at 254, 117 S.E.2d at 97 (quoting *Boice v. Bd. of Educ.*, 111 W.Va. 95, 96, 160 S.E. 566, 566 (1931) (noting that “[a]s the board is purely a statutory creation, it has no authority to change in any way the mold in which it was fashioned by the legislature. It cannot alter the fact that it is a governmental agency; neither can it “step down from its pedestal of immunity,” for that immunity is incident to a governmental agency.”)).

¹⁰*See id.* at 254, 117 S.E.2d at 99 (noting doctrine that state and governmental agencies, such as school board, are immune from liability for tortious personal injury negligently inflicted when performing duties imposed by law).

¹¹*See id.* at 256, 117 S.E.2d at 99 (noting that use of language “may sue and be sued” does not affect governmental immunity of school board for tortious personal injury regarding matters within scope of its statutory or imposed duties).

¹²*See, e.g., Rocky Mount v. Wenco of Danville, Inc.*, 256 Va. 316, 320, 506 S.E.2d 17, 20 (1998) (noting that proprietary functions may involve factors of corporate benefit and pecuniary profit); *see also Carter v. Chesterfield County Health Comm’r*, 259 Va. 588, 591, 527 S.E.2d 783, 785 (2000) (noting that proprietary function is ministerial in nature and involves no use of discretion).

are more akin to a governmental function.¹³ A school board that employs janitors to maintain its public schools is not extending its function beyond those anticipated by the General Assembly because janitorial services are not commercial in nature, and the school board does not derive a pecuniary profit.¹⁴ You specifically note that early cases were in conflict regarding school board liability for the conduct of janitors where the job performed was in connection with nonschool activities. It now is clear that immunity also extends to that situation.¹⁵

Conclusion

Accordingly, it is my opinion that a school board that employs janitors is pursuing a governmental function for purposes of immunity from tort liability.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

2:1305; 1:941/07-095

¹³See, e.g., *Bingham v. Bd. of Educ.*, 118 Utah 582, 592, 223 P.2d 432, 438 (1950) (noting that “disposing of papers, rubbish and debris which collect daily on schoolgrounds and in classrooms is reasonably within the scope of the duties imposed upon boards of education by the legislature”). The *Bingham* court held that the acts complained of were committed in the performance of a governmental function and the rule of immunity applied. *Id.*; but see *Bennett v. Portland*, 124 Ore. 691, 265 P. 433 (1928) (holding that school auditorium was operated by city in its corporate or proprietary capacity; thus, it was liable to third parties in negligence).

¹⁴See *supra* note 4 and accompanying text. “Virginia has long recognized and applied the doctrine of sovereign immunity for the state and its governmental agencies that negligently cause personal injuries while acting in a governmental capacity.” *Croghan v. Fairfax County Sch. Bd.*, 59 Va. Cir. 120, 121 (2002); see also *B.M.H. v. Sch. Bd.*, 833 F. Supp. 560, 573 (E.D. Va. 1993) (dismissing claims of simple negligence and gross negligence alleged against school board based on doctrine of sovereign immunity); *ACM Constr. Mgmt. Corp. v. Chesterfield County Sch. Bd.*, 21 Va. Cir. 125, 127 (1990) (sustaining school board’s demurrer to intentional tort of interference of contract as barred by doctrine of sovereign immunity).

¹⁵See, e.g., *Kellam*, 202 Va. at 257-58, 117 S.E.2d at 99-100 (quoting 160 A.L.R. 7 at 220) (“Where those in charge of a public school have authority to permit the school premises to be used for other than strictly school purposes, it has been ruled that a board of education, in permitting a third person or organization to use school premises, when not otherwise needed for school purposes, for public lectures, concerts or other educational or social interests, is engaged in a purely governmental function, since such use is not out of harmony with the object for which schools are conducted.”).