

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

ABIGAIL ZWERNER,
Plaintiff

v.

Case No. CL2301446H-00

NEWPORT NEWS SCHOOL BOARD,
DR. GEORGE PARKER,
EBONY V. PARKER,
BRIANA FOSTER NEWTON,
Defendants.

PLEA IN BAR

Now come Defendants. Newport News School Board (“NNSB”), Dr. George Parker, III, and Briana Foster Newton, (collectively the “School Defendants”), by counsel, and submit this Special Plea in Bar on the basis that Plaintiff Abigail Zwerner’s (“Zwerner”) Complaint and the allegations contained therein are barred by the Virginia Workers’ Compensation Act (the “Act”), which Act provides the exclusive remedies for work-related injuries.

The School Defendants state the following undisputed, relevant facts:

1. Plaintiff Abigail Zwerner was at all times relevant to this lawsuit a teacher employed by the Newport News School Board and assigned to Richneck Elementary School in Newport News, Virginia. [Complaint, ¶1]
2. Zwerner taught first grade at Richneck Elementary School during the 2022-2023 academic school year. [Complaint, ¶1]
3. John Doe was re-enrolled as a student in first grade at Richneck Elementary School for the 2022-2023 academic year after having transferred from Richneck Elementary School to Denbigh Early Childhood Center for kindergarten in the 2021-2022 academic year. [Complaint, ¶14, 16, 17, 21] Upon information and belief, John Doe ultimately attended some or most of his kindergarten year at an out-of-state school.

4. The relationship between Zwerner and John Doe was that of teacher / student. [Complaint, generally].
5. On Friday, January 6, 2023, John Doe arrived at Richneck Elementary School sometime at or before 11:15a.m. [Complaint, ¶24]. He attended lunch and recess as scheduled and returned to Zwerner's class after recess. [Complaint, ¶30].
6. Later that afternoon, at approximately 2:00pm, John Doe attacked Zwerner in Zwerner's first grade classroom using his mother's handgun which he brought to school with him. [Complaint, ¶10, 34].
7. John Doe was scheduled to be picked up from school by his mother shortly after the attack took place. [Complaint, ¶ 33].
8. Zwerner sustained injuries as a result of the attack by John Doe. [Complaint, 45].
9. Zwerner does not allege that John Doe had previously brought a firearm to school with him. [Complaint, generally].

The Complaint alleges in detail a long list of workplace conditions that were a direct and proximate cause of the attack on Zwerner. On January 6, 2023, Zwerner was at work, acting in furtherance of her employment, and sustained injuries when a student in her class attacked her during the school day. For the reasons that follow, Zwerner's injuries fall under the exclusive coverage of Virginia's Workers' Compensation Act, Va. Code § 65.2-100, *et seq.*, which bars Zwerner from maintaining a cause of action against the School Defendants for the injuries she sustained in the course of her employment as a first-grade teacher with Newport News Public Schools, and this Court therefore lacks subject matter jurisdiction over Zwerner's tort claims arising from the workplace injury.

INTRODUCTION

John Doe enrolled at Richneck Elementary School on August 29, 2022. As a result of behavioral problems, including threatening other students, refusal to do schoolwork, as well as arguing and defying those supervising him, “John Doe” had a personalized schedule for the start of the 2022-2023 school year. Because of his improved behavior and progress, those responsible for his educational environment, including Plaintiff, agreed that following Winter Break John Doe’s day would be extended and the previous parental presence requirement would not always be necessary.

Plaintiff was in full agreement with this assessment. She had already raised that John Doe’s improvement in the class setting warranted an extended school day and other modifications. After returning from the Winter Break, on January 4, 2023, the first day back in school, John Doe grabbed the Plaintiff’s phone and broke it when he was not given something he wanted. The school notified John Doe’s mother and suspended him for January 5, 2023. On January 6, 2023, John Doe returned to school following the pre-agreed protocol put in place by the educators, including Plaintiff. Apparently, however, he had secretly taken his mother’s handgun to school and the same afternoon he shot and wounded Plaintiff.

Plaintiff has refused benefits under the Virginia Worker’s Compensation Act and has brought this action claiming various theories that she’s entitled to sue the Defendants in tort for damages she claims total \$40,000,000.00.

THE STATE OF EDUCATION TODAY

One cannot assess the state today of education-based employment in the United States without paying attention to the problem of violence in its classroom. In 2019, a Virginia elementary school teacher reported in *Business Insider*, “I end up being the first line of defense for my

students when another student's behavior becomes dangerous to them"¹ Such assertions about protecting their children may not be shocking to those persons familiar with the current educational environment. However, what may be surprising is that across the country *teachers themselves* are common targets of violent behavior by students, such as that allegedly perpetrated by John Doe in January 2023. News media articles reflect this unfortunate reality.²

This problem extends to elementary school teachers. As the education-community website "WeAreTeachers" noted in 2019:

It's no secret that violence seems to be on the rise in schools, especially at the elementary level. Teachers report more aggressive behavior than ever before, aimed at both other students and teachers themselves. This uptick in student violence has teachers on edge, worried for their own safety as well as their students'. Many feel helpless in the face of it and question their choice of career.³

An illustrative example of just how young these student-perpetrators of violence are is a recent 2022 Florida incident in which a 5'4" female teacher was attacked by *a five-year-old student*.⁴ In that instance, the teacher was hospitalized as a result of the assault by the student whom she was attempting to relocate to a "cool down room" after he began flipping chairs and throwing items around the classroom. Yet an objective look at the pertinent data supports just how undeniably frequent threats and attacks upon teachers occur. According to a U.S. Department of Justice's National Institute of Justice-commissioners report from February 2022, "over half of teachers have

¹Akhtar, A. (2019, September 3). *11 shocking things about being a teacher that you'd never thought to ask*. Insider. Retrieved April 24, 2023, from <https://www.businessinsider.com/public-school-teachers-reveal-the-most-shocking-things-about-their-job>.

²We Are Teachers (2019, December 2). *Too Many Teachers Are Getting Hit, Kicked, and Punched by Students*. Retrieved April 24, 2023, from <https://www.weareteachers.com/student-violence/>.

³*Id.*

⁴Li, D. K. (2022, March 7). *Florida teacher beaten and hospitalized after attack by 5-year-old student, police say*. Retrieved April 24, 2023, from <https://www.nbcnews.com/news/us-news/florida-teacher-beaten-hospitalized-attack-5-year-old-student-police-s-rcna18961>.

experienced student-perpetrated violence.”⁵ A recent survey published by the American Psychological Association, conducted from July 2020 to June 2021 and involving 15,000 teachers and other school employees, reflected that one-third of teachers reported verbal or threatening behavior against them by student aggressors.⁶ Yet another report from the National Center for Education Statistics 2021 shows that approximately 327,000 public school teachers were threatened with injury by a student in the prior 12 months between 2015-2016, *including 182,100 or 10.8 percent of elementary public school teachers.*⁷ Additionally, over the same years, a total of 192,500 public school teachers were physically attacked by a student during the prior 12 months, *including 153,700 or 9.1 percent of elementary public school teachers.*⁸ In fact, according to the National Center for Education Statistics “[d]uring the 2015-2016 school year, a higher percentage of elementary public school teachers than of secondary public school teachers reported being threatened with injury (11 vs. 9 percent) or being physically attacked (9 vs. 2 percent) by a student from their school” and since the early 1990’s, roughly five percent of public school teachers have consistently been physically attacked by students in the prior twelve months, and ten percent have

⁵ Turanovic, J. J., & Siennick, S. E. (2022, February 1). *The Causes and Consequences of School Violence: A Review*. Office of Justice Programs. Retrieved April 24, 2023, from <https://www.ojp.gov/pdffiles1/nij/302346.pdf>.

⁶ American Psychological Association (n.d.). *Violence and Aggression Against Educators and School Personnel*. Retrieved April 24, 2023, from <https://www.apa.org/education-career/k12/violence-educators>.

⁷ National Center for Education Statistics (n.d.). *Number and percentage of public school teachers who reported that they were threatened with injury or physically attacked by a student from school during the previous 12 months, by selected teacher characteristics: Selected years, 1993-94 through 2015-16*. Digest of Education Statistics. Retrieved April 24, 2023, from https://nces.ed.gov/programs/digest/d21/tables/dt21_228.70.asp?current=yes.

⁸ *Id.*

been threatened with injury.⁹ Unfortunately, Newport News Public Schools experience similar incidents of threats and attacks by students as illustrated by OSHA reports which show numerous assaults on teachers by elementary school students across the school district resulting in injuries, restricted duty, and days away from work.¹⁰

REVIEW OF EDUCATION LAWS, RIGHTS, AND WHAT THEY ENTAIL

As a young first grader who had recently started being evaluated and treated for possible ADHD, John Doe received special alterations to his class instruction setting by way of a modified hours schedule and curriculum and requiring parental presence. His evaluation as to a formal classification had not yet been made, but a Student Support Team (“SST”), which is created to provide a support system for students struggling with academic and behavioral progress, had been formed at Richneck. If found to need additional services, numerous Federal and Virginia laws would have required the Newport News School system to provide further accommodation. More specifically, in the context of this litigation, a mixture of laws concerning education apply to students such as John Doe for the purpose of keeping such children in the classroom with their

⁹ National Center for Education Statistics (2021, May). *Teachers Threatened With Injury or Physically Attacked by Students*. Retrieved April 24, 2023, from <https://nces.ed.gov/programs/coe/indicator/a05>.

¹⁰ Examples of Newport News elementary school student assaults on teachers include hitting, kicking, biting, tripping, punching to the face and/or stomach, throwing items and furniture, including desks, books, water bottles, and even sharpened pencils, in addition to pushing, shoving, and the like. Specific examples from the OSHA reports include injuries sustained when “a student became upset and began throwing furniture and materials around the room,” “standing at the library door to welcome the kids in the library [and a] 1st grader ran up to me full force and punched me in the stomach with both hands,” “I was picking up desks Student threw [and] Student punched me in the chest,” a school nurse who “was attempting to keep the student safe when he bit her arm and punched her in the face, knocking her glasses off the left side of he[r] face [and he] also tried to assault her with her stethoscope around her neck,” and numerous others.

peers when possible (this is known as “mainstreaming”).¹¹ Three of the more significant pieces of federal legislation, the Rehabilitation Act of 1973, as amended, and specifically section 504 (“Section 504”), the Individuals with Disabilities Education Act (“IDEA”), and the Americans with Disabilities Act (“ADA”) overlap to some extent in their coverage, requirements, and definitions.

First, Section 504 (29 U.S.C. § 794, *see* implementing regulations located at 34 C.F.R. Part 104) provides:

[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. § 794. The regulations promulgated pursuant to Section 504 mandate that recipient public elementary schools give “disabled” students, as defined under 42 U.S.C. § 12102(1), “a free appropriate public education.” (“FAPE”) meaning:

- (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.
- (2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

¹¹ Children who exhibit behavioral challenges in school are still entitled to a free appropriate public education under state and federal law. Diagnosing and creating an appropriate educational plan for the student takes time and requires certain specific steps and documentation. Under the circumstances presented here, Plaintiff implies that John Doe should never have been allowed to re-enroll in Richneck Elementary School based on his behavior the previous year in kindergarten. Every child, including John Doe, is entitled to due process in education.

34 CFR § 104.33(b)(1)-(2). To discipline such student a school district must conduct an evaluation prior to “any significant change in a student’s placement.” i.e., expulsions and certain suspensions of certain durations, regarding whether a disabled student’s behavior is based on the student’s disability. *See* 34 C.F.R. 104.35(a). It is undisputed that Attention Deficit Hyperactivity Disorder (“ADHD”) may qualify as a disability for purposes of Section 504.

Second, IDEA states:

[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

20 U.S.C. § 1400(c)(1). Similar to Section 504, IDEA’s purpose is:

“(A) to ensure that all children with disabilities have available to them a **free appropriate public education** that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; and (c) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities

Id. at § 1400(d). Its guarantee of “a free and appropriate public education,” to “disabled” students as defined in 20 U.S.C. 1401(3)(A)(i)-(ii), is via the aforementioned special educational services, including written individualized education plans (“IEPs”). 20 U.S.C. § 1400(c). This is supported through federal funding grants that are administered by state educational agencies.¹² *S.C. Dep’t of Educ. v. Duncan*, 714 F.3d 249, 251 (4th Cir. Apr. 26, 2013). Under IDEA, disciplining a disabled student first requires a “manifestation determination” to establish whether the problematic conduct for which the student is to be disciplined is a manifestation of the student’s disability. *See* 34 C.F.R.

¹² U.S. Department of Education (n.d.). *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*. Protecting Students With Disabilities. Retrieved April 24, 2023, from <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

300.530(e). Like with the Rehabilitation Act of 1973, ADHD may qualify under the IDEA as a disability.

Third, the Americans with Disabilities Act ("ADA"), like Section 504 and IDEA, also prohibits discrimination against disabled persons in the educational environment. It shares the same definition under 42 U.S.C. § 12102(1) of disability, meaning:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).

42 USCS § 12102(1). It also shares similar goals with both Section 504 and IDEA in that it requires services and appropriate integration of the disabled student with other non-disabled students, *see* 42 U.S.C. §§ 12131-12134, and due process prior to any discipline, *see* 28 C.F.R. pt. 35, § 35.107(a).

Within the Commonwealth, Virginia "ensures that all children with disabilities, aged two to 21, inclusive, residing in Virginia have a right to a free appropriate public education, including but not limited to, children with disabilities." 8 VAC 20-81-100 all the while maximizing integration with those children without disabilities. 8 VAC 20-81-130. "Children with disabilities" under the state code means:

a child evaluated in accordance with the provisions of this chapter as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disability (referred to in this part as "emotional disability"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities who, by reason thereof, needs special education and related services. This also includes developmental delay if the local educational agency recognizes this category as a disability in accordance with 8VAC20-81-80 M 3.

And like some of its federal counterpart laws, Virginia's administrative code mandates that local education bodies must come up with individualized education plans, 8 VAC 20-81-110, and

provide due process in terms of discipline procedures before removing a disabled child. 8 VAC 20-81-160.

VIRGINIA'S WORKERS' COMPENSATION LAW

The Virginia Supreme Court recently acknowledged that for over a century, the Virginia Workers' Compensation Act, Va. Code 65.2-100 *et seq.*, has reflected a "quid pro quo" bargain that "gave workers the right to assert no-fault liability against their employers . . . and took from them the right to sue their employers in tort for negligence." *Lopez v. Intercept Youth Servs., Inc.*, 300 Va. 190, 196 (2021). The Act covers (1) "injuries by accident" (2) "arising out of and in the course of employment or occupational disease." Va. Code § 65.2-101. An injury satisfying the aforementioned prongs, including both "in the course of" employment and "arising out of the course of employment", strictly limits the rights and remedies of the injured party to those provided under Virginia's Workers' Compensation Act, excluding all other rights and remedies:

The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death.

Va. Code § 65.2-307 (emphasis added).

The phrase "injury by accident" has been interpreted by the Virginia Supreme Court to mean "[a]n identifiable incident that occurs at some reasonably definite time, which is the cause of an obvious sudden, mechanical or structural change in the body." *Kohn v. Marquis*, 288 Va. 142, 147 (2014) (quoting *Lane Co. v. Saunders*, 229 Va. 196, 199 (1985)). "To establish an 'injury by accident,' a claimant must prove '(1) that the injury appeared suddenly at a particular time and place and upon a particular occasion, (2) that it was caused by an identifiable incident or sudden

precipitating event, and (3) that it resulted in an obvious mechanical or structural change in the human body.” The specific time and place of injuries must be identifiable, i.e., “the accident must be something the date of which can be fixed,” or put more simply, “must be shown to have occurred at some reasonable definite time.” *S. Express v. Green*, 257 Va. 181, 187 (1999). Injuries which occur at an unknown time, are associated with repetitive trauma, or continuous physical stress do not constitute “injuries by accident.” *Id.* at 186.

In addition, the phrase “arising out of employment” also has specific meaning under Virginia law. Focusing on “the origin of the injury,” this second criteria is met under the so-called “actual risk test” when “there is a causal connection between the claimant’s injury and the conditions under which the employer requires the work to be performed.” *Lopez*, 300 Va. At 196-197.

An injury takes place “in the course of employment” when “it takes place within the period of employment, at a place where the employee may be reasonably expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incident thereto.” *Painter v. Simmons*, 238 Va. 196, 199 (1989) (citing *Brown v. Reed*, 209 Va. 562, 564 (1969)).

Physical assaults against an employee (as in this case) fall under the Virginia Workers’ Compensation Act. *Reamer v. Nat’l Serv. Indus.*, 237 Va. 466, 470 (1989); see also *Downey v. Malik*, 2000 Va. Cir. LEXIS 388 (“assaults may constitute accidents for purposes of Workman’s Compensation ... [h]owever, assaults like any injury, must ‘arise out of and in the course of’ the employment.”). “In cases involving physical assaults against an employee, ‘the clearest ground of compensability ... is a showing that the probability of assault was augmented either because of the particular character of claimant’s job or because of the special liability to assault associated with

the environment in which he or she must work.” *Lopez*, 300 Va. at 197 (citing 1 Arthur Larson et al., *Larson's Workers' Compensation Law* § 8.01[1][a], at 8-3 (2021)); *see also Evans v. Sutton*, 32 Va. Cir. 343, 343 (Feb. 4, 1994). Put another way, “[i]n an assault case claimed to arise out of employment, the necessary causal connection may be established if the evidence shows that the attack was directed against the claimant as an employee [or] because of the employment.” *Herrera v. Simms*, 51 Va. Cir. 397, 401 (Mar. 9, 2000). *See also, Lynchburg Steam Bakery, Inc. v. Garrett*, 161 Va. 517 (1933) (workers’ compensation for injuries sustained by employee when the 12-year-old son of a shipping clerk whom the foreman knew was on the premises in violation of plant rule, shot the employee in the eye because boy’s presence increased hazard of employment).

In the present case, Plaintiff Zwerner was undisputedly an employee of Richneck Elementary School, which is part of the Newport News Public Schools [Complaint, ¶1, 9]. The Newport News School Board is a corporate body and political subdivision of the Commonwealth of Virginia under Title 22.2 of the Code of Virginia and supervises all schools within the Newport News Public Schools system. [Complaint, ¶2]. John Doe was a student in Plaintiff’s first grade classroom at Richneck Elementary School. There is no evidence that John Doe and Plaintiff knew each other outside of the teacher/student relationship whereby John Doe was a student in Plaintiff’s classroom. At the time when John Doe caused Plaintiff’s injuries, class was in session and Plaintiff was seated at her reading table in the classroom [Complaint ¶34]. Therefore, Plaintiff was clearly injured while at work, at her place of employment, by a student in the classroom where she was a teacher, and during the school day. Teaching and supervising students in her first grade class was a core function of Plaintiff’s employment. Thus, Plaintiff’s injuries arose out of and in the course of her employment and fall under Virginia’s Workers’ Compensation Act unless an exclusion applies.

While Plaintiff focuses on the instrument used by John Doe in inflicting her injuries – his mother’s handgun – the proper legal analysis involves examining the actions of an elementary student in inflicting an injury on his teacher while at school. Firearms, including handguns, are not permitted in Virginia’s schools by anyone other than law enforcement, and six-year-olds such as John Doe are not permitted to possess firearms anywhere.¹³

Recognizing the breadth of Virginia’s Workers’ Compensation Act, Plaintiff attempts to circumvent the Act by alleging that John Doe’s actions were “personal” and pointing to the handgun as the problem, rather than the child.¹⁴ Plaintiff goes so far as to claim that she reasonably anticipated that “she would be working with young [elementary school] children who posed no danger to her.” [Complaint ¶36]. While in an ideal world, young children would not pose any danger to others, including their teachers, this is sadly not reality. This is exactly why Plaintiff strategically focuses on the use of a handgun as opposed to some other weapon with less perceived

¹³ There is a very limited exception for when the use is authorized and supervised by an adult. See Va. Code §18.2-56.2. John Doe’s mother has been criminally charged. See Milon, H., & Reese, B. (2023, April 10). *Mother of 6-year-old Newport News elementary school shooter indicted by grand jury*. 10 On Your Side WAAVY.com. Retrieved April 25, 2023, from <https://www.wavy.com/news/crime/mother-of-6-year-old-newport-news-elementary-school-shooter-indicted-by-grand-jury/>

¹⁴ Plaintiff’s assertion that John Doe’s “assault was . . . personal to her” runs contrary to long-established legal principles in Virginia regarding the abilities of young children (a.k.a. “infants”) to form requisite mental capacities under its civil and criminal laws. For example, children younger than seven are presumed to be unable to be guilty of negligence, while children between seven and fourteen years of age are presumed to be unable to exercise care and caution for their own safety.” See *Grant v. Mays*, 204 Va. 41, 44 (1963). Additionally, the Virginia Supreme Court has stated, going back as far as 1791, that children under seven are “conclusively presumed to be incapable of crime, and no evidence can be received to rebut the presumption.” *Law v. Commonwealth*, 75 Va. 885, 888-89 (1881). At six years of age, John Doe is too young to be held accountable for an intentional tort and lacked the capacity to form the intent that such tort was “personal.” Furthermore, even “personal” actions still fall under Workers’ Compensation when the “personal” nature was related to and arising out of the employment relationship.

notoriety and shock value, even though serious injuries can be inflicted with scissors¹⁵, knives¹⁶, pencils¹⁷, rocks¹⁸, chairs¹⁹, and hands²⁰. If the allegations in the Complaint substituted “sharp

¹⁵ See, e.g., *Lockwood v. Saul*, 2020 U.S. Dist. LEXIS 219917 (D.S.C. 2020) (a Social Security Disability (SSD) appeal wherein the child’s behavior in kindergarten and first grade described as “he attacks others unprovoked and then laughs. ...police had to be involved in restraining him when he was throwing several items, including scissors”... “[he] stabbed a student in the eye.”...). See also, Wimmer, D. (2019, February 1). *Violent behavior in elementary students becoming more prevalent*. KSL.com. Retrieved April 25, 2023, from <https://www.ksl.com/article/46481666/violent-behavior-in-elementary-students-becoming-more-prevalent>. (Salt Lake City, UT - “Teachers have noted that violence among students has become more prevalent, and classroom rage is another indication of the mental health crisis in the state’s schools. The toughest lesson [one teacher] learned in third grade wasn’t tied to academics, but rather what to do when a boy in her class threw scissors, staplers, and flipped desks. “I thought I was going to be scarred for life because they were really sharp scissors,” she said.”).

¹⁶ See, e.g., Rosales, J. (2019, June 20). *Threatened and Attacked By Students: When Work Hurts*. NEA News. Retrieved April 25, 2023, from <https://www.nea.org/advocating-for-change/new-from-nea/threatened-and-attacked-students-when-work-hurts>. (“The student was extremely upset about something. A paraeducator approached him to inquire. In response, the student kicked her squarely in the stomach. She fell to the floor gasping for air. Fortunately, [one teacher] and another teacher were in that cooking class last summer. The two teachers had no choice but to try and restrain the student. He began to scream, kick, and punch. [The teacher] was hit in an eye. It got worse. The student eventually grabbed a large chef’s knife from the counter.”).

¹⁷ See, e.g., *Angela O. ex. Rel. D.O. v. Kihakazi*, 2021 U.S. Dist. LEXIS 220026, *7-8 (a Social Security Disability (SSD) appeal where in the child’s behavior between the ages of seven and nine includes “more than 50 documented disciplinary infractions between March 2017 and 2019... On more than one occasion, he threatened to stab and kill his teacher. ... lunged at a teacher, kicked, and broke a window, growled at his teacher, hit his head on the wall, cut his wrists with a pencil, ...”).

¹⁸ See, e.g. *Halliman v. L.A. Unified Sch. District*, 163 Cal. App. 3d 46 (Cal. App. 1984) (a workers’ compensation case in California where a teacher was injured when a student threw a rock in class at the teacher and hit him in the head; held that workers’ compensation was exclusive remedy).

¹⁹ See, e.g., *Box v. Astrue*, 2011 U.S. Dist. LEXIS 111326, *11 (E.D.Mo. 2011) (a Social Security Disability (SSD) appeal wherein the child’s behavior in first grade described as having “engaged in dangerous or threatening behavior at Boone Elementary School on four reported occasions which resulted in out-of school suspensions. Such behavior included striking a teacher, trying to hit a teacher and school property with a chair, trying to bite school personnel, trying to break out a school window, and threatening to kill himself.”)

scissors” for “gun” and John Doe stabbed Plaintiff in the neck in the classroom, there would be no doubt that the injury would fall under Workers’ Compensation. The handgun is the classic “red herring.” And this, too, falls under Virginia’s Workers’ Compensation Act.

In this case, John Doe’s behavior had been improving through the first half of his first-grade year. At the beginning of the school year, out of concerns from John Doe’s behavior the previous year, a personalized daily schedule was put in place and a Student Support Team (SST) was established. As part of the plan, John Doe’s mother was to be present throughout the day with John Doe. During this time, John Doe was being evaluated for ADHD and his behavior through the Fall was improving. Plaintiff agreed at the December 2022 SST meeting that John Doe was making good progress and agreed with the new schedule commencing after winter break wherein John Doe’s mother would not need to be present and his day would be extended. Plaintiff was well-aware of John Doe’s history and behavioral challenges through her role as a teacher at Richneck Elementary School and a member of John Doe’s SST. Educating John Doe through his behavioral evaluation and educational journey was squarely within Plaintiff’s job description. Thus, when John Doe acted out and injured Plaintiff during class on January 6, 2023, the resulting injuries fall under Workers’ Compensation.

As set forth above, workers’ compensation exists for the benefit of employees for the purpose of providing coverage for workplace injuries without having to prove negligence on the part of the employer. Plaintiff is not without remedy; her remedy is dictated by the Virginia

²⁰ See, e.g., fn. 4, *supra*, “Florida teacher beaten and hospitalized after attack by 5-year-old student, police say.” (“A south Florida teacher was taken to the hospital last week after she was attacked by a 5-year-old student... the troubling incident started when a 5-year-old boy had to be removed from class for “throwing things around” and “flipping the chairs.”).

Workers' Compensation Act and the provisions contained therein. The Newport News Circuit Court does not have jurisdiction to hear workers' compensation claims.²¹

WHEREFORE, the School Defendants' move this Honorable Court to SUSTAIN their Special Plea in Bar, hold that the Virginia's Workers' Compensation Act provides the exclusive remedy for the workplace injuries sustained by Plaintiff, and dismiss the Complaint with prejudice for lack of subject matter jurisdiction.

Date: April 26, 2023

**NEWPORT NEWS SCHOOL BOARD,
DR. GEORGE PARKER, III,
AND BRIANA FOSTER NEWTON**

By:



Of Counsel

Richard H. Matthews, Esq. (VBS No. 16318)
Robert E. Samuel, Jr., Esq. (VSB No. 18605)
Anne C. Lahren, Esq. (VSB No. 73125)
Andrew C. Harding, Esq. (VSB No. 96820)
Bryan S. Peeples, Esq. (VSB No. 93709)
PENDER & COWARD, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, VA 23462
Tel/Fax: (757) 490-6256 (RHM)
Tel/Fax: (757) 490-6293 (ACL)
rmattthew@pendercoward.com
rsamuel@pendercoward.com
alahren@pendercoward.com
bpeeples@pendercoward.com
aharding@pendercoward.com

²¹ Plaintiff has already been approved for workers' compensation benefits by Newport News School Board's workers compensation carrier and any issues related to such an award would be in the jurisdiction of the Workers Compensation Commission, not the Newport News Circuit Court. Workers' compensation provides up to 500 weeks of compensation along with a cost-of-living escalator (COLA) and lifetime medical care for the injuries suffered. Plaintiff was approved for Temporary Total Disability and the first check was issued to her on January 18, 2023 for the period beginning January 14, 2023. She has refused to accept this workers' compensation benefit.

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of April, 2023, I served a true copy of the foregoing via email and first-class mail on Diane Toscano, Esq., diane@toscanolawgroup.com, and at the Toscano Law Group, P.C., at 1244 Perimeter Parkway, Suite 443, Virginia Beach, VA 23454 and on Jeffrey A. Breit, Esq. and Kevin Biniazan, Esq., at Breit Biniazan, P.C., kevin@bbtrial.com and Jeffrey@bbtrial.com, and at Breit Biniazan, P.C., 600 22nd Street, Suite 402, Virginia Beach, VA 23451.



Anne C. Lahren, Esq.

