

**VIRGINIA:**

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

**JOHN R. BUTCHER**

v.

**BOARD OF EDUCATION**

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)  
) No. \_\_\_\_\_  
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)

**Serve:** Patricia I Wright  
Superintendent of Public Instruction  
James Monroe Building  
101 North Fourteenth Street  
Richmond, Virginia 23219  
(CITY OF RICHMOND)

## **PETITION FOR APPEAL**

The Virginia Department of Education (the “Department”) tells us:

Due to the strong link between attendance and successful completion of school, consistent monitoring of truancy and intervening with supports for students and families are critical.<sup>1</sup>

Nonetheless, on September 27, 2012 the Board of Education (the “Board”) voted to adopt a truancy regulation that generally forgives part-day absences from school. In this respect the regulation unlawfully fails to perform the Board’s duty to enforce Virginia’s mandatory attendance laws. The Board further failed to provide the summary of public comment to Butcher as required by law, enacted two unlawful

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<sup>1</sup> [http://www.doe.virginia.gov/boe/meetings/2012/09\\_sep/agenda\\_items/item\\_h.pdf](http://www.doe.virginia.gov/boe/meetings/2012/09_sep/agenda_items/item_h.pdf) at p.2 (last visited December 13, 2012).

delegations of legislative authority, and later amended its regulation without the required public informational proceedings.

Accordingly, John Butcher (“Butcher”) respectfully avers the following as his Petition for Appeal of the truancy regulation:

### **Parties**

1. Butcher is a resident of the City of Richmond.
2. The Board is vested with the general supervision of the public school system.

### **The Regulation**

3. By an order<sup>2</sup> signed by its President on or after October 25, 2012, the Board adopted its Regulations Governing the Collection and Reporting of Truancy Related Data and Student Attendance Policies, 9VAC20-730 (the “Regulation”).

4. On November 20, 2012, Butcher filed by certified mail a Notice of Appeal of the Regulation with the Board’s Secretary.

5. On November 29, 2012, the Board voted to adopt an amendment to the definition of “excused absence” in the Regulation. An adoption order is pending.

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<sup>2</sup>[http://www.doe.virginia.gov/boe/meetings/2012/10\\_oct/minutes.pdf](http://www.doe.virginia.gov/boe/meetings/2012/10_oct/minutes.pdf) (last visited December 13, 2012).

## Butcher Is Affected by the Regulation

6. The Richmond City public schools are among the worst in the Commonwealth. For example, on the 2012 Standards of Learning<sup>3</sup> tests, Richmond's 79.1% pass rate on the English reading test was sixth from the lowest in the state and its 47.6% pass rate on the mathematics test was fifth from the lowest. As to the four-year cohort graduating in 2012, the state diploma rate<sup>4</sup> (advanced + standard diplomas) was 83% but the Richmond rate<sup>5</sup> was 62.9%. Because of the much better school systems in the surrounding counties, there are few families with school-age children in Butcher's neighborhood.

7. For the 2009 school year (the latest year for which it publishes the data), Richmond reports the following rates of students missing ten or more days<sup>6</sup>:

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<sup>3</sup> <http://bi.virginia.gov/BuildATab/rdPage.aspx> (last visited December 13, 2012).

<sup>4</sup> [https://p1pe.doe.virginia.gov/reportcard/ogr\\_report.do?link=state&year=2011&rate=5](https://p1pe.doe.virginia.gov/reportcard/ogr_report.do?link=state&year=2011&rate=5) (last visited December 13, 2012).

<sup>5</sup> [https://p1pe.doe.virginia.gov/reportcard/ogr\\_report.do?link=division&year=2011&rate=5](https://p1pe.doe.virginia.gov/reportcard/ogr_report.do?link=division&year=2011&rate=5) (last visited December 13, 2012).

<sup>6</sup> <http://web.richmond.k12.va.us/AboutRPS/Statistics/TruancyRates.aspx> (last viewed December 13, 2012). Richmond counts the number of students who have ten or more full-day unexcused absences, apparently in response to a data requirement of the No Child Left Behind Act.  
[http://www.doe.virginia.gov/info\\_management/data\\_collection/student\\_record\\_collection/truancy/truancy\\_rate.pdf](http://www.doe.virginia.gov/info_management/data_collection/student_record_collection/truancy/truancy_rate.pdf)

## Truancy Rates

School	Membership	Students Missing 10 or More Days	Percentage
Elementary	11038	551	5%
Middle	4607	251	5%
High	5924	1073	18%
<b>TOTALS</b>	<b>21569</b>	<b>1875</b>	<b>9%</b>

This astonishing truancy rate contributes to Richmond's appalling graduation rate.

8. CODE § 22.1-258 requires each school division to create an attendance plan for any student with five unexcused absences, to schedule a conference with the parents after the sixth unexcused absence, and to file a judicial proceeding (either a Child in Need of Supervision ("CHINS") petition or a prosecution of the parents) after the seventh unexcused absence.

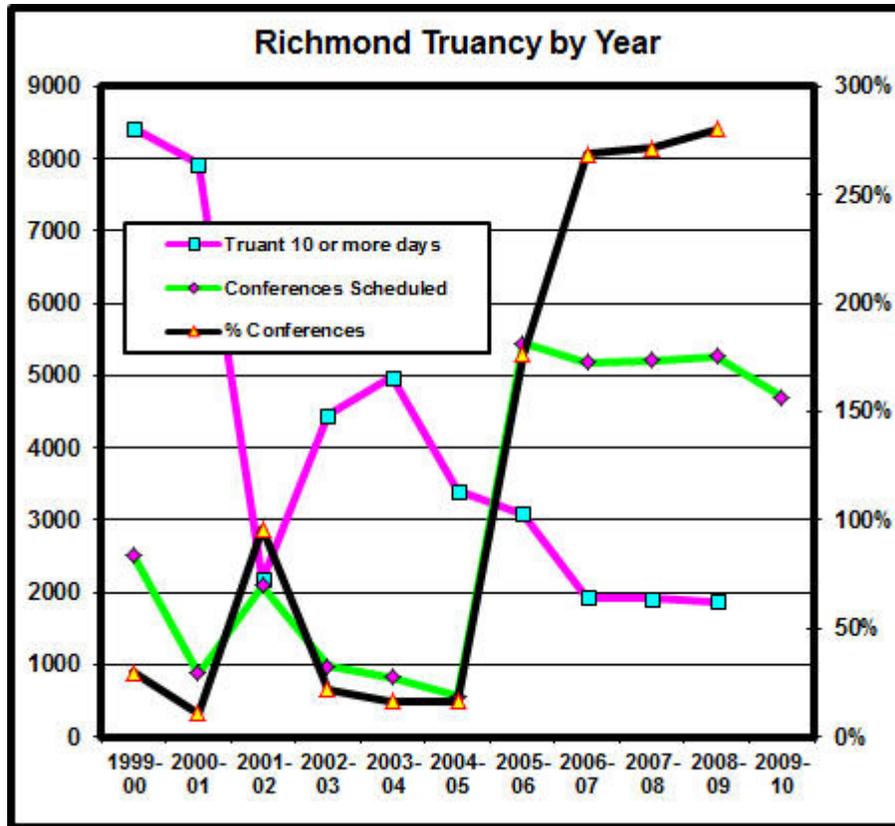
9. CODE § 22.1-269 requires the Board to enforce § 22.1-258. Yet the Board does not even collect data to show compliance with § 22.1-258. It collects and publishes only a list of the number of six-absence conferences<sup>7</sup> reported by each division.

10. Juxtaposition of the state's reports of six-absence conferences with the Richmond ten-absence reports shows that Richmond scheduled fewer than 20% of the required conferences in 2003, 2004, and 2005, but improved sharply in 2006 after Butcher exposed the situation on his Web site.<sup>8</sup>

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<sup>7</sup> [http://www.doe.virginia.gov/statistics\\_reports/school\\_climate/index.shtml](http://www.doe.virginia.gov/statistics_reports/school_climate/index.shtml) (last viewed December 13, 2012).

<sup>8</sup> <http://crankytaxpayer.org/Schools/attendance.htm> (last viewed December 13, 2012).



More recently, Richmond’s Communications Officer admitted in an email<sup>9</sup> that as of March 22, 2012 Richmond had sent 77 “failure to send” petitions (presumably to court) as against 47 in 2011.

11. The Richmond Web site only posts its ten-absence data through 2009. For 2007 through 2009, the number hovered around 1,900. Extrapolation of those data, in light of the statute requiring court action at seven absences while Richmond is reporting instances of ten absences, indicates that Richmond continues to flagrantly violate the seven-absence requirements of § 22.1-258.

<sup>9</sup> <http://crankytaxpayer.org/Schools/attendance.htm#Cosby> (last viewed December 13, 2012).

12. As set out below, the Regulation ignores part-day absences and does not even generate enough data for the Board to discharge its duty to enforce § 22.1-258. The Board's inattention to its duty leaves Butcher (1) to pay Richmond's high taxes to support an ineffective school system that fails to graduate nearly 40% of its students and (2) to suffer the public safety and social costs imposed upon Richmond and its residents by the truants and dropouts whom the schools have failed to retain and properly educate and (3) to suffer the damage to his property values from living in a jurisdiction with a profoundly dysfunctional school system. By ignoring part-day absences, the Board and its regulation are derelict in their duty that, if properly discharged, would ameliorate these burdens on Butcher.

**The Regulation Is Unlawful Insofar as It Fails  
to Enforce the Compulsory Attendance Statutes  
as to Part-Day Absences.**

13. The Regulation at 8VAC20-730-10 defines "truancy" and "unexcused absence" as follows:

"Truancy" means the act of accruing one or more unexcused absences.

"Unexcused absence" is an absence where: (i.) the student misses his/her scheduled instructional school day in its entirety; (ii.) no indication has been received by school personnel within three days of the absence that the student's parent is aware and supports the absence, or the parent provides a reason that is unacceptable to the school administration. The school administration may change an unexcused absence to an excused absence when it determines that the parent has provided an acceptable reason meeting criteria for the student's absence or there are extenuating circumstances.

8VAC20-730-20.B then provides:

Each local school board shall develop procedures to ensure that appropriate interventions will be implemented when a student engages in a pattern of absences less than a full day, the explanation for which, if it were a full-day absence, would not be deemed an excused absence.

14. The Regulation does not specify any such “procedures.” Neither does it provide any test of the adequacy of the “procedures” a local board may develop. Nor does it impose any accountability if the “interventions” fail to control part-day truancy. Indeed, the Regulation does not even require reporting of a count of part-day absences. Thus, the regulation is impotent as to part-day absences.

15. CODE § 22.1-254 contains the compulsory attendance provision of Virginia law:

Except as otherwise provided in this article, every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational, or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent, or provide for home instruction of such child as described in § 22.1-254.1 (emphasis supplied).

CODE § 22.1-98.B.1 provides: “The length of every school’s term in every school division shall be at least 180 teaching days or 990 teaching hours in any school year.” The statute sets out exceptions (e.g., severe weather); those exceptions do not include a blanket authorization for part-day absences.

16. In short, the law requires attendance for the full school day and the full school year.

17. The Board, at least until this year, plainly understood the compulsory attendance statutes to require attendance all day. For example, the Board's regulation at 8VAC20-131-150 provides:

8VAC20-131-150. Standard school year and school day.

A. The standard school year shall be 180 instructional days. The standard school day for students in grades 1 through 12 shall average at least 5-1/2 instructional hours, excluding breaks for meals and recess, and a minimum of three hours for kindergarten.

B. All students in grades 1 through 12 shall maintain a full day schedule of classes (5-1/2 hours), unless a waiver is granted in accordance with policies defined by the local school board.

18. CODE § 22.1-269 provides:

The Board of Education shall have the authority and it shall be its duty to see that the provisions of [§§ 22.1-254 through -269.1] are properly enforced throughout the Commonwealth.

19. CODE § 22.1-258 requires a school division to investigate every unexcused absence and to take specified actions, culminating with a CHINS petition or misdemeanor prosecution of the parent upon a seventh absence.

20. In the face of this clear authority, the Regulation defines "unexcused absence" to include only instances where "the student misses his/her scheduled instructional school day in its entirety." Thus, under the Regulation a student could skip out every day after answering the morning roll call and not be subject to the (mandatory) enforcement requirements of § 22.1-258.

21. The rationale proffered by the Department for defining part-day absences out of the Regulation is convenience.<sup>10</sup> Yet the Board's ongoing defalcation of its duties leaves it with only anecdotal data to show that dealing with part-day truancy would indeed be inconvenient. Moreover, the statute does not make an exception for the convenience of the school divisions or of the courts. The purpose of the regulation must be to require attendance for the required "number of days and hours per day," and the Board is required to enforce that requirement, whether the school divisions find compliance convenient or not.

22. The Department also points to the 2d and 3d paragraphs of § 22.1-258 which require notice to the parent "[w]henver any pupil fails to report to school on a regularly scheduled school day" and require an attendance plan after the fifth such failure.<sup>11</sup> Read narrowly, these provisions would never invoke the enforcement mechanisms of § 22.1-258 so long as the student reported in at any time during the school day, even if the student then departed immediately. This narrow reading of the second and third paragraphs overlooks the fourth paragraph of § 22.1-258, which requires a conference "[i]f the pupil as absent" a sixth time and requires referral to court "[u]pon the next absence," both without mentioning failure to "report." Moreover, the Department's narrow reading of the failure to report language has led to a regulation that is manifestly inconsistent with the General Assembly's

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<sup>10</sup> [http://www.doe.virginia.gov/boe/meetings/2012/09\\_sep/agenda\\_items/item\\_h.pdf](http://www.doe.virginia.gov/boe/meetings/2012/09_sep/agenda_items/item_h.pdf) at p.4 (last viewed December 13, 2012).

<sup>11</sup> *Id.* at 28-29.

command and with its own regulation that requires every student to attend school for “180 instructional days” of “at least 5-1/2 instructional hours.”

23. Richmond and, doubtless, other school divisions have been ignoring § 22.1-258 wholesale. Yet the Board now has created a regulation that would permit their abuse to continue for any student alert enough to attend school long enough to be marked “present” (or, even, “tardy”). This lackadaisical view of the compulsory attendance statute would ratify the practice of marking a student “present” and collecting the State funding for that student whether or not that student remains in school for the balance of the school day.

24. It is exactly that practice that, on January 5, 2004, led to Justin Creech bleeding to death at midday in a Staples Mill Road parking lot, stabbed by schoolmate Phillip Hicks.<sup>12</sup> Both Creech and Hicks had left Thomas Jefferson High School early that day, as on many others, after being marked “present.”

25. In short, as to part-day absences the Regulation attempts to codify and perpetuate part of the Board’s defalcation of its duty to enforce the compulsory attendance statutes. The Regulation thus is contrary to the Board’s statutory authority.

26. The Board’s Agenda Item for the Regulation<sup>13</sup> tells us:

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<sup>12</sup> <http://www.richmondmagazine.com/?articleID=26df8b79bdd78015c53eee35ef1406a5> (last viewed December 13, 2012).

<sup>13</sup> [http://www.doe.virginia.gov/boe/meetings/2012/09\\_sep/agenda\\_items/item\\_h.pdf](http://www.doe.virginia.gov/boe/meetings/2012/09_sep/agenda_items/item_h.pdf) (last viewed December 13, 2012).

Due to the strong link between attendance and successful completion of school, consistent monitoring of truancy and intervening with supports for students and families are critical.

Yet the record of this rulemaking is devoid of substantial evidence to show that part day absences are somehow disconnected from the “strong link between attendance and successful completion of school.” The Board thus lacks substantial evidence for its decision to not enforce the compulsory attendance laws as to part-day absences.

### **The Board Failed to Provide the Required Notice**

27. At 8VAC20-11-50.E, the Board’s Public Participation Procedures restate CODE § 2.2-4012.E, which provides, in relevant part:

A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.

28. Butcher commented during the public comment period for the Regulation. Nonetheless, the Board failed to send a draft of its summary description of public comment to Butcher at least five days before final adoption. On information and belief, the Board similarly failed to send the required summary description to other commenters.

### **The Board Amended the Regulation Without Following the Required Procedures**

29. On November 29, 2012, the Board voted to adopt an amendment to the definition of “excused absence” as follows:

“‘Excused absence’ means an absence of an entire assigned instructional school day with a reason acceptable to the school administration that is provided by the parent. If circumstances permit, the parent should provide the school administration with the reason for the nonattendance prior to the absence. Examples of an excused absence may include, but are not limited to, the following reasons: funeral, illness (including mental health and substance abuse illnesses), injury, legal obligations, medical procedures, suspensions, religious observances and military obligation. Expelled and suspended students continue to remain under the provisions of compulsory school attendance, Code of Virginia, § 22.1-254. An absence from school attendance resulting from a suspension or expulsion may be considered excused for the period of suspension or expulsion ~~unless the parent fails to otherwise adhere to the compulsory school attendance requirements.~~”

With respect to this amendment, the Board conducted none of the informational proceedings required by CODE § 2.2-4007.03 for the adoption.

### **The Board Unlawfully Delegated Its Authority**

30. The motion to adopt the Regulation authorized the Department “to make additional technical edits.”<sup>14</sup> That authorization was an unlawful delegation of legislative authority.

31. The Regulation provides at 8VAC20-730-20.A:

Each local school board shall provide guidance regarding what would constitute an excused absence in order to address when the explanation provided by the parent will be determined to be reasonable and acceptable.

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<sup>14</sup> [http://www.doe.virginia.gov/boe/meetings/2012/09\\_sep/minutes.pdf](http://www.doe.virginia.gov/boe/meetings/2012/09_sep/minutes.pdf) (last viewed December 13, 2012).

The Board thus unlawfully delegates to the local school divisions the decision as to what kinds of absences may be “excused.”

### **Relief Requested**

32. The Court should vacate the Regulation and remand to the Board with instructions to (1) define “unexcused absence” to include any part-day absence that is not excused, (2) conduct the required informational proceedings for the amendment voted on November 29, (3) set out explicitly the types of absence that may be excused, and (4) delete the unlawful delegations of authority from the Regulation and its adopting motion.

**JOHN R. BUTCHER**

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Date: December 14, 2012

John R Butcher  
4208 Riverside Drive  
(804) 925-8815 (voice)  
johnrbutcher@gmail.com