No. 25-

IN THE

Supreme Court of the United States

EILEEN CHOLLET AND DENNIS MA, ON BEHALF OF C.M., THEIR MINOR CHILD; MERYEM GHAZAL AND RICHARD GHAZAL, ON BEHALF OF P.G., THEIR MINOR CHILD; AND GUADALUPE WILLIAMSON AND TIMOTHY WILLIAMSON, ON BEHALF OF T.W., THEIR MINOR CHILD,

Petitioners,

v.

DR. SCOTT BRABRAND, IN HIS ROLE AS SUPERINTENDENT, FAIRFAX COUNTY PUBLIC SCHOOLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 18, 2025

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QUESTION PRESENTED

I. Whether the fundamental right to public education enshrined under a state's constitution can be taken by the state without just compensation?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Eileen Chollet and Dennis Ma, on behalf of their minor child, C.M., Meryem Ghazal and Richard Ghazal, on behalf of their minor child, P.G., and Guadalupe Williamson and Timothy Williamson, on behalf of their minor child, T.W., were the plaintiffs-appellants in all proceedings below.

Respondent Dr. Scott Brabrand, in his official capacity as Superintendent for the Fairfax County Public Schools, was the defendant-appellee in all proceedings below.

No party is a corporation.

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Eastern District of Virginia, and the United States Court of Appeals for the Fourth Circuit:

Chollet, et al., v. Brabrand, No. 24-1059 (4th Cir. May 19, 2025) ("Chollet 4th Cir. II")

Chollet, et al., v. Brabrand, No. 1:21-cv-00987 (E.D. Va. Dec. 14, 2023) ("Chollet Dist. Ct. II")

Chollet, et al., v. Brabrand, No. 22-1005 (4th Cir. Aug. 18, 2023) ("Chollet 4th Cir. I")

Chollet, et al., v. Brabrand, No. 1:21-cv-00987 (E.D. Va. Nov. 29, 2021) ("Chollet Dist. Ct. I")

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Eileen Chollet and Dennis Ma, on behalf of their minor child, C.M., Meryem Ghazal and Richard Ghazal, on behalf of their minor child, P.G., and Guadalupe Williamson and Timothy Williamson, on behalf of their minor child, T.W. (collectively "Petitioners" and C.M., P.G., and T.W. collectively the "Minor Children"), petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit ("Chollet 4th Cir. II") is published at 137 F.4th 241 and is reproduced in the appendix to this petition at Pet. App. 1a-10a. The opinion of the district court ("Chollet Dist. Ct. II") was unpublished but is available at 2023 WL 12087472 and is reproduced in the appendix to this petition at Pet. App. 11a-24a. The opinion of the Fourth Circuit vacating and remanding the district court's initial decision ("Chollet 4th Cir. I") was unpublished but is available at 2023 WL 5317961 and is reproduced in the appendix to this petition at Pet. App. 25a-28a. The district court's initial decision ("Chollet Dist. Ct. I") was unpublished but is available at 2021 WL 6333049 and is reproduced in the appendix to this petition at Pet. App. 29a-38a.

JURISDICTION

The Fourth Circuit entered judgment on May 19, 2025, Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 15 of the Virginia Constitution provides in relevant part, "free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth."

Article VII, § 1 of the Virginia Constitution provides in relevant part, "The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained."

Section 22.1-214 of the Code of Virginia, titled "Board to prepare special education program for children with disabilities," provides in relevant part, "The program developed by the Board of Education shall be designed to ensure that all children with disabilities have available to

them a free and appropriate education, including specially designed instruction to meet the unique needs of such children."

Section 22.1-215 of the Code of Virgina, titled "School divisions to provide special education; plan to be submitted to Board," provides in relevant part, "Each school division shall provide free and appropriate education, including special education, for (i) the children with disabilities residing within its jurisdiction and (ii) the children with disabilities who do not reside within its jurisdiction but reside in the Commonwealth and are enrolled in a full-time virtual school program provided by the school division".

Section 22.1-253.13.1 of the Code of Virginia, titled "Standard 1. Instructional programs supporting the Standards of Learning and other educational objectives," provides in relevant part, "Local school boards shall also implement the following: 1. Programs in grades K through three that emphasize developmentally appropriate learning to enhance success."

STATEMENT OF THE CASE

This case concerns the intersection of certain fundamental rights and protections under the U.S. Constitution with the fundamental right to public education as prescribed under the Virginia Constitution and recognized by the Code of Virginia and the Supreme Court of Virginia. *See Scott v. Commonwealth*, 247 Va. 379, 443 (Va. 1994). One of the fundamental constitutional safeguards for a state-prescribed right to public education is the recognition of that right as a property interest. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975). If a government

action takes away or destroys a property interest, the U.S. Constitution provides mechanisms to protect the holders of that interest. Some of those mechanisms, such as the Due Process Clause, are designed to provide minimum standards for taking away a liberty or property interest. *See id.* Other mechanisms, such as the Takings Clause, are "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Here, COVID-19 policies chosen by Fairfax County Public Schools ("FCPS") resulted in the taking of the fundamental right to access public education from an extremely vulnerable set of young children.

A. Factual Background

On March 12, 2020, Governor of Virginia Ralph Northam declared a state of emergency and disaster in response to the COVID-19 pandemic. The next day, Governor Northam ordered all Virginia K-12 schools to close for a minimum of two weeks. All of the citizens of Virginia bore the burdens of these type of temporary government restrictions in response to the Virginia state government's interest in attempting to stem the spread of COVID-19.

The citizens who bore these burdens include Petitioners and their Minor Children. Each of the Minor Children suffer from certain disabilities. Specifically, C.M., the minor child of Chollet and Ma, has been diagnosed with a rare genetic condition called 2q23.1 microdeletion syndrome, which was found after she was evaluated for developmental delays by developmental pediatricians as an

infant. She has secondary diagnoses of autism spectrum disorder, attention deficit hyperactivity disorder (combined presentation), and a moderate intellectual developmental disorder stemming from her primary genetic diagnosis. These disabilities cause C.M. substantial deficits in motor control, speech production, attention, behavioral regulation, complex memory, processing speed, and emotional control. P.G., the Ghazal's minor child, has been diagnosed with autism spectrum disorder, sensory processing disorder, and global developmental delay. T.W., the Williamson's minor child, has been diagnosed with an intellectual disability. The disabilities for all three of these Minor Children require specialized in-person learning to ensure they can adequately access their fundamental right to public education.

On March 23, 2020, Governor Northam ordered all K-12 schools to close for the remainder of the 2019-2020 school year. The citizens of Virginia, including Petitioners and the Minor Children, continued to bear the burdens of these type of temporary government restrictions in response to the Virginia state government's interest in attempting to stem the spread of COVID-19. However, the collective sharing of these burdens fundamentally changed during the 2020-2021 school year. Respondent, who is the superintendent of the FCPS, a public education district where the Minor Children attend school, continued to keep FCPS closed during lengthy periods of the 2020-2021 school year supposedly due to the COVID-19 pandemic. Unlike other neighboring counties in Virginia, which provided some form of in-person instruction for students with special needs, FCPS announced that it would provide the "Supporting Return to School" Program (the "SRS Program"). The SRS Program did not provide academic

instruction, was limited to only 60 students at 47 different FCPS facilities (including the Minor Children's schools), and required parents to pay monthly fees for children to attend. FCPS's decision to deny in-person instruction to the Minor Children and instead focus on the SRS Program for the entire 2020-2021 school year resulted in the Minor Children suffering significant and permanent setbacks, which ultimately has deprived them of their property interest in the fundamental right to public education as guaranteed by the Virginia Constitution.

B. Proceedings Below

In response to FCPS's depravation of access to the fundamental right to public education for their Minor Children, Petitioners turned to the courts for relief. On August 25, 2021, Petitioners filed their complaint in the United States District Court for the Eastern District of Virginia. Respondent filed a Motion to Dismiss for Failure to State a Claim and for Lack of Subject Matter Jurisdiction on September 22, 2021. A hearing took place on the Motion to Dismiss on November 3, 2021. On November 29, 2021, the District Court issued *Chollet Dist. Ct. I* as an order in which the court granted Respondent's Motion to Dismiss because Petitioners were barred from pursuing their claim due to the failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA").

Petitioners timely filed a Notice of Appeal with the United States Court of Appeals for the Fourth Circuit on December 28, 2021. That appeal dealt with the District Court's dismissal due to failure to exhaust administrative remedies under IDEA, as well as whether Petitioners had

a claim under the Takings Clause for the property taken from the Minor Children by FCPS. On August 18, 2023, the Fourth Circuit issued *Chollet 4th Cir. I* as an unpublished *per curiam* opinion, along with a judgment order, in which it held that the remedies sought by Petitioners were not foreclosed under the IDEA and remanded the case back to the District Court for proper consideration of the Petitioners' Takings Clause arguments.

Respondent then filed a Renewed Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure on November 3, 2023. A hearing took place on the Renewed Motion to Dismiss on November 29, 2023. On December 15, 2023, the District Court issued *Chollet Dist. Ct. II* as an unpublished opinion in which the court granted Respondent's Renewed Motion to Dismiss. Despite holding that the right to education at issue for the Minor Children was both fundamental and vested, the District Court held that said fundamental right is "not sufficiently definite in character to be considered vested property for the purposes of compensation." *See Chollet Dist. Ct. II*, 2023 WL 12087472, at *5.

Petitioners once again looked to the Fourth Circuit to correct the District Court's error by timely filing a Notice of Appeal on January 9, 2024. Oral arguments took place for the appeal on October 30, 2024. On May 19, 2025, the Fourth Circuit issued *Chollet 4th Cir. II*, along with a judgment order, in which it affirmed the District Court's decision to dismiss the case. The Fourth Circuit precluded any further arguments regarding the interaction of the Takings Clause and the fundamental right to public education in Virginia when it held that "the right to public education in Virginia is not 'private property' for Takings

Clause purposes under any available theory." *See Chollet 4th Cir. II*, 137 F.4th at 246.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision fails to properly consider the law, the consequences of its holding, and the public policy implications. Not only are Petitioners precluded from protection by the Takings Clause and now forced alone to bear the burdens of FCPS's decision for their Minor Children, but schoolchildren effectively have no real relief when their right to education is taken away by public officials. Of course, a Due Process claim can be brought; but by the time such a claim works itself through the courts, the damage will already be done. This lack of consequences enables public officials to stunt a student's growth through improper accommodations and force students to bear costs that should be borne by the public under the Takings Clause. The Court should accept this case in order to consider these impacts in light of its prior precedent holding, among other things, that a child's right to public education is a property interest for Due Process clause purposes. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

I. THE FOURTH CIRCUIT INCORRECTLY CONCLUDED THAT THE FUNDAMENTAL RIGHT TO PUBLIC EDUCATION IN VIRGINIA IS NOT ENTITLED TO PROTECTION UNDER THE TAKINGS CLAUSE.

The Fourth Circuit's holding in *Chollet 4th Cir. II* that the fundamental right to public education in Virginia "is not 'private property' for Takings Clause purposes under any available theory" is incorrect. The Fourth Circuit

misunderstands the purpose of the Takings Clause in protecting property rights, the factors to consider in evaluating whether a certain government restriction constitutes a regulatory taking, and the nature of the fundamental right to public education as a property right for Petitioners.

This Court has recognized that this constitutional guarantee protects owners of property rights from alone "bear[ing] public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. at 49. This protection functions as "a fundamental component of equal justice under the law." *See Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 399 (1989). Thus, any analysis under the Takings Clause "necessarily requires a weighing of private and public interests." *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 900 F.2d 783, 789 (4th Cir. 1990) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260-261 (1980)).

To ensure this protection is effective, this Court has extended the Taking Clause beyond physical appropriations of private property because destruction of constitutionally protected rights by a regulatory taking "has very nearly the same effect for constitutional purposes as appropriating or destroying [the physical property]." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-415 (1922). Flexibility has been a "central dynamic of the Court's regulatory takings jurisprudence" because "[p]roperty rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017). Because the Founders

intended for the Constitution to protect rather than create property rights, the existence of a property right that may be subject to a regulatory taking is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)); *see also Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000) (holding that the Takings Clause "*protects* private property; it does not create it") (emphasis in original).

Guided by these principals, this Court has offered some benchmarks to guide lower courts in determining "whether a particular government action goes too far and effects a regulatory taking." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), *overruled on other grounds*, *Knick v. Twp. of Scott, Pa.*, 588 U.S. 180 (2019). To determine whether a particular government restrictive regulation affects a taking, this Court has generally applied the flexible test it developed in *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021). This test balances factors such as the economic impact of the regulation, its interference with investment-backed expectations, and the character of the government action. *See Penn. Cent. Transp. Co.*, 438 U.S. at 124. This Court has not provided guidance about whether to consider all of the *Penn Central* factors or how to weigh each factor. *See Blackburn v. Dare Cnty.*, 58 F.4th 807, 815 (4th Cir. 2023) (noting that "[j]ust as there is no clear guidance on what exactly the *Penn Central* factors encompass, there is no hard and fast way to weigh them"). Rather, in accordance with the flexibility in its regulatory takings jurisprudence,

the Court has directed that the *Penn Central* factors generally govern regulatory takings challenges. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005) (holding that, outside two relatively narrow categories, "regulatory takings challenges are generally governed by the standards set forth in *Penn Central*").

Neither the Fourth Circuit nor the District Court considered, let alone balanced, any of the *Penn Central* factors in evaluating Petitioners' regulatory takings challenge. *See* 2023 WL 12087472, at *5; 137 F.4th at 247. Rather, the reviewing court in both instances focused exclusively on the nature of the Minor Children's property right. Specifically, the District Court focused on (i) the Virginia government's ability to change or remove future interests in the property right, and (ii) the lack of a traditional measurable market value. *See* 2023 WL 12087472, at *5. The Fourth Circuit focused on the Virginia government's ability to establish, maintain, and alter the property right and determined that this retained ability resulted in the property right not being "private property" for Takings Clause purposes. *See* 137 F.4th at 247.

The Fourth Circuit is correct that the nature of the property right is relevant in evaluating Petitioners' regulatory takings challenge. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 604-605 (1987) (holding that child support payments from an entitlement program are not property rights protected by the Takings Clause); *Scott v. Greenville County*, 716 F.2d 1409, 1421-1422 (4th Cir. 1983) (holding that entitlement to the issuance of a permit is "not in the nature of interests the deprivation of which is encompassed by the Fifth Amendment 'taking'

doctrine"). However, the court confuses the nature of a statutory or regulatory entitlement (*i.e.,* property rights created by statute or regulation which can be diminished or removed by the legislature prescribing the statute or the government agency issuing the regulation) with the nature of a right prescribed under a state's constitution (*i.e.,* a property right that can only be diminished or removed by amending said constitution). Rights which a government consciously and explicitly enshrine in its constitution, particularly in its bill of rights, constitute "fundamental rights necessary to our system of ordered liberty." *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (Thomas, J., concurring in part and concurring in judgment).

Here, Virginia made the conscious decision to enshrine the right to public education in the bill of rights of its constitution due to public education's role as a "most vital civic institution for the preservation of a democratic system of government." *See Plyler v. Doe*, 457 U.S. 202, 221 (1982); *see also Scott v. Commonwealth*, 247 Va. At 443 (holding that "education is a fundamental right under the [Virginia] constitution" which must meet the state-prescribed standard of quality). The state has recognized the distinct vitality of public education as something of such "supreme importance" so as to be "fundamental" to "maintaining the fabric of our society," such as core societal values and economic productivity, which makes this fundamental right necessarily distinguishable from "mere" statutory benefits or entitlements. *See Plyler v. Doe*, 457 U.S. at 221.[1] Virginia has further distinguished the

1. The language in the Virginia Constitution and the Supreme Court of Virginia's decision in *Plyler* also shows why the Fourth

fundamental right to public education from other "public property." *See* Va. Const. Art. VII, §§ 8, 9 (providing the following as examples of public property: streets, alleys, public grounds of a city or town, waterfronts, wharf property, public landings, wharves, docks, avenues, parks, bridges). One of the fundamental constitutional safeguards for a state-prescribed fundamental right is the recognition of said right as a vested property interest. *See Goss v. Lopez*, 419 U.S. at 574. As the "protection of property rights is 'necessary to preserve freedom,'" this Court should consider whether the Minor Children's vested property right in an access to public education is compensable under the Takings Clause. *See Murr v. Wisconsin*, 582 U.S. at 394.

Furthermore, the Fourth Circuit's reasoning that the Virginia legislature's ability to "establish, maintain,

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Circuit's reliance on *Zeyen v. Bonneville Joint Dist., # 93*, 114 F.4th 1129 (9th Cir. 2024) – which is neither binding nor analogous – is misplaced. The Ninth Circuit in *Zeyen* itself relied on the language of the Idaho Constitution to support its conclusion that free education is not a vested property right in Idaho. *See id.* at 1140-1144. But the Idaho Constitution is significantly different from the Virginia Constitution. Specifically, although the Idaho Constitution provides a right to free public schools, the Virginia Constitution includes additional language guaranteeing the right to education in its Bill of Rights, emphasizing the importance of Virginia's assurance of access of public education that meets Virginia's codified standards of quality and further establishing the right of access as a fundamental right. Furthermore, the Idaho Supreme Court has held that the Idaho Constitution "does not establish education as a basic fundamental right." *See Thompson v. Engelking*, 96 Idaho 793, 806 (Idaho 1975). As such, the Fourth Circuit's reliance on the Ninth Circuit's decision in *Zeyen* is misplaced.

and alter Virginia's education *system*" (emphasis added) prevents a person holding the fundamental right to public education from possessing the "bundle" of rights necessary to trigger Takings Clause protections is mistaken. It is true that, to be cognizable under the Takings Clause, a constitutionally protected property right must be vested. *See Bowers v. Whitman*, 671 F.3d 905, 912 (9th Cir. 2012). To determine whether a property interest has vested for Taking Clause purposes, the relevant inquiry is not the system by which the right is regulated, but rather the certainty of one's expectation in the property interest at issue. *See id.* at 913. This Court has extended this expectation inquiry to an intangible property interest where the said intangible interest shares "many of the characteristics of more tangible forms of property." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984). These essential characteristics of private property, also known as the "bundle" of rights, include the right to possess, use, exclude, transfer, enjoy, and dispose of the interest. *Horne v. Dep't Of Agric.*, 576 U.S. 351, 361-362 (2015).

Here, the Virginia Constitution has enshrined the right to public education for all schoolchildren in Virginia, including the Minor Children. That enshrinement includes the right to use and enjoy the right. To ensure that all of the schoolchildren in Virginia can use and enjoy this fundamental right, the Virginia General Assembly established and maintains the Virginia education system. *See, e.g.,* Va. Code §§ 22.1-214 (concerning special education programs for children with disabilities), and 22-253.13.1 (concerning local school boards implementing developmentally appropriate learning). Other government agencies within Virginia set forth rules and regulations for

the Virginia school system. Like statutes and regulations impacting physical property (which is unequivocally protected by the Takings Clause), all of these rules and guidelines concerning the Virginia education system function to preserve and protect the fundamental right to public education for all schoolchildren in Virginia. Neither the Virginia General Assembly nor any other government agencies within Virginia are permitted to diminish, disregard, or destroy this fundamental right. *See* Va. Const. Article I, § 15, Article VII, § 1; *see also* An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870) (requiring that, as a condition for Virginia to be admitted to the Union, that "the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."); *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) (holding that a "government can scarcely deemed to be free, where the rights of property are left solely dependent upon the will of the legislative body, without any restraint). The Virginia government having complete control of this fundamental right would in fact cause the right to lose its characteristics as a property interest. *See South Carolina State Educ. Assistance Auth. v. Cavazos*, 897 F.2d 1272, 1276 (4th Cir. 1990) (holding that the government exercising complete control over property can cause it to lose its character as property for purposes of the Takings Clause). As the Virginia government does not have complete control of this fundamental right, FCPS's action, in its role as a government agency, diminished and destroyed the Minor Children's fundamental right, and therefore destroyed and diminished the Minor Children's property interest. As such, Petitioners are entitled to just

compensation under the Takings Clause for their Minor Children's loss of the use and enjoyment of that property right. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 414-415.

II. THE FOURTH CIRCUIT FAILED TO CONSIDER THE PUBLIC POLICY IMPACTS OF ITS DECISION.

In addition to not considering all of the relevant factors in determining whether the Minor Children's fundamental right to public education is protected by the Takings Clause, the Fourth Circuit also failed to consider several public policy implications of its decision.

First, upholding the Fourth Circuit's decision would destroy an important enforcement mechanism for protecting a schoolchild's right to access public education. The language in the Virginia Constitution would be rendered meaningless without any real penalties, financial or otherwise, for FCPS's improper taking of the Minor Children's fundamental right to a public education.

Per the Fourth Circuit's reasoning, the only remedy to protect this type of fundamental right when it is taken away is to sue in court under the Due Process Clause. *See Chollet 4th Cir. II*, 137 F.4th at 245 (citing *Goss v. Lopez*, 419 U.S. at 574). However, due process litigation can be long and costly, and the only remedy available under this approach is to belatedly restore the fundamental right of access to public education. Such an approach has been used previously by this Court. *See, e.g., Griffin v. County School Bd. of Prince Edward Cnty*, 377 U.S. 218 (1964). This belated restoration would be no remedy for any of

the Minor Children or similarly situated schoolchildren when one considers the critical period of intellectual and social development that has been permanently lost as well as Virginia's previous history with school closures. Rejecting the Fourth Circuit's decision would both potentially compensate the Minor Children and other similarly situated schoolchildren for the loss of access to their required and critical specialized instruction, and it would also deter the extended removal of students from the classroom in the first instance because the penalty for doing so would be significant and payable regardless of whether the child is eventually returned to normal learning.

Next, upholding the Fourth Circuit's decision would provide public officials with the ability to stunt a schoolchild's development through the use of improper accommodations, as was done by FCPS and other school districts across the nation. *See, e.g., Zeyen v. Boise District #1*, 2023 WL 4215402 (D. Idaho June 9, 2023). That stunted development will lead to lessened future employment possibilities for the schoolchild, lower lifetime earnings potential, and an inability for the schoolchild to be a fully engaged and contributing citizen as an adult. Public policy should attempt to limit or eliminate these negative effects when possible.

FCPS's denial of access to public education here is a perfect example as to how improper educational accommodations affect childhood development. The improper accommodations in this case occurred only because of FCPS's decisions in how to respond to the COVID-19 Pandemic. Initial studies of education during the COVID-19 Pandemic are already finding significant

harmful long-term consequences of virtual learning.[2] These virtual learning consequences due to improper accommodations during the COVID-19 Pandemic may impact children over the course of their entire lives. The educational and developmental consequences for the Minor Children and other similarly situated schoolchildren are likely even worse than consequences to the general population because of their developmental disorders and their lack of access to proper accommodations for their disabilities.

Public policy in the United States favors limiting these negative consequences and ensuring the proper educational and social development for the Minor Children and other similarly situated schoolchildren. Without rejecting the Fourth Circuit's reasoning in this case, public officials will be able to provide improper accommodations for schoolchildren throughout the country, stunting the educational and social development of America's youngest citizens without any real consequences.

Finally, upholding the Fourth Circuit's decision would force Petitioners and other similarly situated individuals to bear public burdens that should be borne by the public as a whole. There is no dispute that the public education of America's schoolchildren is a vital civic burden borne

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2. *See, e.g.,* Fahle, Erin, Thomas J. Kane, Sean F. Reardon, and Douglas O. Staiger, *The First Year of Pandemic Recovery: A District-Level Analysis*, HARVARD UNIVERSITY CENTER FOR EDUCATION POLICY RESEARCH AND THE EDUCATIONAL OPPORTUNITY PROJECT AT STANFORD UNIVERSITY (January 2024) (available at https://educationrecoveryscorecard.org/wp-content/uploads/2024/01/ERS-Report-Final-1.31.pdf) (last visited March 13, 2024).

by the public as a whole. *See Plyler v. Doe*, 57 U.S. 202, 221 (1982) (recognizing that public schools are "a most vital civic institution for the preservation of a democratic system of government" and serve as the primary vehicle for transmitting "the values on which our society rests"). The Takings Clause is specifically meant to address situations in which the government has intentionally diminished a person's property rights to achieve even a legitimate public end. To the extent that preventing the spread of COVID-19 among the young children was a legitimate end, the cost towards pursuing that public end must be borne by the public as a whole. *See Armstrong v. United States*, 364 U.S. at 49. Without rejecting the Fourth Circuit's reasoning in this case, Petitioner and other similarly situated individuals will be forced to bear burdens for their children that should be borne by the public as a whole.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 18, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MAY 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1059

EILEEN CHOLLET, ON BEHALF OF C.M., A MINOR; DENNIS MA, ON BEHALF OF C.M., A MINOR; MERYEM GHAZAL, ON BEHALF OF P.G., A MINOR; RICHARD GHAZAL, ON BEHALF OF P.G., A MINOR; GUADALUPE WILLIAMSON, ON BEHALF OF T.W., A MINOR; TIMOTHY WILLIAMSON, ON BEHALF OF T.W., A MINOR,

Plaintiffs—Appellants,

v.

DR. SCOTT BRABRAND,
IN HIS ROLE AS SUPERINTENDENT,
FAIRFAX COUNTY PUBLIC SCHOOLS,

Defendant—Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, Senior District Judge. (1:21-cv-00987-AJT-JFA)

Before WYNN, HARRIS, and HEYTENS, Circuit Judges.

Appendix A

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Wynn and Judge Heytens joined.

Argued: October 30, 2024 Decided: May 19, 2025

PAMELA HARRIS, Circuit Judge:

The plaintiffs in this case are the parents of children with special needs who attend public school in Fairfax County, Virginia. They allege that the transition to remote learning during the COVID-19 pandemic constituted an unconstitutional "taking" of what they see as their children's Fifth Amendment property interest in public education. The district court rejected this argument and granted the defendant's motion to dismiss for failure to state a claim. We agree and affirm the judgment of the district court.

I.

Plaintiffs Eileen Chollet, Dennis Ma, Meryem Ghazal, Richard Ghazal, Guadalupe Williamson, and Timothy Williamson are the parents of children with special needs who attend the Fairfax County Public Schools ("FCPS") in Virginia. Pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, FCPS provides the plaintiffs' children with special education services based on Individualized Education Programs. Between March 2020 and February 2021, FCPS—like many school districts—responded to the COVID-19 pandemic by switching to a virtual learning model. The plaintiffs believe that FCPS's use of remote instruction

was inconsistent with their children's individualized needs and caused them to fall behind.

To address these concerns, the plaintiffs filed suit under 42 U.S.C. § 1983 against Dr. Scott Brabrand, in his former role as Superintendent of FCPS, alleging an unconstitutional "taking" of their children's purported Fifth Amendment property interest in a public education. Virginia law, the parents alleged, establishes a fundamental right to a public education. And because that right is a protected property interest under the Fourteenth Amendment's Due Process Clause, they argued, it is also private property subject to the Takings Clause.

The district court dismissed the plaintiffs' complaint for failure to state a claim under Rule 12(b)(6). *See Chollet v. Brabrand*, No. 1:21-cv-00987-AJT-JFA, 2023 U.S. App. LEXIS 21728.[1] In a thoroughly reasoned opinion, the court explained that "[t]he Constitution protects interests in

1. The district court had previously dismissed the plaintiffs' complaint for failure to exhaust administrative remedies under the IDEA. *Chollet v. Brabrand*, No. 1:21-00987-AJT-JFA, 2021 U.S. Dist. LEXIS 250159, 2021 WL 6333049, at *3 (E.D. Va. Nov. 29, 2021). After the court's ruling, the Supreme Court clarified the scope of the IDEA's exhaustion requirement, *see Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 143 S. Ct. 859, 215 L. Ed. 2d 95 (2023), and we vacated and remanded for the district court to consider that new precedent. *See Chollet v. Brabrand*, No. 22-1005, 2023 U.S. App. LEXIS 21728, 2023 WL 5317961, at *1–2 (4th Cir. Aug. 18, 2023). In the decision now on review, the district court concluded that the plaintiffs were not required to exhaust their administrative IDEA remedies and proceeded to reach the merits of their Takings Clause claim. The court's holding as to exhaustion is not challenged on appeal.

property through various clauses." J.A. 229. Under the Due Process Clause of the Fourteenth Amendment, a "right to a public education [] recognized and protected by state law" is a protected property interest. J.A. 228 (citing *Goss v. Lopez*, 419 U.S. 565, 573, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). The court recognized that Virginia law establishes a fundamental right to public education, and agreed with the plaintiffs that this right "likely qualifies as property for the purposes of the Due Process Clause." *Id.*

But it "does not necessarily follow," the district court concluded, that the Virginia right to education "likewise qualifies" as private property under the Takings Clause. *Id.* Instead, "federal courts have long interpreted the property interests protected by the Takings Clause as far narrower than property interests generally, including those protected by the Due Process Clause." J.A. 229; *id.* at 229–30 & n.9 (collecting cases). More specifically, goods or services provided by the government—like public education—are often treated as "property" or "property interests" under the Due Process Clause, but are not typically treated as private property for purposes of the Takings Clause.

The district court then considered the nature of the right to public education in Virginia. Unlike private property protected by the Takings Clause, the court found, the right to public education is subject to regulation or revision by the Virginia government, which retains significant authority to alter public education at its discretion. Further, the right to public education in Virginia cannot be bought or sold, in contrast to other property interests. Accordingly, the district court concluded that the right to public education, as alleged by

the plaintiffs, is not private property under the Takings Clause and dismissed the complaint.

The plaintiffs timely appealed.

II.

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6). *Riddick v. Barber*, 109 F.4th 639, 645 (4th Cir. 2024). We agree with the district court that the plaintiffs have not stated a plausible claim for compensation under the Takings Clause and we therefore affirm its judgment.

As the district court explained, "property interests" that trigger Due Process Clause protections and "private property" under the Takings Clause are two different things. A "legitimate claim[] of entitlement" to a government benefit may give rise to a "property interest" under the Fourteenth Amendment's Due Process Clause. *See Goss*, 419 U.S. at 573. That Clause offers procedural protections for such property interests, ensuring that they are not withdrawn "without adherence to the [required] minimum procedures." *Id.* at 574. The Takings Clause, meanwhile, applies in a narrower set of circumstances: only to "private property," and only when that property is "taken" by the government for "public use." U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). But when it does apply, it provides a substantive remedy in the form of just compensation, which "must generally consist of the total value of the property when taken, plus interest from that time." *Knick v. Twp. of Scott*, 588 U.S. 180, 190, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

The plaintiffs' argument starts with the Due Process Clause. As the district court recognized, the right to a public education is protected in the Commonwealth of Virginia under both the Virginia Constitution and the Code of Virginia. *See* J.A. 226 (citing Va. Const. art. VIII, § 1; Va. Code §§ 22.1-214(A), 22.1-215). Indeed, the Supreme Court of Virginia has held that "education is a fundamental right" under its state constitution. *Scott v. Commonwealth*, 247 Va. 379, 443 S.E.2d 138, 142, 10 Va. Law Rep. 1192 (Va. 1994). And in *Goss v. Lopez*, the Supreme Court ruled that a student's "legitimate entitlement to a public education [is] a property interest" under the Due Process Clause. 419 U.S. at 574. Put that together, and we agree with the district court that the plaintiffs' children may well have the kind of entitlement to a public education that qualifies as a Due Process Clause "property interest." J.A. 228; *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (Due Process Clause property interests are created and defined by "an independent source such as state law").

According to the plaintiffs, this should end the matter. In their view, because their children's right to public education is a protected property interest under the Due Process Clause, it must also fall within the ambit of the Takings Clause. This is the leap in logic that the district court rejected, and we, too, are unpersuaded.

Neither *Goss* nor any other case dealing with public education has suggested, let alone held, that a student's protected property interest in public education constitutes

"private property" for which compensation might be owed under the Takings Clause. *Goss* itself established only that an interest in public education, where established by state law, is protected by the Due Process Clause against deprivations effectuated "without adherence to the minimum procedures required by *that Clause*." 419 U.S. at 574 (emphasis added). *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982), on which the plaintiffs also rely, is no different; that case considered an Equal Protection Clause challenge to a state law denying funds for the education of undocumented students, *id.* at 221–23, and is entirely silent on the meaning of "private property" under the Takings Clause. Instead, in the case most directly on point, the Ninth Circuit recently rejected a Takings Clause challenge aimed at a public school district, holding that the "existence of a legally recognizable property interest" in public education under the Due Process Clause is "not sufficient to establish that the right at issue . . . warrants protection under the Takings Clause." *Zeyen v. Bonneville Joint Dist., # 93*, 114 F.4th 1129, 1140 (9th Cir. 2024).

This is not surprising because, as the district court observed, it is well established that "private property" as used in the Takings Clause is defined more narrowly than the term "property" in other contexts, "particularly compared to the Due Process Clause of the Fourteenth Amendment." *Id.* at 1141; *see, e.g., Kizas v. Webster*, 707 F.2d 524, 540, 227 U.S. App. D.C. 327 (D.C. Cir. 1983) ("[b]road due process 'property' concepts are [] inapposite" to Takings Clause inquiry); *Burns v. PA Dep't of Corr.*, 544 F.3d 279, 285 n.3 (3d Cir. 2008) ("'Property' as used in the Takings Clause is defined much more narrowly

than in the due process clause." (citation omitted)); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (similar). The Supreme Court has recognized that the Takings Clause and Due Process Clause are not coextensive, and has identified constitutionally protected property interests that may be reduced or eliminated, in compliance with procedural requirements, without effecting a taking. *See Bowen v. Gilliard*, 483 U.S. 587, 604–05, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987). And our court has done the same. *Scott v. Greenville Cnty.*, 716 F.2d 1409, 1421–22 (4th Cir. 1983) ("entitlement to permit issuance" was "sufficiently a 'species of property' to require constitutional protection" under the Due Process Clause but was "not in the nature of interests the deprivation of which is encompassed by the Fifth Amendment 'takings' doctrine").

In short, and as the district court held, the plaintiffs' argument, conflating "property interests" under the Due Process Clause with "private property" covered by the Takings Clause, is unavailing. This may well be enough to dispose of their appeal, as they have not alleged any other ground on which they might prevail. And indeed, the right to public education in Virginia is not "private property" for Takings Clause purposes under any available theory.

The Takings Clause, recall, applies not to "property" generally but only to "private property." In analyzing the nature of property under the Takings Clause, our court has used a number of tools. We look to the "traditional rules of property law," asking whether a purported owner has "full rights of 'possession, control and disposition,'" *see Washlefske v. Winston*, 234 F.3d 179, 184–85 (4th Cir.

2000), or "'free use, enjoyment and disposal' . . . and the 'right to exclude others,'" *South Carolina State Educ. Assistance Auth. v. Cavazos*, 897 F.2d 1272, 1276 (4th Cir. 1990) (first quoting *Buchanan v. Warley*, 245 U.S. 60, 74, 38 S. Ct. 16, 62 L. Ed. 149 (1917); then quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)). We also have considered whether a purported property interest is certain or, instead, subject to change by public entities, sometimes using the terms "vested" and "non-vested" to capture the distinction. *See Cavazos*, 897 F.2d at 1276–77. And we have found that property coming within the "complete[] control" of the government can thereby "lose[] its character as 'private property.'" *Id.* at 1276.

We need not determine which of these analytical paths to walk because no matter which we choose, they all lead us to the same place: The public education guaranteed to the plaintiffs' children is not their "private property." The Virginia General Assembly, Board of Education, and local school boards retain significant authority to establish, maintain, and alter Virginia's education system at their discretion. Va. Const. art. VIII; *Scott*, 443 S.E.2d at 141–43. As the Ninth Circuit explained in *Zeyen*, in holding that the right to a free public education under Idaho law does not constitute private property, "what constitutes public education itself is subject to change" at government discretion, making it "fundamentally incompatible with private ownership." 114 F.4th at 1144. The General Assembly governs public education through a comprehensive statutory scheme that regulates virtually every aspect of the education

system. *See* Va. Code tit. 22.1. These regulations make clear that public education is not "handed to students and parents for their use, enjoyment, disposal, or control as private property." *Zeyen*, 114 F.4th at 1143. Rather, a student's right to the use of public education is subject to countless restrictions and requirements. *See, e.g.*, Va. Code §§ 22.1-79.5 (prohibiting use and distribution of tobacco), -254 (compulsory attendance), -272 (public health requirements), -276.2 (discipline for disrupting class). And a student cannot buy, sell, or assign her right to attend public school, and has no right to exclude others. Simply put, a person guaranteed a right to public education in Virginia does not possess the "bundle of rights that are commonly characterized as property" as understood by the Takings Clause. *Ruckelshaus*, 467 U.S. at 1011 (citation omitted); *Zeyen*, 114 F.4th at 1142.[2]

III.

For the reasons given above, we affirm the judgment of the district court.

AFFIRMED

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2. Because the district court held that the right to public education in Virginia does not qualify as "private property," it did not reach FCPS's alternative arguments under the Takings Clause: that there was no "taking," in that it continued to provide education to the plaintiffs' children, albeit remotely; and that public education cannot be taken "for public use." J.A. 229 n.9. We agree with the district court, and so likewise have no need to reach those issues.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, E.D. VIRGINIA, SIGNED DECEMBER 14, 2023

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA.

Civil Action No. 1:21-cv-00987 (AJT/JFA)
|
Signed December 14, 2023

EILEEN CHOLLET, *et al.*,

Plaintiffs,

v.

SCOTT BRABRAND, IN HIS ROLE AS SUPERINTENDENT, FAIRFAX COUNTY PUBLIC SCHOOLS,

Defendant.

ORDER

Plaintiffs Eileen Chollet and Dennis Ma, on behalf of their minor child, C.M.; Meryem Chazal and Richard Ghazal, on behalf of their minor child, P.G.; and Guadalupe Williamson and Timothy Williamson, on behalf of their minor child, T.W. (collectively, "Plaintiffs," and C.M., P.G., and T.W. collectively the "Minor Children"), filed an action under 42 U.S.C. § 1983 against Defendant Dr. Scott Brabrand in his former role as Superintendent of Fairfax County Public Schools ("FCPS"), alleging an

unconstitutional Fifth Amendment taking during the COVID-19 pandemic of the Minor Children's right to a public education.

Pending before the Court following remand from the Fourth Circuit is Brabrand's renewed 12(b)(6) motion to dismiss for failure to exhaust administrative remedies, or, in the alternative, for failure to state a claim, [Doc. No. 31] (the "Motion").[1] For the following reasons, the Motion is **GRANTED**.

I. BACKGROUND

Plaintiffs are parents of the Minor Children, each of whom has a learning disability that required, under both federal and State law, certain supplemental educational resources, as outlined in their respective individualized education programs ("IEPs").[2] The Minor Children

1. In November of 2021, the Court dismissed the Complaint for lack of subject matter jurisdiction because of a failure to exhaust administrative remedies under the Individuals with Disabilities Education Act (the "IDEA"). *See* [Doc. No. 20]. Although Brabrand had also moved pursuant to Rule 12(b)(6) to dismiss the Takings claim for failure to state a claim and, alternatively, based on qualified immunity, the Court did not reach the merits of those contentions because of its dismissal based on a lack of subject matter jurisdiction. *See id.* Plaintiffs appealed. [Doc. No. 21]. While the appeal was pending, the United States Supreme Court held in *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142 (2023), that administrative exhaustion is not a requirement for claims for which the IDEA does not provide the requested remedy.

2. Under the IDEA, an IEP is a required annual plan that states measurable academic and functional goals for a child with

varied in age and specific needs, but each of the Minor Children received special in-person services at their schools prior to the COVID-19 pandemic. *See* [Doc. No. 1] (Compl.) ¶¶ 10–11, 13 (C.M.'s needs); *id.* at ¶¶ 16, 18, 64 (P.G.'s needs); *id.* at ¶¶ 20–22 (T.W.'s needs). Plaintiffs do not contend that FCPS was deficient in addressing the Minor Children's needs before the COVID-19 pandemic. *See generally id.* Rather, Plaintiffs allege that FCPS was deficient in addressing those needs during part of the COVID-19 pandemic. *See id.* at ¶¶ 86–89.

In March of 2020, then-Governor of Virginia, Ralph Northam, announced a statewide school closure due to the COVID-19 pandemic. *Id.* at ¶ 23. Shortly after the initial announcement, the Governor ordered all grade schools closed for the remainder of the 2019-2020 academic year. *Id.* FCPS, like other school districts across Virginia, transitioned to virtual learning for the remainder of the spring of 2020. *Id.* at ¶ 24. The Complaint alleges that the Minor Children experienced significant disruption during this period, which affected their ability to learn; however, the Complaint does not appear to allege that the virtual learning environment constituted an unconstitutional taking during the 2019-2020 academic year given that the closure was required by the Governor's declared state of emergency. *See id.* at ¶¶ 28–29, 30–33.

In summer of 2020, Virginia released guidance on school reopening for the 2020-2021 academic year. *See*

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a disability. 20 U.S.C.A. § 1414(d)(1). The school is required to describe how it will meet the goals, how it will measure progress, and when and how progress will be reported to parents. *See id.*

id. at ¶ 34. The reopening guidance outlined a plan in three phases, with the first phase focused on in-person instruction accommodations for children with disabilities and for families in need of childcare, capping the number of students in each classroom at 10. *See id.*[3] On July 21, 2020, shortly after the Virginia's three-phase plan was released, FCPS announced that it would continue with virtual learning at the start of the 2020-2021 academic year. [Doc. No. 1] ¶ 35. On August 14, 2020, FCPS announced that it would offer childcare services at FCPS through a program called Supporting Return to School ("SRS"). *Id.* at ¶ 39. The SRS program provided full-day, in-person monitoring of students, including students with disabilities, who were participating in virtual learning (*i.e.*, through online instruction) for a fee that depended on household income. *See id.* ("SRS provided support for children's active and engaged learning during the FCPS *virtual* academic day") (emphasis added); *see also id.* at ¶ 41 ("SRS accommodated children with special needs, [but] would 'not provide academic instruction'"); *see also id.* at ¶ 42 ("FCPS and Fairfax County charged . . . a sliding scale but no less than $80 per child per month").

Plaintiffs contend that because the SRS program facilitated in-person student presence and in-person learning had returned in other nearby school districts, in-person *instruction* was possible for the Minor Children in Fairfax County schools. *See id.* at ¶¶ 36, 49, 88. Plaintiffs

3. *See also* Press Release, Commonwealth of Virginia, Governor Northam Shares Guidance for Phased Reopening of PreK-12 Schools (June 9, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/june/headline-857292-en.html.

further contend that because in-person instruction was allegedly possible, Brabrand, in his capacity as Superintendent of FCPS, engaged in an unconstitutional taking of the Minor Children's right to a public education by continuing to offer only virtual instruction to C.M. until October 2020, and to T.W. until February 2021. *See id.* at ¶¶ 60, 89.[4] As a result, Plaintiffs allege, the Minor Children, because of their specific instructional needs, had no meaningful access to their public education in the imposed virtual environment, which forced Plaintiffs to assume responsibility for providing to the Minor Children the education they were entitled to receive, and should have received, from FCPS. *See id.* at ¶¶ 83, 90.[5]

II. DISCUSSION

The right to a public education is recognized and protected in the Commonwealth of Virginia under

4. P.G. did not return to FCPS for the entire 2020-2021 school year because of panic attacks brought on by the virtual learning environment during the spring of 2020, a period of virtual learning that is not claimed to have resulted in a taking. *See id.* at ¶ 67.

5. Following the remand from the Court of Appeals, on October 5, 2023, the Court held a status conference and requested additional briefing on the exhaustion issue in any renewed motion to dismiss. [Doc. No. 30]. Brabrand renewed his 12(b)(6) motion to dismiss with supplemental briefing on November 3, 2023, addressing both exhaustion and the merits of the claim. *See* [Doc. No. 31]. Plaintiffs filed their response in opposition on November 17. *See* [Doc. No. 34]. On November 29, the Court heard oral argument on Brabrand's renewed motion to dismiss and took the Motion under advisement.

both the Virginia Constitution and the Virginia Code. *See* Va. Const. art. VIII, § 1; Va. Code §§ 22.1–214(A), 22.1–215. It has also been recognized by the Supreme Court of Virginia as a fundamental right. *See Scott v. Commonwealth*, 247 Va. 379, 386 (1994)).[6] Accordingly, the issue before the Court is not whether there is such a right, but rather, whether the right is protected as vested private property for the purposes of the Takings Clause, such that compensation is required when it is substantially burdened or appropriated. As Plaintiffs' counsel acknowledged at oral argument, no court has yet so found; but before addressing the merits of this novel theory, discussed in Part III.B, the Court first considers whether Plaintiffs' Takings claim must be administratively exhausted.

A. Plaintiffs Are Not Required to Exhaust Administrative Remedies Under the IDEA

Brabrand contends that even after *Luna Perez*, Plaintiffs' Takings claim is subject to administrative

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6. The Court finds no merit to Brabrand's contention based on *Scott* that Article VIII of the Virginia Constitution only imposes an obligation on the General Assembly to provide funding for public education, rather than conferring an individual right to a public education that can be vindicated when denied. *See* [Doc. No. 34] at 7. The decision in *Scott* was not based on a student's lack of *standing* to bring their claim, but rather on the grounds that disparities in funding, resulting in quality differences from district to district did not *infringe* on the right that Commonwealth students have. Accordingly, *Scott* stands for the proposition that there *is* an individual right to a public education, but that the right does not prescribe or require a particular type of education or how it may be effectuated. *Scott*, 247 Va. at 379; *see also McArthur v. Brabrand*, 610 F. Supp. 3d 822, 842 (E.D. Va. 2022).

exhaustion because they seek the reimbursement of "past educational expenses," which is available as relief under the IDEA. [Doc. No. 32] at 8 (arguing that "while Plaintiffs request this Court to grant the 'compensatory damages' . . . to the extent they are seeking reimbursement for the assistance provided to [Minor Children], those claims are still subject to exhaustion"); *see also Luna Perez*, 590 U.S. at 148 (observing that the IDEA authorizes courts to grant as a remedy reimbursement of past educational expenses). In their opposition briefing, Plaintiffs contend exhaustion is not required because they seek only "compensatory damages" and "punitive damages," neither of which are recoverable under the IDEA, citing *Luna Perez*. *See* [Doc. No. 34] at 7.[7]

Although the Complaint could be read as seeking past educational expenses as Brabrand contends, the measure of damages for the Takings Clause claim—the only claim pleaded in the Complaint—is entirely different, and is not relief that is available under the IDEA. Specifically, a claim brought under the Takings Clause only allows for the recovery of the value of the property taken. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("It is a well settled principle of Fifth Amendment taking law . . . that the measure of

7. Plaintiffs conceded during the hearing that damages under the Takings Clause would be limited to the value of the educational benefit allegedly lost, but did not explicitly state how that value would be measured, suggesting only that the cost of the SRS program, which the Minor Children did not attend, might be a partial proxy for measuring the value of the educational benefit lost.

just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking."). By contrast, the educational expenses implicated in Plaintiffs' pleading are a form of consequential or incidental damages that are not recoverable as part of a Takings Clause claim. *See Klein v. United States*, 179 Ct. 910, 916 (1967) ("It is settled law that . . . compensation under the Fifth Amendment may be recovered only for property taken and not for incidental or consequential losses, the rationale being that the sovereign need only pay for what it actually takes rather than for all that the owner has lost."). Therefore, the only remedy available to Plaintiffs is the value of the education lost, *see id.*, which is retrospective relief that is not available under the IDEA. For these reasons, Plaintiffs are not required to administratively exhaust the remedies available under the IDEA with respect to their Takings claim, *Luna Perez*, 590 U.S. at 150, and for the same reasons, Plaintiffs may not pursue consequential damages for past educational expenses, punitive damages, or attorneys' fees, as seemingly requested in the Complaint. *See Hellenic Ctr., Inc. v. Washington Metro. Area Transit Auth.*, 815 F.2d 982, 984 (4th Cir. 1987) ("[I]ndirect costs to the owner resulting from the taking, such as attorneys' fees and expenses, are not part of the just compensation which the owner is entitled to recover.").[8]

8. While there are limited exceptions to the non-recovery of indirect costs under a Takings claim, *see id.*, Brabrand does not invoke any of these exceptions, but rather contends that (1) the claim against him is one against FCPS since the Complaint names him in his "role as Superintendent;" (2) punitive damages are not available against local government entities; (3) to the extent the claim is against him in his individual capacity, Plaintiffs have

B. Plaintiffs Fail to State a Fifth Amendment Takings Clause Claim

The Supreme Court has recognized that where the right to a public education is recognized and protected by state law, it qualifies as a property right for the purposes of the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, 573 (1975). As observed above, the Commonwealth recognizes and protects the right to a public education. *See* Va. Const. art. VIII, § 1; Va. Code §§ 22.1–214(A), 22.1–215; *see also Scott*, 247 Va. at 386. Thus, the right to education in the Commonwealth likely qualifies as property for the purposes of the Due Process Clause. *See Goss*, 419 U.S. at 573. As other Courts have recognized, it does not necessarily follow, however, that a protected right for the purposes of the Due Process Clause likewise qualifies as a vested property right for the purposes of the Takings Clause, and whether a right to a public education is such a right for the purposes of the Takings Clause has not been definitively answered.[9]

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failed to allege any conduct on his part within the time frame of the alleged taking; and (4) he would in any event be protected by qualified immunity. [Doc. No. 32] at 15–17. Given the Court's findings regarding the relief available under a Takings Clause claim, and its decision that a public education does not constitute vested property for the purposes of the Takings Clause, the Court does not need to rule on these contentions.

9. As best as the Court can determine, only one federal court, the district court for the District of Idaho, has addressed and answered whether a right to a public education is vested property for the purposes of the Takings Clause. *Zeyen v. Boise Dist. #1*, 2023 WL 4215402, at *6 (D. Idaho June 9, 2023). The *Zeyen* court concluded that plaintiffs seeking to challenge the

assessment of public and charter school fees on behalf of their children did not have a vested property interest in a free public education for the purposes of the Takings Clause, citing to a long line of cases in the Federal Circuit, the District of Columbia Circuit, the Ninth Circuit, and to Supreme Court cases, which discuss the rationales for differences in the scope of property protected by the two clauses. *See id.* ("[M]ultiple courts have explained that the property interests protected by the Due Process Clause are not coterminous with the property interests protected by the Takings Clause.") (collecting cases). Plaintiffs attempt to distinguish this case from *Zeyen* on the grounds that (1) unlike the Virginia Constitution, the language in the Idaho State Constitution does not confer a private right to a public education, and (2) the plaintiffs in *Zeyen* challenged only school fees rather than school access. [Doc. No. 34] at 10. But there is no meaningful difference between the Idaho and Virginia constitutions with respect to the protections afforded. *Compare* Va. Const. art. VIII, § 1 ("The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."), *with* Idaho Const. art. IX, § ("[I]t shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."). And whether there is a difference between school fees, as in *Zeyen*, or virtual learning, as in this case, bears not on whether a vested property right exists, but whether there has been an appropriation or burdening sufficient to constitute a taking. *See Alimanestianu v. United States*, 124 Fed. Cl. 126, 130 (2015) (discussing the two-part test used by most circuits for evaluating a Takings Clause claim: "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was taken."). In finding that the right does not constitute vested property, as discussed below, the Court need not reach this second inquiry.

Appendix B

The Constitution protects interests in property through various clauses, including, as relevant here, the Takings Clause. The Takings Clause language is broad, providing that "private property shall not 'be taken for public use, without just compensation.'" *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (quoting U.S. Const. amend. V). Thus, a Takings Clause claimant must establish, as a threshold matter, that the subject of the complaint is "private property." *See Alimanestianu*, 124 Fed. Cl. at 130. However, federal courts have long interpreted the property interests protected by the Takings Clause as far narrower than property interests generally, including those protected by the Due Process Clause. In that regard, government "entitlements," such as the rights to goods and/or services provided by the government, are often considered as "property" or "property interests" for the purposes of the Due Process Clause, but are not typically considered vested private property for the purposes of the Takings Clause. *See, e.g., Bowen v. Pub. Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 55 (1986) (holding that rights in a government benefits program were property for the purposes of the Due Process Clause, but were not vested property for purposes of the Takings Clause); *see also Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (observing that statutory entitlements are not property for the purposes of the Takings Clause, and that "'property' as used in that clause is defined much more narrowly than in the due process clauses. It encompasses real property and personal property, including intellectual property."). As explained by the Court of Appeals for the District of Columbia Circuit:

> [a] claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation. A legitimate claim of entitlement to a government benefit does not transform the benefit itself into a vested right.

Kizas v. Webster, 707 F.2d 524, 539 (D.C. Cir. 1983) (internal quotations and citations omitted).

Courts considering the issue have largely focused on two reasons for the difference in the scope of property protected by the two clauses. First, because the government has the power to change or remove future interests in entitlements that are recognized by the Due Process Clause, those property rights are not "vested" for the purposes of compensation. *See id.*; *see also O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 798 (1980) (Blackmun, J., concurring). In that regard, the government generally has significant discretion in how it chooses to establish, effectuate, or continue the provision of its entitlements, such that the "entitlement" in many cases is a loosely defined "good" and/or service, subject to regulation or revision to account for changed circumstances. *See Kizas*, 707 F.2d at 539 ("[P]roperty interests in public benefits are limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits.") (internal quotations omitted). Indeed, without such a firm limitation in scope on the recognition of vested property, the government would face disincentives to extend

statutory entitlements in the first instance. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("[The] Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). Regulators and administrators of those entitlements, therefore, must and do have control (within due process guardrails) over how to effectuate the provision of the entitlements, and the nature of the entitlements themselves.

Second, many entitlements—especially those that provide for services, like education, rather than goods—are not fungible, have no measurable market value in the traditional sense, and as such, the compensation contemplated by the Takings Clause, which is predicated on the conversion of tangible property or property having objectively measurable value, cannot be easily determined. *See Zeyen*, 2023 WL 4215402, at *6 (observing that the right to education does not have the attributes of traditional vested property that can be bought or sold). Although these rights are "fundamental," and therefore in an abstract sense "vested," they are not sufficiently definite in character to be considered vested property for the purposes of compensation.[10]

10. Plaintiffs argued at the hearing that the right to a public education would be "illusory" if not recognized as vested property for the purposes of the Takings Clause. But even without

For the above reasons, the right to a public education as alleged in the Complaint is not a vested property right for the purposes of the Takings Clause; and Plaintiffs have failed to allege facts that make plausible that they are entitled to compensation under the Takings Clause of the Fifth Amendment to the United States Constitution.

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant's motion to dismiss for failure to state a claim [Doc. No. 31] be, and the same hereby is, **GRANTED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

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compensation under the Takings Clause, such a right may be enforced and a person's "property interest" in it vindicated through a spectrum of due process and statutory protections, such as the IDEA, which (in effect) is at the core of Plaintiffs' claimed entitlements.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED AUGUST 18, 2023

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT.

No. 22-1005

EILEEN CHOLLET; DENNIS MA, ON BEHALF OF C.M., THEIR MINOR CHILD; MERYEM GHAZAL; RICHARD GHAZAL, ON BEHALF OF P.G., THEIR MINOR CHILD; GUADALUPE WILLIAMSON; TIMOTHY WILLIAMSON, ON BEHALF OF T.W., THEIR MINOR CHILD,

Plaintiffs-Appellants,

v.

DR. SCOTT BRABRAND, IN HIS ROLE AS SUPERINTENDENT, FAIRFAX COUNTY PUBLIC SCHOOLS,

Defendant-Appellee.

Submitted: February 21, 2023
|
Decided: August 18, 2023

Before WYNN, HARRIS, and HEYTENS, Circuit Judges.

Appendix C

OPINION

Vacated and remanded by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Plaintiffs are the parents of minor children with special needs who attend the Fairfax County Public Schools ("FCPS") in Virginia. Pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, FCPS provides the plaintiffs' children with special education services based on Individualized Education Programs ("IEPs"). Between March 2020 and February 2021, FCPS – like many school districts – responded to the COVID-19 pandemic by switching to a virtual learning model. The plaintiffs believe that FCPS's use of remote instruction was inconsistent with their children's individualized needs and "caused them to fall behind the progress envisioned in their IEPs." J.A. 19 (internal quotation marks omitted). But rather than addressing these concerns through the IDEA's prescribed administrative channels, the plaintiffs filed suit directly in district court, alleging an unconstitutional "taking" of their children's purported Fifth Amendment property interest in a public education.

The district court dismissed the complaint for failure to exhaust state administrative remedies under the IDEA. *Chollet v. Brabrand*, No. 1:21-cv-00987-AJT-JFA,

2021 WL 6333049, at *3 (E.D. Va. Nov. 29, 2021). Generally speaking, the IDEA "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a [free appropriate public education]" to a disabled child, even if the complaint is framed differently or brought under another statute. *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 170 (2017). And here, the district court observed, the gravamen of the complaint rested squarely on FCPS's alleged failure to provide the plaintiffs' children appropriate special education services, as required by their IEPs, during the pandemic. *Chollet*, 2021 WL 6333049, at *3–4. Under a straightforward application of *Fry*, then, the court held that exhaustion was required and dismissed the case. *Id.*[1]

After this appeal had been fully briefed, however, the Supreme Court recognized an additional prerequisite to the IDEA's exhaustion requirement. *See Luna Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859 (2023). In *Luna Perez*, the Court held that even when a plaintiff's suit

1. The court believed this failure to exhaust deprived it of subject matter jurisdiction and therefore dismissed the action under Federal Rule of Civil Procedure 12(b)(1). After the district court's ruling, however, this court held that "the IDEA's exhaustion requirement is not a jurisdictional requirement but a claims-processing rule," *K.I. v. Durham Pub. Schs. Bd. of Educ.*, 54 F.4th 779, 792 (4th Cir. 2022), which means that failure to exhaust generally cannot be asserted by way of a Rule 12(b)(1) motion. *See Z.W. v. Horry Cnty. Sch. Dist.*, No. 21-1596, 2023 WL 3666904, at *2–3 (4th Cir. May 26, 2023). The plaintiffs here have not argued for reversal on this ground, and any such argument is thus forfeited. *See id.* But going forward, the district court will have the benefit of our ruling in *K.I.* and may proceed accordingly.

is "admittedly premised on the past denial of a free and appropriate education," administrative exhaustion is not required "if the *remedy* a plaintiff seeks is not one [the] IDEA provides." *Id.* at 865 (emphasis added). The parties now dispute, in light of *Luna Perez*, whether and to what extent the plaintiffs seek a remedy also available under the IDEA. But this question was not briefed before the district court or this court on appeal, and as is customary, we decline to address it in the first instance. *See Graham v. Gagnon*, 831 F.3d 176, 189 (4th Cir. 2016). Accordingly, we vacate the district court's order dismissing the plaintiffs' complaint and remand for further proceedings.[2]

VACATED AND REMANDED

2. We also decline the defendant's request to affirm on the alternative ground that the switch to remote learning during the pandemic did not effectuate a "taking" of private property cognizable under the Fifth Amendment's Takings Clause. That argument, too, we leave to the district court to address in the first instance.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, E.D. VIRGINIA, ALEXANDRIA DIVISION, SIGNED NOVEMBER 29, 2021

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA,
ALEXANDRIA DIVISION.

Civil Action No. 1:21-cv-00987 (AJT/JFA)

EILEEN CHOLLET, *et al.*,

Plaintiffs,

v.

SCOTT BRABRAND, IN HIS
ROLE AS SUPERINTENDENT,
FAIRFAX COUNTY PUBLIC SCHOOLS,

Defendant.

Signed 11/29/2021

ORDER

Anthony J. Trenga, United States District Judge

In this matter, Plaintiffs Eileen Chollet and Dennis Ma, on behalf of their minor child, C.M., Meryem Chazal and Richard Ghazal, on behalf of their minor child, P.G., and Guadalupe Williamson and Timothy Williamson, on behalf of their minor child, T.W. (collectively, "Plaintiffs,"

and C.M., P.G., and T.W. collectively the "Minor Children"), have sued Defendant Scott Braband in his role as Superintendent, Fairfax County Public Schools ("FCPS"), under 42 U.S.C. § 1983 based on the Takings Clause of the U.S. Constitution for what Plaintiffs allege was an unconstitutional taking of their Minor Children's right to a public education during the COVID-19 pandemic. Plaintiffs seek compensatory and punitive damages. Defendant has moved to dismiss the Complaint for lack of subject matter jurisdiction on the grounds that their claims are governed by the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1401, *et seq.*, and Plaintiffs have failed to exhaust their administrative remedies, as required under the IDEA. Alternatively, Defendant moves to dismiss the Complaint for failure to state a claim for the unconstitutional taking of private property for public use without just compensation. For the reasons that follow, Defendant's Motion to Dismiss is GRANTED based on lack of subject matter jurisdiction and is otherwise DENIED as moot; and this action is DISMISSED.

I. BACKGROUND

The Complaint [Doc. No. 1] ("Compl.") alleges the following:

The Minor Children are students with disabilities who attend schools within the FCPS system. Compl. ¶ 1. FCPS provides the Minor Children with special education services based on each child's Individualized Education Program ("IEP"). *Id.* ¶¶ 10-22, 49, 64, 69. On March

12, 2020, Governor Ralph Northam declared a state of emergency in Virginia due to the pandemic caused by COVID-19 and, the next day, ordered all Virginia K-12 schools to close for a minimum of two weeks. *Id.* ¶ 23. On March 23, 2020, Governor Northam ordered all K-12 schools to close for the remainder of the 2019-20 school year. *Id.*

Due to the public health risks to students, staff, and the school community resulting from the continuing pandemic, FCPS began the 2020-21 school year utilizing virtual instruction for students generally, while other neighboring counties made different plans, some of which included in-person instruction for students with special needs, and certain private schools in Fairfax County also persisted with in-person instruction. *Id.* ¶¶ 35, 36, 37. On August 14, 2020, FCPS announced a new program for the 2020-21 school year called the Supporting Return to School program ("SRS"), which provided full day on-site programming for children, Kindergarten through sixth grade. *Id.* ¶ 39. SRS accommodated approximately sixty children per site, in classrooms of groups of no more than ten children. *Id.* ¶ 40. Staff stayed with the groups of ten throughout the day to support the online learning and in-person connections, but not to provide academic instruction. *Id.* ¶¶ 40, 41. To participate in SRS, households with adjusted annual household income above $131,000 were charged $1,472 per month. *Id.* ¶ 42. Households with lower income paid on a sliding scale, but no less than $80 per month for the SRS program. *Id.*

FCPS offered each of the Minor Children individual

plans for the start of the 2020-21 school year. *Id.* ¶¶ 51, 64, 72-73. Nevertheless, and despite Plaintiffs' requests, FCPS did not allow the Minor Children to learn in person during the 2020-21 school year, *id.* ¶ 49; and it was not until February 2021 that C.M. and T.W. were able to return to in-person instruction through FCPS, *id.* ¶¶ 60, 81, while P.G. attended a private unilateral placement for the 2020-21 school year *id.* ¶ 67.

Plaintiffs allege that the virtual learning FCPS offered to the Minor Children caused each of them "to fall behind the process envisioned in their IEPs," *id.* ¶¶ 49, 83, and that the failure to offer the Minor Children in-person instruction constitutes a "taking" prohibited by the Takings Clause of the Fifth Amendment to the U.S. Constitution, *id.* ¶¶ 3, 89.

II. LEGAL STANDARDS

A. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction and are "constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute." *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998). Accordingly, a federal court is required to determine, whether *sua sponte* or, as here, on motion of a party pursuant to Fed. R. Civ. P. 12(b)(1), if a valid basis for its jurisdiction exists. That determination may be made on the basis of the factual allegations made in the complaint or based on evidence outside of the pleadings. *See United States ex rel. Vuyyuru*

v. Jadhav, 555 F.3d 337, 348 (4th Cir. 2009) (citations omitted); *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995). Where "no such ground appears," a federal court is entitled "to dismiss the action." *In re Bulldog Trucking*, 147 F.3d at 352; *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

B. Failure to State a Claim

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1994). A claim should be dismissed "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true ... it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *see also Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001). In considering a motion to dismiss, "the material allegations of the complaint are taken as admitted," *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted), and the court may consider exhibits attached to the complaint, *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F. 2d 1462, 1465 (4th Cir. 1991).

Moreover, "the complaint is to be liberally construed in favor of plaintiff." *Id.*; *see also Bd. of Trs. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 475 (E.D. Va. 2007). In addition, a motion to dismiss must be assessed in light

of Rule 8's liberal pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. Nevertheless, while Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the complaint "must be enough to raise a right to relief above the speculative level" to one that is "plausible on its face"); *see also Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). As the Supreme Court stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008), "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw a reasonable inference that the defendant is liable for the conduct alleged."

III. ANALYSIS

Defendant argues the case should be dismissed for lack of subject matter jurisdiction because Plaintiffs' claim, in substance, is that their children have been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1401, *et seq.*, and under the IDEA, before a plaintiff may file a lawsuit claiming the denial of educational rights, a plaintiff must exhaust all administrative remedies, which Plaintiffs here have not done. Plaintiffs argue that they do not allege that FCPS was not providing a FAPE, but that the Minor Children were denied access to those educational benefits when they were denied in-person learning. Here, Defendant does not

dispute, *see* [Doc. No. 10 at 2], and the Court will accept as true, the factual allegations in the Complaint for the purpose of determining whether Plaintiffs have alleged a prima facie case for subject matter jurisdiction. *See Labgold v. Regenhardt*, 573 B.R. 645, 649 (E.D. Va. 2017).

The first issue is whether Plaintiffs allege in substance a violation of IDEA, which would require them to exhaust their administrative remedies.[1] In order to determine the character of Plaintiffs' claim for that purpose, a court must examine "whether a plaintiff's complaint—the principal instrument by which she describes her case—seeks relief for the denial of an appropriate education." *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 755 (2017). And the Court must do so "even if [the complaint is] not phrased or framed in precisely that way." *Id.*

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1. IDEA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [subchapter II of the IDEA], **the procedures under subsections (f) [an impartial due process hearing at the local educational agency] . . . shall be exhausted to the same extent as would be required had the action been brought under this subchapter**.

20 U.S.C. § 1415(l) (emphasis added).

Appendix D

The Plaintiffs' allegations make clear that Plaintiffs are alleging in substance the denial of a free appropriate education for their children whose learning "deficit[s] . . . w[ere] caused by a lack of access" and a "failure to consider in-person assistance for these children." [Doc. No. 15 at 3]. For example, Plaintiffs allege that:

- "[T]he Minor Children needed in-person learning to access educational benefits, virtual learning caused them to fall behind the progress envisioned in their IEPs, and [] in person learning could have been provided by F CPS to the Minor Children safely." Compl. ¶ 49.

- C.M. needed "an in-person classroom small group setting where she is able to practice appropriate social behavior and emotional control in the presence of her peers is the only setting in which C.M. can receive a free, appropriate public education[,]" was "unable to access a virtual classroom without one-on-one in-person assistance" and "require[d] frequent, in person redirection and positive reinforcement . . . because of her behavioral and emotional deficits." *Id.* ¶¶ 52, 53.

- "[V]irtual learning was not appropriate for P.G.'s learning style." *Id.* ¶ 64.

- T.W. was denied individualized instruction when "[t]he IEP team considered having [him] work virtually through the entire class daily schedule, but this plan was rejected by the IEP team

because of T.W.'s special needs and his inability to focus for so many hours of virtual instruction," *Id.* ¶ 74.

- "Plaintiffs did not receive the same educational benefit as they have received while attending school in person. They also did not receive the same degree of educational benefit as other students who did not have the same disabilities as Plaintiffs . . . who was [sic] unable to obtain the benefits of public education through virtual instruction because of their disabilities." *Id.* ¶¶ 82-83.

Overall, the details of Plaintiffs' claims allege how FCPS failed to provide a FAPE, "even though it does not explicitly say so." *Fry*, 137 S. Ct. at 756; *see also McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 645 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2803, 207 L. Ed. 2d 141 (2020) ("[C]omplaints that a school did not adopt a plan individualized to the student's needs sound in the IDEA."). Plaintiffs have therefore asserted claims within the scope of IDEA, whose "goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her 'unique needs.'" *Fry*, 137 S. Ct. at 755 (quoting 20 U.S.C. § 1401(29)). Accordingly, Plaintiffs are required to comply with the IDEA's exhaustion requirement, they have failed to do so and their Complaint must be dismissed for lack of subject matter jurisdiction. And because this Court lacks subject matter jurisdiction, it does not reach whether Plaintiffs have plausibly alleged a claim for relief under the Takings Clause of the Fifth Amendment. *See Steel*

Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 (1998) (stating that once a Court determines that it does not have subject matter jurisdiction, it should not consider claims based on "hypothetical jurisdiction").

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant's Motion to Dismiss [Doc. No. 9] based on lack of subject matter jurisdiction be, and the same hereby is, GRANTED, and the Complaint is DISMISSED for lack of subject matter jurisdiction; and is otherwise DENIED as moot; and this action is DISMISSED without prejudice.

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V.

[N]or shall private property be taken for public use, without just compensation.

Appendix E

U.S. Const. amend. XIV, § 1.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

Va. Const. Art. I, § 15.

§ 15. Qualities necessary to preservation of free government

. . . That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.

Appendix E

Va. Const. Art. VIII, § 1.

§ 1. Public schools of high quality to be maintained

The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

Appendix E

Va. Const. Art. VIII, § 2.

§ 2. Standards of quality; State and local support of public schools

Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly . . . .

Appendix E

Va. Code § 22.1-2.

System of free public elementary and secondary schools to be maintained; administration

There shall be a system of free public elementary and secondary schools established and maintained as provided in this title and administered by the Board of Education, the Superintendent of Public Instruction, division superintendents and school boards.

Appendix E

Va. Code § 22.1-3.

Persons to whom public schools shall be free

A. The public schools in each school division shall be free to each person of school age who resides within the school division. Every person of school age shall be deemed to reside in a school division:

1. When the person is living with a natural parent or a parent by legal adoption . . . .

Appendix E

Va. Code § 22.1-214.

Board to prepare special education program for children with disabilities.

The program developed by the Board of Education shall be designed to ensure that all children with disabilities have available to them a free and appropriate education, including specially designed instruction to meet the unique needs of such children.

Appendix E

Va. Code § 22.1-215.

School divisions to provide special education; plan to be submitted to Board

Each school division shall provide free and appropriate education, including special education, for (i) the children with disabilities residing within its jurisdiction . . . .