



December 18, 2020

Fairfax Education Association  
Kimberly Adams, President  
3917 Old Lee Highway  
Fairfax, VA 22030

Fairfax County Public Schools  
Superintendent Scott Brabrand  
8115 Gatehouse Road  
Falls Church, VA 22042

Dear Ms. Adams and Dr. Brabrand,

Liberty Justice Center (LJC) is a national public-interest legal center that litigates education-law cases across the country. LJC represents several Fairfax County Public Schools (FCPS) families who are deeply concerned by recent actions of the Fairfax Education Association (FEA).

We write because FEA decided to encourage its members to take a “mental health day” on Wednesday, October 28. This was a union-organized sick-out, a sick-out is a form of strike, and a teacher strike is illegal in the Commonwealth of Virginia.

Numerous news outlets reported that the FEA encouraged its members to call in sick on October 28. *See, e.g., “Union Urges Fairfax County Teachers to Take ‘Mental Health Day’ Wednesday,” Associated Press (Oct. 27, 2020).*<sup>1</sup> Apparently several hundred of FEA’s members participated. “More than a few hundred’ Fairfax teachers expected to take mental health day Wednesday,” Associated Press (Oct. 27, 2020).<sup>2</sup>

This action was illegal, and if the FEA repeats it, LJC will move expeditiously on behalf of our clients to ensure FCPS follows thru on its obligation to respond to the leaders of such a strike with the remedy provided by law.

Virginia law is very clear on this point: teacher strikes are illegal, and any teacher who participates in one forfeits his or her employment. Va. Code § 40.1-55. *See Norfolk Airport Auth. v. Nordwall*, 246 Va. 391, 393, 436 S.E.2d 436, 437 (1993) (because the airport authority is a public agency, “the employees are prohibited from striking.”); *Commonwealth v. Cty. Bd.*, 217 Va. 558, 569, 232 S.E.2d 30, 38 (1977) (“Code § 40.1-55 prescribes that the employment of any public employee who engages in strike activity shall be terminated automatically.”). *See also* Frederick R. Kozak, *Public Employee Collective Bargaining in Virginia: Perspectives and Direction*, 11 U. Rich. L. Rev. 431, 433 (1977) (“Like most other states, Virginia law expressly prohibits public employee strikes.”).

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<sup>1</sup> Available at <https://www.nbcwashington.com/news/local/northern-virginia/union-urges-fairfax-county-teachers-to-take-mental-health-day-wednesday/2455264/>.

<sup>2</sup> Available at <https://wjla.com/news/local/union-urges-fairfax-county-teachers-to-take-mental-health-day-wednesday>.

And teacher strikes are illegal for a reason: they negatively impact the academic achievement and emotional well-being of students. See Dylan Matthews, “How teacher strikes hurt student achievement,” Washington Post (Sept. 10, 2012) (detailing, in plain English, studies from professors at the University of Toronto, Wilfrid Laurer University, and the Universities of Edinburgh and Rotterdam all showing student achievement suffers from a teacher strike).<sup>3</sup> LJC recently represented four families suing to end an illegal strike in the largest school district in Idaho, and the affidavits in that case detailed the substantial academic disruption, emotional strain, and logistical nightmare caused by a sick-out that shut down school for two days.<sup>4</sup>

Given that teacher strikes are obviously illegal in Virginia, a court would next have to determine whether the “mental health day” or another similar “sick out” is a strike under the Virginia Code. A judge would almost certainly join the numerous courts and administrative bodies that all recognize that a sick-out is the functional equivalent of or a substitute for or type of strike. See, e.g., *Ky. ex rel. Beshear v. Dickerson*, Civil Action No. 3: 19-033-DCR, 2019 U.S. Dist. LEXIS 78524, at \*14 (E.D. Ky. May 9, 2019); *Chi. Bd. of Educ. v. Chi. Teachers Union*, 33 2017 IL ERB LEXIS 50, \*12 (Illinois Public Employee Relations Board 2017).

The cases “have uniformly asserted substance over formality in considering whether or not a particular activity, such as a ‘sick out,’ constitutes a strike.” *Cal. Trucking Asso. v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, Nos. C-70-883 AJZ and C-70-1057 AJZ., 1977 U.S. Dist. LEXIS 17179, at \*27-28 (N.D. Cal. Feb. 25, 1977), *rev’d on other grounds*, 679 F.2d 1275 (9th Cir. 1981). Here there can be no doubt as to the substance: the FEA used a sick-out as a negotiating tactic, hoping to disrupt the district’s operations and interrupt normal business operations, which in the district’s case is the education of Fairfax’s children. That was both illegal and wrong.

If in the future the FEA’s leaders choose to again use children like pawns as a negotiating tactic, LJC stands ready to vindicate the rights of parents to ensure students’ needs are put first.

Very truly yours,



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<sup>3</sup> Available at <https://www.washingtonpost.com/news/wonk/wp/2012/09/10/how-teacher-strikes-hurt-student-achievement/>.

<sup>4</sup> *Ratliff v. West Ada Education Ass’n*, <https://libertyjusticecenter.org/cases/ratliff-v-west-ada-education-association/>.

