VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of September, 2022.

Loudoun County School Board, Petitioner,

against Record No. 220497
Circuit Court No. CL22-2713

Commonwealth of Virginia, et al., Respondents.

Upon a Petition Under Code § 8.01-626
Justices Kelsey, McCullough, and Russell

Upon consideration of the petition filed pursuant to Code § 8.01-626, the response in opposition, and our review of the record,[1] the decision of the circuit court is affirmed.

Following reports of sexual assaults in the Loudoun County public schools, Governor Glenn Youngkin issued Executive Order 4, in which he "requested the Attorney General to initiate and coordinate" an investigation pursuant to Code § 2.2-511 into Loudoun County Public Schools as well as any "prosecutorial efforts" arising from that investigation. The circuit court granted the Attorney General's motion to impanel a special grand jury to "investigate and report on any condition that involves or tends to promote criminal activity" in the Loudoun County Public Schools.

The Loudoun County School Board filed a complaint seeking an injunction to bar the grand jury from proceeding. Following briefing and argument, the circuit court dismissed the complaint with prejudice. The circuit court rejected the School Board's argument that Code

[1] The Attorney General notes that the transcript was filed for the first time with this Court and that it was not part of the trial court record. *See* Rule 5:17A(c)(ii) ("The petition must be accompanied by a copy of the pertinent portions of the record of the lower tribunal(s), including the relevant portions of any transcripts filed in the circuit court . . ."). The Attorney General further observes that the School Board did not provide the Commonwealth an opportunity to object to inaccuracies, *see* Rule 5:11(g) (providing opportunity to object to a transcript "on the ground that it is erroneous"). A transcript is not always necessary for us to review the lower court's decision. *Smith v. Commonwealth*, 281 Va. 464, 468 (2011). The Attorney General does not contend that, without the transcript, the record is inadequate for us to reach the merits of the petition for review. The record contends the arguments advanced by the parties in their pleadings in the circuit court and the final order of the circuit court. Accordingly, we proceed to address the merits of the School Board's petition for review.

§§ 2.2-511 and 19.2-191 did not authorize such a proceeding, holding that sovereign immunity barred the School Board from relying on those statutes. With respect to Article VIII, § 7 of the Virginia Constitution, the circuit court concluded that the School Board did not satisfy the criteria for an injunction.

The School Board, invoking Code § 8.01-626, has filed a petition for review urging us to enjoin the grand jury proceeding. That statute authorizes a litigant to file a petition for review with this Court when a court "(i) grants a preliminary or permanent injunction, (ii) refuses such an injunction." *Id.*

First, with respect to the interpretation of Code §§ 2.2-511 and 19.2-191, the circuit court held that sovereign immunity foreclosed relief on the question of whether the Governor and the Attorney General lack the authority to impanel a special grand jury under Code §§ 2.2-511 and 19.2-191. That issue is not before us in this petition for review. Under our rules, when a petition for review is filed in this Court, the only part of the order under review is the part that orders or refuses to order injunctive relief. "All other issues are governed by the normal rules and timetables that apply to appeals." Rule 5:17A(f)(i). This is not a situation where the court examined the factors for granting an injunction and then exercised its discretion to grant or refuse to grant the injunction. Instead, the circuit court held that sovereign immunity barred the School Board's claim that the Governor and the Attorney General misinterpreted these statutes. A petition under Code § 8.01-626 is not an appropriate vehicle for this Court to address that question.

The only basis for the award of an injunction in the petition for review is that the grand jury proceeding transgresses Article VIII § 7 of the Constitution of Virginia. Under that provision:

> The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

Va. Const. art. VIII, § 7. The School Board has offered no convincing argument for why the grand jury investigation infringes this provision. We have said that "[n]o statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system." *Russell County School Bd. v. Anderson*, 238 Va. 372, 383 (1989). For example, a school board cannot be divested of its authority to decide when school property should be put

up for sale, and, therefore, a statute that creates a process for voters to force the sale of property owned by the school board is unconstitutional. *Howard v. County School Bd. of Alleghany County*, 203 Va. 55, 58-59 (1961). Similarly, we have held that a policy compelling arbitration of school teacher grievances, adopted by the State Board of Education, is unconstitutional under Article VIII, Section 7. *School Bd. of the City of Richmond v. Parham*, 218 Va. 950, 959 (1978). We reasoned that compelling arbitration was "an unlawful delegation of power" that would render the local school board's "power of local supervision . . . meaningless." *Id.* A grand jury investigation does not render the power of local supervision meaningless. The School Board will continue to oversee the County's schools exactly as before. The constitutional power to administer a school district does not bring with it immunity from investigation for violations of the criminal law.

The School Board fears that the grand jury will overstep its bounds and proceed beyond investigating criminal violations. The Attorney General contests this point.

> To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law. The granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case, and the circuit court's decision to deny injunctive relief will not be disturbed unless it is plainly wrong.

Kent Sinclair, Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.3 (7th ed. 2020). *See also Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008).

We perceive no abuse of discretion by the circuit court. The fear of, and potential for, investigative overreach by the grand jury does not constitute irreparable harm to the School Board's authority under Article VIII, § 7. The special grand jury is not hiring and firing teachers, spending money allocated for the schools, deciding where schools should be built, and so on, i.e. nothing the grand jury is doing restricts the School Board's core constitutional power of supervision over the schools in Loudoun County. At this point, there does not appear to be any actual harm, much less irreparable harm. Furthermore, persons subject to improper subpoenas can move to quash those subpoenas. Therefore, there are remedies at law were the grand jury to overreach. Nor are we persuaded that the public interest requires such an injunction, another factor that courts consider in determining whether to grant an injunction. *See Levisa Coal*, 276 Va. at 61. Under a regime of separated powers, *See* Va. Const. art. III, § 1,

courts ordinarily are reluctant to interfere with a grand jury investigation, which is entrusted to a separate branch of government. *See, e.g., Barry v. United States*, 865 F.2d 1317, 1323 (D.C. Cir. 1989) ("except possibly in an extraordinary case of misconduct, [a] court must avoid disassembling or otherwise directly interfering with the work of the grand jury."). That consideration further leads us to affirm.

This order shall be certified to the Circuit Court of Loudoun County.

A Copy,

Teste:

Clerk