SCHOOLS, MANDATES, AND MONEY: EDUCATION IN THE 2009 SESSION OF THE VIRGINIA GENERAL ASSEMBLY+

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"What power has law where only money rules?"[1]

I. INTRODUCTION

The 2009 Virginia General Assembly session transpired in the shadow of a global financial crisis and dramatic declines in state revenue.[2] Notwithstanding a deepening preoccupation with the ever-expanding hole in the state budget, legislators passed several pieces of substantive education legislation.[3] As a result of the recent fiscal woes, however, most of this year's major education-policy decisions were made not by the

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+ The title is a twist on the title of James E. Ryan's article, *Schools, Race, and Money*. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).

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1. Attributed to Gaius Petronius in 66 AD. *See* Pedro Ramirez, Letter to the Editor, FORT COLLINS COLORADOAN (Colo.), Feb. 18, 2005, at 12A.

2. *See* Gary Emerling, *Kaine Calls for 567 Layoffs, Cutbacks to Shrink Shortfall; Department of Corrections, Education to Take Hardest Hit*, WASH. TIMES, Oct. 10, 2008, at A21.

3. *See id.*; *infra* Part III.

General Assembly, but by the Virginia Board of Education ("Board") through the regulatory processes set in motion years earlier in the areas of special education and graduation rate accountability.[4]

This article will recount the development of this year's revisions to the 2008–2010 budget, examine the long-term implications of budgetary decisions affecting public education, and review notable pieces of substantive education legislation. It will also highlight the major features of the new Standards of Accreditation—implementing graduation rate accountability—and special education regulations.[5] Finally, this article will offer a framework for analyzing the critical education-funding decisions likely to come before the 2010 General Assembly as Virginia continues to feel the effects of a global economic crisis.

II. SCHOOLS AND MONEY

Like many states, Virginia spent most of the 2009 session tackling a budget shortfall estimated as high as $3.7 billion.[6] Every even year, a biennial budget is proposed by the Governor and adopted, usually after substantial revisions, by the General Assembly.[7] During the interim odd years, the General Assembly considers amendments to the biennial budget.[8] Substantially declining revenue projections placed tough choices before the Governor and the General Assembly and made reaching an agreement on how to amend the biennial budget the major focus of the 2009 session.[9]

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4. *See infra* Part III.B.

5. *See infra* Part III.B.

6. The estimated biennial revenue shortfall was a moving target during the 2009 session. In his December 17, 2008 budget proposal remarks, the Governor projected a shortfall of $2.9 billion. Press Release, Office of the Governor Timothy M. Kaine, Governor Kaine Announces Revenue Reforecast, Plan to Address Shortfall (Dec. 17, 2008), *available at* http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease.cfm?id=838. On January 13, 2009, the Senate Finance Committee and the House Appropriations Committee estimated a $3.2 billion shortfall. HOUSE APPROPRIATIONS COMM. & SENATE FIN. COMM., VA. GEN. ASSEMBLY, SUMMARY OF THE GOVERNOR'S PROPOSED AMENDMENTS TO THE 2008–2010 BUDGET: INTRODUCED AS HOUSE BILL 1600/SENATE BILL 850 O-1 (2009), *available at* http://hac.state.va.us/documents/2009/Complete%20Doocument.pdf. The Governor revised his revenue projection on February 16, 2009, adjusting the projected biennial shortfall up to $3.7 billion. Anita Kumar, *Va. Budget Shortfall Reaches $3.7 Billion*, WASH. POST, Feb. 17, 2009, at B1. Senate amendments to the budget used the later $3.7 billion shortfall figure. SENATE FIN. COMM., VA. GEN. ASSEMBLY, SUBCOMM. REPORTS ON AMENDMENTS TO BE SUBSTITUTED FOR HOUSE AMENDMENTS TO HOUSE BILL 1600: CHAIRMAN'S COMMENTS 1 (2009), *available at* http://sfc.state. va.us/2009sessionbudgetdocuments.shtml.

7. VA. CODE ANN. § 2.2-1509(A) (Repl. Vol. 2008).

8. *Id.* § 2.2-1509(E).

9. *See* Anita Kumar, *Va. House, Senate Set for Clash on Budget: Competing Plans Show Partisan Split*,

At roughly thirty-four to thirty-six percent of the General Fund budget allocation,[10] spending on public education is the largest item in Virginia's budget, making it an obvious target for closing a multi-billion dollar deficit, despite earlier efforts to protect the education budget from cuts.[11] The education-budget debate centered around the Governor's proposal to change the funding formula for K–12 education by imposing a cap on the number of support personnel—staff in the departments of guidance counseling, social work, attendance, technology, and more[12]—recognized and funded by the state through the Standards of Quality ("SOQ").[13]

The SOQ represent the largest portion of state support for K–12 education.[14] They set the minimum requirements for both educational inputs (e.g., instructional and support staff) and educational outcomes (e.g., student performance on standards-based tests).[15] The SOQ also define the basic skills students must gain from education, required student-teacher ratios for different levels of schooling, standards for accrediting schools, diploma requirements, and more.[16]

The Virginia Constitution requires that the Board prescribe these standards "subject to revision only by the General Assembly" and also

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WASH. POST, Feb. 9, 2009, at B1.

10. The Senate Finance Committee estimated the K–12 public education budget as comprising thirty-four percent of the General Fund for the 2008–2010 operating budget. *See* BETSY DALEY, STAFF DIR., SENATE FIN. COMM., VA. GEN. ASSEMBLY, 2009 BUDGET OUTLOOK 7 (2009), *available at* http://sfc.state.va.us/annualsfcretreat.shtml (follow "2009 Budget Outlook" hyperlink). The Virginia Department of Planning and Budget estimated the K–12 public education budget as comprising thirty-six percent of the General Fund for the 2008–2010 operating budget. *See* Daniel TIMBERLAKE, DIR., VA. DEP'T OF PLANNING & BUDGET, GOVERNOR KAINE'S PROPOSED AMENDMENTS TO THE 2008–2010 BIENNIAL BUDGET 8 (2008), *available at* http://sfc.state.va.us/archives/2008/committeemeetings.shtml (follow "Governor Kaine's Proposed Amendments to the 2008–2010 Biennial Budget" hyperlink).

11. *See* Memorandum from Timothy M. Kaine, Governor, Commonwealth of Va., to the President of the Senate of Va. and the Speaker of the House of Delegates of Va. 3 (Dec. 17, 2008), *available at* http://dpb.virginia.gov/budget/buddoc09/pdf/kainebudgetmemo12172008.pdf.

12. *See id.* at 4.

13. *See* VA. CODE ANN. § 22.1-253.13:2(O) (Repl. Vol. 2006).

14. *See* KENT C. DICKEY, ASSISTANT SUPERINTENDENT FOR FIN., VA. DEP'T OF EDUC., OVERVIEW OF STANDARDS OF QUALITY FUNDING PROCESS 6 (2009), *available at* http://www.doe.virginia.gov/boe/quality/review_process/soq_funding.ppt (projecting that 91.3% of the Direct Aid to Public Education budget will fund the SOQ in 2010) [hereinafter DICKEY, OVERVIEW]; *see also* KENT C. DICKEY, ASSISTANT SUPERINTENDENT FOR FIN., VA. DEP'T OF EDUC., SHOW ME THE MONEY! WHERE DOES IT COME FROM?: AN OVERVIEW OF PUBLIC EDUCATION FUNDING IN VIRGINIA 8 (2008), *available at* http://www.vsba.org/PRESENTATIONS/Overview%20of%20Public%20Ed%20%20Funding%20in%20Va%20-May%20'08.pps (projecting that 88.8% of the Direct Aid to Public Education budget will fund the SOQ in 2009) [hereinafter DICKEY, SHOW ME THE MONEY].

15. VA. CODE ANN. §§ 22.1-253.13:1 to -253.13:8 (Repl. Vol. 2009).

16. *See id.*

imposes an affirmative duty on the General Assembly to create a funding system that pays for the educational program as defined by the SOQ.[17] Every two years, the SOQ costs are updated through a complex "rebenchmarking" formula designed to capture prevailing education costs across the state.[18] The SOQ require local school boards to provide those support services that are "necessary for the efficient and cost-effective operation and maintenance of its public schools."[19] Traditionally, the state paid its share of the "prevailing" support costs—the linear weighted average cost of the support services identified and funded by the localities as necessary to achieve the Commonwealth's educational goals.[20]

Governor Kaine's December 2008 budget proposed saving $340 million by capping the number of school support staff positions recognized by the state at one support staff position for each 4.03 teachers.[21] Although in theory each new budget starts from a blank slate, the Governor's proposed change could potentially reduce funding for public education in later budgets by embedding the new teacher-to-support-staff ratio into the rebenchmarking formula, cycling the cut through each biennial calculation of state support.[22]

The House and Senate took opposing positions on the Governor's proposal to cap the number of support staff. House conferees supported imposing a support cap ratio and embedding it in the rebenchmarking formula.[23] By contrast, Senate conferees did not support the change, contending that evaluating and prescribing staffing standards necessary

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17. *See* VA. CONST. art. VIII, § 2; *see also* Scott v. Commonwealth, 247 Va. 379, 381–82, 443 S.E.2d 138, 140 (1994).

18. *See* ROBERT B. ROTZ, SENIOR DIV. CHIEF, JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N, VIRGINIA'S FRAMEWORK FOR COSTING THE STANDARDS OF QUALITY (SOQ) 11 (2008), *available at* http://sfc.state.va.us/archives/2008/committeemeetings.shtml (follow "Virginia's Framework for Costing the Standards of Quality (SOQ)" hyperlink under "2008 Regular Session").

19. *See* VA. CODE ANN. § 22.1-253.13:2(O) (Repl. Vol. 2006).

20. *See* DICKEY, SHOW ME THE MONEY, *supra* note 14, at 12.

21. *See* Memorandum from Timothy M. Kaine, *supra* note 11, at 4; *see also* Olympia Meola & Holly Prestidge, *13,000 Support Jobs in Va. Schools at Stake; Dinwiddie Education Can't Imagine How They'd "Function with Any Less"*, RICH. TIMES-DISPATCH (Va.), Feb. 22, 2009, at A1. The Governor's proposed budget also included several revenue enhancing measures in an effort to reduce cuts to core services, but there was little appetite for higher taxes during a recession. *See* THE COMMONWEALTH INST., TAX POLICY STATUS REPORT: CHECKING IN AT CROSSOVER 1 (2009), *available at* http://www.thecommonwealthinstitute.org/Portals/16/Tax%20and%20Budget/taxpolicycrossoverchecki n.pdf; *see also* Anita Kumar, *House Panel Rejects Bill to Hike Tax on Cigarettes; Kaine Sought to Double Levy to 60 Cents a Pack*, WASH. POST, Jan. 29, 2009, at B2; Jeff E. Schapiro, *Panel Rejects Bid to Double Cigarette Tax; Defeat of Kaine Proposal Likely Means More Cuts to Try to Fill Hole in Budget*, RICH. TIMES-DISPATCH (Va.), Feb. 4, 2009, at A1.

22. *See* Anita Kumar & Tim Craig, *Disagreements Over Kaine Proposals Holding Up Budget Deal*, WASH. POST, Feb. 26, 2009, at B3.

23. *See id.*

to support the SOQ was a role more properly suited to the Board as contemplated by the Virginia Constitution.[24]

The Senate had reason to be concerned if the proposed support staff cuts were justified only by the state's balance sheet, instead of valid educational or technical improvements.[25] In other states, courts have called into question the constitutionality of funding schemes driven more by budgetary considerations than by educational policy.[26] In 2002, Virginia's legislative accountability office summarized the legal principles at stake, noting:

> [I]t has generally been presumed that the costs must not be arbitrary, and must be realistic in relation to current costs for education that are prevailing in the Commonwealth . . . . One of the ways to promote these objectives in the determination of costs is to estimate SOQ costs using a methodology with cost estimation principles that are known, reliable, and *independent of factors that are unrelated to the actual expense of education, such as the short-term availability of State funds.*[27]

Indeed, critics of Virginia's SOQ argue that the standards are more

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24. *See id.* The Senate Finance Committee stated:

> The introduced budget incorporated several policy actions, including a support staff cap, which produced reductions of $368.4 million GF. Although this Subcommittee will embrace the *amount* of these reductions, we are not embracing the proposed change in methodology behind these reductions. *It is our intent that these reductions will be temporary and local school divisions will have flexibility in achieving these reductions.*

SENATE FIN. COMM., VA. GEN. ASSEMBLY, REPORT OF THE SUBCOMMITTEE ON EDUCATION (AMENDMENTS TO SB 850, AS INTRODUCED) 2 (2009), *available at* http://leg1.state.va.us/091/bud/SubCom/SFCed.PDF [hereinafter REPORT OF THE SUBCOMMITTEE ON EDUCATION].

25. The Virginia Department of Planning and Budget listed the policy change under the heading "Budget Reduction Strategies," lending credence to the Senate's concerns. *See* VA. DEP'T OF PLANNING AND BUDGET, THE 2009 EXECUTIVE BUDGET DOCUMENT (2009), http://dpb.virginia.gov/budget/ buddoc09/agency.cfm?agency=197 (last visited July 3, 2009). This is not the first time the executive or legislative branch has proposed changes to the formula to solve budget problems rather than to make technical improvements. *See* JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N, VA. GEN. ASSEMBLY, REVIEW OF ELEMENTARY AND SECONDARY SCHOOL FUNDING 52 (2002), *available at* http://jlarc.virginia.gov/ reports/Rpt277.pdf.

26. *See, e.g.*, Lake View Sch. Dist. v. Huckabee, 220 S.W.3d 645, 654–55 n.4 (Ark. 2005) ("The amount of [education] funding shall be based on need and not funds available."); Montoy v. State, 112 P.3d 923, 937 (Kan. 2005) (per curium) ("[A] determination of the reasonable and actual costs of providing a constitutionally adequate education is critical."); DeRolph v. State, 780 N.E.2d 529, 532 (Ohio 2002) ("[The Constitution] expressly directs the General Assembly to secure a thorough and efficient system of common school . . . . The Constitution protects [citizens] whether the state is flush or destitute.").

27. JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N, *supra* note 25, at 34 (emphasis added).

representative of what Virginia can afford to spend, rather than what resources students need in order to achieve the outcomes mandated by the state.[28]

The House and Senate conferees ultimately embraced a compromise that adopted the Governor's recommended staff support position cap for fiscal year 2010 but uses federal funds to defray the cut for the coming year.[29] For future budgets, the compromise also requires the Virginia Department of Education to calculate the state share of funding using both methodologies—the "support position funding cap" methodology and the rebenchmarking methodology.[30] Further, the compromise compels the Board to "review the current Standards of Quality to evaluate the appropriateness of the existing staffing standards for instructional positions and the appropriateness of establishing ratio standards for support positions, with the objective of maximizing resources devoted to the instructional program."[31] In the meantime, the effect that the funding formula change has on local school budgets for the current biennium will be mitigated by the influx of federal stimulus dollars.[32]

In effect, this compromise defers major education funding decisions to the 2010 session and, by referring questions related to the SOQ to the Board, acknowledges the constitutional role of the Board in making

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28. *See, e.g.*, Ashley McDonald Delja, *Across Four Aprils: School Finance Litigation in Virginia*, 2004 BYU EDUC. & L.J. 191, 243–44. ("The primary criticisms of [the estimated cost of meeting the SOQ] are, first, that the state's estimation of the cost to fund the SOQ is too low because it is outdated and inaccurate and, second, that the SOQ standards themselves are set too low compared to the schools's [sic] prevailing practices."). *See also id.* at 246 (detailing reports indicating that all school divisions exceed the requirements contained in the SOQ and suggesting that "the Standards of Quality are not adequately defining a foundation program for Virginia.").

29. KENT C. DICKEY, ASSISTANT SUPERINTENDENT FOR FIN., BD. OF EDUC., REPORT ON AMENDMENTS TO THE 2008–2010 BIENNIAL BUDGET ADOPTED BY THE 2009 GENERAL ASSEMBLY AND FUNDING FOR PUBLIC EDUCATION UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA) 1–2, 4 (2009), *available at* http://www.doe.virginia.gov/boe/meetings/2009/03_mar/agenda_items/item_e.pdf.

30. Legislative Information System, State Budget, Budget Amendments: 2009 Session, Amendments to House Bill 1600: Conference Report, item 140, No. 8c, http://leg2.state.va.us/WebData/09amend.nsf/e23f6fe4c26e8cb18525689e00349982/1facf57baea0f8578525756b008087d2?OpenDocument[hereinafter House Bill 1600 Conference Report].

31. *Id.*

32. The budget for fiscal year 2010 reduces Direct Aid to localities for education by $629.5 million compared to the 2008–2010 budget, and most of the reductions will be offset by a disbursement of $365.2 million from the American Recovery and Reinvestment Act's ("ARRA") State Fiscal Stabilization Fund. *See* KENT C. DICKEY, ASSISTANT SUPERINTENDENT FOR FIN., BD. OF EDUC., REPORT ON AMENDMENTS TO THE 2008–2010 BIENNIAL BUDGET ADOPTED BY THE 2009 GENERAL ASSEMBLY AND FUNDING FOR PUBLIC EDUCATION UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA) 4 (2009), *available at* http://www.doe.virginia.gov/boe/meetings/2009/03_mar/agenda_items/item_e.pdf.

educational policy decisions.[33] Further, the compromise preserves funding for educational programs that serve students at-risk of educational failure, including the Virginia Preschool Initiative—Virginia's preschool program for at-risk four-year-olds—which was expanded by the 2008 General Assembly.[34] Finally, the 2009 General Assembly continued the process of shifting these funding streams from the General Fund into the Lottery Proceeds Fund.[35] Because the lottery funds are constitutionally dedicated to local public schools, this shifting of funds results in a decrease in the Commonwealth's overall funding commitment to public education and frees General Fund dollars for other uses.[36]

III. SCHOOLS AND MANDATES

The other story in the 2009 General Assembly session involved substantive legislation and new regulations. The General Assembly considered approximately ninety-six bills related to education,[37] and the Board promulgated new regulations for special education and public school accreditation.[38] Ultimately, the regulations promulgated by the Board are likely to have a greater impact on the educational services provided to students than the substantive legislation passed by the 2009 General Assembly.

A. Legislation

Members of the 2009 General Assembly were reticent to impose any new mandates on schools in the face of the local and state budget shortfalls.[39] In general, education legislation in the 2009 session tended to be more permissive than mandatory.[40] Most of the significant education legislation will affect the areas of student discipline, special education, school choice, and confidentiality.[41]

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33. *See* House Bill 1600 Conference Report, *supra* note 30.

34. *See id.*

35. *Id.*

36. *See* VA. CONST. art. X, § 7-A.

37. *See* Richmond Sunlight, *2009 Bills Tagged With "Education,"* http://www.richmondsunlight.com/bills/tags/education/ (last visited July 3, 2009).

38. *See infra* Part III.B.

39. *See, e.g.*, Trevor Brown, *Legislators: Session Productive, But Falls Short*, DAILY NEWS LEADER (Staunton, Va.), Mar. 6, 2009, at 1A.

40. *See, e.g., infra* notes 53–61 and accompanying text.

41. *See infra* notes 43–84 and accompanying text.

1. Student Discipline

Virginia law grants local education agencies broad discretion in disciplining students.[42] Nonetheless, bills are frequently introduced that authorize or require schools to impose punishment for specific categories of misbehavior.[43] These bills often fit into the "tough on crime" rubric, promoting swift and sometimes automatic or "zero tolerance" approaches to student conduct that remove the student from school for a number of days without any educational services.[44] Though intended as school safety measures, the research suggests that these bills are unlikely to achieve their goals.[45] Zero tolerance policies have been increasingly discredited by research, and experts argue that they are an ineffective means of achieving a safe school environment.[46] Moreover, research indicates that out-of-school suspension can lead to disengagement from school and eventual dropping out.[47]

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42. *See, e.g.*, VA. CODE ANN. § 22.1-277(A) (Repl. Vol. 2006) ("Pupils may be suspended or expelled from attendance at school for sufficient cause.").

43. *See, e.g.*, *infra* notes 53–61 and accompanying text.

44. *See* ELLEN M. BOYLAN, EDUC. LAW CTR., ADVOCATING FOR REFORM OF ZERO TOLERANCE STUDENT DISCIPLINE POLICIES: LESSONS FROM THE FIELD 1 (2002), *available at* http://www.edlawcenter.org/ELCPublic/Publications/PDF/AdvocatingReform_ZeroTolerance.pdf.

45. *See, e.g.*, RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 50 (2006), *available at* http://www.senate.state.tx.us/75r/Senate/commit/c530/handouts06/092006.c530.LevinM.1.pdf (finding that zero tolerance has failed to maintain school discipline or order); KIM BROOKS ET AL., SCHOOL HOUSE HYPE: TWO YEARS LATER 4 (2000), *available at* http://www.prisonpolicy.org/scans/jpi/shh2.pdf (discussing how zero tolerance approaches to safe schools turn schools into "funnels for the juvenile justice system").

46. *See, e.g.*, SKIBA ET AL., *supra* note 45 ("In the short term, suspension and expulsion appear to be associated with an *increase* in the future probability of disruptive behavior or disciplinary action. In the long term, the experience of disciplinary exclusion is associated with an increased probability of school dropout or failure to graduate on time."); JUDITH A. BROWNE, DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 6 (2003), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/5a/dc.pdf (finding a strong link between zero tolerance policies, removal from school, and court involvement); RALPH C. MARTIN, II, CHAIRPERSON, CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, ZERO TOLERANCE POLICY REPORT (2001), *available at* http://www.abanet.org/crimjust/juvjus/zerotolreport.html ("Unfortunately, most current [zero tolerance] policies eliminate the common sense that comes with discretion and, at great cost to society and to children and families, do little to improve school safety.").

47. *See, e.g.*, JOHN M. BRIDGELAND ET AL., THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS iii (2006), *available at* http://www.civicenterprises.net/pdfs/thesilentepidemic3-06.pdf (finding that forty-three percent of dropouts interviewed dropped out because they had "missed too many days of school and could not catch up"); CRAIG D. JERALD, PRESIDENT, BREAK THE CURVE CONSULTING, IDENTIFYING POTENTIAL DROPOUTS: KEY LESSONS FOR BUILDING AN EARLY WARNING DATA SYSTEM 5 (2006), *available at* http://www.achieve.org/files/FINAL-dropouts_0.pdf ("Students who become disengaged from school and develop disciplinary problems are more likely to drop out.").

House Bill 1794 responds to one such short-sighted zero tolerance policy—the removal of students from school for the offense of not coming to school in the first place.[48] House Bill 1794 amends Virginia Code section 22.1-277 to outlaw out-of-school suspension solely for the purposes of punishing truancy.[49] According to the Virginia Commission on Youth—which prompted the introduction of House Bill 1794—from 2006 to 2007, schools resorted to suspensions for attendance violations in 18,530 instances.[50] The Code already contained a clear and comprehensive scheme for addressing truancy, including contacting parents after any absence, developing an attendance plan with parents following the fifth unexcused absence, holding a conference after the sixth unexcused absence, and ultimately providing for a referral to juvenile court.[51] House Bill 1794 recognizes that suspending students for non-attendance at best delays implementation of the truancy section of the Virginia Code and at worst thwarts the intent of this Code section.

House Bill 2341 amends section 22.1-277.2:1 of the Code of Virginia, allowing schools to suspend students for up to ten days when the student has been charged with certain serious crimes involving intentional injury to another student in the same school, even if the crime occurred outside of school, pending a decision as to whether to require attendance in an alternative education program.[52] Although limited in its application, House Bill 2341 marks a major shift in Virginia's policy of providing educational services to students who are suspected of crimes that occurred off school grounds.[53] Prior to this bill's passage, schools could not deny *all* educational services to students charged for conduct occurring outside of school.[54]

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48. H.B. 1794, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 22.1-277 (enacted as Act of Feb. 25, 2009, ch. 70, 2009 Va. Acts ___).

49. *Id.*

50. VA. COMM'N ON YOUTH, 2008 LEGISLATIVE STUDIES: STUDY OF ALTERNATIVE EDUCATION OPTIONS 6 (2008), *available at* http://coy.state.va.us/2008%20Legislative%20Study%20Recommendations%20Adopted.pdf. Suspensions for attendance violations "constitute[d] over [eight percent] of short-term suspensions and [was] the fourth most frequently reported offense resulting in short-term suspension." *Id.* Based on these findings in their ongoing study of truancy and dropout prevention, the Commission on Youth recommended that the Code of Virginia be amended to foreclose suspension as an option for responding to attendance problems. *See id.*

51. *See* VA. CODE ANN. § 22.1-258 (Repl. Vol. 2006).

52. H.B. 2341, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 22.1-277.2:1 (enacted as Act of Mar. 27, 2009, ch. 208, 2009 Va. Acts ___).

53. *Compare* VA. CODE ANN. § 22.1-277.2:1 (Repl. Vol. 2006) (allowing school boards to require attendance at alternative education programs for students who committed crimes on or off school grounds), *with* H.B. 2341, ¶ 1, § 22-1.277.2:1 (allowing the imposition of short-term suspension pending a decision as to whether to require students, who committed crimes on or off school grounds, to attend an alternative education program).

54. *See* VA. CODE ANN. § 22.1-277.2:1 (Repl. Vol. 2006).

Several other student discipline bills are worth mentioning. House Bill 1624 modifies section 22.1-279.6 of the Code of Virginia, requiring the Board to develop model guidelines of student conduct for local school boards on punishing "cyber-bullying."[55] House Bill 1826 allows courts to suspend a student's driver's license if they are less than eighteen years of age and have ten or more unexcused absences from school on consecutive school days.[56] The student has an opportunity to "show cause" as to why the license should not be suspended.[57] The license suspension can be for any period of time, until the minor reaches age eighteen.[58] Finally, House Bill 1945 amends section 22.1-209.1:2 of the Code of Virginia, allowing students who are "at risk" of expulsion or suspension to be assigned to regional alternative schools, which had only been authorized to take suspended or expelled students.[59] The amendment upholds due process protections, including notice, a hearing before the superintendent or his designee, and an appeal to the school board.[60]

The prevalence of student discipline legislation underscores the need for a more rigorous empirical examination of current student discipline practices and policies, particularly out-of-school suspension. According to the Virginia Department of Education's Safe Schools Information Resource, there were 216,031 short-term suspensions (suspensions of ten days or fewer) in Virginia in the 2007–2008 school year.[61] Virginia schools also handed out 4856 long-term suspensions (suspensions lasting longer than ten days) and 991 expulsions in the 2007–2008 school year.[62] With Virginia's development of an individual student tracking system, there is an opportunity to perform longitudinal, cohort-based studies on the educational outcomes of students who are suspended, expelled, or referred to alternative programs.

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55. H.B. 1624, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 22.1-279.6 (enacted as Act of Mar. 27, 2009, ch. 431, 2009 Va. Acts ___) (requiring model school board policies on "the use of electronic means for purposes of bullying, harassment, and intimidation").

56. H.B. 1826, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, §§ 46.2-323 and -334.001 (enacted as Act of Mar. 27, 2009, ch. 439, 2009 Va. Acts ___).

57. H.B. 1826, ¶ 1, § 46.2-334.001.

58. *Id.*

59. H.B. 1945, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 22.1-209.1:2 (enacted as Act of Apr. 8, 2009, ch. 792, Va. Acts ___).

60. *Id.*

61. VA. DEP'T OF EDUC., SAFE SCHOOL INFORMATION RESOURCE: STUDENT DISCIPLINARY OUTCOME REPORT 186 (2008), https://p1pe.doe.virginia.gov/pti/outcome.do (last visited July 3, 2009).

62. *Id.* at 185.

2. Special Education

Two successful special education bills will require changes to the Commonwealth's newly released regulations. House Bill 2537 adds section 22.1-213.1 to the Code of Virginia, defining "parent" for the purpose of making special education decisions.[63] Under current law and under House Bill 2537, absent a court order designating another party as the educational decision-maker, a biological or adoptive parent will be presumed to be the parent for special education purposes if "attempting to act" as the parent.[64] Because of the new legislation, however, when the biological or adoptive parent is not attempting to act as the parent, a foster parent may be presumed the parent for special education purposes even in the absence of an order terminating parental rights of the biological parent.[65] House Bill 2537 eliminates delays in evaluations and services for children with disabilities in foster care without undermining the rights of those biological or adoptive parents who are willing and able to participate in the special education process.[66]

Another special education bill, House Bill 2304, amends section 22.1-214 of the Code of Virginia, requiring that appeals of a hearing officer's procedures or decisions must be brought within 180 days of the hearing officer's findings and decision in cases involving special education disputes.[67] Virginia's special education regulations had provided for a full year, but the recent revisions reduced the appeal period to ninety days, following the lead of the changes to the federal regulations.[68] The 180-day compromise appeal period was intended to give parents sufficient time to locate an attorney and articulate their claims, while also preserving evidence and avoiding undue delays in the implementation of a hearing officer's decision.

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63. H.B. 2537, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 22.1-213.1 (enacted as Act of Feb. 25, 2009, ch. 119, 2009 Va. Acts ___). The language of the bill mirrors federal regulations that made it easier for foster parents to make educational decisions for children in their care with disabilities, but left it to the states to determine when a foster parent may act as parent. *See* 34 C.F.R. § 300.30(a) (2008).

64. H.B. 2537, ¶ 1, § 22.1-213.1; 34 C.F.R. § 300.30(b)(1) (2008).

65. H.B. 2537, ¶ 1, § 22.1-213.1.

66. *Id.*

67. H.B. 2304, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 22.1-214 (enacted as Act of Mar. 27, 2009, ch. 468, 2009 Va. Acts ___).

68. *See* 34 C.F.R. § 300.516(b) (2008) (providing an appeal period of ninety days or the time permitted by the state).

3. School Choice

Virginia has very few charter schools,[69] in part because its charter law requires approval of the local school board in the area where the charter would be located.[70] House Bill 1844 allows some provisions of Virginia's charter law to expire this year, but retains measures that require continuous disclosure of any financial or ownership interests by the charter applicant or charter holder and directs local school boards to give priority to charter applicants who design programs intended to benefit at-risk students.[71] House Bill 1844 also amends Virginia Code section 22.1-212.11 to lift the cap on the number of charter schools a locality may establish.[72] This provision will have little immediate practical effect in Virginia given that few, if any, localities were in danger of exceeding the cap.[73]

Senate Bill 1221, which would have provided a tax incentive for businesses contributing cash or personal property to nonprofit educational organizations, was defeated in the Senate Finance committee.[74] An impact statement estimating that the bill could reduce revenue by up to twenty-five million dollars per year, in addition to administrative costs, proved fatal.[75] Additionally, Senate Bill 956 and House companion bills 1985 and 2104, which were also defeated, would have established a private school tuition assistance grant program (or voucher) for students with autism spectrum disorder receiving special education services.[76] House Bill 2104 reported out of the House

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69. Only three charter schools were operating in Virginia in the 2007–2008 school year. *See* BILLY K. CANNADAY, JR., SUPERINTENDENT OF PUB. INSTRUCTION, DEP'T OF EDUC., A REPORT ON PUBLIC CHARTER SCHOOLS IN THE COMMONWEALTH OF VIRGINIA FOR 2007–2008 iii (2008), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD2472008/$file/RD247.pdf.

70. VA. CODE ANN. § 22.1-212.7 (Repl. Vol. 2006).

71. H.B. 1844, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, §§ 22.1-212.88 and -212.11 (enacted as Act of Mar. 27, 2009, ch. 441, 2009 Va. Acts ___).

72. H.B. 1844, ¶ 1, § 22.1-212.11.

73. *See supra* note 69 and accompanying text.

74. S.B. 1221, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 58.1-439.12:03 (as introduced Jan. 13, 2009 by S. Comm. on Finance); *see* Legislative Information System, Bill Tracking: SB 1221, 2009 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?091+sum+SB1221 (last visited July 3, 2009).

75. DEP'T OF TAXATION, 2009 FISCAL IMPACT STATEMENT: SENATE BILL 1221 2 (2009), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?091+oth+SB1221F161+PDF.

76. H.B. 2104, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, §§ 22.1-335.1 to -335.8 (as engrossed Feb. 9, 2009 by the H. Comm. on Appropriations); H.B. 1985, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, §§ 22.1-335.1 to -335.8 (as introduced Jan. 13, 2009 by the H. Comm. on Appropriations); S.B. 956, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, §§ 22.1-335.1 to -335.8 (as introduced Jan. 9, 2009 by the S. Comm. on Education and Health). Senate Bill 956 failed in the committee of origin, while House Bill 1985 was incorporated into House Bill 2104. *See* Legislative Information System, Bill Tracking: HB 1985, 2009 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?091+sum+HB1985 (last visited July 3, 2009); Legislative Information System, Bill Tracking: SB 956, 2009 Session, http://leg1.state.va.us/cgi-

Committee on Appropriations, despite a fiscal impact statement indicating both the need for additional state-level staff to manage the program and an additional cost of $3491 per student per year for the over seven thousand Virginia students with autism.[77] After the House passed House Bill 2104, it was defeated in the Senate Committee on Education and Health.[78]

4. Confidentiality

Each year, several bills are introduced to make exceptions to the laws protecting the confidentiality of children's education, mental health, and juvenile court records.[79] These bills often have an unintended effect of thwarting one of the core missions of Virginia's juvenile justice system—rehabilitation[80]—by inhibiting candid interactions between youth and mental health, substance abuse, or other service providers and by disrupting successful reentry into the school and the community.

One such bill, Senate Bill 1218, originally allowed a student's entire probation or parole file, including highly confidential information protected by the Health Insurance Portability and Accountability Act ("HIPAA"), to be transmitted to schools.[81] After significant modification, the bill was passed by both houses, and the new legislation requires the Director of Juvenile Justice to notify the school superintendent of the school where a juvenile offender will be enrolled if the Director "reasonably believes that the juvenile poses any credible danger of serious bodily injury or death to one or more students, school personnel, or others on school property."[82] The bill, as passed by the

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bin/legp504.exe?ses=091&typ=bil&val=sb956 (last visited July 3, 2009).

77. DEP'T OF PLANNING AND BUDGET, 2009 FISCAL IMPACT STATEMENT: HOUSE BILL 2104 1 (2009), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?091+oth+HB2104F122+PDF; *see* Legislative Information System, Bill Tracking: HB 2104, 2009 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?091+sum+HB2104 (last visited July 3, 2009).

78. *See* Legislative Information System, Bill Tracking: HB 2104, 2009 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?091+sum+HB2104 (last visited July 3, 2009).

79. *See, e.g.*, Robert E. Shepherd, Jr., *Legal Issues Involving Children*, 33 U. RICH. L. REV. 1001, 1005 (1999).

80. VA. DEP'T OF JUVENILE JUSTICE, STRATEGIC PLAN 1 (2006), *available at* http://www.djj.state.va.us/ About_Us/pdf/Strategic_Plan/DJJ_Strategic_Plan_December_2006.pdf.

81. The bill as originally drafted required the probation or parole officer for juveniles convicted of certain offenses to transmit to the school division superintendent "any probation or parole report, including intake, social history and sentencing reports . . . prepared in relation to his alleged commission of or adjudication regarding such offense." S.B. 1218, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 16.1-237 (as introduced Jan. 13, 2009 by the S. Comm. for Courts of Justice).

82. S.B. 1218, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 66-25.2:1 (enacted as Act of Mar. 27, 2009, ch. 276, 2009 Va. Acts ___).

General Assembly, allows further dissemination

of confidential information only when necessary to protect the physical safety of the students and personnel in the school where the youth is enrolled.[83]

5. Mandates

In consideration of impending budget shortfalls, House Bill 2166 sought to delay the implementation of all new school mandates until July 1, 2010.[84] The bill received broad support among legislators, who were aware that a decrease in state funding for localities in all areas—public safety, education, and health—was pending due to the size of the revenue shortfall.[85] Further, House Bill 2166 postpones the implementation of a new graduation rate accountability measure until July 1, 2010.[86]

B. Regulations

The Virginia Board of Education took final action on two major regulatory items: (1) the regulations governing special education and (2) the standards for accrediting Virginia's public schools.

1. Special Education

The reauthorization of the Individuals with Disabilities Education Act in 2004 and the implementation of federal regulations promulgated in 2006 necessitated an overhaul of Virginia's regulations governing special education programs.[87] In September 2008, the Board voted to approve

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83. *Id.*

84. H.B. 2166, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1 (enacted as Act of Mar. 27, 2009, ch. 463, 2009 Va. Acts ___).

85. *See* Legislative Information System, Bill Tracking: HB 2166, 2009 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2166 (last visited July 3, 2009) (showing that the bill passed in the House with a ninety-six to two vote and passed in the Senate with a forty to zero vote).

86. H.B. 2166, ¶ 1.

87. *See* Individuals with Disabilities Education Improvement Act, Pub. L. No.108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. § 1400–1482 (2006)); 34 C.F.R. § 300 (2006); VA. BD. OF EDUC., REGULATIONS GOVERNING SPECIAL EDUCATION PROGRAMS FOR CHILDREN WITH DISABILITIES IN VIRGINIA: DRAFT 2 (Sept. 4, 2008),

the final regulations and send them to the Governor for review.[88] In March 2009, the Governor endorsed the regulations and permitted them to proceed to the final stages of Virginia's regulatory process, and the new regulations became effective on July 7, 2009.[89]

Some of the major changes to Virginia's special education regulations include:

- Short-term education objectives will only be required within the individualized education program ("IEP") for students with disabilities who are using alternate assessments.[90] For all other students with disabilities, the IEP team must document their consideration of whether to include short-term objectives in the student's IEP.[91]
- Each school must maintain a team (formerly known as the "Child Study" team) to review the records and performance of a child suspected of having a disability and to make recommendations and referrals regarding the child's educational and behavioral needs.[92] This school-based team will be required to "meet within [ten] business days following the receipt of [a] referral."[93] The referring source must be part of the IEP team.[94]
- Initial evaluations for special education and related services must be completed and an eligibility decision made within sixty-five business days following the receipt of the referral by a special education administrator, even if the administrator subsequently routes the referral through the school-based team.[95]

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http://www.doe.virginia.gov/VDOE/dueproc/final_sped_regs.pdf (last visited July 3, 2009).

88. *See* VA. BD. OF EDUC., MINUTES 142 (Sept. 25, 2008), http://www.doe.virginia.gov/boe/meetings/2008/09_sep/minutes.pdf (last visited July 3, 2009).

89. *See* Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 3849 (June 22, 2009) (to be codified at 8 VA. ADMIN. CODE §§ 20-81-10 to 20-81-340); VA. REGULATORY TOWN HALL, REGULATIONS GOVERNING SPECIAL EDUCATION PROGRAMS FOR CHILDREN WITH DISABILITIES IN VIRGINIA [8 VAC 20-80], http://www.townhall.state.va.us/L/ViewAction.cfm?actionid=2221 (last visited July 3, 2009) (providing updates on the status of the regulations). The Virginia Department of Education also maintains an online resource for tracking the revision process, including the final regulations and summaries of key changes. *See* VA. DEP'T OF EDUC., REGULATIONS GOVERNING SPECIAL EDUCATION PROGRAMS FOR CHILDREN WITH DISABILITIES IN VIRGINIA: THE REVISION PROCESS, http://www.doe.virginia.gov/VDOE/dueproc/regulationsCWD.html (last visited July 3, 2009).

90. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2918 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-110(G)(3)).

91. *Id.*

92. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2897 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-50(D)(2)).

93. *Id.*

94. *Id.*

95. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25

- The "developmental delay" classification will be limited to students ages two through six.[96]
- Secondary transition services designed to facilitate the child's movement from school to post-school activities must be in place by age fourteen.[97]
- A functional behavior assessment will no longer be *automatically* required upon suspension of more than ten days for behavior found *not* to be a manifestation of the child's disability.[98] During periods of long-term removal, functional behavior assessments and behavioral intervention services continue to be required "as appropriate" to "address the behavior violation so that it does not recur" even when the behavior is found *not* to be a manifestation of the child's disability.[99] Further, schools are still required to consider the use of "positive behavioral interventions, strategies, and supports" to address a "child's behavior [that] impedes the child's learning or that of others."[100]

The initial draft of the new regulations proposed to eliminate parental consent requirements for termination of special education services and proposed to transfer oversight of the due process-hearing system from the Supreme Court of Virginia to the Virginia Department of Education.[101] These revisions were rejected by the Board after an outcry from advocates.[102] Parents argued that parental consent requirements

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Va. Reg. Regs. 2898 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-60(B)(1)(g)). The sixty-five business day timeline does not apply when the parent repeatedly fails to produce the child for evaluation or when the process was started by another school division. *Id.*

96. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2875 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-10).

97. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2919 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-110(G)(10)). This is not actually a change, but is important because Virginia declined to accept the federal invitation to move the age back to sixteen. *See* VA. REGULATORY TOWN HALL, FINAL REGULATION AGENCY BACKGROUND DOCUMENT: REGULATIONS GOVERNING SPECIAL EDUCATION PROGRAMS FOR CHILDREN WITH DISABILITIES IN VIRGINIA 34 (Sept. 4, 2008), *available at* http://www.townhall.state.va.us/L/GetFile.cfm?File=E:\townhall\docroot\93\2221\4828\AgencyStatement_DOE_4828_v2.pdf [hereinafter FINAL REGULATION AGENCY BACKGROUND DOCUMENT].

98. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2929 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-160(D)).

99. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2928 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-160(C)(6)).

100. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2927 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-160(A)(2)).

101. FINAL REGULATION AGENCY BACKGROUND DOCUMENT, supra note 96, at 1; Olympia Meola, *Special Education Changes Advance: Disputed Proposals Removed, Plan Goes to Governor's Office*, RICH. TIMES-DISPATCH (Va.), Sept. 26, 2008, at B1.

102. FINAL REGULATION AGENCY BACKGROUND DOCUMENT, supra note 96, at 1; Meola, *supra* note

encourage schools and parents to reach agreement, rather than resort to litigation.[103] The final regulations thus retain current rules requiring parental consent

before any partial or complete termination of IEP services.[104] They also specify that the Supreme Court of Virginia will continue to administer the impartial hearing officer system.[105]

Additionally, the Board made several changes to align Virginia's regulations with federal law, including the elimination of "stay put" requirements during disciplinary disputes;[106] the adoption of a stricter standard for making manifestation determination decisions;[107] and the permission to use "response to intervention" ("RTI") techniques to review a child's performance when the child is suspected of having a disability, so long as the process does not delay evaluations.[108] Finally, the Board replaced all references to "mental retardation" and "emotional disturbance" with "intellectual disability" and "emotional disability" respectively.[109]

101.

103. *See* Meola, *supra* note 101.

104. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2911 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-90(C)).

105. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2944 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-210(B)).

106. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2930 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-160(G)).

107. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2929 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-160(D)).

108. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2908 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-80(I)). Federal regulations permit the use of RTI only for diagnosing specific learning disabilities, while Virginia regulations appear to permit it for diagnosing any disability. *Compare* 34 C.F.R. § 300.307 (2008) (stating a state "may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability"), *with* Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2905 (Aug. 13, 2009) (deleting language which limited the use of RTI to diagnosis specific learning disabilities). Federal regulations also do not permit early intervening services "to delay appropriate evaluation of a child suspected of having a disability," while Virginia regulations do not permit interventions to "*needlessly* delay" evaluations. *Compare* 34 C.F.R. § 300.226 (2008) (prohibiting early intervention services that delay the appropriate evaluation of suspected disabled children), *with* Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2897 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-50(D)(4)) (emphasis added) (prohibiting needless delay in evaluating a suspected disabled child). In the event of any conflicts, federal law supersedes state law. U.S. CONST. amend. VI, § 2.

109. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2874 (Aug. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-10).

2. Standards of Accreditation

In February 2009, the Board also made dramatic changes to the Standards of Accreditation ("SOA").[110] Mandated by the SOQ, the SOA regulations establish the minimum criteria for approving public schools in Virginia.[111] Prior to the 2009 changes, accreditation decisions were based primarily on passage rates on the "Standards of Learning" ("SOL") tests, Virginia's standards-based exams.[112] A recent analysis of a similar test-based accountability system in Texas identified a "strong association between high-stakes test-based accountability and large-scale dropping out" largely because "the system's internal administrative incentives . . . reward[s] increased school ratings, even if they are produced at the expense of youth" with low test scores who drop out.[113]

In order to be fully accredited, Virginia's new regulations require high schools to meet an eighty-five-point target on a weighted graduation and completion index where diplomas are weighted at one hundred points, GEDs at seventy-five points, Certificates of Program Completion at twenty-five points, and dropouts at zero points.[114] The index will be phased in over the next seven years, and by the 2016–2017 school year, high schools will have to meet the dual benchmarks—the test score benchmark and the graduation and completion index benchmark—in order to achieve accreditation.[115] The adoption of the graduation and completion index places Virginia among a minority of states to place high school completion on equal footing with test scores in the accreditation of schools.[116]

Other major features of the new regulations include two new diploma options for students—the Standard Technical Diploma and the

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110. VA. BD. OF EDUC., REGULATIONS ESTABLISHING STANDARDS FOR ACCREDITING PUBLIC SCHOOL IN VIRGINIA: REVISIONS FOR CONSIDERATION BY THE BOARD OF EDUCATION (Feb. 19, 2009), *available at* http://www.doe.virginia.gov/boe/meetings/2009/02_feb/agenda_items/item_a.pdf [hereinafter 2009 STANDARDS OF ACCREDITATION]. When final, these regulations will be codified at 8 VA. ADMIN. CODE § 20-131. *See id.*

111. *See* VA. CODE ANN. § 22.1-253.13:3 (Repl. Vol. 2009).

112. *See* 8 VA. ADMIN. CODE § 20-131-280 (2002 & Cum. Supp. 2008).

113. Linda McSpadden McNeil et al., *Avoidable Losses: High-Stakes Accountability and the Dropout Crisis*, EDUC. POL'Y ANALYSIS ARCHIVES 1, 37 (2008), *available at* http://epaa.asu.edu/epaa/v16n3/v16n3.pdf.

114. 2009 STANDARDS OF ACCREDITATION, *supra* note 109, at 51, 59.

115. *See id.* at 59.

116. *See* Olympia Meola, *Va. to Link Graduation Rates with Accreditation; Education Board Agrees to Delay Implementation Until 2010–2011 School Year*, RICH. TIMES-DISPATCH (Va.), Feb. 20, 2009, at B1.

Advanced Technical Diploma—and the requirements for earning them, as well as a new requirement that all students must have an Academic and Career Plan by their eighth-grade year.[117]

SCHOOLS, MANDATES, AND MONEY

The 2010 session of the Virginia General Assembly will no doubt be a defining moment. The worsening economy and the state's over-reliance on local financial support for public education[118] have forced local educators and government leaders to cut the very "programs, positions, and people"[119] that have helped them meet or exceed state and federal achievement standards and that have helped earn Virginia a fourth-place ranking in Education Week's annual Quality Counts report.[120] Local leaders are, understandably, demanding that the state "either fund its mandates, or reduce them."[121]

The desirability of reducing or eliminating the state's commitment to measurable gains in student achievement must be evaluated by the effect such measures have on students. The most expensive mandates are likely to be student achievement standards such as the federal No Child Left Behind Act ("NCLB") and the state SOA. Withdrawal from NCLB would only worsen the state's plight. Not only would withdrawal require Virginia to walk away from well over three hundred million dollars per year in federal funding,[122] but the state would likely have to give up any stimulus monies funneled through the state to local schools for support of NCLB programs.[123]

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117. *See* 2009 STANDARDS OF ACCREDITATION, *supra* note 109, at 12–14, 32–33.

118. In the 2005–2006 school year, localities paid 53.7% of the total costs of public education, compared with 39.6% from state sources and 6.7% from federal sources. *See* U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2006 5 tbl.5 (2008), *available at* http://ftp2.census.gov/govs/school/06f33pub.pdf. The same year, Virginia ranked fifteenth in local funding per pupil, but thirty-seventh in state funding per pupil. *See id.* at 11 tbl.11.

119. *See* Milton Liverman, President-elect, Va. Ass'n of Sch. Superintendents, Remarks at the Va. Ass'n of Sch. Superintendents Press Conference 2 (Jan. 27, 2009), http://vass.edschool.virginia.edu/homepages/legisltv.htm (last visited July 3, 2009); *see also* VA. ASS'N OF SCH. SUPERINTENDENTS, VASS 2009 LEGISLATIVE PRIORITIES, http://vass.edschool.virginia.edu/legisltv/2009/VASS%202009%20LEGISLATIVE%20PRIORITIES_Final_122208.pdf (last visited July 3, 2009).

120. *See Quality Counts 2009: Portrait of a Population*, EDUC. WEEK.COM, Jan. 8, 2009, http://www.edweek.org/ew/qc/2009/17src.h28.html (last visited July 3, 2009).

121. *See, e.g.*, VA. MUN. LEAGUE, 2009 LEGISLATIVE PROGRAM 4 (2008), *available at* http://www.vml.org/LEG/09LegPrgm/09VMLLegPrgm1.pdf.

122. *See* VA. BD. OF EDUC., REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY ON THE FEDERAL NO CHILD LEFT BEHIND ACT WAIVER REQUESTS MADE BY THE VIRGINIA BOARD OF EDUCATION (SB 1212 AND HB 2542) 13 (2007), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1862007/$file/RD186.pdf.

123. Virginia's school districts stand to receive over $165 million from the ARRA stimulus package to

Under the state accountability system, schools must meet pass-rate benchmarks on SOL tests.[124] Virginia schools have proven that they are up to the task: in 2008–2009, ninety-five percent of schools were fully accredited.[125] Moreover, because the benchmarks for achievement on SOL tests are higher under the federal NCLB than the state SOA, lowering the state benchmarks would not relieve the stress on schools.[126] Thus, in the absence of repeal or major revisions to NCLB, the only way for Virginia to meaningfully reduce the pressure and expense of complying with state and federal student outcome targets is to lower the passing score for tests or dilute the content of the standards, joining the "race to the bottom" that has been well-documented by other authors.[127]

The other option for Virginia is retreating on the new high school graduation and completion index. But this would be a step back for Virginia, as well as for students. The state, localities, and students all benefit when Virginia's schools have their eyes on the prize of graduating students, and not solely on achieving test passage rates. Research indicates that "[d]ropouts are much more likely than their peers who graduate to be unemployed, living in poverty, receiving public assistance, in prison, on death row, unhealthy, divorced, and ultimately single parents with children who drop out from high school themselves,"[128] all of which imposes staggering economic and social costs on our communities. The February 2009 unemployment numbers indicate that the recession is hitting our dropouts the hardest.[129]

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support Title I of the Elementary and Secondary Education Act, commonly referred to as NCLB. *See* U.S. DEP'T OF EDUC., TITLE I GRANTS TO LOCAL EDUCATION AGENCIES—VIRGINIA: ALLOCATIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT (2009), http://www.ed.gov/about/overview/budget/statetables/09recoverybystate.pdf (last visited July 3, 2009).

124. *See* VA. CODE ANN § 22.1-253.13:8 (Repl. Vol. 2006).

125. *See* VA. DEP'T OF EDUC., VIRGINIA SCHOOL REPORT CARD: SCHOOL ACCREDITATION STATUS FOR 2008–2009, http://www.doe.virginia.gov/VDOE/src/accreditation.shtml (last visited July 3, 2009).

126. *Compare* 8 VA. ADMIN. CODE § 20-131-300 (2002 & Cum. Supp. 2008) (setting the pass rate benchmark at seventy-five percent in English and seventy percent in math, science, and history and social science), *with* VA. BD. OF EDUC., ADDENDUM TO NCLB AMENDMENT REQUEST (2005), *available at*http://www.doe.virginia.gov/VDOE/nclb/AMO-6-22-05.pdf (setting the benchmark for Adequate Yearly Progress at eighty-one percent in reading and seventy-nine percent in math for 2008–2009 and increasing annually).

127. *See, e.g.*, James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944–48 (2004) (arguing that the NCLB's "overly ambitious goals" ultimately encourages states to "lower their standards, make their tests easier or lower the scores needed to be deemed proficient").

128. *See* BRIDGELAND, *supra* note 47, at 2.

129. In February 2009, the unemployment rate for people with less than a high school diploma was 15.1%, compared with high school graduates at 9.6% and persons with a bachelor's degree or higher at 4.2%. *See* U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION 25 YEARS AND OVER BY EDUCATIONAL ATTAINMENT tbl.A-4 (2009), http://www.bls.gov/news.release/empsit.t04.htm (last visited July 3, 2009).

Thus, reducing or eliminating some of the Commonwealth's quality standards is neither possible, nor desirable. However, the 2009 session suggests that future sessions may try to find an easy way out by reducing or delaying mandates rather than providing the resources to support them. For example, the effect of House Bill 2166, together with the phase-in already embodied in the regulations, is to delay full implementation of Virginia's new graduation and completion index until 2016.[130]

The other alternative is for the General Assembly, the Governor, and the Board to hold their ground on quality standards and support them with adequate resources. If one truly wanted to fully fund the Commonwealth's quality mandates (including the SOQ, SOL, and SOA), one would first determine what resources are necessary to provide all students with a meaningful opportunity to pass SOL tests and graduate with a Standard Diploma or better, and then determine the cost of providing those resources.[131] Quality standards should be determined according to constitutional procedures, instead of altering the numbers to close a budget gap.

Indeed, the Senate's firm stance against the proposal to create a teacher-to-support-staff ratio in the SOQ relied upon the fact that the proposal lacked any educational justification.[132] Now, the Board must make a determination about whether any changes to the SOQ funding formula are educationally justified. The Board cannot make this determination in a vacuum, but must consider the need for educational inputs, such as support staff, in relation to the Commonwealth's goals for its students and schools, as defined by the SOQ, SOL, and SOA. The Commonwealth has mandated certain student achievement outcomes[133] and has emphasized the achievement of educationally at-risk students.[134] The Board must look at each particular service provided by support

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130. *See* H.B. 2166, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1 (enacted as Act of Mar. 27, 2009, ch. 463, 2009 Va. Acts ___); 2009 STANDARDS OF ACCREDITATION, *supra* note 109, at 59. The state index is less rigorous than the graduation rate formula adopted for NCLB in late 2008 by former Secretary of Education Margaret Spellings, which makes its delay even less justifiable. *See* U.S. DEP'T OF EDUC., A UNIFORM, COMPARABLE GRADUATION RATE 1 (2008), http://www.ed.gov/policy/elsec/reg/proposal/
uniform-grad-rate.html (last visited July 3, 2009).

131. *See* Michael A. Rebell, *Professional Rigor, Public Engagement, and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 TCHRS. C. REC. 1, 2 (2007*), available at* http://www.schoolfunding.info/resource_center/research/professional_rigor.pdf ("[C]lose scrutiny of the state education finance systems revealed that few states had seriously attempted to determine objectively the amount of resources actually required to meet children's learning requirements.").

132. *See* REPORT OF THE SUBCOMMITTEE ON EDUCATION, supra note 24.

133. *See* VA. CODE ANN. §§ 22.1-253.13:1 through -253.13:4 (Repl. Vol. 2009).

134. *See, e.g.*, VA. CODE ANN. § 22.1-253.13:6 (Repl. Vol. 2009).

personnel and ask whether the position is justified in light of the Commonwealth's educational goals and requirements for students—who must each pass six SOL tests in order to graduate—and for schools—which must meet benchmarks for student achievement on SOL tests and high school completion.[135] The cap proposed by the Governor limits the aggregate number of support staff per teacher without recognizing that many support personnel provide services directly to students or perform other tasks so that teachers are free to focus on students.[136]

In summary, if the General Assembly does not consider ways to fully fund the Commonwealth's SOQ, the clamor to reduce Virginia's commitment to quality will rise as tapped-out local governments struggle to meet state standards with fewer resources. School boards themselves have no power to tax, save one—increasing fees levied on students—and already the press reported plans to shore up school budgets by increasing student activity fees.[137] These increases are occurring despite evidence that engaging students through arts programs and extra-curricular activities can increase graduation rates[138] and despite recently issued guidance from the Virginia Department of Education reminding local schools of the constitutional limitations on allowable fees and the need to waive required fees for students whose families cannot afford them.[139]

CONCLUSION

The future of Virginia's students will depend on how the General Assembly, the Governor, and the Board reconcile the Commonwealth's unwavering commitment to high standards with its unwillingness to increase its concomitant investment. If money, rather than law and research, is the driving force behind education policy in Virginia, expect a widening of the achievement gap and a decrease in overall student achievement. In January 2009, Education Week awarded Virginia an

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135. *See, e.g.*, VA. CODE ANN. § 22.1-18 (Repl. Vol. 2006) (requiring the Board to review the SOQ and justify each "particular" standard).

136. The Governor's budget memorandum to General Assembly members describes his proposed cuts to education, including the teacher-to-support-staff cap, under the heading, "Protecting the Classroom." *See* Memorandum from Timothy M. Kaine, *supra* note 11, at 2–3. A more targeted question for the Board to answer, and one required by the SOQ, is not what impact support staff has on classrooms, but rather what their impact is on students' test scores and graduation rates.

137. *See, e.g.*, Daniel de Vise & Michael Birnbaum, *Schools' Reaction to Tight Times Seen in Fee Rules*, WASH. POST, Jan. 8, 2009, at B1.

138. *See generally* Jay Matthews, *Fees Shouldn't Keep Kids from Sport, Activities*, WASH. POST, Sept. 8, 2008, at B2.

139. *See* Memorandum from Bill K. Cannaday, Jr., Superintendent of Pub. Instruction, to Div. Superintendents, on Guidance Regarding School Fees and Charges 1 (2008), *available at* http://www.doe.virginia.gov/info_centers/superintendents_memos/2008/07_jul/inf/169.html.

"A" in Standards, Assessment, and Accountability, a "C+" in School Finance, and a "C" in K–12 Achievement.[140] The question in 2010 and beyond is: Will Virginia turn its C's into A's, or its A's into C's?

140. *See* Christopher B. Swanson, *Grading the States*, EDUC. WK., Jan. 10, 2008, at 36, 39, *available at* http://www.edweek.or/go/qc08.