

1994

Annual Survey of Virginia Law: Legal Issues Involving Children

Robert E. Shepherd Jr.
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Juvenile Law Commons](#)

Recommended Citation

Robert E. Shepherd Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 28 U. Rich. L. Rev. 1075 (1994).
Available at: <http://scholarship.richmond.edu/lawreview/vol28/iss4/10>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

LEGAL ISSUES INVOLVING CHILDREN

*Robert E. Shepherd, Jr.**

I. INTRODUCTION

The past year has been another significant year for children and the legal system with the completion of the Virginia Commission on Youth's Serious Juvenile Offender study and the enactment of comprehensive legislation intended to implement the recommendations of that study as the General Assembly continues to focus on juvenile delinquency and school behaviors. The Governor and General Assembly failed to agree on a funding scheme for the Family Court, created in 1993, which consequently postponed the date for the Family Court's implementation from January 1, 1995 until July 1, 1996. Also, the past year experienced a series of different results in a nationally prominent and highly publicized case involving the emotionally charged issue of the custody rights of gay or lesbian parents.¹ The year also saw the continuing affirmation by the United

* Professor of Law, T.C. Williams School of Law, University of Richmond; B.A., 1959, Washington and Lee University; LL.B., 1961, Washington and Lee University.

1. The Virginia Court of Appeals reversed the earlier decisions of the Henrico County Juvenile and Domestic Relations District Court and the Circuit Court of Henrico County by awarding custody of a three-year-old boy to his birth mother, an admitted lesbian living with her gay lover. *Bottoms v. Bottoms*, __ Va. App. __, 444 S.E.2d 276 (1994). The court reaffirmed the principle that the "child's best interest controls" and concluded that the evidence failed to prove that the mother, Sharon Bottoms, "abused or neglected her son, that her lesbian relationship . . . has or will have a deleterious effect on her son, or that she is an unfit parent." *Id.* at __, 444 S.E.2d at 278. The court distinguished the earlier Virginia Supreme Court decision in *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985), because *Roe* involved a custody battle between two biological parents, while the contestant in *Bottoms* was the maternal grandmother, thus requiring that the presumption of parental fitness be rebutted. In deciding in Sharon Bottoms' favor, the court of appeals considered the illegality of her lesbian activities but concluded that there was no "proof that such behavior or activity pose[d] a substantial threat of harm to [the] child's emotional, psychological, or physical well-being." *Id.* at __; 444 S.E.2d at 282. The court rejected a *per se* rule of unfitness based on either homosexuality or engaging in illegal activities. *Id.* at __; 444 S.E.2d at 281.

States Supreme Court of the principle of separation of church and state in the setting of public education, which has been recurring issue.

II. THE FAMILY COURT

The history of the Family Court movement in Virginia and the adoption of Family Court legislation have been amply described in the 1992 and 1993 installments of this Annual Survey of Virginia Law.² However, although the planning process for the court has continued without interruption, the court itself received a major setback at the 1994 Session of the Virginia General Assembly, the Session that was to enact funding legislation to implement the acts creating the court in 1993. With the election of a new Governor along with some new members, the earlier commitment to the court was revisited. Consequently, no legislation was passed providing the financial resources for the court to begin operation on January 1, 1995, as previously planned.³ Legislation was adopted, however, amending the 1993 statutes in order to delay the effective date of the Family Court until July 1, 1996, dependent on the passage of funding provisions prior to that date.⁴ In the meantime, the Family Court Planning Advisory Committee and its subcommittees will continue to work toward the implementation of the court through the drafting of rules, the development of a training plan, and the preparation of forms and procedures for the new court.

III. JUVENILE DELINQUENCY AND NON-CRIMINAL MISBEHAVIOR

The most profound changes in the laws dealing with children this past year came through the enactment of reforms proposed

2. See Robert E. Shepherd, Jr., *Legal Issues Involving Children: Annual Survey of Virginia Law*, 26 U. RICH. L. REV. 797, 797-99 (1992); Robert E. Shepherd, Jr., *Legal Issues Involving Children: Annual Survey of Virginia Law*, 27 U. RICH. L. REV. 783, 783-85 (1993).

3. See generally Acts of Apr. 7, 1993, chs. 929, 930, 1993 Va. Acts 1422, 1464 (effective January 1, 1995).

4. Act of Apr. 9, 1994, ch. 564, 1994 Va. Acts 789 (effective July 1, 1996).

by the Virginia Commission on Youth's study of serious juvenile offenders.⁵ The core of the Commission's recommendations came in two crucial and interrelated prongs—a revision of the juvenile transfer statute previously found in section 16.1-269 of the Virginia Code,⁶ and a revision of the serious juvenile offender commitment statute embodied in Virginia Code section 16.1-285.1.⁷ The Commission's study was undertaken by a task force consisting of legislators, circuit and juvenile and domestic relations district court judges, Commonwealth's attorneys, and two citizen members of the Commission. The task force developed recommendations based on an examination of how often jurisdictions treat serious juvenile offenders Virginia's practice in transferring juveniles for trial as adults or in retaining youth in the juvenile justice system, and recommended national standards.

The adopted legislation embodied many of the Commission's recommendations. For example, in its effort to give juvenile court judges and prosecutors more tools for safeguarding the public while still treating youths as juveniles and delineating criteria for transfer to the adult court, the legislation focused primarily on violent and serious acts that threatened others.

The transfer statute taking effect on July 1, 1994, consisted of six sections which broke down the prior statute into more manageable segments.⁸ Section 16.1-269.1 lowers the minimum age for transfer from fifteen to fourteen while retaining Commonwealth's attorney's the filing of a motion as the trigger for a transfer hearing (this must precede an adjudicatory hearing).⁹ Upon the filing of the Commonwealth's motion, the court

5. See Report of the Virginia Commission on Youth, Report to the Gen. Assembly of 1994 on the Study of Serious Juvenile Offenders, H. Doc. No. 81 (1994). This report builds on a prior report made to the General Assembly in 1993 which contained the results of considerable research on the characteristics of juveniles transferred for trial as adults and other valuable data. Report of the Virginia Commission on Youth on the Study of Serious Juvenile Offenders, H. Doc. No. 33 (1993).

6. VA. CODE ANN. § 16.1-269 (Cum. Supp. 1993).

7. *Id.* § 16.1-285.1.

8. Acts of Apr. 20, 1994, chs. 859, 949, 1994 Va. Acts 1386, 1581 (codified at VA. CODE ANN. §§ 16.1-269.1 to 269.6 (Cum. Supp. 1994)).

9. VA. CODE ANN. § 16.1-269.1 (Cum. Supp. 1994).

must hold a transfer hearing.¹⁰ Furthermore, the court must hold the hearing in a bifurcated fashion, with the determination of probable cause that the juvenile committed an act that would be a felony if committed by an adult as the initial decision.¹¹ In addition, the court must also decide if the youth is competent to stand trial, with a presumption of competency which must be rebutted by a preponderance of the evidence by the party alleging incompetency.¹² If the juvenile is fourteen years of age or older and is charged with a Class One or Two felony under Chapter 4 of Title 18.2 or with an unclassified felony pursuant to the same chapter with a maximum penalty of life imprisonment or imprisonment for a term of forty years if committed by an adult, the court may transfer the case to circuit court if it finds the child was (1) at least fourteen at the time of the commission of the offense, (2) that the child is competent to stand trial, and (3) that there is probable cause that the juvenile committed the offense.¹³ If the juvenile is sixteen years old or older, a finding of probable cause for commission of a Class Three felony violation of Chapter 4 of Title 18.2 for murder under Article 1, a mob-related felony under Article 2, kidnapping or abduction under Article 3, or assault or bodily wounding under Article 4, coupled with the jurisdictional and competency findings will warrant transfer.¹⁴

If a juvenile who is fourteen years of age or older is charged with any other felony, then the court must enter into the second stage of the bifurcated hearing, which is a determination by a preponderance of the evidence of whether the "juvenile is not a proper person to remain within the jurisdiction of the juvenile court."¹⁵ The factors enumerated include: (a) age; (b)

10. *Id.* § 16.1-269.1(A)(1).

11. *Id.* § 16.1-269.1(A)(2).

12. *Id.* § 16.1-269.1(A)(3).

13. *Id.* § 16.1-269.1(B).

14. *Id.* § 16.1-269.1(B)(1).

15. *Id.* § 16.1-269.1(A)(4). This phrase replaces the prior determination that "the child is not . . . amenable to treatment . . . as a juvenile through available facilities . . ." *Id.* § 16.1-269(A)(3)(b). The new language is taken from the Institute of Judicial Administration-American Bar Association Juvenile Justice Standards. However, the Standard establishes a "clear and convincing evidence" burden of proof. STANDARDS RELATING TO TRANSFER BETWEEN COURTS Standard 2.2 (IJA & ABA Joint Comm'n on Juvenile Justice Standards 1980).

the seriousness and number of offenses, with a particular focus on the violence of the offense and the degree of the juvenile's culpability; (c) the length of time the juvenile could be kept in the juvenile justice system for treatment and rehabilitation; (d) the services and dispositional alternatives available in both the juvenile and adult systems; (e) the court record and previous offense history of the juvenile; (f) the history of escapes from juvenile correctional facilities; (g) the extent of any mental retardation or mental illness; (h) the youth's school record and education; (i) the juvenile's mental and emotional maturity; and (j) the physical maturity of the child.¹⁶ There is a curious anomaly in the section in that it directs the court to consider the factors, while stating "[n]o transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of . . . [them]"¹⁷

The age of the juvenile at the time of the commission of the offense governs eligibility for transfer. Consequently, a youth who was thirteen when the delinquency occurred but turned fourteen prior to arrest or the filing of a petition would not be eligible for transfer.¹⁸ Similarly, the new statute would appear to apply only to juveniles who committed offenses after July 1, 1994, the effective date of the statute.¹⁹

As before, statements made by the juvenile during the transfer hearing are not admissible against him over objection in any subsequent criminal proceeding, except for impeachment purposes.²⁰ Likewise, the court staff is directed to prepare a

16. VA. CODE ANN. § 16.1-269.1(A)(4) (Repl. Vol. 1993). The Code makes clear that the list of factors is not exclusive, indicating that consideration is "not limited to" the enumerated criteria. *Id.*

17. *Id.* The deliberations in the Task Force focused more on the practical unavailability of information about one or more factors rather than a deliberate or inadvertent lack of consideration. For example, if a juvenile facing transfer was not a Virginia resident and the court was unsuccessful in securing school records, that omission should not preclude a decision to transfer the juvenile.

18. *Id.* § 16.1-241 (Repl. Vol. 1993). See *Hairfield v. Commonwealth*, 7 Va. App. 649, 651, 376 S.E.2d 796, 797 (1989).

19. Since the new statutory scheme applies to younger juveniles and has different, and not necessarily more stringent, standards for transfer, the changes appear substantive and not procedural, and cannot be applied retroactively. See *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987).

20. VA. CODE ANN. § 16.1-269.2(A) (Cum. Supp. 1994).

transfer report addressing the factors enumerated in section 16.1-269.1(A)(4) prior to the hearing. The report, however, may not be considered by the judge until after a finding has been made regarding probable cause. In addition, this report and any others considered by the court must be made available to the juvenile's lawyer and the attorney for the Commonwealth.²¹ After the transfer hearing, the court must set bail for the juvenile pursuant to Chapter 9 of Title 19.2.²²

If the juvenile court declines to transfer the juvenile and instead retains jurisdiction over the youth, the judge who presided over the transfer hearing may not try the case over the objection of any interested party.²³ The Commonwealth may appeal the judge's decision to retain jurisdiction and deny transfer within ten days if the offense is one which, if committed by an adult, would be punishable by death, life imprisonment, or for a maximum period of twenty years or more of confinement.²⁴ Likewise, the juvenile may appeal the juvenile judge's decision to transfer the case within ten days.²⁵ Pending the hearing of the case in the circuit court and in the absence of making bail, the juvenile court judge may order the juvenile to be detained in a juvenile detention home or in a local adult facility, such as a jail. If, however, the youth is detained in an adult facility, he or she must be kept separate and apart from adults.²⁶

Within seven days after appeal of the transfer decision, the juvenile court clerk must transfer the case records to the circuit court along with a written court order explaining the reasons for the judge's decision, and a copy of that order should be sent

21. *Id.* § 16.1-269.2(B). Although Rule 8:5 of the Rules of the Supreme Court of Virginia currently refers to section 16.1-269, it would appear that the rule's requirement that the report be furnished to counsel and, upon request, be mailed to the attorney, is applicable here. See VA. SUP. CT. R. 8:5 (Repl. Vol. 1994).

22. VA. CODE ANN. § 16.1-269.2(C). Virginia is among a minority of states that define a right to bail for juveniles.

23. *Id.* § 16.1-269.3.

24. *Id.*

25. *Id.* § 16.1-269.4.

26. *Id.* § 16.1-269.5. If the juvenile is placed in an adult facility the specific limitations of section 16.1-249(E) regarding the jailing of juveniles apply. *Id.* § 16.1-249(E).

to counsel for the parties.²⁷ Within a reasonable time after receipt of the case from the juvenile court, the circuit judge should examine the papers and the court order and hold a hearing at which further evidence may be taken.²⁸ The Code makes clear that the circuit court cannot redetermine the issue of probable cause, thus apparently precluding an appeal by either the juvenile or the Commonwealth on the basis of the juvenile court judge's determination of that initial question.²⁹

The circuit court may then either remand the case to the juvenile court for further proceedings or advise the attorney for the Commonwealth that an indictment may be sought.³⁰ If the judge advises the Commonwealth that the matter may proceed in the circuit court through the seeking of an indictment, the court "shall issue an order transferring the juvenile from the juvenile detention facility" to a jail where the youth can be integrated with adults unless good cause is shown.³¹ The circuit court order advising the Commonwealth that it may seek an indictment also divests the juvenile court of jurisdiction over any other pending allegations of delinquency arising out of the same events.³² Upon conviction of the juvenile following transfer and trial in the circuit court, the judge must also issue an order terminating the juvenile court's jurisdiction over the juvenile as to any future delinquent acts or other pending allegations of delinquency "which have not been disposed of by the juvenile court at the time of the criminal conviction."³³ Both of

27. *Id.* § 16.1-269.6(A).

28. *Id.* § 16.1-269.6(B). The substitution of "within a reasonable time" for a specific time period in an earlier version of section 16.1-269 avoids the debate over whether non-compliance is jurisdictional, depriving the circuit court of the power to hear the case. See *Jamborsky v. Baskins*, 247 Va. 506, 442 S.E.2d 636 (1994) (concluding that the twenty-one-day time limit for hearing a transfer appeal in the circuit court is not jurisdictional, and therefore does not warrant the issuance of a writ of prohibition). The *Jamborsky* decision overrules the Court of Appeals previous decisions in both *In re Baskins*, 16 Va. App. 241, 430 S.E.2d 555 (1993), and *Bea v. Commonwealth*, 14 Va. App. 977, 420 S.E.2d 255 (1992).

29. VA. CODE ANN. § 16.1-269.6(B) (Cum. Supp. 1994).

30. *Id.*

31. *Id.*

32. *Id.* § 16.1-269.6(C). A "delinquent child" in the definitions section now excludes a youth for whom the juvenile court's jurisdiction has been terminated. *Id.* § 16.1-228.

33. VA. CODE ANN. § 16.1-269.6(C) (Cum. Supp. 1994).

these provisions raise serious double jeopardy concerns in light of *Breed v. Jones*,³⁴ where the court held that a juvenile may not be exposed to transfer for trial as an adult once an adjudicatory proceeding has commenced in the juvenile court on a delinquency charge.³⁵ The failure to object to the jurisdiction of the circuit court prior to arraignment constitutes a waiver of such objection.³⁶ The preclusion of future juvenile court jurisdiction over juveniles once they have been convicted as adults is a new approach for Virginia.³⁷

If a jury trial takes place in the circuit court after transfer of a juvenile, the jury only decides guilt or innocence, and the judge will sentence the youth. In sentencing, the judge uses either the adult sentences for the offense or the juvenile dispositions available to the juvenile court.³⁸ The juvenile retains the power to waive the jurisdiction of the juvenile court in any felony case where the juvenile is fourteen years of age or older.³⁹

The second major prong of the Commission on Youth's recommendations is the significant amendments made to the former serious juvenile offender statute.⁴⁰ The previous statute empowered a juvenile court judge to make a determinate minimum commitment to the Department of Youth and Family Services for twelve months.⁴¹ The amended statute, however, allows the determinate commitment of a youth fourteen years of age or older for up to seven years or until he or she reaches the age of twenty-one, whichever occurs first.⁴² The triggering circumstances for the use of this dispositional alternative are: (1) the fact that the youth is fourteen or older; (2) that (a) the juvenile is on parole for a delinquent offense which is a felony,

34. 421 U.S. 519 (1975).

35. *Id.* See also *Lewis v. Howard*, 374 F. Supp. 446 (W.D. Va. 1974).

36. VA. CODE ANN. § 16.1-269.6(E) (Cum. Supp. 1994). See *Hairfield v. Commonwealth*, 7 Va. App. 649, 376 S.E.2d 796 (1989).

37. See VA. CODE ANN. § 16.1-271 (Cum. Supp. 1994).

38. VA. CODE ANN. § 16.1-272.

39. *Id.* § 16.1-270.

40. *Id.* § 16.1-285.1 (Repl. Vol. 1993).

41. *Id.*

42. Acts of Apr. 20, 1994, chs. 859, 949, 1994 Va. Acts 1386, 1581 (codified at VA. CODE ANN. §§ 16.1 285.1 (Cum. Supp. 1994)).

or (b) the youth was committed to the state for a felony delinquent offense within the preceding twelve months, or (c) the felony offense of which the juvenile has been found guilty would be punishable by a penitentiary sentence of twenty years or more if committed by an adult; and (3) the court finds that a determinate commitment under the section is necessary to meet the rehabilitative needs of the juvenile and the best interests of the community.⁴³

Several factors determine whether a court will utilize the section. The court must consider (a) the youth's age; (b) the seriousness of the offense and the degree of participation by the juvenile; (c) the record and previous offense history of the youth; and (d) the Department of Youth and Family Service's recommended length of stay as embodied in the social history report.⁴⁴ The commitment order must also be supported by a determination "that the interests of the juvenile and community require that the juvenile be placed under legal restraint or discipline and that the juvenile is not a proper person to receive treatment or rehabilitation through other juvenile programs or facilities."⁴⁵

The court retains continuing jurisdiction over the juvenile under this section and the juvenile cannot be released prior to the time specified by the court except pursuant to a court order.⁴⁶ The Department of Youth and Family Services may petition for the early release of the juvenile. In doing so, the Department must petition the court for a determination of the wisdom of continued commitment under the section at least sixty days prior to the second anniversary of the juvenile's date of commitment and sixty days prior to each annual anniversary thereafter.⁴⁷ Upon receiving such a petition, the court shall schedule a hearing within thirty days and appoint counsel for the juvenile.⁴⁸ The court must also give notice of the hearing to the juvenile, the parents, any guardian ad litem, counsel and

43. VA. CODE ANN. § 16.1-285.1(A) (Cum. Supp. 1994).

44. *Id.* § 16.1-285.1(B).

45. *Id.*

46. *Id.* § 16.1-285.1(E)-(F).

47. *Id.* § 16.1-285.1(F).

48. *Id.* § 16.1-285.2.

the attorney for the Commonwealth with the petition and a progress report attached.⁴⁹ The progress report must contain specified information relevant to the determination of the appropriateness of continued determinate placement.⁵⁰ At the hearing, the court must consider the report and may hear other evidence.⁵¹ The court may order continued commitment of the juvenile pursuant to the original order, may reduce the length of the determinate commitment, or may order the release of the juvenile under terms and conditions in light of statutorily defined considerations.⁵² The court's order is final and not subject to appeal.⁵³

Although the statutes do not expressly permit the filing of a petition by a juvenile, it may be argued that the continuing jurisdiction of the court gives the juvenile the right to petition for review or modification of the court order pursuant to section 16.1-289 of the Code.⁵⁴ When the juvenile is released by the department, the victim of the offense which resulted in serious juvenile offender treatment for the youth is to be notified, if notification was requested, when the juvenile is released by the department, as well as the committing court, the attorney for the Commonwealth, and law enforcement.⁵⁵ The greater power of the juvenile court to dictate a longer minimum period of incarceration under the revised sections was intended to somewhat reduce the use of transfer as the primary vehicle for protection of public safety through incapacitation. The legislation also seeks to reduce the confinement of minor offenders within the institutions of the Department of Youth and Family Services by limiting commitment to children over the age of ten who have been convicted of a felony offense or of a Class One misdemeanor offense after a conviction of delinquency for a felony or Class One misdemeanor offense.⁵⁶

49. *Id.* § 16.1-285.2.

50. *Id.*

51. VA. CODE ANN. § 16.1-285.2(B)-(C) (Cum. Supp. 1994).

52. *Id.* § 16.1-285.2(D).

53. *Id.*

54. *Id.* § 16.1-289 (Cum. Supp. 1988).

55. *Id.* § 66-25.2 (Cum. Supp. 1994).

56. VA. CODE ANN. § 16.1-278.8(14) (Cum. Supp. 1994).

Several recent court decisions have dealt with these issues. In *Anderson v. Commonwealth*,⁵⁷ the Court of Appeals of Virginia sitting *en banc* concurred with the panel's decision that a juvenile whose transfer appeal was being heard in a circuit court had a right to a mental health expert of her own choosing after the court designated an expert for the Commonwealth to determine her mental condition and capacity.⁵⁸

Meanwhile, in *Broadnax v. Commonwealth*,⁵⁹ the panel withdrew its earlier opinion, concluding that a circuit court never acquired jurisdiction over a transferred youth because a hearing had not been provided to him on his appeal of the transfer decision, and remanded the case for a hearing on the question of transfer.⁶⁰ The court of appeals rejected an attack upon a conviction based in part on a confession obtained after a juvenile voluntarily accompanied his twenty-six-year-old uncle to a police station, in *Commonwealth v. Roberts*.⁶¹ The defendant was advised of his rights and did not request that either the uncle or any other relative or counsel be present. His confession was voluntary under the totality of the circumstances. Likewise, the confession was not rendered inadmissible by the failure of the police to take him to an intake officer or judge of the juvenile court pursuant to section 16.1-247 of the Code because such violation did not amount to any abrogation of his Fifth or Sixth Amendment rights.⁶² Meanwhile, a circuit court concluded in *Commonwealth v. J.B.G.*⁶³ that a juvenile and domestic relations district court had no jurisdiction to order a school division to develop an alternative program for a juvenile suspended from school for an act of delinquency.⁶⁴

57. 17 Va. App. 192, 436 S.E.2d 625 (1993) (en banc), *affg*, 15 Va. App. 226, 421 S.E.2d 900 (1992).

58. *Id.*

59. ___ Va. App. ___, 442 S.E.2d 219 (1993) (withdrawing 16 Va. App. 36, 427 S.E.2d 741 (1993)).

60. *Id.*

61. 445 S.E.2d 709 (Va. App. 1994).

62. *Id.*

63. 29 Va. Cir. 101 (Loudoun County 1992).

64. *But see* VA. CODE ANN. § 16.1-227 (Cum. Supp. 1994) and VA. CODE ANN. § 16.1-278 (Repl. vol. 1988). The General Assembly amended section 22.1-279.2 of the Code to make explicit that a court could not order development of a Program for Persons At-Risk (PPAR) until the programs are fully implemented on July 1, 1996.

The United States Supreme Court's denial of review of *QUTB v. Strauss*,⁶⁵ gave considerable impetus to the growing trend of enacting curfew ordinances for teenagers. The Fifth Circuit Court of Appeals upheld the Dallas, Texas curfew because it was narrowly drawn, did not violate the Equal Protection Clause of the Fourteenth Amendment, and the compelling governmental interests outweighed any burdens on the juveniles' First Amendment rights of association.⁶⁶ The Virginia Boot Camp Incarceration Program did not fare so well, falling before an equal protection challenge brought by a female youthful offender who was denied admission to the program because of her gender.⁶⁷ In *United States v. Male Juvenile*,⁶⁸ the district judge dismissed a federal criminal prosecution of a juvenile for bank robbery because he found the United States Attorney's certification of a "substantial Federal interest" insufficient to warrant federal processing instead of prosecution in the state courts.⁶⁹

Other amendments to the juvenile code passed during the 1994 General Assembly session included: an amendment of Virginia Code section 16.1-249 to require the placement of persons over eighteen in adult, rather than juvenile, facilities for detention prior to disposition;⁷⁰ the addition of a new section to permit the introduction of evidence regarding a juvenile's age at any time prior to the adjudication of a case;⁷¹ further amendment of the "abuse and lose" law to make the unlawful drinking or possession of alcoholic beverages on public school grounds a triggering offense for a six-month loss of a driver's license or delay in obtaining such;⁷² and a reduction (from

Acts of Apr. 11, 1994, chs. 760, 761, 1994 Va. Acts 1151, 1152 (codified at VA. CODE ANN. § 22.1-279.2 (Cum. Supp. 1994)).

65. 11 F.3d 488 (5th Cir. 1993), *cert. den.*, 62 U.S.L.W. 3787 (U.S. May 30, 1994).

66. *Id.* at 496.

67. *West v. Virginia Dept. of Corrections*, 847 F. Supp. 402 (W.D. Va. 1994).

68. 844 F. Supp. 280 (E.D. Va. 1994).

69. *Id.*

70. Acts of Apr. 20, 1994, chs. 859, 904, 949, 1994 Va. Acts 1386, 1495, 1581 (codified at VA. CODE ANN. § 16.1-249(H) (Cum. Supp. 1994)).

71. Act of Apr. 20, 1994, ch. 913, 1994 Va. Acts 1514 (codified at § 16.1-274.1 (Cum. Supp. 1994)).

72. Act of Apr. 5, 1994, ch. 338, 1994 Va. Acts 466 (codified at VA. CODE ANN. § 16.1-278.9 (Cum. Supp. 1994)).

thirty days to ten days) of the maximum time a child in need of supervision may be placed in a secure institution.⁷³ There were further changes in the various statutes concerning the confidentiality of juvenile records. These changes included adding court service unit records and reports to the confidentiality provisions governing Department of Youth and Family Services records,⁷⁴ requiring court services unit personnel or the attorney for the Commonwealth, to give notice of the disposition to a victim or the parents of a victim in a sexual assault case upon request.⁷⁵ The department must also give notice of the anticipated release of a committed juvenile in such a case;⁷⁶ requiring a judge to make available to the public identifying information concerning a broader group of juveniles and permitting the department or a court services unit to petition for the release of information on a juvenile escapee;⁷⁷ and directing clerks of juvenile and circuit courts to notify superintendents of school divisions of the final disposition in a student's case involving serious offenses against the person or drug offenses, with limitations on the dissemination of such information within the school division.⁷⁸

Other significant legislation increased the penalty for soliciting a juvenile to commit a felony;⁷⁹ made it an offense for a person to knowingly authorize a child under twelve to use a firearm when not under the supervision of an adult;⁸⁰ created a Class One misdemeanor penalty for threats to an elementary, middle, or secondary school employee;⁸¹ and established a re-

73. Act of Mar. 4, 1994, ch. 21, 1994 Va. Acts 25 (codified at VA. CODE ANN. § 16.1-292, -300 (Cum. Supp. 1994)).

74. Act of Mar. 4, 1994, ch. 19, 1994 Va. Acts 20 (codified at VA. CODE ANN. § 16.1-300 (Cum. Supp. 1994)). The section also clarifies that a juvenile who has reached the age of majority may seek release of his own records.

75. VA. CODE ANN. § 16.1-300 (Cum. Supp. 1994).

76. Act of Apr. 10, 1994, ch. 603, 1994 Va. Acts 863 (codified at VA. CODE ANN. § 16.1-305 (Cum. Supp. 1994)).

77. Acts of Apr. 9, 1994, chs. 499, 502, 1994 Va. Acts 705, 708 (codified at VA. CODE ANN. § 16.1-309.1 (Cum. Supp. 1994)).

78. Acts of Apr. 20, 1994, chs. 835, 913, 1994 Va. Acts 1304, 1514 (codified at VA. CODE ANN. § 16.1-305.1 (Cum. Supp. 1994)).

79. Acts of Apr. 6 & 8, 1994, chs. 364, 440, 1994 Va. Acts 528, 628 (codified at VA. CODE ANN. § 18.2-29 (Cum. Supp. 1994)).

80. Act of Apr. 20, 1994, ch. 832, 1994 Va. Acts 1302 (codified at VA. CODE ANN. § 18.2-56.2 (Cum. Supp. 1994)).

81. Act of Apr. 4, 1994, ch. 265, 1994 Va. Acts 365 (codified at VA. CODE ANN. §

buttable presumption that a juvenile between the ages of ten and fourteen is physically incapable of rape.⁸² The General Assembly also imposed a six-month license forfeiture and a five hundred dollar fine upon any person under the age of twenty-one who drives with a blood-alcohol concentration of .02 to .08 while negating the applicability of the "abuse and lose" statute or other juvenile dispositions in such situations.⁸³ Furthermore, legislation prohibited the distribution of tobacco to minors;⁸⁴ enhanced the penalty for escape from a juvenile facility if accomplished by force or violence;⁸⁵ made juvenile convictions and adjudications of delinquency admissible for sentencing purposes in the new bifurcated sentencing system for adults;⁸⁶ adopted a new scheme for the registration of both juvenile and adult sexual offenders, including the establishment of a Sex Offender Registry;⁸⁷ and provided that felons convicted as adults be incarcerated in state or local correctional facilities, and that felons under eighteen not be incarcerated in local juvenile detention homes.⁸⁸

18.2-60(B) (Cum. Supp. 1994)).

82. Acts of Apr. 5 & 11, 1994, chs. 339, 772, 794, 1994 Va. Acts 467, 1178, 1235 (codified at VA. CODE ANN. § 18.2-61 (Cum. Supp. 1994)). This amendment effectively overrules two older cases creating an irrebuttable presumption of physical incapacity below the age of fourteen. *Foster v. Commonwealth*, 96 Va. 306, 31 S.E. 503 (1898); *Law v. Commonwealth*, 75 Va. 885 (1881).

83. Acts of Apr. 6, 1994, chs. 359, 363, 1994 Va. Acts 502, 518 (codified at VA. CODE ANN. § 18.2-266.1 (Cum. Supp. 1994)); *see also id.* §§ 16.1-278.9, 18.2-270 to -271 (explaining "abuse and lose" or other juvenile penalties).

84. Act of Apr. 4, 1994, ch. 305, 1994 Va. Acts 422 (codified at VA. CODE ANN. § 18.2-371.2 (Cum. Supp. 1994)).

85. Act of Apr. 8, 1994, ch. 490, 1994 Va. Acts 696 (codified at VA. CODE ANN. § 18.2-477.1 (Cum. Supp. 1994)).

86. Acts of Apr. 20, 1994, chs. 828, 860, 862, 881, 1994 Va. Acts 1288, 1409, 1413, 1464 (codified at VA. CODE ANN. §§ 19.2-295.1, -297.1 (Cum. Supp. 1994)). These provisions will be effective only if they are reenacted at a special session of the General Assembly in the fall of 1994.

87. Act of Apr. 6, 1994, ch. 363, 1994 Va. Acts 514 (codified at VA. CODE ANN. § 16.1-272 (Cum. Supp. 1994)). For a description of Sex Offender Registry, see Virginia Code § 19.2-390.1.

88. VA. CODE ANN. § 53.1-20 (Cum. Supp. 1994).

IV. ABUSE AND NEGLECT, FOSTER CARE, AND TERMINATION OF RESIDUAL PARENTAL RIGHTS

The unending tragedy of child abuse and neglect, especially sexual abuse, continued to be reflected unabated in the appellate court reports. The Virginia Supreme Court affirmed the Virginia Court of Appeals' decision in *Shull v. Commonwealth*⁸⁹ that oral sodomy, by defendant placing her mouth on the penis of a boy under the age of fifteen, constituted carnal knowledge in violation of the law.⁹⁰

In *Yeager v. Commonwealth*,⁹¹ the court of appeals rejected a defendant's attack on his conviction for raping his eleven-year-old daughter.⁹² The defendant was successful in arguing that his convictions for forcible sodomy and carnal knowledge of his daughter constituted double jeopardy in *Chaine v. Commonwealth*.⁹³ In *Asa v. Commonwealth*,⁹⁴ however, the court affirmed the defendant's conviction for enticing or soliciting a minor to be the subject of sexually explicit visual material.⁹⁵ In *Love v. Commonwealth*,⁹⁶ the court of appeals agreed with the trial court that a conviction for sodomy only required proof that the outer lips of the vagina were penetrated and concurred that the step-granddaughter's testimony was credible and did not require corroboration.⁹⁷ In *Ein v. Commonwealth*,⁹⁸ the court concluded that a circuit court lacked jurisdiction to vacate an earlier order expunging Ein's police and court records concerning a charge of sexually abusing his daughter at the request of the complainants who were seeking access to the records to defend a civil case brought by Ein.⁹⁹

89. 16 Va. App. 667, 431 S.E.2d 924 (1993), *aff'd*, 247 Va. 161, 440 S.E.2d 133 (1994).

90. 247 Va. at 161, 440 S.E.2d at 133.

91. 16 Va. App. 761, 433 S.E.2d 248 (1993).

92. *Id.* at 762, 433 S.E.2d at 248.

93. 17 Va. App. 179, 436 S.E.2d 187 (1993).

94. ___ Va. App. ___, 441 S.E.2d 26 (1994).

95. *Id.* at ___, 441 S.E.2d 27.

96. ___ Va. App. ___, 441 S.E.2d 709 (1994).

97. *Id.* at ___, 441 S.E.2d at 712.

98. 246 Va. 396, 436 S.E.2d 610 (1993).

99. *Id.* at 401, 436 S.E.2d at 613.

A federal district court concluded that the city was not civilly liable to a former youth counselor for the loss of his employment with a private residential psychiatric facility for youth in *Billing v. City of Norfolk*.¹⁰⁰ The counselor was afforded a post-deprivation hearing on a sexual abuse charge which initiated an investigation resulting in a finding that there was "reason to suspect" that child abuse had occurred, a conclusion reported to the employer.¹⁰¹

In *Mahony v. Becker*,¹⁰² the supreme court ruled that a tort suit brought by parents for emotional distress occasioned by the sexual abuse of their daughter was derivative and barred by the statute of limitations because the action was not filed until more than five years after the daughter turned eighteen.¹⁰³

The court of appeals concluded in *Wright v. Alexandria Division of Social Services*¹⁰⁴ that a child's guardian *ad litem* had standing to appeal the termination of the mother's parental rights and to raise the issue of whether the mother was denied due process by the ineffectiveness of her counsel.¹⁰⁵ However, the court decided that counsel was not ineffective, that the evidence supported termination of parental rights, and that there was no constitutional right to preservation of the parent-child relationship after parental unfitness was established in proceedings that comported with due process.¹⁰⁶

A similar assault on the state's power to intervene in families for the purpose of protecting children was rejected by the federal courts in *Jordan v. Jackson*.¹⁰⁷ The court concluded that section 63.1-248.9 of the Virginia Code¹⁰⁸ was constitutional

100. 848 F. Supp. 630 (E.D. Va. 1994).

101. *Id.* at 631.

102. 246 Va. 209, 435 S.E.2d 139 (1993).

103. *Id.* at 211, 435 S.E.2d at 141.

104. 16 Va. App. 821, 433 S.E.2d 500 (1993).

105. *Id.* at 825, 433 S.E.2d at 502.

106. *Id.* at 826, 828, 433 S.E.2d at 503, 504.

107. 15 F.3d 333 (4th Cir. 1994).

108. VA. CODE ANN. § 63.1-248.9 (Cum. Supp. 1993). The section required a hearing before a juvenile court judge within seventy-two hours after a child's emergency removal from the home for suspected abuse or neglect, even if a weekend intervenes. A 1992 amendment, enacted after the facts giving rise to this case, allows for a delay of up to ninety-six hours if a weekend or holiday occur. VA. CODE ANN. §

on its face, and as applied to the facts of the case.¹⁰⁹ However, the court reversed the district court's dismissal of the claim against the local department of social services for the actions it undertook in this particular case.¹¹⁰

In the case of *In the Matter of Baby "K,"*¹¹¹ the Fourth Circuit Court of Appeals concluded that the Emergency Medical Treatment and Active Labor Act (EMTALA)¹¹² required a hospital to provide respiratory support, as well as warmth, nutrition, and hydration, to an anencephalic infant.¹¹³

Legislation enacted in 1994 included: expansion of the Court-Appointed Special Advocate Advisory Committee;¹¹⁴ extending the use of closed circuit television testimony for child abuse victims to preliminary removal order hearings in juvenile court;¹¹⁵ directing the Judicial Council of Virginia to establish guidelines for the appointment of guardians *ad litem* in juvenile courts and providing for appointments to be made from a list of persons who have met these standards;¹¹⁶ providing that the individual family service plan prepared pursuant to the Comprehensive Services Act could be accepted by the courts in lieu of the foster care plan if it meets the statutory guidelines;¹¹⁷ and changing the timelines for foster care reviews so that the initial petition for foster care review must be filed within ten months of the placement with a hearing scheduled within sixty

63.1-248.9 (Cum. Supp. 1994).

109. 15 F.3d at 351.

110. *Id.* at 356.

111. 16 F.3d 590 (4th Cir. 1994).

112. 42 U.S.C. § 1395dd (1994).

113. 16 F.3d 590.

114. Act of Mar. 4, 1994, ch. 24, 1994 Va. Acts 29 (codified at VA. CODE ANN. § 9-173.6 (Cum. Supp. 1994)).

115. Act of Mar. 7, 1994, ch. 42, 1994 Va. Acts 116 (codified at VA. CODE ANN. § 16.1-252 (Cum. Supp. 1994)). The notice to be given before the use of this technique is shortened from seven days to forty-eight hours because the hearing must take place within five days after removal from the home.

116. Act of Mar. 7, 1994, ch. 36, 1994 Va. Acts 109 (codified at VA. CODE ANN. § 16.1-266.1 (Cum. Supp. 1994)). A resolution also called on the Committee on District Courts to encourage courts to pay guardians *ad litem* the prescribed hourly fees established by the Office of the Executive Secretary of the Supreme Court. S.J. Res. 90, Va. Gen. Assembly, (Reg. Sess. 1994).

117. Acts of Apr. 4, 10 & 20, 1994, chs. 223, 604, 865, 1994 Va. Acts 319, 865, 1418 (codified at VA. CODE ANN. §§ 16.1-281 to -282 (Cum. Supp. 1994)).

days, and future hearings every twelve months thereafter.¹¹⁸ Other legislation provided graduated penalties for parental abduction in violation of a court order and gave juvenile courts jurisdiction over the offense regardless of where the custody order was entered.¹¹⁹ Recent legislation also created an enhanced Class 6 felony penalty for a third conviction of certain misdemeanor sex offenses¹²⁰ and increased the penalty for subsequent offenses of possession of child pornography to a Class 6 felony.¹²¹

The General Assembly also took steps to aid child witnesses. Legislation granted juvenile victims the right to have an adult of their own choosing, in addition to a parent or guardian, present at a trial subject to the rules governing sequestration of witnesses.¹²² The General Assembly also made the civil rule adopted in 1993 (stating that no child is incompetent to be a witness solely because of age) apply to criminal proceedings as well.¹²³

If a judge of a juvenile court receives a report that an employee of a department of social services is abusing a child, the judge should assign the case for investigation to another local department, with the assistance of the state department, if necessary.¹²⁴

118. Acts of Apr. 4, 10 & 20, 1994, chs. 223, 604, 865, 1994 Va. Acts 319, 865, 1418 (codified at VA. CODE ANN. § 16.1-282 (Cum. Supp. 1994)). Pursuant to these amendments, foster care review hearings will be held twelve, twenty-four and thirty-six months after placement instead of eighteen, twenty-four and thirty months after the initial placement. *Id.*

119. Acts of Apr. 9, 10, 11 & 20, 1994, chs. 575, 719, 813, 859, 949, 1994 Va. Acts 800, 1041, 1260, 1386, 1581 (codified at VA. CODE ANN. §§ 16.1-241, 18.1-49.1 (Cum. Supp. 1994)).

120. Act of Apr. 8, 1994, ch. 468, 1994 Va. Acts 649 (codified at VA. CODE ANN. § 18.2-67.5:1 (Cum. Supp. 1994)).

121. Act of Apr. 9, 1994, ch. 511, 1994 Va. Acts 719 (codified at VA. CODE ANN. § 18.2-374.1:1 (Cum. Supp. 1994)).

122. Acts of Apr. 6 & 10, 1994, chs. 361, 598, 1994 Va. Acts 513, 858 (codified at VA. CODE ANN. §§ 19.2-11.1, -265.01 (Cum. Supp. 1994)).

123. Act of Apr. 9, 1994, ch. 543, 1994 Va. Acts 797 (codified at VA. CODE ANN. § 19.2-267 (Cum. Supp. 1994)). The provision becomes effective if reenacted at a special legislative session in 1994.

124. Acts of Apr. 10 & 20, 1994, chs. 643, 675, 840, 1994 Va. Acts 912, 988, 1319 (codified at VA. CODE ANN. §§ 63.1-248.3, -248.4, -248.6, -248.9 (Cum. Supp. 1994)).

Legislation also extended the time for completion of a child abuse investigation from forty-five to sixty days when a written justification is provided, but the person investigated must be advised of the determination made.¹²⁵

Persons seeking employment or volunteer status at state-regulated juvenile facilities after July 1, 1994, must provide copies of their criminal record and child abuse registry entries, if any.¹²⁶ After years of effort, the General Assembly finally enacted legislation establishing a child fatality review advisory committee at the state level to establish procedures for the systematic review of child deaths.¹²⁷ Also, legislation was adopted to allow departments of social services and licensed child placing agencies to accept children for placements out of their homes through an agreement with the parents or guardians which will nonetheless allow the parents or guardians to retain legal custody over their children.¹²⁸

The General Assembly also enacted, for a second time, a proposed constitutional amendment permitting the retroactive change in the accrual date for civil actions involving intentional torts against minors, such as sexual abuse, and providing for a statewide referendum on the amendment in November, 1994.¹²⁹

125. Acts of Apr. 10 & 20, 1994, chs. 643, 675, 840, 1994 Va. Acts 912, 988, 13 (codified at VA. CODE ANN. §§ 63.1-248.3, -248.4, -248.6, -248.9 (Cum. Supp. 1994)).

126. Act of Apr. 10, 1994, ch. 704, 1994 Va. Acts 1026 (codified at VA. CODE ANN. § 63.1-248.7:2 (Cum. Supp. 1994)).

127. Acts of Apr. 10 & 20, 1994, chs. 643, 675, 840, 1994 Va. Acts 912, 988, 1319 (codified at VA. CODE ANN. §§ 63.1-248.3, -248.4, -248.6, -248.9 (Cum. Supp. 1994)).

128. Acts of Apr. 4, 10 & 20, 1994, chs. 223, 604, 854, 859, 865, 949, 1994 Va. Acts 319, 865, 1353, 1386, 1418, 1581 (codified at VA. CODE ANN. §§ 2.1-757, -758, 16.1-228, -278.2, -278.4, -281, -282, 63.1-55.8, -56, -56.2, -56.3, -57, -67.2, -195, -204 (Cum. Supp. 1994)).

129. Act of Apr. 7, 1994, ch. 405, 1994 Va. Acts 578. S.J. Res. 172, Va. Gen. Assembly, (Reg. Sess. 1992). The amendment to Article IV, § 14, of the Virginia Constitution, would overrule the decision of the Virginia Supreme Court in *Starnes v. Cayotte*, 244 Va. 202, 419 S.E.2d 669 (1994). See Robert E. Shepherd, Jr., *Legal Issues Involving Children: Annual Survey of Virginia Law*, 27 U. RICH. L. REV. 783, 793 (1993).

V. EDUCATION

The area of education continued to be a fertile field for both litigation and legislation. The United States Supreme Court again reaffirmed its commitment to separation of church and state in public education by condemning New York's creation of a separate school district coterminous with a village controlled and inhabited by members of a separatist community of Satmar Hasidic Jews.¹³⁰ Justice Souter, writing for five members of the court, found the constitutional infirmity in the action to reside in the specific legislative creation of the district, as opposed to the district's creation resulting from a generally applicable law.¹³¹ Justice Kennedy, concurring, concluded that the Constitution was offended by "drawing political boundaries on the basis of religion."¹³² Justice Scalia filed a dissenting opinion which Justice Thomas and Chief Justice Rehnquist joined.¹³³

The United States Supreme Court also resolved a dispute among federal judicial circuits by ruling that parents who unilaterally withdraw their disabled child from the public schools for placement in unapproved private schools are entitled to reimbursement if the public program is determined to be inappropriate.¹³⁴

The Virginia Supreme Court addressed a historically significant issue by concluding that Article I, Section 15 and Article VIII, Section 1, of the Constitution of Virginia do not require "substantial equality" of spending or programs among or between school divisions in the Commonwealth.¹³⁵ The court ruled that the constitution only requires that the General Assembly provide for a system of free public schools in the state, that it define certain standards of quality that all school divisions must meet, and that the Assembly establish a method

130. Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994).

131. *Id.* at 2489, 2490.

132. *Id.* at 2501.

133. *Id.* at 2505-2516.

134. Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993) (applying the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (1994)).

135. Scott v. Commonwealth, 247 Va. 379, 443 S.E.2d 138 (1994).

for raising funds to comply with the standards of quality; all of these requirements had been met.¹³⁶

Other decisions concluded (1) that the United States Department of Education could not withhold Virginia's special education funds for the state's failure to comply with the Individuals with Disabilities Education Act¹³⁷ without affording the state an opportunity for a hearing;¹³⁸ (2) that educationally disabled children's parents, who had entered into a settlement agreement with one defendant during the pendency of an appeal, were not "prevailing parties" for the purpose of securing the award of attorney fees from a nonsettling defendant due to post-dismissed events;¹³⁹ (3) that other parents could not recover attorney fees when an administrative ruling was adverse to them despite the fact that the school board later made some changes demanded by the parents;¹⁴⁰ (4) that a teacher alleging disability discrimination resulting from her failure of the National Teacher Examination due to a learning disability was entitled to a jury trial;¹⁴¹ and (5) that the Fairfax County School Board unconstitutionally discriminated against churches by charging them greater rental rates for off-hour use of school facilities than secular groups.¹⁴²

In *B.M.H. v. School Board of Chesapeake*,¹⁴³ the federal district court ruled that a student who was sexually assaulted at school had no § 1983 cause of action against the school system and its teachers for their failure to protect her after she reported a threat by the assaulting student three days before the attack.¹⁴⁴

136. *Id.* at 386, 443 S.E.2d at 142.

137. 20 U.S.C. §§ 1400 *et seq.* (1994).

138. *Virginia Dep't of Educ. v. Riley*, 23 F.3d 80 (4th Cir. 1994). Virginia agreed to comply with the disputed federal policy pending the hearing by continuing to provide special education services to expelled or long-term suspended disabled students.

139. *S-1 and S-2 v. State Bd. of Educ. of N.C.* 21 F.3d 49 (4th Cir. 1994) (en banc), *setting aside prior panel decision*, 6 F.3d 160 (4th Cir. 1993).

140. *Combs v. School Bd.* 15 F.3d 357 (4th Cir. 1994).

141. *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994).

142. *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994).

143. 833 F. Supp. 560 (E.D. Va. 1993).

144. *Id.* at 564-573.

In *Gearon v. Loudoun County School Board*,¹⁴⁵ the court concluded that a violation of the Establishment Clause of the First Amendment occurred when prayer was included in high school commencement exercises, regardless of who initiated the prayer.¹⁴⁶ The court also found that there was an excessive entanglement by the school with religion due to the superintendent's memorandum pointing out a way of getting around *Lee v. Weisman*,¹⁴⁷ and the distribution of a ballot to vote on prayer at commencement for graduating students.¹⁴⁸

Despite the court decisions on school prayer and the separation of church and state, the General Assembly sought to give its stamp of approval to student-initiated prayer by permitting prayer to the extent that the practice is consistent with the constitution,¹⁴⁹ and directing the Board of Education, in consultation with the Attorney General, to develop guidelines on prayer and other religious expressions.¹⁵⁰ The legislature also sought to reaffirm efforts to address the problem of school financing equity presented in *Scott*¹⁵¹ by continuing the Commission on Equity in Public Education.¹⁵²

Considerable attention was paid again this year to safety and security in the schools. The General Assembly gave the juvenile courts new jurisdiction to sanction parents for willfully and unreasonably refusing to cooperate with the schools in dealing with their disruptive children,¹⁵³ established a prohibition

145. 844 F. Supp. 1097 (E.D. Va. 1993).

146. *Id.* at 1099.

147. 501 U.S. 1215 (1992).

148. 844 F. Supp. at 1100. The court rejected the Fifth Circuit Court of Appeal's reasoning in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), at least to the extent that it permitted delegation of decisionmaking regarding commencement prayers from school officials to students. *Id.*

149. Act of Apr. 11, 1994, ch. 799, 1994 Va. Acts 1242 (codified at VA. CODE ANN. § 22.1-203.1 (Cum. Supp. 1994)).

150. VA. CODE ANN. §§ 9-6.14:4.1, 22.1-280.3 (Cum. Supp. 1994).

151. *See supra* note 131.

152. Act of Apr. 20, 1994, ch. 863, 1994 Va. Acts 1416 (codified at VA. CODE ANN. § 9-310 (Cum. Supp. 1994)).

153. Acts of Apr. 9, 10, 11 & 20, 1994, chs. 575, 719, 813, 859, 949, 1994 Va. Acts 800, 1041, 1260, 1386, 1581 (codified at VA. CODE ANN. §§ 16.1-241, -241.2 (Cum. Supp. 1994)). One Code section referred to in this law is non-existent because the Governor vetoed Senate Bill 340 and House Bill 947 which contained the referenced section.

against drinking or serving alcoholic beverages on school grounds or in connection with student activities,¹⁵⁴ enacted a Class 1 misdemeanor penalty for threats against school personnel,¹⁵⁵ raised the penalty for trespass upon school property from a Class 3 to a Class 1 misdemeanor in certain instances,¹⁵⁶ increased the number of pilot alternative education programs for suspended or expelled pupils from four up to ten,¹⁵⁷ gave school divisions the authority to exclude from attendance students who have been expelled from another school system,¹⁵⁸ and required reports to the Department of Education of instances of firearms being brought into educational settings.¹⁵⁹ In addition, the Assembly required the Board of Education to promulgate regulations for the establishment of school crime lines,¹⁶⁰ clarified the confidentiality of student scholastic records, including disciplinary records, so as to remove the distinction between Category I and II records,¹⁶¹ and established more guidelines for the reporting of delinquency dispositions and criminal convictions of minors to school systems by the courts and for the handling of such records in school systems and correctional and youth facilities.¹⁶²

In a more benign fashion, the General Assembly amended various sections of the Code to reflect the terminology of the Individual with Disabilities Education Act in various state statutes,¹⁶³ provided that preschoolers with disabilities may be

154. Act of Apr. 20, 1994, ch. 844, 1994 Va. Acts 1335 (codified at VA. CODE ANN. § 4.1-309 (Cum. Supp. 1994)).

155. Acts of Apr. 4, 1994, chs. 265, 285, 1994 Va. Acts 365, 392 (codified at VA. CODE ANN. §§ 18.2-60, 22.1-280.1 (Cum. Supp. 1994)).

156. Act of Apr. 5, 1994, ch. 326, 1994 Va. Acts 457 (codified at VA. CODE ANN. § 18.2-128 (Cum. Supp. 1994)).

157. Act of Apr. 11, 1994, ch. 762, 1994 Va. Acts 1152 (codified at VA. CODE ANN. § 22.1-209.1:2 (Cum. Supp. 1994)). See REPORT OF THE DEPARTMENT OF EDUCATION ON A STUDY OF ALTERNATIVE EDUCATION IN VIRGINIA, H. DOC. NO. 32 (1994).

158. VA. CODE ANN. § 22.1-277.2 (Cum. Supp. 1994).

159. Acts of Apr. 4, 1994, chs. 265, 285, 1994 Va. Acts 365, 392 (codified at VA. CODE ANN. § 22.1-280.1 (Cum. Supp. 1994)).

160. Act of Apr. 10, 1994, ch. 721, 1994 Va. Acts 1046 (codified at VA. CODE ANN. § 22.1-280.2 (Cum. Supp. 1994)).

161. Acts of Apr. 11 & 20, 1994, chs. 808, 835, 913, 1994 Va. Acts 1253, 1304, 1514 (codified at VA. CODE ANN. § 22.1-289 (Cum. Supp. 1994)).

162. Acts of Apr. 11 & 20, 1994, chs. 808, 835, 913, 1992 Va. Acts 1253, 1304, 1514 (codified at VA. CODE ANN. §§ 16.1-274.1, -305.1, -309, 22.1-288.2, -289 (Cum. Supp. 1994)).

163. Acts of Apr. 6 & 20, 1994, chs. 376, 854, 865, 1994 Va. Acts 544, 1353, 1418

provided education in private nonsectarian child-care programs licensed in accordance with state law,¹⁶⁴ revised the Standards of Quality,¹⁶⁵ and delayed the effective date for Programs for Persons At-Risk (PPAR) until July 1, 1996, and prohibited placements and referrals by schools, state agencies, and courts until such date.¹⁶⁶

VI. PARENTAGE AND ADOPTION

The General Assembly clarified the law relative to parent-child relationships by noting that a child born more than ten months after the death of a parent will not be recognized as such parent's child for a number of legal relationships,¹⁶⁷ and elaborated on access to identifying information by an adoptee's biological parents and adult biological siblings, as well as adoptive parents and adult adoptees.¹⁶⁸

Circuit court cases decided that where a couple took custody of a child with the intent to adopt her but no adoption ever took place, the husband had no legal obligation to support the child upon divorce,¹⁶⁹ and that a child's blood relatives may be granted visitation rights after the child has been adopted.¹⁷⁰

VII. MISCELLANEOUS

The General Assembly amended the indecent exposure statute to specifically exempt mothers breast feeding their chil-

(codified at VA. CODE ANN. §§ 2.1-757, 16.1-278.20, 22.1-7, -101.1, -209.2, -213-216, -218.1, -220-221, -254.1, 32.1-69.1 (Cum. Supp. 1994)).

164. Acts of Apr. 6 & 20, 1994, chs. 376, 854, 1994 Va. Acts 544, 1353 (codified at VA. CODE ANN. §§ 22.1-216, -220 (Cum. Supp. 1994)).

165. Acts of Apr. 10 & 11, 1994, chs. 618, 790, 1994 Va. Acts 887, 1214 (codified at VA. CODE ANN. §§ 22.1-253.13:1, -253.13:4 (Cum. Supp. 1994)).

166. Acts of Apr. 20, 1994, chs. 760, 761, 1994 Va. Acts 1151, 1152 (codified at VA. CODE ANN. § 22.1-279.2 (Cum. Supp. 1994)).

167. Act of Apr. 20, 1994, ch. 919, 1994 Va. Acts 1529 (codified at VA. CODE ANN. §§ 20-164, 32.1-257, 64.1-5.1, -8.1 (Cum. Supp. 1994)).

168. Acts of Apr. 20, 1994, chs. 856, 942, 1994 Va. Acts 1367, 1568 (codified at VA. CODE ANN. §§ 63.1-236 -236.01 (Cum. Supp. 1994)).

169. *Schalton v. Schalton*, 31 Va. Cir. 47 (Fairfax County 1993).

170. *In re Adoption of K.B.M.*, 30 Va. Cir. 344 (Radford City 1993).

dren,¹⁷¹ amended the statute governing immunizations to require immunization for Hepatitis B by age one,¹⁷² provided that family assessment teams and planning teams established under the Comprehensive Services Act are exempt from the Freedom of Information Act,¹⁷³ and provided for a reduction in Aid to Families with Dependent Children benefits if children do not receive their required immunizations.¹⁷⁴

A circuit court decision reaffirmed the long-standing principle that a minor over the age of fourteen is presumed to be capable of contributory negligence.¹⁷⁵ Additionally, two circuit judges ruled that there is no cause of action in Virginia for "wrongful life."¹⁷⁶

VIII. CONCLUSION

The past year was marked by disappointment for many child and family advocates with the postponement of, and uncertain future for, the family court. It also continued the trend of enacting ever more restrictive laws treating delinquency, and disruptive acts in school, more severely without any significant advances in the provision of resources for either delinquency prevention or rehabilitative services. It does not appear to be a trend that shows any signs of abating in the near future.

171. Act of Apr. 6, 1994, ch. 398, 1994 Va. Acts 571 (codified at VA. CODE ANN. § 18.2-387 (Cum. Supp. 1994)).

172. Act of Mar. 9, 1994, ch. 62, 1994 Va. Acts 136 (codified at VA. CODE ANN. § 32.1-46 (Cum. Supp. 1994)).

173. Act of Apr. 9, 1994, ch. 507, 1994 Va. Acts 717 (codified at VA. CODE ANN. § 2.1-345 (Cum. Supp. 1994)).

174. Act of Apr. 1, 1994, ch. 167, 1994 Va. Acts 263, 279 (codified at VA. CODE ANN. §§ 63.1-105, -105.2 (Cum. Supp. 1994)).

175. *Sullivan v. Cleek*, 26 Va. Cir. 240 (Spotsylvania County 1992).

176. *Barnes v. Head*, 30 Va. Cir. 218 (Fairfax County 1993); *Glascocock v. Laserna*, 30 Va. Cir. 367 (Spotsylvania County 1993).

