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Robert E. Shepherd Jr.
University of Richmond

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LEGAL ISSUES INVOLVING CHILDREN

Robert E. Shepherd, Jr. *

I. INTRODUCTION

The Virginia General Assembly once again acted in a very restrained fashion in addressing juvenile justice issues in the lengthening wake after the extensive statutory changes in 1994 and 1996. The newly enacted juvenile competency statute is an important innovation contained in the new article 18 of title 16.1 of the Virginia Code,[1] and a study by the Virginia Bar Association on the applicability of the insanity defense in juvenile delinquency proceedings will further address the implications of mental health problems for children in trouble.[2] One major issue in the delinquency area that arose during the past year involved the necessity of notifying both parents, if their identities or whereabouts are known, that their child is before the juvenile court, especially where the petition involves delinquency or transfer to the criminal court.[3] The Virginia Court of Appeals and Supreme Court of Virginia concluded that notice to both parents was a necessary prerequisite for the jurisdiction of the court in transfer and certification matters, and presumably in other proceedings as well.[4] The General Assembly limited the long term effects of these decisions by amending the Virginia Code to require only notice to "at least one parent" as of July 1, 1999.[5]

The General Assembly acted to ameliorate slightly the harshness of requiring the automatic expulsion of students from public schools pursuant to the "zero tolerance" laws for the possession of weapons or drugs.[6] This was accomplished by authorizing local School Boards

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

1. VA. CODE ANN. §§ 16.1-356 to -361 (Repl. Vol. 1999).
2. *See* H.J. Res. 680, Va. Gen. Assembly (Reg. Sess. 1999).
3. *See* Baker v. Commonwealth, 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam).
4. *See id., aff'g* 28 Va. App. 306, 504 S.E.2d 394 (Ct. App. 1998).
5. VA. CODE ANN. § 16.1-263 (Repl. Vol. 1999).
6. *See id.* §§ 22.1-277.01 to -277.01:1 (Cum. Supp. 1999).

to allow the division superintendent or a designee to conduct a preliminary review of an individual case to determine if such an extreme sanction is appropriate.[7] Recent cases also addressed the scope of searches in school settings,[8] and the General Assembly directed the Virginia Board of Education to develop guidelines for conducting strip searches in the schools.[9] The United States Supreme Court clarified when a school division might be liable for money damages pursuant to Title IX[10] for student-on-student sexual harassment.[11]

II. JUVENILE DELINQUENCY AND NONCRIMINAL MISBEHAVIOR

The Commission on Youth's study of truancy and runaway behavior by juveniles led to several amendments to the law by the 1999 General Assembly.[12] Section 16.1-228, the definitions section of the juvenile code, was amended to include a new definition of a "child in need of supervision."[13] This provision now provides that a child who deserts or runs away on more than one occasion may be found to be such a child, rather than conditioning the finding on a conclusion that the juvenile acted "habitually."[14] Another statutory change produced by the Commission on Youth study amends the intake section of the juvenile code to allow intake officers to proceed informally in cases involving children in need of supervision ("CHINSup") if there has not been a prior adjudication or informal adjustment, or if the juvenile is not the subject of a complaint filed by a school division pursuant to section 22.1-258 of the Virginia Code.[15]

The intake section of the juvenile code was also amended in 1999 to expand the offenses for which an intake officer, upon the filing of a petition, and the clerk of the court, upon adjudication of delin-

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7. *See id.* §§ 22.1-277.01(A), -277.01:1(A) (Cum. Supp. 1999).
8. *See* DeRoches v. Caprio, 156 F.3d 571 (4th Cir. 1998); Smith v. School Bd., 46 Va. Cir. 238 (Norfolk City 1998).
9. *See* VA. CODE ANN. § 22.1-277.01:2 (Cum. Supp. 1999).
10. 20 U.S.C. § 1681(a) (1994).
11. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999).
12. *See* REPORT OF THE VIRGINIA COMMISSION ON YOUTH STUDY OF TRUANTS AND RUNAWAYS, H. Doc. No. 57 (1999).
13. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1999).
14. *See id.*
15. *See id.* §§ 16.1-260 (Repl. Vol. 1999), 22.1-258 (Cum. Supp. 1999).

quency or a conviction, must notify the superintendent of the school division in which the child is enrolled or was enrolled at the time of the offense.[16] The offenses added are robbery and violations dealing with illegal weapons, including machine guns, sawed-off shotguns and rifles.[17] The same bill was amended, at the request of the Governor, during the "Veto Session" to include a provision requiring that only one parent be notified when a civil or criminal petition is filed concerning a juvenile.[18] A bill to the same effect introduced during the regular session was killed in the Senate Courts of Justice Committee.[19] Although the amendment was intended to address problems of notice in delinquency or transfer and certification cases, the section in question applies to notice in all cases arising in juvenile court and may well be unconstitutional if it is applied to child custody, abuse or neglect, termination of parental rights, or similar cases where due process requires notice to parents in matters where family autonomy issues exist.[20]

A 1999 enactment requires the Virginia Board of Education to develop, in consultation with the Office of the Attorney General, guidelines for the conduct of strip searches in public schools and mandates that a report on the development of the guidelines be made to the General Assembly.[21]

Legislation enacted in 1998, effective July 1, 1999, requires drug screening and assessments as a part of social history investigations of certain offenders.[22] The legislation was controversial because of the fiscal and work impact it would have on juvenile court service units. A 1999 amendment makes such an assessment contingent on whether the screening identifies the juvenile offender as having a substance abuse problem.[23] It further provides that screenings and

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16. *See id.* § 16.1-260(G) (Repl. Vol. 1999).
17. *See id.* § 16.1-260(G)(1) (Repl. Vol. 1999).
18. *See id.* § 16.1-263(A) (Repl. Vol. 1999). This will change the result in *Baker v. Commonwealth*, 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam) for cases arising on or after July 1, 1999.
19. *See* H.B. 1931, Va. Gen. Assembly (Reg. Sess. 1999).
20. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Armstrong v. Manzo, 380 U.S. 545 (1965).
21. *See* VA. CODE ANN. § 22.1-277.01:2 (Cum. Supp. 1999).
22. *See id.* § 16.1-273 (Cum. Supp. 1998).
23. *See id.* § 16.1-273(A) (Repl. Vol. 1999).

assessments may be performed by a person working under the direction of a certified substance abuse counselor rather than by the counselor.[24] The Secretary of Public Safety is responsible for convening an Interagency Offender Drug Assessment and Screening Committee to oversee the implementation of the legislation and the Chief Justice of the Supreme Court of Virginia may select pilot sites for the implementation of its provisions.[25] An amendment to section 16.1-277.1 tolls the time limitations provided for certain hearings involving a juvenile during "any period in which (i) the whereabouts of the child are unknown, (ii) the child has escaped from custody, or (iii) the child has failed to appear pursuant to a court order."[26]

Another 1999 amendment allows the juvenile court to require a juvenile found delinquent based on certain crimes to participate in a gang-activity prevention program, funded under the Virginia Juvenile Community Crime Control Act.[27] The amendment requires that transfer reports and social history reports include an assessment of affiliation with a youth gang.[28] Similar legislation requires the court to have a juvenile found delinquent based on certain crimes make at least partial restitution or reparation for any property damage or loss caused by the offense or for actual medical expenses incurred by the victim as a result of the offense for which the juvenile was found to be delinquent.[29] It also requires the juvenile to participate in a public service project under such conditions as the court prescribes.[30] The crimes covered are shooting, stabbing, and the like, with intent to maim or kill; malicious bodily injury to law enforcement officers; malicious bodily injury by means of a caustic substance; shooting while committing or attempting to commit a felony; bodily injuries caused by prisoners, probationers, or parolees; unlawful hazing; assault and battery; assault and battery against law enforcement officers; assault and battery against household members; entering property of another for the purpose of damaging it; injuries to churches or cemeteries;

24. *See id.*
25. *See id.*
26. *Id.* § 16.1-277.1(D) (Repl. Vol. 1999).
27. *See id.* §§ 16.1-309.2 to -309.10 (Repl. Vol. 1999).
28. *See id.* §§ 16.1-269.2, -273, -278.8 (Repl. Vol. 1999).
29. *See id.* § 16.1-278(A), (B) (Repl. Vol. 1999).
30. *See id.*

trespass on church or school property; injuring any property or monument; damaging public buildings; breaking into any part of any vehicle, aircraft, or boat; and entering or setting in motion any vehicle, aircraft or boat.[31]

The legislature continues to widen the breach in the traditional wall of confidentiality surrounding proceedings in juvenile court or protecting the records of the court. Legislation adopted in 1999 provides that whenever a juvenile fourteen years of age or older is charged with a delinquent act that, if committed by an adult, would be a felony involving a weapon, a violation of "mob offenses"[32] or of "drug offenses,"[33] the judge may, where the public interest requires, make the juvenile's name and address available to the public.[34] Prior law covered, in such circumstances, only an "act of violence" as defined in Virginia Code section 19.2-297.1(A).[35]

An amendment to section 16.1-330.1 allows juveniles who are being supervised by the Serious or Habitual Offender Comprehensive Action Program ("SHOCAP") as of their eighteenth birthday to continue to be supervised until age twenty-one.[36]

An amendment to the Virginia Code makes it a Class 5 felony for a probationer or parolee to inflict bodily injury on a juvenile probation or parole officer, as well as on an adult officer.[37] Another amendment provides for a mandatory period of incarceration of two days when the object of a battery is a teacher, principal, or guidance counselor and six months of mandatory incarceration if a gun or other weapon prohibited on school property is used.[38] An additional enactment provides that all of the offenses in subdivisions 1 through 9 of Virginia Code section 53.1-203 apply to secure juvenile correc-

31. *See id.*
32. *See id.* §§ 18.2-38 to -46 (Repl. Vol. 1996 & Cum. Supp. 1999).
33. *See id.* §§ 18.2-247 to -265 (Repl. Vol. 1996 & Cum. Supp. 1999).
34. *See id.* § 16.1-309.1 (Repl. Vol. 1999).
35. *See id.* (Cum. Supp. 1998).
36. *See id.* § 16.1-330.1(A) (Repl. Vol. 1999).
37. *See id.* § 18.2-55(B) (Cum. Supp. 1999).
38. *See id.* § 18.2-57(D) (Cum. Supp. 1999).

tional institutions or detention homes, as well as adult facilities, and are punishable as Class 1 misdemeanors.[39]

A 1999 amendment provides that a court shall suspend all or any portion of the prescribed civil penalty where it finds that a defendant retail establishment has trained its employees concerning the law on the prohibited purchase or possession of tobacco products by minors or sale of tobacco products to minors.[40] The bill also authorizes the court to impose a civil penalty up to a maximum of $1,000, in lieu of the lesser civil penalties, for a violation where it finds that a defendant retail establishment has failed to train its employees.[41] The bill also authorizes the court to prescribe community service instead of imposing the civil penalty against a minor.[42]

The most significant legislative action in the area of juvenile delinquency established new juvenile court procedures for determining whether a juvenile is competent to stand trial, for the restoration of competency, and for dispositions for unrestorably incompetent juveniles.[43] A juvenile's competency is presumed in every proceeding, although the Commonwealth's Attorney, defense counsel, or judge can raise the issue of competency.[44] The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services is to approve the training for and determine the qualifications of professionals who will perform the evaluations and provide restoration services.[45] Evaluations are to be performed on an outpatient basis whenever possible.[46] If the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency cannot be made based solely on "(i) the juvenile's age or developmental factors, (ii) the juvenile's

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39. *See id.* § 18.2-477.2 (Cum. Supp. 1999) (including the following offenses: escape; damaging property to escape; possession of knife, chemical compound, drugs or firearms; and burning property).

40. *See id.* § 18.2-371.2(D) (Cum. Supp. 1999).

41. *See id.*

42. *See id.*

43. *See id.* §§ 16.1-356 to -361 (Repl. Vol. 1999). This legislation came out of a Commission on Youth Task Force report. *See* REPORT OF THE VIRGINIA COMMISSION ON YOUTH STUDY OF JUVENILE COMPETENCY ISSUES IN LEGAL PROCEEDINGS, H. Doc. No. 42 (1999).

44. *See* VA. CODE ANN. § 16.1-356(A) (Repl. Vol. 1999).

45. *See id.*

46. *See id.* § 16.1-356(C) (Repl. Vol. 1999).

claim to be unable to remember the time period surrounding the alleged offense, or (iii) the fact that the juvenile is under the influence of medication."[47] Incompetent juveniles must receive restoration services.[48] If the juvenile is likely to remain incompetent for the foreseeable future, the court shall order that the juvenile be committed, be certified, become the subject of a child in need of services petition, or be released.[49]

The most highly publicized and controversial court decision of the past year in the delinquency area was *Baker v. Commonwealth*,[50] wherein the Virginia Court of Appeals concluded that the failure of the juvenile court to serve notice on the juvenile defendant's biological father prior to a transfer hearing deprived the circuit court of jurisdiction to try Baker as an adult.[51] The Supreme Court of Virginia affirmed the decision in a per curiam opinion and refused to grant the Attorney General's request that the ruling be given only prospective effect.[52] The court of appeals noted that section 16.1-263 of the Virginia Code required service on the "parents," and the absence of service, or even an attempt of service, on the biological father deprived the juvenile court and, ultimately, the circuit court of jurisdiction over Baker.[53] There was not even a certification that the identity of the father or his whereabouts were unknown.[54] The impact of the decision on other convictions is open to speculation, but, in two cases involving juveniles on death row for capital murder convictions and death sentences, the executions were stayed because of questions relating to notice to parents.[55] In *Weese v. Commonwealth*,[56] the court of appeals ruled that where the juvenile's parents

47. *Id.* § 16.1-356(F) (Repl. Vol. 1999).

48. *See id.* § 16.1-357(A) (Repl. Vol. 1999).

49. *See id.* § 16.1-358 (Repl. Vol. 1999). The legislation is modeled after the adult competency provisions found in title 19.2 of the Virginia Code.

50. 28 Va. App. 306, 504 S.E.2d 394 (Ct. App. 1998), *aff'd* 258 Va. 1, 516 S.E.2d 219 (1999).

51. *See* 28 Va. App. at 313, 504 S.E.2d at 398.

52. *See Baker*, 258 Va. at 1, 516 S.E.2d at 219 The supreme court denied a rehearing to the Commonwealth by an order on July 30, 1999.

53. *See* 28 Va. App. at 313, 504 S.E.2d at 398; *see also* VA. CODE ANN. § 16.1-263 (Cum. Supp. 1998).

54. *See* 28 Va. App. at 313, 504 S.E.2d at 398.

55. *See* Thomas v. Commonwealth, Nos. 991284, 991291 (Va. June 16-17, 1999) (executions stayed just hours before the scheduled execution); Roaeh v. Commonwealth, Nos. 991816, 991817 (Va. Aug. 6, 1999) (execution stayed that was scheduled for Aug. 25, 1999).

56. 30 Va. App. 484, 517 S.E.2d 740 (Ct. App. 1999).

had notice of the juvenile court proceedings, there was no need to give new notices of the de novo hearing on appeal in the circuit court.[57]

The court of appeals affirmed a trial court's suppression of a youth's confession in *Commonwealth v. Benjamin*,[58] where the videotape of the detective reading the juvenile defendant his *Miranda* rights demonstrated that the advice was "so jumbled and unintelligible" that the judge inquired whether the officer was "speaking in tongues."[59] The evidence supported the judge's suppression of the ensuing confession on the ground that it was not voluntary because the challenged reading was the functional equivalent of a total failure to read the defendant his *Miranda* rights.[60]

Three other confession cases arose out of the City of Norfolk. In *Commonwealth v. Williams*,[61] the trial judge suppressed a confession because the juvenile had diminished capabilities, was inexperienced with the criminal justice system, and was interrogated after his preliminary hearing at his own request but in the absence of his lawyer who had specifically requested that his client not be questioned unless he was present.[62] The appellate court reversed this decision, concluding that, in light of the totality of the circumstances, there was no deprivation of the youth's Fifth Amendment rights.[63] In *Commonwealth v. Ruffin*,[64] the circuit court judge ruled that a fourteen-year-old's confession was admissible where he was advised of his rights and waived them in his mother's presence and the totality of the circumstances showed that his statement was voluntary.[65] Likewise, in *Commonwealth v. Bazemore*,[66] the circuit court admitted a confession obtained after a juvenile suspect was

57. *See id.* at 491, 517 S.E.2d at 744.
58. 28 Va. App. 548, 507 S.E.2d 113 (Ct. App. 1998).
59. *Id.* at 553, 507 S.E.2d at 19.
60. *See id.*
61. No. 2204-98-1, 1999 Va. App. LEXIS 215, at *1 (Va. Ct. App. Apr. 19, 1999) (unreported decision).
62. *See id.* at *21.
63. *See id.* at *21-22.
64. 45 Va. Cir. 1 (Norfolk City 1997).
65. *See id.* at 7.
66. 46 Va. Cir. 178 (Norfolk City 1998).

advised of his rights in the presence of his parents, although they left the interrogation room before the questioning began.[67] The discussion of the youth's learning disability as a factor in the intelligence of the waiver of rights and in the voluntariness of the confession is notably superficial and troubling, as it conveys the impression that such a disability would only have an impact on reading comprehension.[68]

The only search and seizure cases this past year involved searches in school settings. In *DesRoches v. Caprio*,[69] the Fourth Circuit Court of Appeals reversed the district court's decision granting injunctive relief against the Norfolk city schools[70] and ruled that school officials did not act unreasonably in repeatedly requesting to search the backpack of a high school student for a set of missing tennis shoes after the other eighteen class members had submitted to the search.[71] The appellate court found the student's continued refusal to consent to the search after all the other students had acquiesced provided the individualized suspicion justifying the search.[72] The case is unusual in that the item searched for was an article of clothing and not weapons or drugs.[73] The other search case also arose in Norfolk and involved a general challenge to the school search practices in that city's schools. In *Smith v. Norfolk City School Board*,[74] the court upheld the random search policy and procedures utilized in the school system in light of the methods used for the searches and the "compelling governmental interest" involved.[75]

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67. *See id.* at 188.

68. *See id.* at 186. The opinion notes that the almost eighteen-year-old youth had completed the ninth grade, but was several grades behind in school. *See id. See generally* Robert E. Shepherd, Jr. & Barbara A. Zaremba, *Juvenile Justice: When a Disabled Juvenile Confesses to a Crime: Should It Be Admissible?*, CRIM. JUST., Winter 1995, at 31.

69. 156 F.3d 571 (4th Cir. 1998).

70. *See* DesRoches v. Caprio, 974 F. Supp. 542, 551 (E.D. Va. 1997), *rev'd* 156 F.3d 571 (4th Cir. 1998).

71. *See DesRoches*, 156 F.3d at 578.

72. *See id.* at 576-77.

73. *See id.* at 572.

74. 46 Va. Cir. 238 (Norfolk City 1998). One of the plaintiffs was James Allen DesRoches, III, the plaintiff in the federal litigation described above.

75. *Id.* at 260-61.

The Supreme Court of Virginia affirmed the decision of the court of appeals in *Commonwealth v. Price*[76] that applied the state "speedy trial" statute to compel the release of a juvenile who was held continuously in custody for more than five months.[77] The Circuit Court of Fauquier County concluded in *Commonwealth v. Juvenile*[78] that a juvenile charged with aggravated malicious wounding and proceeded against in a preliminary hearing pursuant to section 16.1-269.1(B) may enter a plea of *autrefois convict* to bar trial in the circuit court where the juvenile court judge concluded that there was no probable cause to sustain the petition.[79] The judge found there was only probable cause to support the included misdemeanor of assault and battery and retained jurisdiction with respect to that charge and accepted a guilty plea from the defendant.[80] Thus, the Commonwealth was barred from proceeding by direct indictment in the circuit court under section 16.1-269.1(D).[81] In *Brown v. Commonwealth*,[82] the Virginia Court of Appeals determined that a juvenile may be transferred for trial as an adult pursuant to section 16.1-269.1(A) of the Virginia Code, even though there were still appropriate services available for the youth in the juvenile system.[83] The availability of services is only one of several criteria to be considered by the judge in exercising discretion.[84]

In *Peeples v. Commonwealth*,[85] the court of appeals sitting en banc concluded that the trial court did not err in refusing to permit expert testimony regarding Peeples's mental state when he

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76. 256 Va. 373, 506 S.E.2d 317 (1998) (per curiam), *aff'g* 25 Va. App. 655, 492 S.E.2d 447 (Ct. App. 1997).

77. *See* 256 Va. at 373, 506 S.E.2d at 317; *see also* VA. CODE ANN. §19.2-243 (Cum. Supp. 1999).

78. No. CR99-173 (Fauquier County Mar. 26, 1999). The record for this case is sealed because it involves a juvenile.

79. *See id.*; *see also* VA. CODE ANN. § 16.1-269.1(B) (Repl. Vol. 1999).

80. *See Juvenile*, No. CR99-173.

81. *See id.*; *see also* VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1999).

82. No. 2858-97-2, 1999 Va. App. LEXIS 182, at *1 (Va. Ct. App. Mar. 30, 1999) (unreported decision).

83. *See id.* at *7; *see also* VA. CODE ANN. § 16.1-269.1(A) (Repl. Vol. 1999).

84. *See* VA. CODE ANN. § 16.1-269(A) (Repl. Vol. 1999).

85. No. 1261-97-2, 1999 Va. App. LEXIS 550, at *1 (Va. Ct. App. Oct. 5, 1999), *rev'g* 28 Va. App. 360, 504 S.E.2d 870 (Ct. App. 1998).

committed an act of malicious wounding.[86] Although the evidence related to defendant's mental retardation and difficulty in "interpreting social situations" and thus his self-defense argument, it relied too heavily on the inexact discipline of psychiatry to diminish his criminal responsibility.[87]

Although not a juvenile case, the Virginia Court of Appeals decision in *Utz v. Commonwealth*[88] is likewise significant. The court determined that the trial judge did not err in admitting expert testimony about street-gang culture and its characteristics as part of the Commonwealth's case,[89] which may be relevant to both the prosecution and defense in juvenile cases. In *Commonwealth v. Williams*,[90] the court declined to admit testimony of prior assaults on the victim by a juvenile being tried as an adult because Williams was acquitted of one prior charge and the other charge's prejudicial effect outweighed the probative value.[91] In a different case, a fifteen-year old being tried as an adult for several offenses presented sufficient evidence to warrant an instruction on whether he was an accessory after the fact to these offenses committed by his older companions.[92]

In *Richardson v. Commonwealth*,[93] the court of appeals determined that the circuit court should have allowed the juvenile's appeal from the juvenile court's decision declining to rescind the earlier commitment to the Department of Juvenile Justice.[94] Although Richardson did not appeal the original commitment order within the required period, his appeal from the subsequent action within the time for appeal was timely and should have been considered on its merits.[95] The court of appeals concluded in *Green*

86. *See id.* at *3.
87. *See id.* at *9.
88. 28 Va. App. 411, 505 S.E.2d 380 (Ct. App. 1998).
89. *See id.* at 427, 505 S.E.2d at 388.
90. 46 Va. Cir. 263 (Norfolk City 1998).
91. *See id.* at 265.
92. *See* Fennell v. Commonwealth, No. 2217-97-1, 1999 Va. App. LEXIS 162, at *11 (Va. Ct. App. Mar. 16, 1999) (unreported decision).
93. 28 Va. App. 389, 504 S.E.2d 884 (Ct. App. 1998).
94. *See id.* at 393, 504 S.E.2d at 886.
95. *See id.*

v. Commonwealth[96] that where the juvenile defendant was convicted in circuit court of carjacking and use of a firearm in commission of a carjacking, the trial court did not err in imposing the mandatory minimum three-year sentence for the firearm offense, as that sentence took precedence over the juvenile dispositional scheme incorporated in section 16.1-272 of the Virginia Code.[97] In *Jackson v. Commonwealth*,[98] however, the court of appeals decided that a juvenile convicted in circuit court of statutory burglary and petit larceny, not "serious" offenses under section 16.1-285.1, could nonetheless be sentenced under sections 16.1-272(A)(2) and 16.1-285.1.[99]

The court of appeals resolved a growing controversy in *Chatman v. Commonwealth*,[100] when it determined that the insanity defense applied in juvenile court proceedings, or in appeals of delinquency proceedings in the circuit court, to diminish the youth's responsibility for the criminal offense.[101] The court found "that the right to assert an insanity defense is an essential [element] of 'due process and fair treatment' which is required at a juvenile delinquency adjudication."[102] The study pursuant to House Joint Resolution 680 enacted at the 1999 General Assembly Session will presumably address the procedures to follow such a plea.[103]

In *Niles v. Commonwealth*,[104] the appellate court ruled that it could not consider a claim that the trial court violated appellant's rights by not considering "section 16.1-283"[105] when applying section 16.1-272 because no transcript or statement of facts were filed to

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96. 28 Va. App. 567, 507 S.E.2d 627 (Ct. App. 1998).

97. *See* Va. App. at 570, 507 S.E.2d at 629; *see also* VA. CODE ANN. § 16.1-272 (Repl. Vol. 1999).

98. 29 Va. App. 418, 512 S.E.2d 838 (Ct. App. 1999).

99. *See id.* at 424, 512 S.E.2d at 841; *see also* VA. CODE ANN. § 16.1-285.1 (Repl. Vol. 1999).

100. No. 980-98-2, 1999 Va. App. LEXIS 528, at *1 (Va. Ct. App. Sept. 14, 1999) (unreported decision).

101. *See id.* at *11-12.

102. *Id.*

103. *See* H.J. Res. 680, Va. Gen. Assembly (Reg. Sess. 1999).

104. No. 2428-97-4, 1998 Va. App. LEXIS 553, at *1 (Va. Ct. App. Oct. 27, 1998) (unreported decision).

105. The opinion apparently meant VA. CODE ANN. § 16.1-285.1 (Repl. Vol. 1999).

permit the court to decide the issue.[106] In *Hurley v. Commonwealth*,[107] the court ruled that an adult could be convicted of distributing cocaine to a juvenile based in part on the proof derived from the driving record of the youth that showed his birth date.[108] In an old opinion recently published, a circuit court ruled that an adult acquitted of statutory burglary could be convicted of contributing to the delinquency of two children who accompanied him at the break-in.[109]

Two Fourth Circuit Court of Appeals cases denied habeas corpus relief and certificates of appealability to two Virginia inmates convicted of murders committed while they were juveniles and sentenced to death.[110] In *Thomas v. Taylor*,[111] the court ruled that certain of the contentions were procedurally defaulted and that the claim of the ineffective assistance of counsel was insufficient to entitle him to relief.[112] In *Roach v. Angelone*,[113] the court found no constitutional defect in the Supreme Court of Virginia's proportionality review of the death sentence,[114] rejected the claim that Virginia's juvenile transfer procedure was unconstitutional because it did not require a finding that the juvenile possessed the requisite maturity and moral responsibility to be tried as an adult,[115] and found no other constitutional deficiencies in the conviction.[116]

In *Schleifer v. City of Charlottesville*,[117] the Fourth Circuit Court of Appeals affirmed the district court's denial of an injunction against the enforcement of the Charlottesville curfew ordinance, and concluded that the provision was constitutional.[118]

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106. *See Niles*, at *1; *see also* VA. CODE ANN. § 16.1-272 (Repl. Vol. 1999).
107. No. 2794-97-3, 1999 Va. App. LEXIS 146, at *1 (Va. Ct. App. Mar. 2, 1999) (unreported decision).
108. *See id.*
109. *See* Commonwealth v. Etheridge, 46 Va. Cir. 475 (Princess Anne County 1960).
110. *See* Roach v. Angelone, 176 F.3d 210 (4th Cir. 1999); Thomas v. Taylor, 170 F.3d 466 (4th Cir. 1999).
111. 170 F.3d 466 (4th Cir. 1999).
112. *See id.* at 475.
113. 176 F.3d 210 (4th Cir. 1999), *petition for cert. filed*, 68 U.S.C.W. 3153 (Aug. 30, 1999).
114. *See id.* at 217.
115. *See id.* at 224.
116. *See id.* at 226
117. 159 F.3d 843 (4th Cir. 1998), *aff'g* 963 F. Supp. 534 (W.D. Va. 1997).
118. *See id.* at 845-46.

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

Much of the legislative action at the 1999 General Assembly dealing with abuse and neglect issues focused on family abuse. The definitions in section 16.1-228 of the juvenile code were amended to redefine "family abuse" to mean "any act involving violence, force, or threat . . . which results in physical injury or places one in reasonable apprehension of serious bodily injury and which is committed by a person against such person's family or household member."[119] The same section was amended to revise the definition of "family or household member" to include "parents, stepparents, children, stepchildren, brothers, sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home."[120] This is the definition under current law for criminal jurisdiction of the juvenile court, but under other sections of the Virginia Code such persons must reside in the same home to be considered family or household members.[121] Prior law also precluded conviction under the family assault statute of a parent who assaults a child when the child did not reside with the parent.[122] The amended statute imposes enhanced punishment (Class 6 felony for a third offense) and requires the issuance of an emergency protective order whenever a warrant is issued.[123] Under certain circumstances, a warrantless arrest may be made for violations of the family assault statute.[124] Section 16.1-260 was also amended to require a juvenile and domestic relations district court intake officer to accept and file a petition when family abuse is alleged and a protective order is sought.[125] Legislation also amended the current provisions that require the issuance of an emergency protective order when a warrant is issued for assault and battery against a

119. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1999). The prior definition referred to "family abuse" as an "act of violence" that had the defined effects. *See id.* (Repl. Vol. 1996).

120. *Id.* (Repl. Vol. 1999); *see also id.* § 16.1-241 (Repl. Vol. 1999).

121. *See, e.g.*, VA. CODE ANN. §§ 2.1-780 (Repl. Vol. 1995), 18.2-60.2 (Repl. Vol. 1996).

122. *See id.* § 18.2-57.2(C) (Repl. Vol. 1996).

123. *See id.* (Cum. Supp. 1999).

124. *See id.* § 19.2-81.3(A) (Cum. Supp. 1999).

125. *See id.* § 16.1-260(F) (Repl. Vol. 1999).

family or household member to make the issuance of a protective order discretionary when the defendant is a minor.[126]

Amendments to several code sections accomplish the following: increase the penalty for first offense possession of child pornography from a Class 3 misdemeanor to a Class 1 misdemeanor;[127] punish the use of a communication system for accomplishment of certain sex crimes with children, as well as the production and possession of child pornography, each as a Class 5 felony;[128] and expand the crimes for which sex offender registration is required to include making and possessing child pornography.[129] Another amendment created a Class 1 misdemeanor to punish the person who, for commercial purposes, sends any electronic file or message containing sexually explicit material that is harmful to and may be examined by juveniles.[130] A further amendment provides that all medical fees involved in the gathering of evidence for criminal cases of child abuse, malicious wounding, assault and battery, and homicide will be paid by the Commonwealth out of the appropriation for criminal charges.[131]

A birth father's consent to an adoption is no longer necessary where the father was convicted of carnal knowledge of a child between thirteen and fifteen years of age and the child to be adopted was conceived as a result of the offense.[132] The birth father is also barred from having a legitimate interest in the custody and visitation of the child conceived.[133] Other legislation amended several code sections to provide that testimony of a child victim in a criminal or civil case may be taken by closed-circuit television if the witness was fourteen years of age or under at the time of trial, or if the child was fourteen years of age or under on the date of the

126. *See id.* §§ 16.1-253.4 (Repl. Vol. 1999), 18.2-57.2 (Cum. Supp. 1999), 19.2-81.3 (Cum. Supp. 1999).
127. *See id.* § 18.2-374.1:1(A) (Cum. Supp. 1999).
128. *See id.* §§ 18.2-374.2, -374.3(B) (Cum. Supp. 1999).
129. *See id.* § 19.2-298.1(A) (Cum. Supp. 1999).
130. *See id.* § 18.2-391(A)(1) (Cum. Supp. 1999).
131. *See id.* § 19.2-165.1 (Cum. Supp. 1999).
132. *See id.* §§ 16.1-241(A) (Repl. Vol. 1999), 63.1-204(C) (Cum. Supp. 1999).
133. *See id.* §§ 63.1-220.2, -220.3(C)(7), -225(B) (Cum. Supp. 1999).

alleged offense and is sixteen years of age or under at the time of trial.[134]

Persons who serve as court-appointed special advocates have been added to the list of those professionals who are mandated to report suspected cases of child abuse and neglect encountered in that capacity.[135] The penalty for a first offense of knowingly making a false report of child abuse has been increased from a Class 4 misdemeanor to a Class 1 misdemeanor, and for a second or subsequent offense from a Class 2 misdemeanor to a Class 6 felony.[136]

The major piece of legislation in the child protection area in 1999 was a further manifestation of the Court Improvement Program enhancing permanency planning for children in foster care as a result of voluntary entrustment or a parental petition for relief of custody.[137] Two new code sections separate the handling of petitions for approval of entrustment agreements and petitions for relief of care and custody, clarify the procedural and substantive requirements related to filing such petitions, and make uniform with other provisions the treatment of children who come into foster care through these proceedings.[138] The legislation also establishes several new procedural requirements. The agency to which a child is entrusted must file a petition no later than the last day of the entrustment period for approval of an agreement for fewer than ninety days, if the child does not go home within the entrustment period.[139] A foster care plan must be filed for a hearing pursuant to section 16.1-281 with any petition for approval of an entrustment agreement.[140] A guardian ad litem is appointed to represent the child and the matter is set for a hearing within forty-five days.[141] The new standard for the court's approval is that the entrustment

134. *See id.* §§ 16.1-252(D) (Repl. Vol. 1999), 18.2-67.9(A) (Cum. Supp. 1999), 63.1-248.13:1 (Cum. Supp. 1999).
135. *See id.* §§ 9-173.8(A)(5) (Cum. Supp. 1999), 63.1-248.3(A) (Cum. Supp. 1999).
136. *See id.* § 63.1-248.5:1.01(A) (Cum. Supp. 1999).
137. *See id.* §§ 16.1-277.01 to -277.2, -278.3, -282 to -282.1, -283 (Repl. Vol. 1999), 63.1-56, -204 (Cum. Supp. 1999).
138. *See id.* §§ 16.1-277.01 to -277.02 (Repl. Vol. 1999).
139. *See id.* § 16.1-277.01(A)(1) (Repl. Vol. 1999).
140. *See id.* § 16.1-277.01(A)(3) (Repl. Vol. 1999).
141. *See id.* § 16.1-277.01(B) (Repl. Vol. 1999).

agreement is in the best interests of the child.[142] Entry of an order approving a permanent entrustment agreement has the effect of terminating the parent's rights and renders the agreement irrevocable.[143] An Adoption Progress Report, outlining the agency's progress toward finalizing a child's adoption, is required in all parental rights termination cases.[144] The guardian ad litem appointment continues in juvenile court until a final order of adoption is entered.[145] Prior to the first hearing, a petition for relief of care and custody of a child must be referred to the local department of social services for investigation and provision of any appropriate services to prevent out-of-home placement.[146] Notice to a parent who is not a petitioner for permanent relief of care and custody of a child and termination of parental rights must be provided and termination of that parent's parental rights must be in accordance with section 16.1-283.[147] The petitioner must establish good cause for relief of care and custody of a child.[148] Several additional dispositional alternatives are available to the court in handling a petition for relief of care and custody.[149] If the court makes a finding, but does not dispose of the matter at the first hearing, a dispositional hearing must be held within seventy-five days of the initial hearing.[150] An appeal may be taken from a final order.[151]

The Virginia Court of Appeals ruled in *Fairfax County Department of Family Services v. D.N. and S.N.*[152] that the jurisdiction of a circuit court in hearing an appeal from a juvenile court's finding of abuse and neglect is derivative.[153] The circuit court can hear all relevant evidence under the jurisdictional predicate, and thus the court can consider other evidence of abuse and neglect other than

142. *See id.* § 16.1-277.01(D) (Repl. Vol. 1999).
143. *See id.*
144. *See id.* § 16.1-277.01(E) (Repl. Vol. 1999).
145. *See id.*
146. *See id.* § 16.1-277.02(A) (Repl. Vol. 1999).
147. *See id.*
148. *See id.* § 16.1-277.02(C) (Repl. Vol. 1999).
149. *See id.*
150. *See id.* § 16.1-277.02 (Repl. Vol. 1999).
151. *See id.*
152. 29 Va. App. 400, 512 S.E.2d 830 (Ct. App. 1999).
153. *See id.* at 405, 512 S.E.2d at 832.

that heard by the juvenile court in making its finding.[154] In an unpublished decision, the court upheld an adjudication of abuse and neglect resulting in the removal of children from their mother's home in spite of an administrative hearing officer's determination of the level of abuse, and over an objection that the action violated her legal rights as a disabled person.[155] In *Richmond Department of Social Services v. Carter*,[156] the court of appeals ruled that the Department of Social Services's ("DSS") standard of proof in proposing to change the goals in a foster care plan is "preponderance of the evidence" and not "clear and convincing" evidence, even where the changed goal would be adoption of the child.[157] A circuit court concluded that a court can approve a foster care plan for only six months at a time under the juvenile code regardless of what might be in the best interests of a child.[158]

Courts continue to struggle with administrative findings of abuse and neglect after investigations of complaints. In *Carter v. Gordon*,[159] the court of appeals concluded that the evidence supported the DSS's findings of sexual abuse in the investigation of complaints against an elementary school teacher.[160] Likewise, in *Eggleston v. Virginia Department of Social Services*,[161] the DSS's findings were upheld in spite of inconsistencies in the victim's statements.[162] The DSS was not required to accept the proffered results of a polygraph examination.[163] In *Perry v. Carter*,[164] the court of appeals upheld a trial court's action ordering the amendment of department records to "unfounded" because of an invalid notice of the right to appeal over the objection of the subject who desired a different basis for purging the records and who unsuccessfully

154. *See id.* at 405-06, 512 S.E.2d at 832.

155. Plotkin v. Fairfax County Dep't of Family Servs., No. 0085-98-4, 1998 Va. App. LEXIS 535, at *1 (Va. Ct. App. Oct. 13, 1998) (unreported decision).

156. 28 Va. App. 494, 507 S.E.2d 87 (Ct. App. 1998).

157. *See id.* at 498, 507 S.E.2d at 88.

158. *See In re* Hurdle, 47 Va. Cir. 409 (Richmond City 1998).

159. 28 Va. App. 133, 502 S.E.2d 697 (Ct. App. 1998).

160. *See id.* at 148, 502 S.E.2d at 704.

161. No. 670-98-3, 1999 Va. App. LEXIS 166, at *1 (Va. Ct. App. Mar. 16, 1999) (unreported decision).

162. *See id.* at *8.

163. *See id.* at *9.

164. No. 1366-98-1, 1999 Va. App. LEXIS 73, at *1 (Va. Ct. App. Feb. 2, 1999) (unreported decision).

sought attorneys fees.[165] In another case, the Supreme Court of Virginia held that a circuit court had ruled correctly in examining a local department's files *in camera* and ordering release of the records to the subject of a complaint after he alleged bad faith and malicious intent in the making of the complaint.[166]

Termination of parental rights cases continue to proliferate on the Virginia Court of Appeals docket although there are fewer published cases. In *Padilla v. Norfolk Division of Social Services*,[167] the court upheld the termination of a mother's parental rights where the evidence showed her child was severely developmentally delayed when placed in foster care at seven months of age and that the child had progressed significantly over the intervening six years with the foster family (although still with problems).[168] Other evidence illustrated that the mother had persistent psychological problems, and that a former court-appointed special advocate gave a recommendation in favor of termination.[169] Likewise, in *Elkins v. Department of Social Services for the County of Campbell*,[170] the court upheld a termination of parental rights where the mother suffered from a severe emotional disorder that impaired her ability to care properly for her children.[171] The resulting neglect presented a serious threat to the children that was unlikely to be corrected.[172] In another case, the court concluded that the trial court had adequately explored the possibility of placement with relatives and had sufficiently assessed whether the children were of an age of discretion before concluding they were not.[173]

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165. *See id.* at *3, *9.

166. *See* Gloucester County Dep't of Soc. Servs. v. Kennedy, 256 Va. 400, 404, 507 S.E.2d 81, 83 (1998).

167. No. 1388-98-1, 1999 Va. App. LEXIS 48, at *1 (Va. Ct. App. Jan. 26, 1999) (per curiam) (unreported decision).

168. *See id.* at *7 (A therapist testified that the removal from the foster family would be detrimental to him.).

169. *See id.*

170. No. 1878-98-3, 1999 Va. App. LEXIS 47, at *1 (Va. Ct. App. Jan. 26, 1999) (per curiam) (unreported decision).

171. *See id.* at *6.

172. *See id.* at *5.

173. *See* Fuller v. Virginia Beach Dep't of Soc. Servs., No. 2610-97-1, 1998 Va. App. LEXIS 391 (Va. Ct. App. July 7, 1998) (unreported decision).

The Virginia Court of Appeals affirmed the trial court's termination of rights in *Kenny v. Richmond Department of Social Services*,[174] where the mother's parenting skills had not improved during the six years her daughter had been in foster care and the mother's emotional and intellectual levels were quite low.[175] The court of appeals rejected the assertion on appeal that there had been no finding by the trial court that the daughter was of an age of discretion because the issue was not raised below.[176] The termination of parental rights was affirmed in *Conner v. Arlington County Department of Social Services*.[177] The child had been placed in foster care at the age of eight because he was found accompanying his mother while she was shoplifting.[178] He could not read, write, or recognize numbers, and he had been taught to lie and steal by his mother.[179] The mother did not cooperate with attempted therapy and failed to attend counseling sessions over the three years preceding the termination proceedings.[180]

The court of appeals affirmed termination in *Whittaker v. Roanoke County Department of Social Services*,[181] where the evidence showed that the ten-year-old daughter had severe emotional problems as a result of her abuse and neglect, had multiple foster care placements, had engaged in self-destructive acts, and had expressed suicidal thoughts.[182] In *Allen v. Lynchburg Division of Social Services*,[183] termination was upheld where the child was placed in foster care at the age of two because of persistent neglect caused by the mother's substance abuse and beatings by the child's stepfather.[184] Six years

174. No. 1483-97-2, 1998 Va. App. LEXIS 377, at *1 (Va. Ct. App. June 30, 1998) (unreported decision).
175. *See id.* at *2.
176. *See id.*
177. No. 046-98-4, 1998 Va. App. LEXIS 477, at *1 (Va. Ct. App. Sept. 9, 1998) (per curiam) (unreported decision).
178. *See id.* at *4.
179. *See id.*
180. *See id.*
181. No. 1650-98-3, 1998 Va. App. LEXIS 649, at *1 (Va. Ct. App. Dec. 15, 1998) (per curiam) (unreported decision).
182. *See id.* at *4.
183. No. 1209-98-3, 1998 Va. App. LEXIS 648, at *1 (Va. Ct. App. Dec. 15, 1998) (per curiam) (unreported decision).
184. *See id.* at *4.

later there had been no improvement in the mother's ability to care for or protect the child.[185] A divided court of appeals panel affirmed the termination of the mother's parental rights in *Gallupe v. Roanoke City Department of Social Services*,[186] where she refused to believe the allegations of sexual abuse against the father in spite of overwhelming evidence, blamed the children for the breakup of the family, and would not protect the children from the father.[187] In a different case, a circuit court declined to terminate the parental rights of a couple where the department presented no direct evidence of the alleged sexual abuse and did not establish by clear and convincing evidence that the conditions leading to removal of the children could not be corrected.[188]

The flood of criminal prosecutions for abuse and neglect continues unabated. In *Krampen v. Commonwealth*,[189] the court of appeals concluded that the defendant could be convicted of taking indecent liberties with a child in violation of section 18.2-370.1 because the mother's entrustment of the victim to him for transporting the child to and from church placed him in "a custodial or supervisory relationship."[190] Such status does not require any formal legal custodial relationship. Similarly, a therapist was acting in a "custodial or supervisory relationship" when he took sexually explicit photographs of a girl he was counseling during the time she was entrusted to his care.[191] In *Woodson v. Commonwealth*,[192] the court ruled that the defendant was a "person responsible" for the victim's care under section 18.2-371.1 where he lived in the same house and exercised authority over him and he thus could be convicted of neglecting the boy.[193] However, in *Kisling v. Common-*

185. *See id.* at *5.
186. No. 0515-98-3, 1998 Va. App. LEXIS 651, at *1 (Va. Ct. App. Dec. 15, 1998) (per curiam) (unreported decision).
187. *See id.* at *3.
188. *See* Department of Family Servs. v. Desouza, 45 Va. Cir. 48 (Fairfax County 1998).
189. 29 Va. App. 163, 510 S.E.2d 276 (Ct. App. 1999).
190. *Id.* at 166, 510 S.E.2d at 278; *see also* VA. CODE ANN. § 18.2-370.1 (Repl. Vol. 1996).
191. DeAmicis v. Commonwealth, 29 Va. App. 751, 756-57, 514 S.E.2d 788, 791 (Ct. App. 1999).
192. No. 140-98-2, 1999 Va. App. LEXIS 142, at *1 (Va. Ct. App. Mar. 2, 1999) (unreported decision).
193. *See id.* at *3; *see also* VA. CODE ANN. § 18.2-371.1 (Repl. Vol. 1996).

wealth,[194] the court found insufficient proof of a "custodial or supervisory relationship" where the seventeen-year-old victim was living as a guest in Kisling's home and where Kisling did not have any legal or actual authority over the girl.[195] The court of appeals ruled in *Ellis v. Commonwealth*[196] that a mother could not be convicted of criminal neglect where she left her two young children alone napping in an apartment while she visited a friend for thirty minutes in another apartment.[197] The girls were injured in a fire because the mother left the gas stove on, but there was no proof of the requisite criminal intent to support the convictions.[198]

In *Castelow v. Commonwealth*,[199] the court of appeals ruled that a girl's complaint of sexual abuse made sixteen months after it occurred was erroneously admitted into evidence because there was no explanation for the extraordinary delay.[200] Evidence of a "fresh complaint" of sexual abuse is not admissible without the victim's testimony because such evidence is admissible only as corroboration.[201] The rape shield statute[202] precludes the cross-examination of a minor rape victim regarding her false denial of prior vaginal sexual intercourse.[203] In a different case, the court of appeals, sitting en banc, found evidence that the defendant taught his nine-year-old niece how to run her hairbrush back and forth on her "pookie," coupled with testimony that the girl had constant irritation of her vagina and a swollen clitoris, was sufficient to establish circumstantially that the victim's labia majora was penetrated.[204] In *Siquina v. Commonwealth*,[205] the court concluded

194. No. 0169-98-3, 1998 WL 886963, at *1 (Va. Ct. App. Dec. 22, 1998) (unreported decision).
195. *See id.* at *1.
196. 29 Va. App. 548, 513 S.E.2d 453 (Ct. App. 1999).
197. *See id.* at 555, 513 S.E.2d at 456-57.
198. *See id.* at 557, 513 S.E.2d at 458.
199. 29 Va. App. 305, 512 S.E.2d 137 (Ct. App. 1999).
200. *See id.* at 313, 512 S.E.2d 141.
201. *See* Commonwealth v. Wills, 44 Va. Cir. 459, 460 (Spotsylvania County 1998).
202. *See* Va. CODE ANN. § 18.2-67.7 (Repl. Vol. 1996).
203. *See* Thompson v. Commonwealth, 28 Va. App. 543, 547, 507 S.E.2d 110, 112 (Ct. App. 1998).
204. *See* Jett v. Commonwealth, 29 Va. App. 190, 510 S.E.2d 747 (Ct. App. 1999), *aff'g* 27 Va. App. 759, 501 S.E.2d 457 (Ct. App. 1998).
205. 28 Va. App. 694, 508 S.E.2d 350 (Ct. App. 1998).

that a person could be convicted of "exposing" sexual or genital parts to a child even though the child did not actually see them.[206]

The court of appeals found the necessary element of force or intimidation missing in a case charging animate object sexual penetration where the teenage victim appeared to be acquiescing in the behavior.[207] In *Penley v. Commonwealth*,[208] the court of appeals concluded that the evidence was sufficient to establish Penley's guilt of attempted taking of indecent liberties with children where he asked two girls awaiting their school bus if they had "ever seen a dick before" and if they "would like to see one."[209] Another defendant, appealing his conviction for sexually abusing his four-year-old daughter, was held to have waived his appellate claims by pleading guilty.[210] In *Roberts v. Commonwealth*,[211] the court found that the evidence of felony child neglect was sufficient where the mother neglected to get necessary medical treatment for her four-year-old child who had serious physical injuries.[212] The court deemed the evidence sufficient despite her claim that she lacked criminal intent because she feared her boyfriend.[213] On the other hand, the court of appeals reversed a similar conviction where a mother failed to take her son to get medical attention when she noticed injuries he suffered while he was with a babysitter.[214]

IV. EDUCATION

Much of the legislative action concerning education continued to focus on weapons and drugs in schools, as well as on the threats of violence, even prior to the shootings in Littleton, Colorado. Educa-

206. *See id.*

207. *See* Adsit v. Commonwealth, No. 0882-98-2, 1999 Va. App. LEXIS 86, at *1 (Va. Ct. App. Feb. 9, 1999) (unreported decision).

208. No. 188-97-2, 1998 Va. App. LEXIS 472, at *1 (Va. Ct. App. Sept. 8, 1998) (unreported decision).

209. *Id.* at *2, *5.

210. *See* Cardwell v. Commonwealth, 28 Va. App. 563, 566, 507 S.E.2d 625, 627 (Ct. App. 1998).

211. No. 1594-98-3, 1999 Va. App. LEXIS 323, at *1 (Va. Ct. App. June 8, 1999) (unreported decision).

212. *See id.* at *5.

213. *See id.* at *6.

214. *See* McBeth v. Commonwealth, No. 1096-98-2, 1999 Va. App. LEXIS, at *1 (Va. Ct. App. June 29, 1999) (unpublished decision).

tion itself, however, was a major emphasis in this election year for the entire General Assembly.[215] One piece of legislation expanded the list of weapons prohibited on school property to include knives with metal blades of three inches or longer.[216] Two bills addressed firearms possession on school grounds,[217] and one eliminated the prior exception from the statute requiring expulsion of students for bringing firearms onto school property or to a school-sponsored activity.[218] The prior exception was for possession of an unloaded firearm in a closed container in or upon a motor vehicle, or an unloaded shotgun or rifle in a firearms rack in or upon a car.[219] Other action modified the "zero tolerance" provision of the law, which mandated one year expulsions for students bringing weapons on school property or to school-sponsored events.[220] The modification would permit School Boards, by regulation, to authorize the division superintendent or his designee to conduct a preliminary review in such cases to determine whether a disciplinary action other than expulsion is appropriate.[221] These regulations are to ensure that any "other" subsequent disciplinary action is to be taken in accordance with the due process procedures set forth in the Virginia Code.[222] The school administrator or a School Board, pursuant to School Board policy, may determine, based on the facts of a particular situation, that special circumstances exist and that no disciplinary action, some other disciplinary action, or another term of expulsion is appropriate.[223] Similar action was taken in the "zero tolerance" provision concerning the possession of drugs on school property or at a school-sponsored activity.[224] Currently, possession with intent to manufacture, sell, or distribute is the basis for required expul-

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215. This discussion will not try to address all the education bills enacted at the 1999 Session, but will only deal with selected pieces of legislation.

216. *See* VA. CODE ANN. § 18.2-308.1 (Cum. Supp. 1999). Butter knives and other implements used for food consumption or preparation are excluded from the prohibition. *See id.*

217. *See id.* §§ 18.2-308.1, 22.1-277.01 (Cum. Supp. 1999).

218. *See id.* § 22.1-277.01 (Cum. Supp. 1999).

219. *See id.* § 22.1-277.01(A) (Cum. Supp. 1997).

220. *See id.* (Cum. Supp. 1999).

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.* § 22.1-277.01:1 (Cum. Supp. 1999).

sion.[225] As noted above, the Board of Education is directed to develop, in consultation with the Office of the Attorney General, guidelines for strip searches in public schools.[226] A report on the guidelines is to be made to the General Assembly.[227]

The drug-free school zones law was amended to add designated school bus stops, and any public property or property open to public use within 1,000 feet of any such school bus stop, to the sites in which it is unlawful to conduct drug activities.[228] Such activities include the manufacture, sale, or distribution, or possession with intent to sell, give, or distribute any controlled substance, imitation controlled substance, or marijuana.[229] The drug-free zone would be in effect during the times school children are waiting to be picked up or are being dropped off.[230]Another amendment permits local law enforcement authorities to report to school principals regarding student offenses that would be a felony if committed by an adult, or would be an adult misdemeanor involving any of the at-school drug, weapons, or violence-related incidents already required to be reported to school officials.[231] Principals are to contact the parents of students involved in these incidents, and the student must participate in appropriate intervention and prevention activities.[232] A principal who knowingly fails to comply or secure compliance with these reporting requirements will be subject to sanctions prescribed by the local School Board.[233] These sections may include, but need not be limited to, demotion or dismissal.[234]

A further amendment authorizes School Boards to adopt regulations empowering the division superintendent or his designee to require certain students to attend alternative education programs after written notice is given to the student and his parent.[235] The

225. *See id.* § 22.1-227.01:2(A) (Cum. Supp. 1999).
226. *See id.* § 22.1-227.01:2 (Cum. Supp. 1999).
227. *See id.*
228. *See id.* § 18.2-255.2(A)(iv) (Cum. Supp. 1999).
229. *See id.* § 18.2-255.2(A) (Cum. Supp. 1999).
230. *See id.* § 18.2-255.2(A)(iv) (Cum. Supp. 1999).
231. *See id.* § 22.1-280.1(B) (Cum. Supp. 1999).
232. *See id.* § 22.1-280.1(C) (Cum. Supp. 1999).
233. *See id.*
234. *See id.*
235. *See id.* § 22.1-277.1(A) (Cum. Supp. 1999).

student or his parent must also be notified of the opportunity to participate in a hearing conducted by the division superintendent or his designee regarding such alternative education placement.[236] The decision of the superintendent or his designee would be final unless altered by the School Board.[237] It could be altered upon timely written petition by the student or his parent for a review of the record by the School Board.[238] The affected students include those who have been

> (i) charged with an offense relating to the laws, or with a violation of school board policies, on weapons, alcohol or drugs, or intentional injury to another person; (ii) found guilty of a crime which resulted in or could have resulted in injury to others, or of a crime for which the court disposition is required to be disclosed to the superintendent of the school division; or (iii) expelled [for weapons offenses or convictions or adjudications of delinquency related to certain serious crimes].[239]

The General Assembly also established grants for pilot discretionary programs for disruptive elementary and middle school students who do not qualify for the alternative education programs established in section 22.1-209.1:2.[240] A "disruptive student" is defined as one, "whose behavior interrupts or obstructs the learning environment and results in two or more short-term suspensions or requires repeated intervention by school personnel."[241]

> The Board [of Education] shall establish criteria for these pilot discretionary programs which shall require innovative approaches to resolving common disciplinary problems which occur among disruptive elementary and middle school students, such as nontraditional physical plants or locations or courses, family involvement and participation, and nontraditional attendance patterns. All such innovative approaches shall require, as a condition of enrollment, written agreements for parental involvement and participation in the programs.[242]

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236. *See id.* § 22.1-277.1(B) (Cum. Supp. 1999).
237. *See id.*
238. *See id.*
239. *Id.* § 22.1-277.1(A) (Cum. Supp. 1999).
240. *See id.* § 22.1-209.1:6 (Cum. Supp. 1999).
241. *Id.*
242. *Id.*

Another innovation established the Community-Based Intervention Program for Suspended and Expelled Students to provide interim instruction, intervention, and supervision for students in the public schools who are suspended or expelled from regular school attendance.[243] Participants will be either recommended for the program, ordered into the program by a court, or enrolled by the parent.[244] The program shall consist of five regional projects and must include a structured and balanced educational program that accommodates the specific needs of the students.[245]

Several amendments to the education laws deal with truancy as a result of the Commission on Youth study.[246] One comprehensive bill makes a number of revisions to the truancy and compulsory school attendance statutes.[247] The measure (i) allows intake officers to proceed informally on a complaint alleging a child is in need of services, supervision, or is delinquent in certain instances involving violations of certain school attendance requirements;[248] (ii) requires attendance officers, in addition to making a reasonable effort to notify the parent of the pupil's absence, to obtain an explanation for the absence;[249] (iii) requires principals or their designees, after a pupil has been absent for five days for the school year without indication of the parent's awareness and support of such absence, to make a reasonable effort to ensure that direct contact is made with the parent by the attendance officer to obtain an explanation and explain to the parent the consequences of continued nonattendance;[250] (iv) requires the attendance officer, the pupil, and the pupil's parent to jointly develop a plan to resolve the pupil's nonattendance;[251] (v) requires a conference to be scheduled, after an additional unexcused absence, to resolve issues related to the

243. *See id.* § 22.1-209.1:9(A) (Cum. Supp. 1999).
244. *See id.* § 22.1-209.1:9(B) (Cum. Supp. 1999).
245. *See id.* § 22.1-209.1:9(C) (Cum. Supp. 1999).
246. *See* REPORT OF THE VIRGINIA COMMISSION ON YOUTH STUDY OF TRUANTS AND RUNAWAYS, H. Doc. No. 57 (1999); *see also* VA. CODE ANN. §§ 16.1-260, 22.1-258, -260 to -263 (Cum. Supp. 1999).
247. *See* VA. CODE ANN. §§ 16.1-260, 22.1-258, -260 to -263 (Cum. Supp. 1999).
248. *See id.* § 16.1-260(B) (Repl. Vol. 1999).
249. *See id.* § 22.1-261 (Cum. Supp. 1999).
250. *See id.* § 22.1-258 (Cum. Supp. 1999).
251. *See id.*

nonattendance;[252] (vi) empowers attendance officers to enforce these new provisions by making a complaint alleging the student is a child in need of supervision or instituting proceedings against the parent relating to violations of the compulsory school attendance law;[253] (vii) directs school principals to report annually the number of pupils by grade level for whom a conference between the pupil, his parent, and school personnel has been scheduled because of no indication that the pupil's parent is aware of and supports the pupil's sixth unexplained absence;[254] and (viii) makes initial violations of the various nonattendance trigger days, plan, and conference requirements a Class 3 misdemeanor and subsequent or knowing and willful violations a Class 2 misdemeanor.[255]

A second bill authorizes law enforcement officers and attendance officers who pick up a public school student for truancy to deliver the child to the appropriate public school or a truancy center.[256] "'[T]ruancy center' means a facility or site operated by a school division, sometimes jointly with the local law-enforcement agency, and designated for receiving children who have been retrieved by a [police] officer or attendance officer for truancy from school."[257] The prior Virginia Code section only contemplated the delivery of these students to the appropriate school.[258] Immunity from civil liability is also provided for acts or omissions relating to the pickup and delivery of truant public school children.[259] This bill also provides that a minor in violation of local curfew ordinances may now be proceeded against as a child in need of supervision, rather than as a "status offender."[260] Related legislation amends the compulsory school attendance laws authorizing local School Boards to allow compulsory attendance requirements to be satisfied for any student sixteen years of age and older, upon a meeting between the student, the student's parents, and the principal or his designee, in which an

252. *See id.*
253. *See id.* § 22.1-262 (Cum. Supp. 1999).
254. *See id.* § 22.1-260(A) (Cum. Supp. 1999).
255. *See id.* § 22.1-263 (Cum. Supp. 1999).
256. *See id.* § 22.1-266 (Cum. Supp. 1999).
257. *Id.* § 22.1-266(C) (Cum. Supp. 1999).
258. *See id.* § 22.1-266 (Repl. Vol. 1997).
259. *See id.* § 22.1-266(B) (Cum. Supp. 1999).
260. *See id.*

individual student alternative education plan ("ISAEP") is developed in conformity with guidelines prescribed by the Board.[261] The plan must include career guidance counseling, mandatory enrollment in a GED testing program (or other alternative education program approved by the local School Board), counseling on the economic impact of failing to complete high school, and provisions for reenrollment in school.[262] Such students must take the GED test.[263] From appropriated funds, local School Boards must implement GED testing and preparatory programs consistent with guidelines to be developed by the Board of Education.[264] The guidelines must include a provision allowing such preparatory and testing programs to be offered jointly by two or more School Boards.[265] The amendment provides that no one under sixteen is eligible for GED testing programs and a student who fails to comply with his ISAEP shall be deemed to be in violation of compulsory attendance requirements.[266] Additionally, students enrolled with a plan shall be counted in the average daily membership in the relevant school division.[267] Other amendments provide that home-schooled students need not have three consecutive years of home instruction to be eligible to take the GED test.[268]

Another 1999 bill revised the statute controlling who is entitled to free public education in the school divisions of the Commonwealth.[269] The statute adds those persons of school age whose parents are unable to care for them and who are living within the school division (not solely for school purposes) with another person who resides in the school division where the person with whom they reside is acting *in loco parentis* pursuant to placement of the school-age person for adoption by an authorized person or entity.[270] A similar enactment provides criteria for determining residency for

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261. *See id.* § 22.1-254 (Cum. Supp. 1999).
262. *See id.; see also id.* §§ 16.1-278.4, 22.1-199.1, -253.13:1, -254, -254.01, -254.1, -254.2, -263, -271.4 (Repl. Vol. 1999).
263. *See id.* § 22.1-254(D)(b) (Cum. Supp. 1999).
264. *See id.* § 22.1-254.2(B) (Cum. Supp. 1999).
265. *See id.*
266. *See id.* § 22.1-254.2(A) (Cum. Supp. 1999).
267. *See id.* § 22.1-253.13.1(H) (Cum. Supp. 1999).
268. *See id.* § 22.1-251.1 (Cum. Supp. 1999).
269. *See id.* § 22.1-3 (Cum. Supp. 1999).
270. *See id.*

school attendance when property is divided by a jurisdictional line.[271] These criteria establish that a person residing within housing or temporary shelter situated in more than one school division shall be deemed to reside in and shall be entitled to attend a public school within either school division.[272] However, if a person resides in housing or temporary shelter that is located in one school division, but the property on which such housing or temporary shelter is located lies within more than one school division, such person shall be deemed to reside only in the single school division in which the housing or temporary shelter is located.[273] Local School Boards are to adopt regulations governing tuition charged to certain nonresident and underage students consistent with this provision.[274]

After several years of attempts, legislation was finally enacted to allow local School Boards to adopt procedures for the appointment of student representatives from among the students enrolled in the public schools in the division.[275] "The student representative will serve in a nonvoting, advisory capacity and [will] be appointed under such circumstances and serve for such terms as the board prescribes."[276] The School Board may exclude the nonvoting student representative from executive sessions or closed meetings pursuant to the Virginia Freedom of Information Act,[277] and the representative must not be construed to be a member of the local School Board for any purpose, including but not limited to, establishing a quorum or making any official decision.[278]

The Education Accountability and Quality Enhancement Act of 1999[279] makes several changes to the statutes that govern teacher preparation, evaluation, and employment, including

> (i) requiring each local school board to evaluate its division superintendent annually; (ii) directing the Board of Education to prescribe by regulation

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271. *See id.*
272. *See id.*
273. *See id.*
274. *See id.* § 22.1-5 (Cum. Supp. 1999).
275. *See id.* § 22.1-86.1(A) (Cum. Supp. 1999).
276. *Id.*
277. *See id.* § 221.1-86.1(B) (Cum. Supp. 1999).
278. *See id.* § 22.1-86.1(C) (Cum. Supp. 1999).
279. Act of May 7, 1999, ch. 1030, 1999 Va. Acts 2730.

> uniform performance standards and criteria to be used by local school boards in evaluating superintendents; (iii) establishing the National Teacher Certification Reward Program to provide annual monetary awards to teachers achieving and maintaining national certification; (iv) amending Standard 5 of the Standards of Quality to incorporate specific training for administrative and supervisory personnel in the evaluation and documentation of training in evaluation and documentation of teacher and administrator performance; (v) requiring local school boards to develop for use by division superintendents a performance evaluation process for principals, assistant principals, and supervisors; (vi) requiring school boards to fill teaching positions with licensed instructional personnel qualified in the relevant subject areas; (vii) directing school boards to include in their teacher employment policies incentives for excellence in teaching, and to develop a procedure for use by the division superintendent and principals in evaluating instructional personnel; (viii) requiring the Board of Education to require persons seeking initial licensure on and after July 1, 2003, to complete study in instructional methods tailored to promote student achievement and effective preparation for the Standards of Learning end-of-course and end-of-grade assessments and to submit materials evidencing proficiency in classroom instruction and to require persons renewing licenses on and after July 1, 2004, to receive training in instructional methods promoting academic progress and effective preparation for the SOL tests; (ix) directing Virginia's public colleges and universities to use a professional teacher's examination prescribed by the Board of Education for persons seeking entry into teacher education programs and to report annually, pursuant to Board of Education guidelines, performance reports that include pass rates of graduates taking the state teacher licensure examination; (x) directing school boards to provide mentor teachers to probationary teachers, except probationary teachers who have prior successful teaching experience; (xi) requiring annual evaluations of probationary teachers; and (xii) specifying various guidelines for the Mentor Teacher Program.[280]

A new mandate requires all School Boards to establish character education programs in cooperation with students, parents, and the community.[281] The basic character traits may include trustworthiness, respect, responsibility (including hard work and economic self-reliance), fairness (including consequences of bad behavior and principles of nondiscrimination), caring, and citizenship (including

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280. S.B. 1145, *Teacher Certification Incentive Reward Program: Summary as Passed* (visited Sept. 17, 1999) <http://legl.state.va.us/cgi-bin/>; *see also* VA. CODE ANN. §§ 22.1-60.1, -253.13:5, -293, -294, -295, -298, -299.2, -303, -303.1, -305, -305.1, 23-9.2:3.4 (Cum. Supp. 1999).

281. *See* VA. CODE ANN. § 22.1-208.01 (Cum. Supp. 1999).

patriotism, the Pledge of Allegiance, and respect for the American flag), each of which subsumes various characteristics such as honesty, integrity, tolerance, and accountability.[282]

Two United States Supreme Court decisions impacted the possible liability of local school divisions for student-on-student sexual harassment and for services for disabled students. In *Davis v. Monroe County Board of Education*,[283] the Court concluded that a private damages action under Title IX of the Education Amendments of 1972 may exist for peer sexual harassment of a student in a public school receiving federal funds, at least under certain circumstances.[284] Those circumstances are limited to when the recipient of federal funds "acts with deliberate indifference to known acts of harassment in its programs or activities," and where the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[285] Thus, the decision of the district court dismissing the proceedings and of the court of appeals affirming that determination were reversed.[286] The Court seems to equate sexual harassment with other types of student-on-student physical assaults, but the high bar established should discourage frivolous cases presenting isolated instances of teasing or similar minor incidents. In *Cedar Rapids Community School District v. Garret F.*,[287] the Court held that continuous professional nursing care must be provided to a disabled student under the Individuals with Disabilities Education Act ("IDEA") where that care represents a "related service" enabling a student to have meaningful access to public education.[288] Justice John Paul Stevens, writing for the majority, stated that

> [t]his case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such

282. *See id.*
283. 119 S. Ct. 1661 (1999).
284. *See id.* at 1666; *see also* 20 U.S.C. § 1681(a) (1994).
285. *Davis*, 119 S. Ct. at 1666.
286. *See id.* at 1666, 1676.
287. 119 S. Ct. 992 (1999).
288. *See id.* at 1000; *see also* 20 U.S.C. §§ 1400-1491 (1994).

> "related services" in order to help guarantee that students like Garret are integrated into the public schools.[289]

In *Manning v. Fairfax County School Board*,[290] the United States Court of Appeals for the Fourth Circuit concluded that Virginia's one year statute of limitations governing personal actions was also applicable to the filing of administrative proceedings under the IDEA.[291] In *Erickson v. Board of Education of Baltimore County*,[292] the court ruled that an attorney cannot recover fees pursuant to the IDEA for the representation of his own son in proceedings to secure education services under the Act.[293]

The Supreme Court of Virginia ruled in *Wagoner v. Benson*[294] that the doctrine of sovereign immunity does not bar a suit on behalf of a child injured when struck by an automobile while crossing the street to board a school bus, where the School Board's liability insurance policy covers the accident and section 22.1-194 of the Virginia Code applies.[295] In *Newman v. Erie Insurance Exchange*,[296] the Supreme Court of Virginia overruled a prior case by deciding that a child struck by an automobile while crossing the road to board a school bus, while the bus's specialized safety equipment was activated, was "using" the school bus within the meaning of the language in a School Board's insurance policy.[297] In another case, the Supreme Court of Virginia reversed a lower court's award of summary judgment in a case to allow parents to conduct discovery with regard to their claim that a liquidated damages clause in a private school tuition contract was an unenforceable penalty.[298]

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289. *Cedar Rapids Community Sch. Dist.*, 119 S. Ct. at 1000.
290. 176 F.3d 235 (4th Cir. 1999).
291. *See id.* at 239.
292. 162 F.3d 289 (4th Cir. 1998).
293. *See id.* at 290; *see also* 20 U.S.C. § 1415(e)(4)(B) (1994).
294. 256 Va. 260, 505 S.E.2d 188 (1998).
295. *See id.* at 262, 264, 505 S.E.2d at 188, 190; *see also* VA. CODE ANN. § 22.1-194 (Repl. Vol. 1997). Section 22.1-194 of the Virginia Code abrogates a School Board's sovereign immunity to the extent of the coverage of a liability insurance policy in force to cover the complainant's injury. *See id.*
296. 256 Va. 501, 507 S.E.2d 348 (1998).
297. *See id.* at 509, 507 S.E.2d at 352. The decision overruled *Stern v. Cincinnati Ins. Co.*, 252 Va. 307, 477 S.E.2d 517 (1996). *See id.*
298. *See* O'Brian v. Langley Sch., 256 Va. 547, 549, 552, 507 S.E.2d 363, 364, 366 (1998).

V. MISCELLANEOUS

An amendment to the Comprehensive Services Act for At-Risk Youth and Families ("CSA") added oversight responsibilities to the State Executive Council to improve review of services provided to children under the Act by making the Council responsible for the following: overseeing implementation of a uniform assessment instrument, development of case management standards, and adoption of other quality assurance measures, and authority to withhold funding to local management teams that did not comply with the Act.[299] Localities would be required to use multidisciplinary teams in developing treatment plans, except for routine foster care cases.[300] Another amendment to the Act allows parents who are employed by public or private programs that receive CSA funds, or agencies represented on a community and policy management team, to be parent representatives on community policy and management teams and family assessment and planning teams, provided that they do not interact directly on a regular basis with the children.[301] Foster parents also may serve as parent representatives.[302] Current law prohibits parents employed by these entities from being parent representatives.[303]

Significant legislation revised the laws applicable to a guardianship of a minor's estate to update the code provisions so that they conform with current practical considerations raised by attorneys, guardians, minors, and the courts.[304] This makes a guardianship similar to a typical minor's trust insofar as the guardian's administrative and distributive powers are concerned.[305] Additionally, court decisions were incorporated into the law, prohibiting the use of a minor's assets for the support of the minor when the minor has a parent who is under a duty to support the minor and is capable of

299. *See* VA. CODE ANN. §§ 2.1-746, -751, -752, -754, -755, -757, -758, 16.1-286 (Cum. Supp. 1999).
300. *See id.* § 2.1-752 (Cum. Supp. 1999).
301. *See id.* §§ 2.1-751, -753 (Cum. Supp. 1999).
302. *See id.* § 2.1-753 (Cum. Supp. 1999).
303. *See id.*
304. *See id.* § 26-17.4 (Cum. Supp. 1999).
305. *See id.* §§ 26-17.4, 31-1 to -9, -14 to -14.1, -18.1 (Cum. Supp. 1999).

providing such support.[306] A commissioner of accounts for the jurisdiction wherein a guardian qualifies may authorize distributions without court approval provided the total distributions authorized in any one year shall not exceed $3,000.[307] The commissioner must, in his report to the court on the guardian's next accounting, explain the necessity for the distributions so authorized.[308] The changes were developed to parallel the recent enactment of legislation relating to incapacitated adults, including a new approach to fiduciary powers, eliminating distinctions between realty and personalty, and placing the focus of distributions on the needs of the minor.[309]

Several bills addressed driver's licenses and learner's permits for minors.[310] One bill provided that parents waiving the requirement that their child be in academic good standing and regularly attending school to obtain a driver's license or learner's permit indicate their authorization on forms provided by and at the Department of Motor Vehicles.[311] A second bill provided that the evidence of successful completion of a driver's education course, signed by the minor's parent or guardian, together with the minor's learner's permit, constitute a temporary driver's license.[312] A third bill provided that only custodial parents have the ability to request that the Division of Motor Vehicles cancel their child's driver's license.[313]

The Fourth Circuit Court of Appeals ruled in *Montalvo v. Radcliffe*[314] that a martial arts school did not violate Title III of the Americans with Disabilities Act by denying admission to a twelve-year-old boy who was HIV-positive.[315] The youth's "condition posed a significant risk to the health or safety of other students and no reasonable modification could sufficiently reduce this risk without

306. *See id.* § 31-8.1 (Cum. Supp. 1999).
307. *See id.* § 31-8.2 (Cum. Supp. 1999).
308. *See id.*
309. *See id.* §§ 31-8 to -8.2 (Cum. Supp. 1999).
310. *See id.* §§ 46.2-334 to -335 (Cum. Supp. 1999).
311. *See id.* §§ 46.2-334(A)(4) to -335(A) (Cum. Supp. 1999).
312. *See id.* § 46.2-334(D) (Cum. Supp. 1999).
313. *See id.* § 46.2-334(B) (Cum. Supp. 1999).
314. 167 F.3d 873 (4th Cir. 1999).
315. *See id.* at 879; *see also* 42 U.S.C. §§ 12101-12213 (1994).

fundamentally altering the nature of the program."[316] The Supreme Court of Virginia held that a mother may not sue a hospital for negligent infliction of emotional distress caused by observing her daughter's physical reactions to the overdose of a drug administered by the hospital during medical tests because the hospital owed no duty to the mother.[317]

The Supreme Court of Virginia also decided two charitable immunity cases. In *Bailey v. Lancaster Ruritan Recreation Center, Inc.*,[318] the court concluded that the center was not protected by charitable immunity from a suit for wrongful death filed by a mother whose daughter drowned while a guest in the center's swimming pool.[319] In *Mooring v. Virginia Wesleyan College,*[320] the court decided that a college professor who established a volunteer program at a local boys and girls club using his students was not protected by the club's charitable immunity for negligence while he was present at the club observing a student's performance.[321]

316. *Montalvo*, 167 F.3d at 874.
317. *See* Gray v. INOVA Health Care Servs., 257 Va. 597, 514 S.E.2d 355 (1999).
318. 256 Va. 221, 504 S.E.2d 621 (1998).
319. *See id.* at 227, 504 S.E.2d at 624.
320. 257 Va. 509, 514 S.E.2d 619 (1999).
321. *See id.* at 512, 514 S.E.2d at 621.