Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

Robert E. Shepherd, Jr.*

I. INTRODUCTION

This article examines the pertinent legislative and judicial developments of the past year that have effected juvenile law in Virginia. Specifically, this article discusses new laws and amendments passed by the Virginia General Assembly with respect to juvenile delinquency, non-criminal misbehavior, and termination of parental rights. Part IV discusses changes to Title 22.1 of the Virginia Code that affect school disciplinary matters. Part V examines developments in the area of juvenile mental health. Finally, Part VI discusses various miscellaneous developments affecting youth abortions, teenage driving, parental negligence in the tort context, and a significant amendment made to the Comprehensive Services Act for At-Risk Youth and Families. Discussion of relevant case law supplements each topical section.

II. JUVENILE DELINQUENCY AND NON-CRIMINAL MISBEHAVIOR

A. Legislative Developments

Consistent with its actions over recent years the General Assembly enacted legislation allowing more access to law enforcement and court records involving juveniles, and by increasing communication between the juvenile justice system and the schools. For example, it enacted legislation permitting the chief law-enforcement officer of a locality to disclose to a school principal that a juvenile student is a suspect in, or has been charged

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with, a violent juvenile felony, a crime involving arson or bombs, or a crime involving weapons. Another law allows the Department of Juvenile Justice to release confidential information from the Virginia Juvenile Justice Information System, but only as provided for in Virginia Code section 16.1-300.2

The assembly also rewrote the “threats” statute3 to provide that it is a Class 6 felony to “knowingly communicate[ ], in a writing . . . a threat to kill or do bodily injury . . . [which creates a] reasonable apprehension of death or bodily injury [in someone].”4 The statute also provides that a person is guilty of a Class 6 felony if he or she threatens in a writing, which includes electronic communications, “to kill or do bodily harm” on school grounds, at a school event, or on a school bus “regardless of whether the person who is the object of the threat actually receives the threat.”5 The threat need only be written in such a fashion that the recipient of it would have a “reasonable apprehension of death or bodily harm.”6 In the wake of post-Columbine era concerns about school violence, the Virginia Code now provides that a juvenile who makes a bomb threat shall be additionally punished by being deprived of their privilege to drive for one year.7

With respect to such things as detentions and commitments to mental health facilities, a new law provides that a hearing deadline continues to the next day that is not a legal holiday or weekend if the maximum period for the hearing ends on a holiday or weekend.8

A statute to become effective on July 1, 2002, was amended at the 2001 session to provide that if a period of post-dispositional confinement of a juvenile for delinquency is to exceed thirty days, the youth must be committed to the Department of Juvenile Jus-

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1. VA. CODE ANN. § 16.1-301(A) (Cum. Supp. 2001). Under previous law, information about a juvenile, fourteen years of age or older, could be released only when the juvenile was arrested for violent juvenile felonies. See id. § 16.1-301 (Repl. Vol. 1999).
6. Id.
The statute also provides that a juvenile who has been released from the department within the previous eighteen months is not eligible for post-dispositional detention. A further change allows a circuit court to treat a transferred juvenile as a serious juvenile offender and commit the youth to the department regardless of whether he or she meets existing criteria regarding their criminal background if, upon review of the juvenile’s entire criminal history, such action is justified.

Another piece of legislation more precisely delineates the respective responsibilities of the Department of Juvenile Justice and social services over parole supervision of juveniles released from a juvenile correctional facility. The legislation provides that the court service units will be responsible for those juveniles committed to the department. The same bill also gives the court the authority to place a child fourteen or older into a detention facility for up to ten days for a violation of probation. The law also makes clear that the juvenile court retains authority over an adult on probation or parole for violations committed as a juvenile. In addition, the bill also clarifies the type of evidence required to revoke probation or parole by repealing the language in Virginia Code section 16.1-291 requiring revocation proceedings to be governed by the same standard of proof and evidence as the original adjudicatory hearing.

9. VA. CODE ANN. § 16.1-284.1(B) (Cum. Supp. 2001). The significant change is that such action is now mandatory rather than discretionary.
An amendment to Virginia Code section 18.2-55 provides that it is a Class 5 felony for an accused being investigated by, or a probationer or parolee under the supervision of, a probation or parole officer, or a local pretrial services officer, to willfully inflict a bodily injury on such officer. Another law provides that any employee of the Department of Juvenile Justice, a secure facility, a detention home, or a court services unit, who carnally knows any youth in a facility or detention home, or under their supervision, is guilty of a Class 6 felony. Another amendment adds the Virginia Department of Military Affairs to the list of juvenile residential facilities that require a criminal background check as a condition of employment or volunteering.

B. Case Law

In Commonwealth v. Chatman, the Supreme Court of Virginia held that a juvenile has neither a due process nor a statutory right to assert an insanity defense in a delinquency proceeding. The decision reversed the holding of the court of appeals, which had followed the majority of states that had considered the issue. House Bill 2653 introduced in the 2001 Session, would have implemented the recommendations of a study that was con-

18. Id. § 18.2-55(B) (Cum. Supp. 2001). This section currently does not apply to an accused person as the perpetrator or to a local pretrial services officer as the victim. See id.
22. Id. at 567–70, 538 S.E.2d at 306–07.
ducted by the Virginia Bar Association,\textsuperscript{26} pursuant to a General Assembly resolution.\textsuperscript{27} The bill would have established an insanity defense for juveniles.\textsuperscript{28} Instead, the bill was killed in Senate Finance after passing the House 99-0 and being reported out of the Senate Courts of Justice Committee 15-0.\textsuperscript{29} Nevertheless, the assembly did adopt Senate Joint Resolution 440, which directs the Joint Commission on Behavioral Health Care, in conjunction with the Virginia State Crime Commission and the Virginia Commission on Youth, to study treatment options for offenders who have mental illness or substance abuse disorders.\textsuperscript{30}

In \textit{Heath v. Commonwealth},\textsuperscript{31} the Supreme Court of Virginia affirmed an en banc determination of the Court of Appeals of Virginia\textsuperscript{32} that no violation of the Speedy Trial Statute\textsuperscript{33} occurred despite the fact that Heath was incarcerated for more than five months between his preliminary hearing in juvenile court and his circuit court trial.\textsuperscript{34} The court decided that a period of forty days was tolled by the youth’s motion for a competency evaluation and the fact that he did not object to another delay of twenty-seven days between the fixing of the trial date and the trial itself.\textsuperscript{35} The fact that no trial date had been fixed at the time of the competency evaluation motion and that the trial had been delayed by the Commonwealth’s motion for a blood test did not change the fact that the forty days should be charged to Heath because a trial could not have been held while the competency issue was left unresolved.\textsuperscript{36}

\textsuperscript{26} See \textit{REPORT ON THE ADJUDICATION OF THE INSANITY DEFENSE IN JUVENILE DELINQUENCY PROCEEDINGS}, H. Doc. No. 60 (2000).


\textsuperscript{28} Va. H.B. 2653.

\textsuperscript{29} Detailed information about House Bill 2653’s path through the General Assembly may be found by using the Virginia Legislative Information System’s searchable database. For further details, see Bills and Resolutions: 2001 Session, at http://leg1.state.va.us/011/bil.htm (last visited Oct. 19, 2001).

\textsuperscript{30} S.J. Res. 440, Va. Gen. Assembly (Reg. Sess. 2001). The commission was also requested to study the not guilty by reason of insanity defense for juveniles. See \textit{id}.

\textsuperscript{31} 261 Va. 389, 541 S.E.2d 906 (2001).


\textsuperscript{34} \textit{Heath}, 261 Va. at 393–94, 541 S.E.2d at 908–09.

\textsuperscript{35} \textit{id}.

\textsuperscript{36} \textit{id}.
In *Shackleford v. Commonwealth*, the Court of Appeals of Virginia ruled that a juvenile defendant had waived his *Baker* rights regarding the lack of notice to his father. In addition, the court of appeals held that the defendant's rights under the Vienna Convention as a foreign national were not violated, that he had properly waived his *Miranda* rights, and that the evidence was sufficient to find him guilty of the charged offenses. The Supreme Court of Virginia affirmed the lower court's conclusions.

This past year witnessed two significant court of appeals' cases regarding jurisdiction of the juvenile courts. In *Spain v. Commonwealth*, the court of appeals concluded that although the defendant waived a transfer hearing in the juvenile court in 1995 while a juvenile, that waiver did not negate the necessity of giving notice to his parents of the hearing in juvenile court. Such failure constituted a jurisdictional defect, rendering invalid all subsequent judicial proceedings.

In *Asby v. Commonwealth*, however, the court of appeals ruled that Asby's conviction as an adult in January of 1996 divested the juvenile court of jurisdiction over other offenses then pending in the lower court. Since the juvenile court no longer had jurisdiction, the purported lack of notice to Asby's father did not invalidate any subsequent proceedings in the circuit court.

In another important application of *Baker*, the Court of Ap-
peals of Virginia ruled in Duong v. Commonwealth\textsuperscript{49} that a defendant may collaterally attack juvenile convictions utilized and relied on as prior convictions in the sentencing guidelines if they were secured without notice to a parent in violation of Baker.\textsuperscript{50} Although these convictions are not made void by the collateral attack, a court must nonetheless disregard them during the sentencing phase.\textsuperscript{51} Similarly, in Langhorne v. Commonwealth,\textsuperscript{52} the court of appeals held that a defendant's guilty plea following a transfer of his case from the juvenile court to the circuit court did not negate the dispositive effect of Baker.\textsuperscript{53}

Three unpublished decisions of the Court of Appeals of Virginia\textsuperscript{54} addressed the interplay between Virginia Code section 16.1-269.1(E)\textsuperscript{55} and the Supreme Court of Virginia's recent decision in Moore v. Commonwealth.\textsuperscript{56} Virginia Code section 16.1-269.1(E) provides, in part, that for any offense committed on or after July 1, 1996, "[a]n indictment in the circuit court cures any error or defect in any proceeding held in the juvenile court except with respect to the juvenile's age."\textsuperscript{57} In Moore, the supreme court recognized that defects had existed in the juvenile proceeding against the defendant due to "[t]he Commonwealth's failure to notify the defendant's biological father of the initiation of juvenile court proceedings."\textsuperscript{58} The court held, however, that since these defects had occurred after July 1, 1996, they were cured, pursuant to Virginia Code section 16.1-269(E), by the return of an indictment against the defendant.\textsuperscript{59} The court of appeals' decisions interpreting Moore each dealt with a juvenile proceeding in which it was alleged that a defect in the juvenile proceeding deprived the

\textsuperscript{50} Id. at 424–29, 542 S.E.2d at 48–49.
\textsuperscript{51} Id.
\textsuperscript{52} 35 Va. App. 19, 542 S.E.2d 780 (Ct. App. 2001).
\textsuperscript{53} Id. at 25, 542 S.E.2d at 782.
\textsuperscript{56} 259 Va. 405, 527 S.E.2d 415 (2000).
\textsuperscript{58} Moore, 259 Va. at 410, 527 S.E.2d at 418.
\textsuperscript{59} Id.
circuit court of jurisdiction. In each case the court of appeals concluded that the Moore holding, and the clear language of Virginia Code section 16.1-269(E), cured any jurisdictional defects.

In Phillips v. Commonwealth, the court of appeals added a new dimension to Baker. In Phillips, notice was given to a juvenile defendant's mother and stepfather at the time of the juvenile proceeding. However, the stepfather had never adopted the youth. The court of appeals held that the defendant's motion for a new trial should have been granted in light of Baker since no notice was given to the youth's biological father. In yet another unpublished decision, the court of appeals held that failure to give notice to a father whose address was listed as "unknown" did not satisfy the statutory exception for the father's identity not being "reasonably ascertainable." Note that the key distinction between the Whitney and Phillips cases and the McDonald, Adams, and Monteon cases is that the offense in Whitney and Phillips occurred prior to July 1, 1996. It seems clear that it will be significantly more difficult for juvenile defendants to have their convictions overturned if such a conviction involves a crime committed after July 1, 1996.

At least three recent circuit court opinions have dealt with the issue of parental notification in juvenile proceedings. In Commonwealth v. Bryant, the Fairfax Circuit Court held that notification of only one of the defendant's parents was proper even in light of Baker. The court reasoned that because the underlying offense had occurred in 1976 and the then-applicable statute re-

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63. Id. at *2.

64. Id. at *3.

65. Id. at *13.


68. 51 Va. Cir. 143 (Cir. Ct. 1989) (Fairfax County).

69. Id. at 145.
quired notification of only one parent, the Commonwealth had satisfied the notification requirement. In another case, the Norfolk Circuit Court ruled that an affidavit, given almost ten years after the original court proceeding, could not be used to impeach a recital in a juvenile court transfer order that there was “proper notice to the juvenile and the juvenile’s parents.” Finally, in Commonwealth v. Cano, the Fairfax Circuit Court granted defendant’s motion to set aside his guilty pleas to three felonies. The court reasoned that because the identity of the defendant’s father was ascertainable and notification was not provided, the trial court did not have jurisdiction under Baker to accept the defendant’s guilty pleas.

In Parsons v. Commonwealth, the Court of Appeals of Virginia ruled that the trial court erred in excluding as hearsay a defendant’s testimony regarding statements made by the juvenile judge who convicted him in 1994. According to the defendant’s proffer, the juvenile judge had told the defendant that when he reached eighteen, all records of his adjudication would be expunged; the defendant allegedly relied on this statement in failing to list the juvenile adjudication when he attempted to purchase a firearm. Similarly, the use of two 1994 juvenile felony adjudications to support a charge of possession of a firearm by a convicted felon did not amount to an ex post facto application of the law in violation of the defendant’s constitutional rights.

Although apparently not a juvenile, a defendant high school student was properly convicted of assault and battery for shining a laser light at the eyes of a law enforcement officer in a high school. In another case, the court of appeals ruled that no error was committed by the admission of rebuttal evidence during the sentencing phase of a trial about a defendant’s behavior on the

70. See id.
72. 52 Va. Cir. 223 (Cir. Ct. 2000) (Fairfax County).
73. Id. at 223, 225.
74. See id. at 224–25.
75. 32 Va. App. 576, 529 S.E.2d 810 (Ct. App. 2000).
76. Id. at 580, 529 S.E.2d at 812.
77. Id.
four occasions he was detained at a juvenile detention center. Likewise, a juvenile's statutory right to release from detention after twenty-one days did not apply where he was in jail after a preliminary hearing and the juvenile court had certified the charge to the grand jury for trial as an adult.

In *Pannell v. Commonwealth*, both the juvenile court and the circuit court on appeal found Pannell guilty of violating his conditions of probation and committed him to the Department of Juvenile Justice. The court of appeals found a violation of Virginia Code section 16.1-291 in the use of hearsay evidence during the probation revocation hearing and the application of a "preponderance of the evidence" standard of proof. The Virginia Code required that such proceedings "be governed by the procedures, safeguards, rights and duties applicable to the original proceedings." The effect of the *Pannell* decision was short-lived, however, as the General Assembly deleted the quoted language from section 16.1-291 at its 2001 session.

In *Salvatierra v. City of Falls Church*, the court of appeals ruled that a juvenile parole or probation violation, on its own, does not constitute a felony or a class 1 misdemeanor so as to allow for commitment to the Department of Juvenile Justice. The decision would also seem to apply to detention decisions that are predicated primarily on the commission of a "felony or class 1 misdemeanor."

Two cases demonstrate the court of appeals' continued refusal to overturn convictions based on confessions obtained under ques-
tionable circumstances. In *Potts v. Commonwealth*, the seventeen year old defendant was arrested and interrogated about a murder that had occurred several weeks earlier. Shortly after being advised of his *Miranda* rights, Potts requested a lawyer and indicated he wanted to contact his mother, but the officer denied the defendant's request to contact his mother and told Potts that he would get a lawyer "when you get one." Potts continued to press his desire for a lawyer, and the detective put him off further. Finally, the defendant agreed to talk. The court concluded that he had waived his right to an attorney, and the defendant's motion to suppress the statement was properly denied.

In an unpublished opinion, the court of appeals held that even though the defendant was a juvenile during his contact with a police officer, he was not entitled to a *Miranda* warning prior to the commencement of a formal custodial interrogation. Further, there was no absolute requirement for an attorney or guardian ad litem to be present prior to the discussion leading to a confession by defendant.

In four other unpublished court of appeals decisions, the court ruled: (1) it was proper to amend a conspiracy indictment to exclude all periods of time when defendant was a juvenile and thus avoid any jurisdictional issues; (2) a trial court properly considered sentencing guidelines evaluations that considered a defendant's juvenile adjudications; (3) a defendant did not properly

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92. *Id.* at 490, 546 S.E.2d at 231.
93. *Id.* at 490, 546 S.E.2d at 231–32.
94. *See id.*
95. *Id.* at 491, 546 S.E.2d at 232.
98. *See id.* at 2 n.2.
preserve for appeal his claim of constitutional error in the trial court's denial of his attempt to impeach a witness with his juvenile felonies; and (4) the fact that the original juvenile petition charged a youth with possession of a specific firearm did not preclude indictment for possession of a "firearm" or his conviction for possessing a shotgun since the description of the firearm in the juvenile petition was excess language.

In *Peace v. Commonwealth,* the court of appeals held that even though the evidence established that a mother was aware that her son and his friends were at her home smoking marijuana, her refusal to act more forcefully to prevent the illegal act did not amount to a willful omission to act.

In *Penry v. Johnson,* the United States Supreme Court ruled, for the second time in Penry’s case, that the trial court had not adequately instructed the jury during the sentencing phase of his second capital trial about the mitigating effect of his mental retardation and history of abuse when he was a child.

### III. Abuse and Neglect, Foster Care, and Termination of Residual Parental Rights

#### A. Legislative Developments

Legislation adopted in 2001 addressing the protection of children provides that a “child-placing agency may approve as an adoptive parent an applicant convicted of not more than one misdemeanor [simple assault conviction] not involving abuse, neglect or moral turpitude, provided ten years have elapsed following conviction.” Further, the Commissioner of the Department of

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104. *Id.* at *5–10.
105. 121 S. Ct. 1910 (2001) [*hereinafter Penry II*].
Social Services ("DSS") may grant a waiver to an applicant for licensure or registration of a family day home even if another adult living in the home has been convicted of misdemeanor simple or domestic assault so long as five years have elapsed following the conviction and the department has conducted a home study.\textsuperscript{109}

Further legislation provides that the chief judge of each juvenile and domestic relations district court may provide for an alternative means of copying and distributing Court Appointed Special Advocate reports.\textsuperscript{110} An important new Virginia Code section allows a juvenile and domestic relations district court to issue an order to the Department of Corrections to deliver a prisoner who is a witness in an action to the sheriff's office in the jurisdiction of the court issuing the order.\textsuperscript{111} This section partially overrules Commonwealth \textit{ex rel. Virginia Department of Corrections v. Brown},\textsuperscript{112} which held that general district courts did not have the statutory authority to issue transportation orders for prisoners confined within a state correctional facility.\textsuperscript{113} The bill also provides for the taking of a prisoner's testimony by telephone in certain cases.\textsuperscript{114} It also requires the party seeking the testimony to pay for the transportation costs when the court requires the presence of the prisoner.\textsuperscript{115} For juvenile courts, the amendment specifically addresses: proceedings under Virginia Code Section 16.1-241(A) (2), (4), or (5) (dependency, entrustment, or termination cases); relinquishment hearings pursuant to Section 16.1-241(K) of the Code; and foster care plan, foster care review, and permanency planning hearings.\textsuperscript{116}

Another amendment makes clear that current law regarding

\textsuperscript{109} See id. § 63.1-198.4 (Cum. Supp. 2001). The waiver shall not be granted if the adult living in the home is an assistant or substitute provider or if convicted of both simple assault or assault and battery and domestic assault. \textit{Id.}

\textsuperscript{110} Id. § 16.1-274 (Cum. Supp. 2001).


\textsuperscript{112} 259 Va. 697, 529 S.E.2d 96 (2000).

\textsuperscript{113} Id. at 705, 529 S.E.2d at 100.


testimony in cases involving child victims includes child witnesses and adds murder to the list of offenses that these sections cover.117 Another significant piece of legislation provides that, upon a victim's request, the attorney for the Commonwealth must consult with the victim throughout the plea negotiation process.118 Except for good cause, the court is not allowed to accept a plea agreement unless it finds that the Commonwealth has done so.119 The duty to confer with the victim, however, does not limit the ability of the attorney for the Commonwealth to exercise his discretion with respect to the handling of any criminal charge against the defendant.120

Other legislation makes clear that teachers, principals, or other persons "employed by a school board or employed in a school operated by the Commonwealth" are prohibited from subjecting a student to corporal punishment.121 The bill provides, however, that the definitions of "corporal punishment" or "abused or neglected child" do not include permitted actions described in the corporal punishment statute.122

Various criminal code amendments rewrote the "indecent liberties with children" statute123 to clarify that, except for the portion on receiving remuneration for encouraging a child to perform in sexually explicit visual material, the child must be under fourteen years of age to constitute a crime.124 Another bill sets forth

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120. Id.
122. See id. The legislation largely parallels the provisions of Virginia Code section 22.1-279.1 prohibiting the use of corporal punishment in school settings. See VA. CODE ANN. § 22.1-279.1 (Repl. Vol. 2000 & Cum. Supp. 2001). In determining whether a person acts within the exceptions in the section, the local department of social services shall examine whether the actions at the time of the event were reasonable. See id. § 63.1-248.4:1(A) (Cum. Supp. 2001).
124. Id. The bill further provides that a second or subsequent violation of the Virginia Code section prohibiting taking indecent liberties with a child by a person in custodial or supervisory relationship is a Class 5 felony. Id. § 18.2-370.1 (Cum. Supp. 2001). Also, a first offense under the taking indecent liberties with children sections is defined as a sexually violent offense. Id. § 19.2-288.1(A) (Cum. Supp. 2001). Under previous law the offense was not defined as sexually violent until the second offense. See id. § 19.2-288.1(A) (Repl. Vol. 2000). This means that a person has to register with the Sexual Offender and Crimes Against Minors Registry after a first offense rather than a second offense. The bill also elevates the penalty for knowingly failing to register or re-register or knowingly pro-
civil penalties for persons providing harmful material to minors who appear to be under eighteen years of age without first requiring the production of a government-issued photo identification.\textsuperscript{125}\textsuperscript{\textdagger} A third enactment requires the State Police to furnish an affidavit to the jurisdiction prosecuting a person for the failure to comply with the duty to register or re-register as a sexually violent offender.\textsuperscript{126}\textdagger The affidavit shall be admitted in court as proof of the failure to register, and will therefore alleviate the need for the custodian of the records at the State Police to testify as to the record.\textsuperscript{127}

Amendments to the statutes governing the Criminal Injuries Compensation Fund provide that a person who suffered sexual abuse as a minor has until ten years after his or her eighteenth birthday to file a claim.\textsuperscript{128}\textdagger The bill also provides that any claim involving the sexual abuse of a minor that has been denied before July 1, 2001, because it was not timely filed, may, upon application filed with the Compensation Fund, be reconsidered provided the application for reconsideration is filed within ten years after the minor’s eighteenth birthday.\textsuperscript{129}

B. Case Law

It has been commonplace to find that many of the appellate cases on the criminal side of the docket each year involve issues of abuse or neglect. For example, in \textit{Collado v. Commonwealth},\textsuperscript{130} the evidence was deemed sufficient to support the defendant’s conviction for child abuse through the “shaken baby syndrome” in light of both her custody of the child as a daycare provider when the injuries occurred and her expert testimony regarding the time of the injuries.\textsuperscript{131} During the sentencing phase of the trial, the trial court might have erred in admitting into evidence a letter providing false information from a Class 1 misdemeanor to a Class 6 felony. See \textit{id.} § 18.2-472.1 (Cum. Supp. 2001).

\begin{footnotesize}
\textsuperscript{125} See \textit{id.} § 18.2-391(E) (Cum. Supp. 2001).
\textsuperscript{126} \textit{Id.} § 19.2-298.1(H) (Cum. Supp. 2001). The affidavit must be provided to the registrant or his counsel seven days before a hearing. \textit{Id.} § 18.2-472.1 (Cum. Supp. 2001).
\textsuperscript{128} \textit{Id.} § 19.2-368.5(B) (Cum. Supp. 2001).
\textsuperscript{129} See \textit{id.} § 19.2-368.8(A) (Cum. Supp. 2001).
\textsuperscript{130} 33 Va. App. 356, 533 S.E.2d 625 (Ct. App. 2000).
\textsuperscript{131} \textit{Id.} at 363, 533 S.E.2d at 629.
\end{footnotesize}
from a couple indicating that their child had suffered a similar injury while in Collado’s care. The trial court also considered positive letters from other parents, however, and the judge stated that he would not sentence the defendant based on the negative letter.

In Craig v. Commonwealth, the court held that a defendant could properly be convicted of involuntary manslaughter in a trial for second degree murder for the death of his daughter as the result of “shaken baby syndrome.” This is because the Commonwealth, as well as the defendant, may request an instruction on the lesser-included offense of involuntary manslaughter in such a case.

In Dowden v. Commonwealth, another case involving a parent, the circumstantial evidence that defendant was responsible for the blunt trauma fatal injuries to his seven-month-old son was sufficient to support his conviction for involuntary manslaughter. However, in Barrett v. Commonwealth, a mother appealed her convictions for felony murder and felony child neglect for failing to adequately supervise her almost three-year-old daughter who drowned her ten-month-old brother. The court of appeals reversed the trial court because of the trial court’s refusal to instruct the jury on the meaning of “willful” in the context of felony abuse or neglect.

In Velazquez v. Commonwealth, the court of appeals affirmed the defendant’s conviction for the rape of a fifteen-year-old. The court ruled that the trial court properly admitted testimony by a
sexual assault nurse examiner ("SANE") as an expert witness concerning the cause of the victim's injuries. In another case, a defendant neglected to proffer evidence of an eleven-year-old sodomy victim's disciplinary problems in school. The defendant was denied review of the trial court's ruling excluding the evidence. In *Bloom v. Commonwealth,* the evidence was sufficient to support defendant's convictions for attempting to take indecent liberties with a child under the age of fourteen and for solicitation to commit sodomy in various Internet communications.

In *Snow v. Commonwealth,* the court of appeals held that an uncle could be convicted of child cruelty as a "person responsible for the care of a child" by engaging in a high speed attempt to evade the police with several children under eighteen in his car. The conviction was sustained because he voluntarily took control of the car and drove away from the police knowing that the children were in the vehicle. Likewise, in *Quinones v. Commonwealth,* the court held that a step-grandfather could be tried as a custodian. His conviction was reversed, however, because of the erroneous introduction of prior bad acts testimony lacking any connection to the charged incidents.

In *Paris v. Commonwealth,* the court of appeals concluded that the statute under which a defendant was convicted for committing oral sodomy on his fifteen-year-old nephew was clearly constitutional and did not violate his rights to "the enjoyment

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144. *Id.* at 195–97, 543 S.E.2d at 634–35.
145. *Id.* at 340, 542 S.E.2d at 6.
146. *Id.* at 340, 542 S.E.2d at 6.
147. *Id.* at 342, 542 S.E.2d at 7.
148. *Id.* at 342, 542 S.E.2d at 7.
149. *Id.* at 372–73, 542 S.E.2d at 22.
151. *Id.* at 777–72, 537 S.E.2d at 9.
152. *Id.* at 777–72, 537 S.E.2d at 9.
153. *Id.* at 636, 547 S.E.2d at 525.
154. *Id.* at 639–44, 547 S.E.2d at 527–29.
155. *Id.* at 639–44, 547 S.E.2d at 527–29.
156. The law in question was Virginia's "Crimes against nature" statute. *See Va. Code*
of life and liberty” and to “pursuing and obtaining happiness.”157 In addition, the court held that the trial judge did not err in refusing a jury instruction that the Commonwealth had to prove beyond a reasonable doubt that the defendant knew that the victim did not consent.158

In Cairns v. Commonwealth,159 a defendant was convicted of multiple offenses involving sexual conduct with his daughter and step-daughter.160 The defendant's wife allegedly filmed, and engaged in, the sexual acts between the defendant, daughter, and step-daughter.161 Because the wife did not testify against Cairns, there was no violation of the marital privilege through the introduction of her pretrial statements; hence, the admission of those statements did not violate the hearsay rule.162 However, the admission of the wife's statements in the joint trial violated the husband's Sixth Amendment Confrontation Clause rights, and the erroneous admission of the evidence was not harmless error.163

In Ashby v. Commonwealth,164 the court of appeals concluded that when the original indictment was “nol prossed” and a new indictment issued, the speedy trial period began anew.165 Moreover, the victim's testimony was sufficient to support the convictions for sexual offenses even though he was a fourteen-year-old special education student who told no one about the incidents until well after they occurred.166 In Moyer v. Commonwealth,167 the court of appeals allowed a boarding school teacher's diaries into evidence and found the teacher guilty of taking indecent liberties with a minor child.168 In Griffin v. Commonwealth,169 the court concluded that although the defendant had confessed to sexual of-

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158. Id. at 385, 545 S.E.2d at 561.
160. Id. at 6, 542 S.E.2d at 773.
161. Id. at 11–12, 542 S.E.2d at 776.
162. Id. at 10–12, 542 S.E.2d at 776.
163. See id. at 12–18, 542 S.E.2d at 776–79.
165. Id. at 549, 535 S.E.2d at 187.
166. Id. at 544–48, 535 S.E.2d at 185–86.
168. Id. at 36–37, 531 S.E.2d at 594.
fenses against his six-year-old daughter, there was not even “slight corroborative evidence” to establish the *corpus delicti* of the offense and justify the conviction. In two cases brought by a Virginia prison inmate who had been convicted for sexual crimes involving juveniles, the United States District Court for the Western District of Virginia ruled that correctional authorities could confiscate photographs of children from inmates’ cells because incarcerated individuals have “no recognizable expectation of privacy” in their cells.

In *Green v. Richmond Department of Social Services*, the Court of Appeals of Virginia held that allowing an individual, incarcerated for several sexual offenses, access to his daughter’s medical, hospital and other records “would be harmful to her and was not in her best interests.” In *Rivera v. Roanoke City Department of Social Services*, the court of appeals ruled that the trial court properly granted an emergency removal order when Rivera failed to control the behavior of her two grandsons in her custody. The boys had a history of delinquency, and Rivera had a history of failing to maintain their home detention status. Rivera also failed to cooperate with DSS’s attempts to provide her with counseling, homemaking, and parenting services.

Substance abuse continues to play a major role in the termination of residual parental rights. In *Hawthorne v. Smyth County Department of Social Services*, the Hawthornes’ son was removed from their care in 1997 because of inadequate parenting skills, including, among other things, neglect, serious alcohol abuse, and general instability in the home. The son remained in foster care for several months. Finally, he went to live with a grown sister and brother-in-law before returning home later that

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170. *Id.* at 430, 533 S.E.2d at 661.
173. *Id.* at 686, 547 S.E.2d at 550.
175. *Id.* at *4.
176. *Id.* at *5.
177. *Id.*
179. *Id.* at 132, 531 S.E.2d at 641.
180. *Id.*
A foster care plan was prepared and approved, but the parents failed to comply with its provisions and continued to abuse alcohol. Consequently, DSS removed the child from the Hawthornes' home. Despite the trial court's error in ruling that the department had no duty to seek placement with a relative before terminating parental rights, the Court of Appeals of Virginia ruled that the error was harmless and terminated the parental rights.

In another case, a father's parental rights were terminated where the neglected child had special needs resulting from the father's incarceration, involvement with cocaine, and failure to follow the prescribed conditions for the child's return. In *Walker v. Virginia Beach Department of Social Services*, the Court of Appeals of Virginia terminated a father's parental rights because of his failure to remedy the neglect and domestic violence that led to the removal of the child from his home. In *Walker*, the father was a military veteran suffering from post-traumatic stress disorder and "polysubstance dependence." He was in and out of the hospital during much of the time his daughter was in foster care, and he was not successful in dealing with his problems or in complying with the terms of the foster care service plan. In *Roanoke City Department of Social Services v. Heide*, however, the court of appeals ruled that the circuit court properly refused to terminate a father's parental rights despite a history of alcohol abuse. In *Heide*, the father made substantial progress in dealing with his abuse to the extent that he had not had a drink in more than a year and had an improved employment record. Thus, it seems clear that a parent's successful efforts to stem sub-

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 140, 531 S.E.2d at 644.
187. *Id.* at *9.
188. *Id.* at *6.
189. *Id.*
191. *Id.* at 330, 544 S.E.2d at 890.
192. *Id.* at 333–34, 544 S.E.2d at 892.
stance abuse will play a major role in a court's determination of whether to terminate parental rights.

As in *Walker*, the mental illness or mental deficiency of a parent, when combined with substance abuse, may also play a role in the termination of a parent's rights. In *Richmond Department of Social Services v. L.P.*, the court of appeals reversed the circuit court's conclusion that the mother's parental rights could not be terminated because her inability to properly care for her child was due solely to her mental deficiency, thereby constituting "good cause." Stating that the guiding principle in termination cases is "the best interests of the child," the courts of appeals held that the severity of the mother's mental deficiency precluded her from ever being "able to assume responsibility for the care of her child." The court concluded that:

[A] parent's mental deficiency that is of such severity that there is no reasonable expectation that such parent will be able within a reasonable period of time befitting the child's best interests to undertake responsibility for the care needed by the child in accordance with the child's age and stage of development does not constitute "good cause" under Code § 16.1-283(C)(2).

A third category of persistent termination cases involves incarcerated parents. In *Howard v. Charlottesville Department of Social Services*, the court found clear and convincing evidence to terminate Howard's residual parental rights where she repeatedly gave up custody of her daughter to others without maintaining contact with either the girl or the custodians. Howard was either a fugitive or incarcerated during much of the child's life and did not follow through on the treatment programs prescribed by the foster care plan. However, in *Fairfax County Department of Social Services v. Ibrahim*, the court refused to terminate Ibrahim's parental rights because DSS's evidence was insufficient
to sever his bond with his children.\textsuperscript{201} Ibrahim's children were placed in foster care as a result of abuse by a substitute custodian while Ibrahim, a foreign national, was incarcerated in a federal penitentiary for a drug offense.\textsuperscript{202} DSS never returned the children to the family because the father was deported upon his release.\textsuperscript{203} The court found that the statutory requirements for termination were not met because services were not provided to assist in reuniting the family.\textsuperscript{204} On the other hand, in \textit{Jones v. Richmond Department of Social Services},\textsuperscript{205} the court upheld the juvenile and domestic relations court's termination of the mother's parental rights in light of evidence that the mother was incarcerated four times, continuously resumed her substance abuse, and repeatedly failed to comply with the instructions of either DSS or the court.\textsuperscript{206} Also, in \textit{Lefler v. Smyth County Department of Social Services},\textsuperscript{207} a mother's parental rights were terminated after a long history of physical altercations between the parents, a history of neglect of the children and their persistent physical, behavioral, and emotional problems, and a history of regular incarceration of the mother on a variety of criminal charges.\textsuperscript{208}

In another case, a father's parental rights were terminated while he was serving a fifty-seven year sentence.\textsuperscript{209} There were no relatives capable or willing to care for his son who had been in foster care with prospective adoptive parents for more than four years.\textsuperscript{210}

In \textit{Fredericksburg Department of Social Services v. Brown},\textsuperscript{211}

\begin{itemize}
  \item \textsuperscript{201} Id. at *11.
  \item \textsuperscript{202} Id. at *3.
  \item \textsuperscript{203} Id. at *8.
  \item \textsuperscript{204} Id. at *6–7. Judge Clement concurred, but expressed concern that little focus had been placed on the best interests and needs of the children in the majority opinion. Id. at *12–15 (Clement, J., concurring).
  \item \textsuperscript{206} Id. at *6.
  \item \textsuperscript{207} No. 2706-00-3, 2001 Va. App. LEXIS 250 (Ct. App. May 8, 2001) (unpublished decision).
  \item \textsuperscript{208} Id. at *3–5.
  \item \textsuperscript{210} Id.
  \item \textsuperscript{211} 33 Va. App. 313, 533 S.E.2d 12 (Ct. App. 2000).
\end{itemize}
the Court of Appeals of Virginia found an entrustment agreement executed by the children’s aunt invalid, even though the aunt had legal custody of the children.\textsuperscript{212} Because the aunt was neither a “parent” nor a “guardian” as required by Virginia Code section 63.1-56, the court denied the termination of residual parental rights but could not grant custody of the children to DSS.\textsuperscript{213} Other parents had their rights to their son terminated where there were various allegations of abuse, where the mother absconded with the boy and could not be located for almost two years, where the child had such severe behavioral problems that he had to be placed in therapeutic foster care, and where the parents had little involvement with their son after his return to foster care.\textsuperscript{214}

One termination case involved a family with a long history of interaction with DSS, commencing with a finding of neglect in 1993, which resulted in the award of custody to the paternal grandparents.\textsuperscript{215} In September of 1994, the children were removed through an emergency removal order, and in October of 1994, DSS drafted a foster care plan with the goal of returning the children to the parents.\textsuperscript{216} A year later, a new foster care plan was filed with a new goal of adoption.\textsuperscript{217} The parents could not meet the plan’s requirements, and as such, the decision to terminate parental rights was clearly supported by the evidence.\textsuperscript{218} In \textit{Miller v. Richmond Department of Social Services},\textsuperscript{219} Miller’s children had been in foster care for more than five years, and, during that time, Miller had visited them only seven times.\textsuperscript{220} While one of the boys had special needs, Miller did little to participate in the services offered by DSS.\textsuperscript{221} Thus, the evidence supported the termination of his parental rights.\textsuperscript{222} Failure to follow through with a

\begin{thebibliography}{99}
\bibitem{212} Id. at 323, 533 S.E.2d at 17.
\bibitem{213} Id. at 323, 533 S.E.2d at 16.
\bibitem{216} Id. at *4.
\bibitem{217} Id. at *5.
\bibitem{218} Id. at *13.
\bibitem{220} Id. at *4.
\bibitem{221} Id. at *11–12.
\bibitem{222} Id.
\end{thebibliography}
foster care plan resulted in the termination of parental rights in *Fayette v. Stafford County Department of Social Services*.\(^{223}\) In *Fayette*, the father failed to comply with a foster care plan calling for extensive visitation: he attended only sixteen of the fifty-six potential visits, never attended the prescribed parenting classes, failed to complete a scheduled parenting evaluation, and incurred significant child support arrearages.\(^{224}\)

In *May v. Virginia Beach Department of Social Services*,\(^{225}\) the court concluded there was no abuse of discretion by the trial court in terminating May's parental rights.\(^{226}\) May's attorney had made repeated unsuccessful efforts to contact May, and May failed to stay in touch with her attorney.\(^{227}\) The evidence also showed that May did not respond to repeated efforts by DSS to provide services to her, visited her son only twice in foster care between April 1998 and July 1999, and was unwilling or unable to substantially remedy the situations that led to her son's foster care.\(^{228}\) In *Harmon v. Richmond County Department of Social Services*,\(^{229}\) the court of appeals concluded that the trial court did not err in quashing subpoenas directed to the defendant's eleven-year-old twin sons because the boys were not of an age of discretion sufficient to testify and express their opinions about the termination of their mother's residual parental rights.\(^{230}\) However, where there was no explicit finding that termination was in the best interest of the children, the court of appeals found error in concluding that the evidence was sufficient to terminate the mother's parental rights.\(^{231}\) In another case, the termination of a mother's parental rights was affirmed when the mother failed to appear at the de novo hearing in the circuit court.\(^{232}\) Also, the failure of a mother to assert her claim that a contractual agree-

\(^{224}\) *Id.* at *5*.
\(^{226}\) *Id.* at *6*.
\(^{227}\) *Id.* at *2–3*.
\(^{228}\) *Id.* at *5*.
\(^{230}\) *Id.* at *2*.
\(^{231}\) *Id.* at *9–10*.
ment with the DSS precluded the termination of parental rights in the circuit court during her de novo appeal barred an appeal to the court of appeals on that basis.\footnote{233}{Swearingin v. Dep't of Soc. Servs., No. 1798-00-3, 2001 Va. App. LEXIS 377, at *6 (Ct. App. June 26, 2001) (unpublished decision).}

Several other Virginia cases were recently decided on procedural grounds. In a custody dispute, the failure of a mother to serve a copy of her opening appellate brief on the child’s guardian ad litem constituted a failure to bring a necessary party before the court.\footnote{234}{Comer v. Comer, No. 0157-00-2 (Ct. App. Dec. 19, 2000) (unpublished decision), available at http://www.courts.state.va.us/wpcau.htm.} The mother’s appeal was therefore dismissed.\footnote{235}{Id.} In another case, the court of appeals dismissed a parent’s appeal from the approval of a permanent entrustment agreement and the termination of parental rights because the parent’s counsel simply endorsed the order as “seen and objected to” without any specific grounds for objection stated or preserved for appeal.\footnote{236}{Id.} Further, DSS failed to preserve any issues for appeal from an order denying termination of parental rights by endorsing the judgment order as “[w]e ask for this.”\footnote{237}{Keator v. Lutheran Soc. Servs. of the Natl Capital Area, Inc., No. 1883-00-4, 2001 Va. App. LEXIS 37, at *2-3 (Ct. App. Jan. 30, 2001) (unpublished decision).} Finally, a party failed to perfect an appeal from a DSS administrative hearing by failing to make DSS a party in the circuit court proceeding.\footnote{238}{Suffolk Dep't of Soc. Servs. v. Ellis, No. 1705-00-1, 2001 Va. App. LEXIS 129, at *2 (Ct. App. Mar. 13, 2001) (unpublished decision).}

In Ferguson v. City of Charleston,\footnote{239}{Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001).} the Supreme Court of the United States ruled that a public hospital’s non-consensual drug testing of pregnant women for law enforcement purposes was an unconstitutional search in violation of the Fourth Amendment.\footnote{240}{Id. at 1293.} Pregnant women who obtained obstetrical care at the hospital were tested for cocaine use, and if the tests were positive, the women were either arrested or offered drug treatment.\footnote{241}{Id. at 1285.}

A divided Fourth Circuit Court of Appeals concluded, in Bell v. Jarvis,\footnote{242}{236 F.3d 149 (4th Cir. 2000) (en banc).} that a state court’s closure of the courtroom during peti-
tioner's trial on fifty-eight counts of sexual misconduct with his step-granddaughter and two of her friends, and the failure of his state appellate counsel to raise the issue, did not warrant federal habeas corpus relief. Likewise, in *Quinn v. Haynes*, the Fourth Circuit denied habeas corpus review of a state court decision refusing cross-examination of a child sexual abuse victim regarding allegations of sexual assault against others pursuant to a state rape shield law.

The Fourth Circuit ruled in *United States v. Mento* that the Child Pornography Protection Act of 1996 was constitutional. In a later case the Fourth Circuit concluded that the dissemination of child pornography in interstate commerce in violation of the same Act could constitute "distribution," even without a pecuniary motive. Such a finding could factor into a sentence enhancement.

IV. EDUCATION

A. Legislative Developments

A number of substantive changes were made to Title 22.1 of the Virginia Code during the 2001 session of the General Assembly. The new legislation: (1) adds definitions for the various student disciplinary actions; (2) requires division superintendents, in making recommendations for expulsion for violations other than those involving weapons or drugs, to consider various factors, such as the student's age, grade level, academic and attendance records, disciplinary history, and the appropriateness and availability of an alternative education placement; (3) requires subsequent confirmation or disapproval of a recommended student

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243. Id. at 175.
244. 234 F.3d 837 (4th Cir. 2000).
245. Id. at 862.
246. 231 F.3d 912 (4th Cir. 2000).
250. Id.
expulsion by a school board, or a committee thereof, regardless of whether the pupil exercised the right to a hearing.\footnote{Id. § 22.1-277.06(A) (Cum. Supp. 2001).} (4) allows school boards to exclude from attendance students who have been suspended for more than thirty days, or expelled by another school division, or for whom private school admission has been withdrawn regardless of the offense, upon a finding that the student presents a danger to the other students or staff of the school division and upon compliance with a hearing process;\footnote{Id. § 22.1-277.2(A) (Cum. Supp. 2001).} (5) eliminates the one-year cap for the period of time a student may be excluded from school attendance in another school division, and provides that the date upon which the student may re-petition for admission must be issued by the relevant body or person rendering the initial exclusion, and, upon denial of the petition, a date for subsequent petitions;\footnote{Id. § 22.1-277.2(C) (Cum. Supp. 2001).} (6) permits school divisions excluding students who have been expelled from another school division in the Commonwealth to “accept or waive any or all of any conditions for readmission” that may have been imposed by the expelling school division\footnote{Id. § 22.1-277.2(A) (Cum. Supp. 2001).} with the exception that the excluding school division cannot impose additional conditions for readmission;\footnote{Id. § 22.1-277.2:1(A) (Cum. Supp. 2001).} (7) allows school boards to permit students who were expelled, were excluded, are subject to a long-term suspension, or were found guilty of a crime that could have resulted in injury to others or for whom a court disposition is required to be reported, to attend an alternative education program provided by the school division;\footnote{Id. § 22.1-277.2:1(A) (Cum. Supp. 2001).} (8) permits school boards to take action against students for actual breakage, or destruction of, or failure to return school property that is caused in the course of a student’s studies;\footnote{Id. § 22.1-280.4 (Cum. Supp. 2001).} and (9) requires school boards to establish a schedule pursuant to which expelled students may apply and reapply for readmission to school.\footnote{Id. § 22.1-277.06(B) (Cum. Supp. 2001). This schedule would be designed to ensure that the hearing and ruling on any initial petition for readmission, if granted, would en-
Other legislation deals with weapons by providing that the hunting exemption and the exemption for an established shooting range do not apply to the willful discharge of a firearm upon the buildings and grounds of a school.\(^{261}\) Another statute prohibits all knives on school property, or at a school-sponsored event, except for pocket knives having a folding metal blade less than three inches long.\(^{262}\) In *Frias v. Commonwealth*,\(^{263}\) the court of appeals determined that a "registered armed security officer" who also has a valid concealed weapons permit is not a "conservator of the peace" and, thus, can be convicted of possession of a firearm on school property.\(^{264}\)

Another behavior-focused law authorizes local school boards to establish optional age-appropriate education programs for young students in grades kindergarten through five who require guidance, supervision, and discipline in a structured learning environment.\(^{265}\) These programs must provide services that will enable students to maintain academic achievement, attain basic skills and academic proficiencies, and otherwise benefit from a public education during the time they may be removed from the regular classroom.\(^{266}\) School boards must ensure that the programs are adequately staffed by licensed teachers or other persons with qualifications to implement the program.\(^{267}\)
Legislation was enacted at the insistence of the Joint Subcommittee to Study Continuing and Vocational/Technical Education. The legislation changed the name of “vocational technical education” in the Virginia Code to “career and technical” education, in conformance with the currently accepted national view.\textsuperscript{268} Other new legislation requires, as part of the acceptable Internet use policies that public school divisions must file every two years, that computers with Internet access be equipped with “blocking devices” to prevent access to obscenity and child pornography.\textsuperscript{269}

A highly debated piece of legislation requires: (1) all students to learn the Pledge of Allegiance and to demonstrate such knowledge;\textsuperscript{270} (2) each school board to require the daily recitation of the Pledge of Allegiance in each classroom of the school division;\textsuperscript{271} and (3) each school to ensure that an American flag is displayed in each classroom.\textsuperscript{272} Every school board must determine the appropriate time during the school day for the recitation of the Pledge, and students must either stand and recite the Pledge while facing the flag with their right hands over their hearts, or in an appropriate salute if in uniform.\textsuperscript{273} However, no student must recite the Pledge if he or his parent or legal guardian objects on religious, philosophical, or other grounds.\textsuperscript{274} Relatedly, the controversial 2000 amendment to Virginia’s “minute of si-


\textsuperscript{269} VA. CODE ANN. § 22.1-70.2 (Cum. Supp. 2001). This bill further requires the principal or other chief administrator of any private school that satisfies the compulsory school attendance law and accepts federal funds for Internet access (E-rate funds) to select a technology for its computers that will do the same. Id.

\textsuperscript{270} Id. § 22.1-202(A) (Cum. Supp. 2001). Students exempt from reciting the pledge must remain quietly standing or sitting at their desks while others recited the pledge and must not make any display that disrupts or distracts others who are reciting the pledge. Id. § 22.1-202(C) (Cum. Supp. 2001). Schools must provide appropriate accommodations for students who are unable to comply with these procedures due to disability, and codes of conduct shall apply to disruptive behavior during the recitation of the pledge. Id. The Office of the Attorney General must intervene on behalf of local schools boards and must provide legal defense of these provisions. Id. § 22.1-202(D) (Cum. Supp. 2001).

\textsuperscript{271} Id. § 22.1-202(C) (Cum. Supp. 2001).

\textsuperscript{272} Id.

\textsuperscript{273} Id.

\textsuperscript{274} Id.
ence” statute 275 withstood First Amendment scrutiny in the
Fourth Circuit Court of Appeals. 276

Another enactment requires public schools to provide instruc-
tion on the dangers of alcohol abuse, underage drinking, and
drunk driving. 277 The Department of Alcoholic Beverage Control
must provide educational materials to the Department of Educa-
tion, which, in turn, must review and distribute to public schools
all approved materials. 278 Boards of Education are also directed to
publicize and disseminate to parents of students who are enrolled
in special education programs, or for whom a special education
placement has been recommended, information regarding current
federal laws and regulations addressing procedures and rights re-
lated to the placement and withdrawal of children in special edu-
cation. 279

An amendment to the Code provides that the criminal records
history obtained by school boards for applicants who are offered
or who accept school employment, whether on a temporary, per-
manent, or part or full-time basis, address all felony and Class 1
misdemeanor convictions and equivalent offenses in other states. 280
Previously, records were searched for all felonies and
misdemeanors involving drugs, abuse or neglect of children,
moral turpitude, obscenity offenses, and/or sexual assault. 281 In
addition, reports of all arrests of school employees, not just the
currently enumerated serious crimes, will now be reported to
school boards. 282 These employees must then submit to finger-
printing and criminal history records checks. 283

275. See id. § 22.1-203 (Repl. Vol. 2000); see also Robert E. Shepherd, Jr., Annual Sur-
276. See Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001), petition for cert. filed, 70
278. Id.
must apprise local school boards of the provisions of this act by an Administrative Memo-
randum no later than thirty days after its enactment. Id. The bill was a recommenda-
tion of the Joint Subcommittee Studying the Overrepresentation of African-American Students
in Special Education Programs.
applicants for school employment previously had to certify they had not been convicted of
a felony, crime of moral turpitude, or other specific crimes involving the abuse of a child.
B. Case Law

There were only a few cases this year that dealt with children with disabilities in the school system. In *C.M. v. Board of Education,*\(^{284}\) the United States Court of Appeals for the Fourth Circuit decided that a North Carolina statute requiring that a request for a due process hearing be filed within sixty days of a state agency decision was not inconsistent with the Individuals with Disabilities Education Act.\(^{285}\) However, the parents of the child must receive adequate notice of the decision, and that did not occur in this case.\(^{286}\) In *Brown v. Ramsey,*\(^ {287}\) the United States District Court for the Eastern District of Virginia held that two teachers’ physical restraint of a first grade special education student suffering from Asperger’s Syndrome, a neurological disorder similar to autism, by use of a “basket hold” did not violate the boy’s civil rights.\(^ {288}\) A Virginia circuit court ruled, in *Colona v. Accomack County School Board,*\(^ {289}\) that a school board has a duty to inform its teachers of any students who have AIDS or who are HIV positive.\(^ {290}\)

The United States Supreme Court ruled in *Good News Club v. Milford Central School*\(^ {291}\) that public elementary schools permitting non-religious groups to meet in school facilities after school hours must allow religious groups to use the buildings as well.\(^ {292}\) The Court’s 6-3 decision extends to elementary schools the same constitutional principle previously articulated for public high schools and universities.\(^ {293}\)

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n,*\(^ {294}\) the Court ruled that the private association’s enforcement of a regulation constituted “state action” for the purposes of
the Fourteenth Amendment. In *Brentwood*, there was pervasive public involvement and entanglement with the Athletic Association. In *Newton v. Slye*, a federal district judge denied a preliminary injunction to a high school English teacher and some of his students seeking the reposting of a pamphlet about banned books on the teacher's classroom door. The court concluded that the posted pamphlet could be viewed as part of the curriculum and therefore was not protected speech. In *Baynard v. Lawson*, the United States District Court for the Eastern District of Virginia ruled that a student who was sexually abused by a teacher could recover from the school's principal for deliberate indifference to the charges, but that the school board could not be held liable under Title IX where the board had no knowledge of the activities. The Supreme Court of Virginia ruled, in *Linhart v. Lawson*, that a trial judge improperly sustained a plea of sovereign immunity for a school board for the acts of a bus driver who struck a vehicle and inflicted injuries.

V. MENTAL HEALTH

A study by the Commission on Youth on the problem of youth suicide resulted in the enactment of legislation that requires the Department of Health to assume lead responsibility in the Commonwealth for coordinating activities concerning youth suicide prevention. Another bill eliminated the seventy-two or ninety-six-hour maximum extension periods for a commitment hearing.

295. Id. at 929.
296. Id. at 933.
298. Id. at 679.
299. Id. at 684.
301. Id. at 532.
304. VA. CODE ANN. § 32.1-73.7 (Repl. Vol. 2001). This responsibility includes coordination of the activities of the agencies of the Commonwealth pertaining to youth suicide prevention in order to develop a comprehensive youth suicide prevention plan addressing the promotion of health development, early identification, crisis intervention, and support to survivors. Id. See generally Report of Commission on Youth, Youth Suicide Prevention Plan, H. Doc. No. 29 (2001).
to conform to the duration of a temporary detention order and provides that when the maximum forty-eight-hour period of temporary detention would expire on a Saturday, Sunday, or legal holiday, the person may be detained until the next day that is not a Saturday, Sunday, or legal holiday.305

VI. MISCELLANEOUS

Provided that state pool funds are not used, an amendment to the Comprehensive Services Act for At-Risk Youth and Families306 authorizes a community policy and management team, upon approval of the participating governing bodies, to contract with another such team to purchase coordination services.307 Another bill requires the “family assessment and planning team” to provide for the participation of foster parents in the assessment, planning, and implementation of services when a child has a program goal of permanent foster care, or is in a long-term foster care placement.308 The case manager shall notify the foster parents of a troubled youth of the time and place of all assessment and planning meetings related to the youth.309 In addition, the foster parents shall be given the opportunity to speak at the meeting or submit written testimony if they are unable to attend, and their opinions shall be considered by the family assessment and planning team in its deliberations.310

The abortion statutes were amended in 2001 to establish certain conditions for obtaining informed written consent from a pregnant woman of any age prior to performing an abortion.311 The conditions include the requirement that, at least twenty-four hours before the abortion, each woman be given: (1) an explanation of the proposed procedures or protocols; (2) notification that she may withdraw her consent at any time prior to the procedure; (3) an offer to speak with the physician who is to perform the abortion; (4) a statement of the probable gestational age of the fe-

309. Id.
310. Id.
tus at the time the procedure is to be performed; and (5) an offer to review printed materials that must be developed by the Department of Health.\textsuperscript{312} Informed written consent is not required in medical emergencies.\textsuperscript{313}

In \textit{Taylor v. Commonwealth},\textsuperscript{314} the Supreme Court of Virginia upheld a defendant's conviction for abduction as a principal in the second degree for assisting a birth-father in the abduction of his illegitimate ten-month-old child from the legal custody of the child's mother.\textsuperscript{315} The Supreme Court of Virginia held in \textit{Thompson v. Skate America, Inc.},\textsuperscript{316} that a business owner may be liable to an invitee for the assaultive acts of a third person for which the business was on notice.\textsuperscript{317} The court reaffirmed its earlier holding that parents are not vicariously liable for the acts of their minor children on a theory of negligent supervision.\textsuperscript{318}

Teenage driving was a major focus during the 2001 Session of the Virginia General Assembly in light of a series of high profile automobile accidents involving teen drivers and multiple fatalities.\textsuperscript{319} One major bill provides for the issuance of provisional driver's licenses to persons less than eighteen years old.\textsuperscript{320} The new legislation authorizes minors with licenses to operate a motor vehicle with no more than one passenger who is less than eighteen years old until the holder's seventeenth birthday and no more than three passengers under eighteen until the holder's eighteenth birthday.\textsuperscript{321} The holder of such a license also cannot drive between the hours of midnight and 4:00 a.m., except for cer-

\begin{itemize}
\item \textsuperscript{312} \textit{Id} § 18.2-76(B) (Cum. Supp. 2001).
\item \textsuperscript{313} \textit{Id.} § 18.2-76(C) (Cum. Supp. 2001).
\item \textsuperscript{314} 260 Va. 683, 537 S.E.2d 592 (2000).
\item \textsuperscript{315} \textit{Id.} at 690, 537 S.E.2d at 596.
\item \textsuperscript{316} 261 Va. 121, 540 S.E.2d 123 (2001).
\item \textsuperscript{317} \textit{Id.} at 131, 540 S.E.2d at 128. The Motion for Judgment alleged that the third person had been banned from the premises and yet the business did nothing to enforce the ban or protect other patrons from assaults by the third person. \textit{Id.} at 125–26, 540 S.E.2d at 125.
\item \textsuperscript{319} See generally Carlos Santos, \textit{Tough Issues Surround Teen Driving; Group's Fatalities Rise Dramatically}, \textit{RICH. TIMES-DISPATCH.}, Jan. 21, 2001, at A1 (detailing an increase in teenage traffic fatalities during 2000).
\item \textsuperscript{320} \textit{VA. CODE ANN.} § 46.2-334.01 (Cum. Supp. 2001).
\item \textsuperscript{321} \textit{Id.} The statute exempts members of the minor driver’s family or household from this limitation. \textit{Id.}
tain specified exceptions. In addition, persons under eighteen must drive a motor vehicle for at least forty hours under a learner's permit before receiving a provisional license.

Another bill provided that where a minor's parents have been awarded joint custody, both custodial parents must sign a request to the Department of Motor Vehicles before the department will cancel the minor's driver's license. If one parent is not reasonably available, or if the parents disagree, one parent may petition the juvenile and domestic relations district court for a determination of the issue. A third enactment provides that it is the date of the violation, not the date of the conviction, that will subject a driver who is less than eighteen years old to those requirements and restrictions not applicable to drivers who are eighteen years of age or older.

In Lorillard Tobacco Co. v. Reilly, the United States Supreme Court ruled that Massachusetts regulations barring tobacco advertising and sales within a certain distance of a school were either pre-empted by the Federal Cigarette Labeling and Advertising Act or were overly broad and violated the First Amendment. In Nguyen v. Immigration & Naturalization Service the Supreme Court concluded that Congress could legally treat the American fathers of illegitimate children born abroad differently than mothers for the purpose of establishing the citizenship of those children. Justice O'Connor dissented in a strong opinion charging that the majority had abandoned nearly three decades of cases applying "heightened scrutiny to legislative classifications based on sex."

322. Id.
323. Id. § 46.2-335(B) (Cum. Supp. 2001).
324. Id. § 46.2-334(B) (Cum. Supp. 2001).
325. Id.
326. Id. § 46.2-334.01 (Cum. Supp. 2001).
329. Lorillard, 121 S. Ct. at 2430.
331. Id. at 2058.
332. Id. at 2066 (O'Connor, J., dissenting). Justice O'Connor was joined by Justices Souter, Ginsburg, and Breyer.