

2001

Annual Survey of Virginia Law: Legal Issues Involving Children

Robert E. Shepherd Jr.
University of Richmond

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



Part of the [Juvenile Law Commons](#)

Recommended Citation

Robert E. Shepherd Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 35 U. Rich. L. Rev. 741 (2001).
Available at: <http://scholarship.richmond.edu/lawreview/vol35/iss3/12>

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

LEGAL ISSUES INVOLVING CHILDREN

*Robert E. Shepherd, Jr.**

I. INTRODUCTION

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

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

with, a violent juvenile felony, a crime involving arson or bombs, or a crime involving weapons.¹ 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 day 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-

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).

2. *Id.* § 16.1-300 (Cum. Supp. 2001).

3. *Id.* § 18.2-60 (Cum. Supp. 2001).

4. *Id.* § 18.2-60(A)(1) (Cum. Supp. 2001).

5. *Id.* § 18.2-60(A)(2) (Cum. Supp. 2001) (emphasis added).

6. *Id.*

7. *Id.* § 16.1-278.9(A) (Cum. Supp. 2001).

8. S.B. 906, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 5, 2001, ch. 837, 2001 Va. Acts 1178) (codified as amended in scattered sections of the Virginia Code).

tice to serve that confinement.⁹ 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.¹⁰ 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.¹¹

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.¹² The legislation provides that the court service units will be responsible for those juveniles committed to the department.¹³ 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.¹⁴ The law also makes clear that the juvenile court retains authority over an adult on probation or parole for violations committed as a juvenile.¹⁵ 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.¹⁶

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.

10. *Id.* § 16.1-284.1(A) (Cum. Supp. 2001).

11. *Id.* § 16.1-285.1 (Cum. Supp. 2001). This amendment appears to validate the discretion in the circuit court permitted by the Court of Appeals of Virginia in *Jackson v. Commonwealth*, 29 Va. App. 418, 421, 512 S.E.2d 838, 840 (Ct. App. 1999).

12. S.B. 1296, VA. GEN. ASSEMBLY (REG. SESS. 2001) (enacted AS ACT OF APR. 5, 2001), CH. 853, 2001 VA. ACTS 1560 (codified as amended at VA. CODE ANN. §§ 16.1-233 to -237, -285, -291, -293, 63.1-248.3 (Cum. Supp. 2001)).

13. *See* VA. CODE ANN. § 16.1-235 (Cum. Supp. 2001).

14. *See id.* § 16.1-291(C)(2) (Cum. Supp. 2001).

15. *See id.* § 16.1-291(E) (Cum. Supp. 2001).

16. *See id.* § 16.1-291(A) (Cum. Supp. 2001). The amendment negates the ruling by the Court of Appeals of Virginia in *Pannell v. Commonwealth*, 34 Va. App. 287, 540 S.E.2d 527 (Ct. App. 2001) (en banc). In *Pannell*, the full court of appeals held that probation and parole revocation proceedings pursuant to VA. CODE ANN. § 16.1-291 must follow the procedural and evidentiary requirements of the original, underlying proceeding. *Pannell*, 34 Va. App. at 294-95, 540 S.E.2d at 531.

An amendment to Virginia Code section 18.2-55¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

B. Case Law

In *Commonwealth v. Chatman*,²¹ 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.²² The decision reversed the holding of the court of appeals,²³ which had followed the majority of states that had considered the issue.²⁴ House Bill 2653²⁵ introduced in the 2001 Session, would have implemented the recommendations of a study that was con-

17. VA. CODE ANN. § 18.2-55 (Cum. Supp. 2001).

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.*

19. *Id.* § 18.2-64.2 (Cum. Supp. 2001).

20. *Id.* § 63.1-248.7:2 (Cum. Supp. 2001).

21. 260 Va. 562, 538 S.E.2d 304 (2000).

22. *Id.* at 567-70, 538 S.E.2d at 306-07.

23. *See Chatman v. Commonwealth*, 30 Va. App. 593, 518 S.E.2d 847 (Ct. App. 1999).

24. At least seven states, either directly or by implication, recognize an insanity defense for juveniles by statute or rule. *See* CAL. PENAL CODE § 25 (West 1999); MASS. GEN. LAWS ch. 123, § 15 (1989); NEB. REV. STAT. § 43-258 (1998); N.J. STAT. ANN. § 2A:4A-40 (West 1987); N.Y. FAM. CT. ACT (43A) § 335.1 (Consol. 1999); TEX. FAM. CODE ANN. § 55.51 (Vernon Supp. 2001); VT. FAM. R. PROC. 1(a)(1). Other states acknowledge such a defense for juveniles in their case law. *See Ex parte Dep't of Mental Health*, 511 So. 2d 181 (Ala. 1987); *Interest of Causey*, 363 So. 2d 472 (La. 1978); *In re Devon T.*, 584 A.2d 1287 (Md. Ct. Spec. App. 1991) (until age 14); *In re Hamil*, 431 N.E.2d 317 (Ohio 1982); *Matter of L.J.*, 552 P.2d 1322 (Or. Ct. App. 1976); *In re Winburn*, 145 N.W.2d 178 (Wis. 1966). Only two jurisdictions before Virginia appear to have rejected the availability of the defense in family court. *See K.M. v. State*, 983 S.W.2d 93 (Ark. 1998); *Matter of C.W.M.*, 407 A.2d 617 (D.C. 1979).

25. H.B. 2653, Va. Gen. Assembly (Reg. Sess. 2001).

ducted by the Virginia Bar Association,²⁶ pursuant to a General Assembly resolution.²⁷ The bill would have established an insanity defense for juveniles.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 15-0.²⁹ 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.³⁰

In *Heath v. Commonwealth*,³¹ the Supreme Court of Virginia affirmed an en banc determination of the Court of Appeals of Virginia³² that no violation of the Speedy Trial Statute³³ 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.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.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.³⁶

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

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

28. Va. H.B. 2653.

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).

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 *id.*

31. 261 Va. 389, 541 S.E.2d 906 (2001).

32. *Heath v. Commonwealth*, 32 Va. App. 176, 526 S.E.2d 798 (Ct. App. 2000) (en banc), *aff'd*, 261 Va. 389, 541 S.E.2d 906 (2001).

33. VA. CODE ANN. § 19.2-243 (Repl. Vol. 2000).

34. *Heath*, 261 Va. at 393-94, 541 S.E.2d at 908-09.

35. *Id.*

36. *Id.*

In *Shackleford v. Commonwealth*,³⁷ the Court of Appeals of Virginia ruled that a juvenile defendant had waived his *Baker* rights³⁸ regarding the lack of notice to his father.³⁹ In addition, the court of appeals held that the defendant's rights under the Vienna Convention⁴⁰ 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.⁴¹ The Supreme Court of Virginia affirmed the lower court's conclusions.⁴²

This past year witnessed two significant court of appeals' cases regarding jurisdiction of the juvenile courts. In *Spain v. Commonwealth*,⁴³ 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.⁴⁴ Such failure constituted a jurisdictional defect, rendering invalid all subsequent judicial proceedings.⁴⁵

In *Asby v. Commonwealth*,⁴⁶ 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.⁴⁷ 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.⁴⁸

In another important application of *Baker*, the Court of Ap-

37. 32 Va. App. 307, 528 S.E.2d 123 (Ct. App. 2000).

38. See *Baker v. Commonwealth*, 28 Va. App. 306, 504 S.E.2d 394 (Ct. App. 1998), *aff'd per curiam*, 258 Va. 1, 516 S.E.2d 219 (1999). For additional discussion of *Baker* and related cases see Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 34 U. RICH. L. REV. 939, 939-45 (2000); Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 33 U. RICH. L. REV. 1001, 1007-08 (1999).

39. *Shackleford*, 32 Va. App. at 319, 528 S.E.2d at 129.

40. Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 500 U.N.T.S. 95.

41. See *Shackleford*, 32 Va. App. at 316-23, 528 S.E.2d at 128-31.

42. See *Shackleford v. Commonwealth*, 262 Va. 196, 547 S.E.2d 899 (2001).

43. 35 Va. App. 431, 545 S.E.2d 583 (Ct. App. 2001).

44. *Id.* at 435, 545 S.E.2d at 585.

45. *Id.* at 435-36, 545 S.E.2d at 585.

46. 34 Va. App. 217, 539 S.E.2d 742 (Ct. App. 2001), *aff'd*, 35 Va. App. 572, 546 S.E.2d 748 (Ct. App. 2001) (en banc).

47. *Id.* at 223, 539 S.E.2d at 745.

48. *Id.*

peals of Virginia ruled in *Duong v. Commonwealth*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*.⁵⁰ Although these convictions are not made void by the collateral attack, a court must nonetheless disregard them during the sentencing phase.⁵¹ Similarly, in *Langhorne v. Commonwealth*,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*.⁵³

Three unpublished decisions of the Court of Appeals of Virginia⁵⁴ addressed the interplay between Virginia Code section 16.1-269.1(E)⁵⁵ and the Supreme Court of Virginia's recent decision in *Moore v. Commonwealth*.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."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."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.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

49. 34 Va. App. 424, 542 S.E.2d 47 (Ct. App. 2001).

50. *Id.* at 424-29, 542 S.E.2d at 48-49.

51. *Id.*

52. 35 Va. App. 19, 542 S.E.2d 780 (Ct. App. 2001).

53. *Id.* at 25, 542 S.E.2d at 782.

54. See *McDonald v. Commonwealth*, No. 0679-99-2, 2000 Va. App. LEXIS 384 (Ct. App. May 16, 2000) (unpublished decision); *Adams v. Commonwealth*, No. 0641-99-2, 2000 Va. App. LEXIS 382 (Ct. App. May 16, 2000) (unpublished decision); *Monteon v. Commonwealth*, No. 2038-99-3, 2000 Va. App. LEXIS 316 (Ct. App. May 2, 2000) (unpublished decision).

55. VA. CODE ANN. § 16.1-269.1(E) (Repl. Vol. 1999 & Cum. Supp. 2001).

56. 259 Va. 405, 527 S.E.2d 415 (2000).

57. VA. CODE ANN. § 16.1-269.1(E) (Repl. Vol. 1999 & Cum. Supp. 2001).

58. *Moore*, 259 Va. at 410, 527 S.E.2d at 418.

59. *Id.*

circuit court of jurisdiction.⁶⁰ 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.⁶¹

In *Phillips v. Commonwealth*,⁶² 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.⁶³ However, the stepfather had never adopted the youth.⁶⁴ 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.⁶⁵ 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 exception⁶⁶ for the father's identity not being "reasonably ascertainable."⁶⁷ 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*,⁶⁸ the Fairfax Circuit Court held that notification of only one of the defendant's parents was proper even in light of *Baker*.⁶⁹ The court reasoned that because the underlying offense had occurred in 1976 and the then-applicable statute re-

60. See *McDonald v. Commonwealth*, No. 0679-99-2, 2000 Va. App. LEXIS 384, at *2 (Ct. App. May 16, 2000) (unpublished decision); *Adams v. Commonwealth*, No. 0641-99-2, 2000 Va. App. LEXIS 382, at *1-2 (Ct. App. May 16, 2000) (unpublished decision); *Monteon v. Commonwealth*, No. 2038-99-3, 2000 Va. App. LEXIS 316, at *2-3 (Ct. App. May 2, 2000) (unpublished decision).

61. See *McDonald*, 2000 Va. App. LEXIS 384, at *2-3; *Adams*, 2000 Va. App. LEXIS 382, at *2-3; *Monteon*, 2000 Va. App. LEXIS 316, at *4-6.

62. No. 2938-99-1, 2001 Va. App. LEXIS 101 (Ct. App. Mar. 6, 2001) (unpublished decision).

63. *Id.* at *2.

64. *Id.* at *3.

65. *Id.* at *13.

66. See VA. CODE ANN. § 16.1-263(E) (Repl. Vol. 1999 & Cum. Supp. 2001).

67. See *Whitney v. Commonwealth*, No. 0835-00-1, 2001 Va. App. LEXIS 228, at *3 (Ct. App. May 1, 2001) (unpublished decision).

68. 51 Va. Cir. 143 (Cir. Ct. 1999) (Fairfax County).

69. *Id.* at 145.

quired notification of only one parent, the Commonwealth had satisfied the notification requirement.⁷⁰ 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."⁷¹ Finally, in *Commonwealth v. Cano*,⁷² the Fairfax Circuit Court granted defendant's motion to set aside his guilty pleas to three felonies.⁷³ 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.⁷⁴

In *Parsons v. Commonwealth*,⁷⁵ 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 1994.⁷⁶ 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.⁷⁷ 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.⁷⁸

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.⁷⁹ 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.*

71. *See Commonwealth v. Leavell*, 52 Va. Cir. 214, 215 (Cir. Ct. 2000) (Norfolk City).

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.*

78. *See Griffin v. Commonwealth*, 33 Va. App. 413, 427-28, 533 S.E.2d 653, 659-60 (Ct. App. 2000).

79. *See Adams v. Commonwealth*, 33 Va. App. 463, 467-69, 534 S.E.2d 347, 350-52 (Ct. App. 2000).

four occasions he was detained at a juvenile detention center.⁸⁰ 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.⁸¹

In *Pannell v. Commonwealth*,⁸² 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.⁸³ The court of appeals found a violation of Virginia Code section 16.1-291⁸⁴ in the use of hearsay evidence during the probation revocation hearing and the application of a "preponderance of the evidence" standard of proof.⁸⁵ The Virginia Code required that such proceedings "be governed by the procedures, safeguards, rights and duties applicable to the original proceedings."⁸⁶ 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.⁸⁷

In *Salvatierra v. City of Falls Church*,⁸⁸ 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.⁸⁹ The decision would also seem to apply to detention decisions that are predicated primarily on the commission of a "felony or class 1 misdemeanor."⁹⁰

Two cases demonstrate the court of appeals' continued refusal to overturn convictions based on confessions obtained under ques-

80. See *Pughley v. Commonwealth*, 33 Va. App. 640, 644, 536 S.E.2d 447, 449 (Ct. App. 2000).

81. See *Williams v. Commonwealth*, 33 Va. App. 725, 728, 536 S.E.2d 916, 918 (Ct. App. 2000).

82. 34 Va. App. 287, 540 S.E.2d 527 (Ct. App. 2001), *aff'd, on reh' en banc* 35 Va. App. 643, 547 S.E.2d 529 (Ct. App. 2001).

83. *Id.* at 289, 540 S.E.2d at 528.

84. VA. CODE ANN. § 16.1-291 (Repl. Vol. 1999).

85. *Pannell*, 34 Va. App. at 293, 540 S.E.2d at 531.

86. VA. CODE ANN. § 16.1-291 (Repl. Vol. 1999).

87. See VA. CODE ANN. § 16.1-291 (Cum. Supp. 2001). The amendment became effective July 1, 2001.

88. 35 Va. App. 453, 546 S.E.2d 214 (Ct. App. 2001).

89. *Id.* at 458, 546 S.E.2d at 216.

90. See VA. CODE ANN. § 16.1-248.1(A)(1) (Repl. Vol. 1999).

tionable circumstances. In *Potts v. Commonwealth*,⁹¹ the seventeen year old defendant was arrested and interrogated about a murder that had occurred several weeks earlier.⁹² 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."⁹³ Potts continued to press his desire for a lawyer, and the detective put him off further.⁹⁴ Finally, the defendant agreed to talk.⁹⁵ The court concluded that he had waived his right to an attorney, and the defendant's motion to suppress the statement was properly denied.⁹⁶

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.⁹⁷ 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.⁹⁸

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;⁹⁹ (2) a trial court properly considered sentencing guidelines evaluations that considered a defendant's juvenile adjudications;¹⁰⁰ (3) a defendant did not properly

91. 35 Va. App. 485, 546 S.E.2d 229 (Ct. App. 2001).

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.

96. *Id.* at 496, 546 S.E.2d at 234. A White Paper issued this year by the American Bar Association Criminal Justice Section Task Force on Youth in the Criminal Justice System recommended very close scrutiny of confessions by juveniles. *See TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYSTEM, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS 9* (2001). Judge Benton wrote a strong dissent addressing many of the concerns articulated in the White Paper. *Potts*, 35 Va. App. at 498-505, 546 S.E.2d at 235-39 (Benton, J., dissenting).

97. *See Sneade v. Commonwealth*, No. 1105-99-2, 2000 WL 1486567 (Va. Ct. App. Oct. 10, 2000) (unpublished decision).

98. *See id.* at *2 n.2.

99. *Crawford v. Commonwealth*, No. 1844-99-3, 2000 Va. App. LEXIS 367, at *4 (Ct. App. May 16, 2000) (unpublished decision).

100. *Jackson v. Commonwealth*, No. 0388-99-2, 2000 Va. App. LEXIS 398, at *14 (Ct. App. May 23, 2000) (unpublished decision).

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;¹⁰¹ 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.¹⁰²

In *Peace v. Commonwealth*,¹⁰³ 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.¹⁰⁴

In *Penry v. Johnson*,¹⁰⁵ the United States Supreme Court ruled, for the second time in Penry's case,¹⁰⁶ 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.¹⁰⁷

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."¹⁰⁸ Further, the Commissioner of the Department of

101. *Boyce v. Commonwealth*, No. 1463-99-4, 2000 Va. App. LEXIS 477, at *4 (Ct. App. June 27, 2000) (unpublished decision).

102. *Toliver v. Commonwealth*, No. 2880-99-2, 2000 Va. App. LEXIS 716, at *3 (Ct. App. Nov. 7, 2000) (unpublished decision).

103. No. 2651-99-2, 2000 Va. App. LEXIS 725 (Ct. App. Nov. 14, 2000) (unpublished decision).

104. *Id.* at *5-10.

105. 121 S. Ct. 1910 (2001) [hereinafter *Penry II*].

106. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

107. *Penry II*, 121 S. Ct. at 1924.

108. VA. CODE ANN. § 63.1-198.1 (Cum. Supp. 2001).

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.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.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.¹¹¹ This section partially overrules *Commonwealth ex rel. Virginia Department of Corrections v. Brown*,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.¹¹³ The bill also provides for the taking of a prisoner's testimony by telephone in certain cases.¹¹⁴ It also requires the party seeking the testimony to pay for the transportation costs when the court requires the presence of the prisoner.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.¹¹⁶

Another amendment makes clear that current law regarding

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. *Id.*

110. *Id.* § 16.1-274 (Cum. Supp. 2001).

111. *Id.* § 16.1-276.2 (Cum. Supp. 2001). Under prior law, the Department of Corrections was to deliver witnesses in circuit court actions, but the statute did not specify where the prisoner was to be delivered. *See* VA. CODE ANN. § 8.01-410 (Repl. Vol. 1999), amended by VA. CODE ANN. § 8.01-410 (Cum. Supp. 2001).

112. 259 Va. 697, 529 S.E.2d 96 (2000).

113. *Id.* at 705, 529 S.E.2d at 100.

114. *See* VA. CODE ANN. §§ 16.1-93.1, -276.3, 17.1-513.2 (Cum. Supp. 2001) (providing for the use of telephonic, electronic video, and audio communication systems in the district courts, juvenile and domestic relations courts, and circuit courts, respectively).

115. *See id.* § 8.01-410, 16.1-276.2 (Cum. Supp. 2001).

116. *See id.* § 16.1-276.2 (Cum. Supp. 2001).

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

117. *See id.* § 18.2-67.9 (Cum. Supp. 2001).

118. *See id.* § 19.2-11.01 (Cum. Supp. 2001).

119. *Id.* § 19.2-11.01(A)(4)(d) (Cum. Supp. 2001).

120. *Id.*

121. *See id.* § 63.1-248.4:1 (Cum. Supp. 2001).

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).

123. *Id.* § 18.2-370 (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.* § 19.2-298.1(A) (Cum. Supp. 2001). Under previous law the offense was not defined as sexually violent until the second offense. *See id.* § 19.2-298.1(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.¹²⁵ 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.¹²⁶ 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.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.¹²⁸ 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.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 *Collado v. Commonwealth*,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.¹³¹ During the sentencing phase of the trial, the trial court might have erred in admitting into evidence a letter

viding false information from a Class 1 misdemeanor to a Class 6 felony. *See id.* § 18.2-472.1 (Cum. Supp. 2001).

125. *See id.* § 18.2-391(E) (Cum. Supp. 2001).

126. *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. *Id.* § 18.2-472.1 (Cum. Supp. 2001).

127. *Id.* § 18.2-472.1 (Cum. Supp. 2001).

128. *Id.* § 19.2-368.5(B) (Cum. Supp. 2001).

129. *See id.* § 19.2-368.8(A) (Cum. Supp. 2001).

130. 33 Va. App. 356, 533 S.E.2d 625 (Ct. App. 2000).

131. *Id.* at 363, 533 S.E.2d at 629.

from a couple indicating that their child had suffered a similar injury while in Collado's care.¹³² 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.¹³³

In *Craig v. Commonwealth*,¹³⁴ 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."¹³⁵ 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.¹³⁶

In *Dowden v. Commonwealth*,¹³⁷ 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.¹³⁸ However, in *Barrett v. Commonwealth*,¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

In *Velazquez v. Commonwealth*,¹⁴² the court of appeals affirmed the defendant's conviction for the rape of a fifteen-year-old.¹⁴³ The court ruled that the trial court properly admitted testimony by a

132. *See id.* at 367, 533 S.E.2d at 630-31.

133. *Id.*

134. 34 Va. App. 155, 538 S.E.2d 355 (Ct. App. 2000).

135. *Id.* at 166, 538 S.E.2d at 360.

136. *Id.* at 161-62, 538 S.E.2d at 358-59.

137. 260 Va. 459, 536 S.E.2d 437 (2000).

138. *Id.* at 468, 536 S.E.2d at 442. The only other possible explanation for the injuries was the administration of CPR during efforts to resuscitate the infant, but the expert evidence negating that theory was overwhelming. *Id.* at 468-70, 536 S.E.2d at 442.

139. 32 Va. App. 693, 530 S.E.2d 437 (Ct. App. 2000).

140. *Id.* at 697, 530 S.E.2d at 439.

141. *Id.* at 699, 530 S.E.2d at 440.

142. 35 Va. App. 189, 543 S.E.2d 631 (Ct. App. 2001).

143. *Id.* at 202, 543 S.E.2d at 638.

sexual assault nurse examiner ("SANE") as an expert witness concerning the cause of the victim's injuries.¹⁴⁴ In another case, a defendant neglected to proffer evidence of an eleven-year-old sodomy victim's disciplinary problems in school.¹⁴⁵ The defendant was denied review of the trial court's ruling excluding the evidence.¹⁴⁶ In *Bloom v. Commonwealth*,¹⁴⁷ 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.¹⁴⁸

In *Snow v. Commonwealth*,¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ Likewise, in *Quinones v. Commonwealth*,¹⁵² the court held that a step-grandfather could be tried as a custodian.¹⁵³ His conviction was reversed, however, because of the erroneous introduction of prior bad acts testimony lacking any connection to the charged incidents.¹⁵⁴

In *Paris v. Commonwealth*,¹⁵⁵ 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 constitutional¹⁵⁶ and did not violate his rights to "the enjoyment

144. *Id.* at 195-97, 543 S.E.2d at 634-35.

145. *Lockhart v. Commonwealth*, 34 Va. App. 329, 340, 542 S.E.2d 1, 6 (Ct. App. 2001). Despite some inconsistencies and lack of corroboration in the victim's testimony, his evidence was not unworthy of belief and did not render the evidence insufficient to convict. *Id.* at 342, 542 S.E.2d at 7.

146. *Id.* at 340, 542 S.E.2d at 6.

147. 34 Va. App. 364, 542 S.E.2d 18 (Ct. App. 2001).

148. *Id.* at 372-73, 542 S.E.2d at 22.

149. 33 Va. App. 766, 537 S.E.2d 6 (Ct. App. 2000).

150. *Id.* at 773, 537 S.E.2d at 10 (quoting VA. CODE ANN. § 18.2-371.1 (Repl. Vol. 1996 & Cum. Supp. 2001)).

151. *Id.* at 771-72, 537 S.E.2d at 9.

152. 35 Va. App. 634, 547 S.E.2d 524 (Ct. App. 2001).

153. *Id.* at 636, 547 S.E.2d at 525.

154. *Id.* at 639-43, 547 S.E.2d at 527-29.

155. 35 Va. App. 377, 545 S.E.2d 557 (Ct. App. 2001).

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-

ANN. § 18.2-361(A) (Repl. Vol. 1996 & Cum. Supp. 2001).

157. *Paris*, 35 Va. App. at 381, 545 S.E.2d at 558 (quoting VA. CONST. art. I, § 1).

158. *Id.* at 385, 545 S.E.2d at 561.

159. 35 Va. App. 1, 542 S.E.2d 771 (Ct. App. 2001).

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.

164. 33 Va. App. 540, 535 S.E.2d 182 (Ct. App. 2000).

165. *Id.* at 549, 535 S.E.2d at 187.

166. *Id.* at 544–48, 535 S.E.2d at 185–86.

167. 33 Va. App. 8, 531 S.E.2d 580 (Ct. App. 2000) (en banc).

168. *Id.* at 36–37, 531 S.E.2d at 594.

169. 33 Va. App. 413, 533 S.E.2d 653 (Ct. App. 2000).

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.¹⁷⁰ 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.¹⁷¹

In *Green v. Richmond Department of Social Services*,¹⁷² 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."¹⁷³ In *Rivera v. Roanoke City Department of Social Services*,¹⁷⁴ 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.¹⁷⁵ The boys had a history of delinquency, and Rivera had a history of failing to maintain their home detention status.¹⁷⁶ Rivera also failed to cooperate with DSS's attempts to provide her with counseling, homemaking, and parenting services.¹⁷⁷

Substance abuse continues to play a major role in the termination of residual parental rights. In *Hawthorne v. Smyth County Department of Social Services*,¹⁷⁸ 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.¹⁷⁹ The son remained in foster care for several months.¹⁸⁰ Finally, he went to live with a grown sister and brother-in-law before returning home later that

170. *Id.* at 430, 533 S.E.2d at 661.

171. *Ballance v. Virginia*, 130 F. Supp. 2d 754, 761 (W.D. Va. 2000); *Ballance v. Young*, 130 F. Supp. 2d 762, 769 (W.D. Va. 2000).

172. 35 Va. App. 682, 547 S.E.2d 548 (Ct. App. 2001).

173. *Id.* at 686, 547 S.E.2d at 550.

174. No. 0727-00-3, 2000 Va. App. LEXIS 490 (Ct. App. July 5, 2000) (unpublished decision).

175. *Id.* at *4.

176. *Id.* at *5.

177. *Id.*

178. 33 Va. App. 130, 531 S.E.2d 639 (Ct. App. 2000).

179. *Id.* at 132, 531 S.E.2d at 641.

180. *Id.*

year under departmental custody.¹⁸¹ A foster care plan was prepared and approved, but the parents failed to comply with its provisions and continued to abuse alcohol.¹⁸² Consequently, DSS removed the child from the Hawthornes' home.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ In *Walker v. Virginia Beach Department of Social Services*,¹⁸⁶ 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.¹⁸⁷ In *Walker*, the father was a military veteran suffering from post-traumatic stress disorder and "polysubstance dependence."¹⁸⁸ 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.¹⁸⁹ In *Roanoke City Department of Social Services v. Heide*,¹⁹⁰ 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.¹⁹¹ 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.¹⁹² 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.

185. See *Turner v. Fredericksburg Dep't of Soc. Servs.*, No. 2532-00-2, 2001 Va. App. LEXIS 163 (Ct. App. Mar. 27, 2001) (unpublished decision).

186. No. 0505-00-1, 2000 Va. App. LEXIS 825 (Ct. App. Dec. 19, 2000) (unpublished decision).

187. *Id.* at *9.

188. *Id.* at *6.

189. *Id.*

190. 35 Va. App. 328, 544 S.E.2d 890 (Ct. App. 2001).

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.*,¹⁹³ 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."¹⁹⁴ 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."¹⁹⁵ 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).¹⁹⁶

A third category of persistent termination cases involves incarcerated parents. In *Howard v. Charlottesville Department of Social Services*,¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ However, in *Fairfax County Department of Social Services v. Ibrahim*,²⁰⁰ the court refused to terminate Ibrahim's parental rights because DSS's evidence was insufficient

193. 35 Va. App. 573, 546 S.E.2d 749 (Ct. App. 2001).

194. *Id.* at 579-80, 546 S.E.2d at 752.

195. *Id.* at 585, 546 S.E.2d at 755.

196. *Id.* (citing VA. CODE ANN. § 16.1-283(C)(2) (Repl. Vol. 1999 & Cum. Supp. 2001)).

197. No. 1275-99-2, 2000 Va. App. LEXIS 364 (Ct. App. May 16, 2000) (unpublished decision).

198. *Id.* at *2-6.

199. *Id.*

200. No. 0821-00-4, 2000 Va. App. LEXIS 824 (Ct. App. Dec. 19, 2000) (unpublished decision).

to sever his bond with his children.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.²⁰² DSS never returned the children to the family because the father was deported upon his release.²⁰³ The court found that the statutory requirements for termination were not met because services were not provided to assist in reuniting the family.²⁰⁴ On the other hand, in *Jones v. Richmond Department of Social Services*,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.²⁰⁶ Also, in *Lefler v. Smyth County Department of Social Services*,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.²⁰⁸

In another case, a father's parental rights were terminated while he was serving a fifty-seven year sentence.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.²¹⁰

In *Fredericksburg Department of Social Services v. Brown*,²¹¹

201. *Id.* at *11.

202. *Id.* at *3.

203. *Id.* at *8.

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).

205. No. 2110-00-2, 2001 Va. App. LEXIS 63 (Ct. App. Feb. 13, 2001) (unpublished decision).

206. *Id.* at *6.

207. No. 2706-00-3, 2001 Va. App. LEXIS 250 (Ct. App. May 8, 2001) (unpublished decision).

208. *Id.* at *3-5.

209. See *Carmon v. Richmond Dept. of Soc. Servs.*, No. 0036-01-2, 2001 Va. App. LEXIS 243, at *3 (Ct. App. May 8, 2001) (unpublished decision).

210. *Id.*

211. 33 Va. App. 313, 533 S.E.2d 12 (Ct. App. 2000).

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.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.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.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.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.²¹⁶ A year later, a new foster care plan was filed with a new goal of adoption.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.²¹⁸ In *Miller v. Richmond Department of Social Services*,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.²²⁰ While one of the boys had special needs, Miller did little to participate in the services offered by DSS.²²¹ Thus, the evidence supported the termination of his parental rights.²²² Failure to follow through with a

212. *Id.* at 323, 533 S.E.2d at 17.

213. *Id.* at 323, 533 S.E.2d at 16.

214. *See* *Beardslee v. Dep't of Soc. Servs.*, No. 2721-00-2, 2001 Va. App. LEXIS 175, at *9 (Ct. App. Apr. 3, 2001) (unpublished decision).

215. *See* *Reid v. Loudoun Co. Dep't of Soc. Servs.*, No. 3074-99-4, 2000 Va. App. LEXIS 515 (Ct. App. July 18, 2000) (unpublished decision).

216. *Id.* at *4.

217. *Id.* at *5.

218. *Id.* at *13.

219. No. 0320-00-2, 2000 Va. App. LEXIS 541 (Ct. App. July 25, 2000) (unpublished decision).

220. *Id.* at *4.

221. *Id.* at *11-12.

222. *Id.*

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-

223. No. 1424-99-4, 2000 Va. App. LEXIS 604 (Ct. App. Aug. 15, 2000) (unpublished decision).

224. *Id.* at *5.

225. No. 0461-00-1, 2000 Va. App. LEXIS 847 (Ct. App. Dec. 28, 2000) (unpublished decision).

226. *Id.* at *6.

227. *Id.* at *2-3.

228. *Id.* at *5.

229. No. 0895-00-2, 2001 Va. App. LEXIS 74 (Ct. App. Feb. 20, 2001) (unpublished decision).

230. *Id.* at *2.

231. *Id.* at *9-10.

232. *Arsenault v. Isle of Wight Co. Dep't of Soc. Servs.*, No. 2609-00-1, 2001 Va. App. LEXIS 290, at *1-3 (Ct. App. May 29, 2001) (per curiam) (unpublished decision).

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.²³³

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.²³⁴ The mother's appeal was therefore dismissed.²³⁵ 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.²³⁶ 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."²³⁷ 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.²³⁸

In *Ferguson v. City of Charleston*,²³⁹ 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.²⁴⁰ 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.²⁴¹

A divided Fourth Circuit Court of Appeals concluded, in *Bell v. Jarvis*,²⁴² that a state court's closure of the courtroom during peti-

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).

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>.

235. *Id.*

236. *Keator v. Lutheran Soc. Servs. of the Nat'l Capital Area, Inc.*, No. 1883-00-4, 2001 Va. App. LEXIS 37, at *2-3 (Ct. App. Jan. 30, 2001) (unpublished decision).

237. *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).

238. *Somers v. Accomack Co. Dep't of Soc. Servs.*, No. 2899-00-1, 2001 Va. App. LEXIS 291, at *5 (Ct. App. May 29, 2001) (per curiam) (unpublished decision).

239. 121 S. Ct. 1281 (2001).

240. *Id.* at 1293.

241. *Id.* at 1285.

242. 236 F.3d 149 (4th Cir. 2000) (en banc).

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.²⁴³ Likewise, in *Quinn v. Haynes*,²⁴⁴ 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.²⁴⁵

The Fourth Circuit ruled in *United States v. Mento*²⁴⁶ that the Child Pornography Protection Act of 1996²⁴⁷ was constitutional.²⁴⁸ 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.²⁴⁹ Such a finding could factor into a sentence enhancement.²⁵⁰

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;²⁵¹ (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;²⁵² (3) requires subsequent confirmation or disapproval of a recommended student

243. *Id.* at 175.

244. 234 F.3d 837 (4th Cir. 2000).

245. *Id.* at 852.

246. 231 F.3d 912 (4th Cir. 2000).

247. Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 18 U.S.C.).

248. *Mento*, 231 F.3d at 923.

249. *See United States v. Williams*, 253 F.3d 789, 795-96 (4th Cir. 2001).

250. *Id.*

251. *See* VA. CODE ANN. § 22.1-276.01(A) (Cum. Supp. 2001).

252. *Id.* § 22.1-277.06(C) (Cum. Supp. 2001).

expulsion by a school board, or a committee thereof, regardless of whether the pupil exercised the right to a hearing;²⁵³ (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;²⁵⁴ (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;²⁵⁵ (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 division²⁵⁶ with the exception that the excluding school division cannot impose additional conditions for readmission;²⁵⁷ (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;²⁵⁸ (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;²⁵⁹ and (9) requires school boards to establish a schedule pursuant to which expelled students may apply and reapply for re-admission to school.²⁶⁰

253. *Id.* § 22.1-277.06(A) (Cum. Supp. 2001).

254. *Id.* § 22.1-277.2(A) (Cum. Supp. 2001).

255. *Id.* § 22.1-277.2(C) (Cum. Supp. 2001).

256. *Id.* § 22.1-277.2(A) (Cum. Supp. 2001).

257. *Id.*

258. *Id.* § 22.1-277.2:1(A) (Cum. Supp. 2001).

259. *Id.* § 22.1-280.4 (Cum. Supp. 2001). Prior law required the pupil to reimburse the school board for property damage. *Id.* § 22.1-276 (Repl. Vol. 2000). In addition, current civil procedure statutes limit recovery from parents for willful or malicious destruction of, or damage to, property by minors to \$2,500. *Id.* § 8.01-43 (Repl. Vol. 2000).

260. *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

able the student to resume school attendance one calendar year from the date of the expulsion. *Id.*

261. See VA. CODE ANN. § 18.2-280(B) (Cum. Supp. 2001). The bill also provides that there is no established shooting range exemption, although there is a hunting exemption, for discharge of a firearm on public property within 1,000 feet of the property line of a school. *Id.* § 18.2-280(C) (Cum. Supp. 2001).

262. *Id.* § 18.2-308.1(A) (Cum. Supp. 2001).

263. 34 Va. App. 193, 538 S.E.2d 374 (Ct. App. 2000).

264. See *id.* at 199, 538 S.E.2d at 377. The Attorney General of Virginia also has expressed the opinion that a person with a valid concealed weapons permit is not entitled to carry a gun onto school property or a school bus. See Op. to Hon. Robert G. Marshall (Nov. 9, 2000).

265. VA. CODE ANN. § 22.1-200.1 (Cum. Supp. 2001).

266. *Id.* The statute further provides:

The programs shall also be designed to accommodate students within the school building to which they have been assigned, facilitate the efficient transition of students between the optional education program and their regular classroom, provide for the continuity of instruction, a nurturing environment, necessary guidance and supervision, and the participation of the student's parents in correcting his behavior.

Id.

267. *Id.*

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.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.²⁶⁹

A highly debated piece of legislation requires: (1) all students to learn the Pledge of Allegiance and to demonstrate such knowledge;²⁷⁰ (2) each school board to require the daily recitation of the Pledge of Allegiance in each classroom of the school division,²⁷¹ and (3) each school to ensure that an American flag is displayed in each classroom.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.²⁷³ However, no student must recite the Pledge if he or his parent or legal guardian objects on religious, philosophical, or other grounds.²⁷⁴ Relatedly, the controversial 2000 amendment to Virginia's "minute of si-

268. S.B. 1055, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 22, 2001, ch. 483, 2001 Va. Acts 481) (codified as amended at VA. CODE ANN. § 22.1-227.01 (Cum. Supp. 2001)). Although the term, "career and technical education" reflects the increased status and complexity of vocational education programs, there appear to be few substantive changes made by the legislation. *See id.*

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.*

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).

271. *Id.* § 22.1-202(C) (Cum. Supp. 2001).

272. *Id.*

273. *Id.*

274. *Id.*

lence" statute²⁷⁵ withstood First Amendment scrutiny in the Fourth Circuit Court of Appeals.²⁷⁶

Another enactment requires public schools to provide instruction 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 Education, 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 related to the placement and withdrawal of children in special education.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, permanent, 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 fingerprinting and criminal history records checks.²⁸³

275. See *id.* § 22.1-203 (Repl. Vol. 2000); see also Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 34 U. RICH. L. REV. 939, 967 (2000).

276. See *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3164 (U.S. Aug. 31, 2001) (No. 01-384).

277. VA. CODE ANN. § 22.1-206 (Cum. Supp. 2001).

278. *Id.*

279. *Id.* § 22.1-215.1 (Cum. Supp. 2001). The Superintendent of Public Instruction must apprise local school boards of the provisions of this act by an Administrative Memorandum no later than thirty days after its enactment. *Id.* The bill was a recommendation of the Joint Subcommittee Studying the Overrepresentation of African-American Students in Special Education Programs.

280. *Id.* § 22.1-296.2(A) (Cum. Supp. 2001).

281. See *id.* § 22.1-296.2(A) (Repl. Vol. 2000).

282. *Id.* § 19.2-83.1 (Cum. Supp. 2001). Pursuant to Virginia Code section 22.1-296.1 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

Id. § 22.1-296.1 (Repl. Vol. 2000).

283. *Id.* § 22.1-296.2(A) (Cum. Supp. 2001).

284. 241 F.3d 374 (4th Cir. 2001).

285. *Id.* at 376.

286. *See id.* at 385-88.

287. 121 F. Supp. 2d 911 (E.D. Va. 2000).

288. *Id.* at 923-25.

289. 52 Va. Cir. 421 (Cir. Ct. 2000) (Accomack County).

290. *Id.* at 424-26.

291. 121 S. Ct. 2093 (2001).

292. *Id.* at 2107.

293. *See id.*

294. 121 S. Ct. 924 (2001).

the Fourteenth Amendment.²⁹⁵ In *Brentwood*, there was pervasive public involvement and entanglement with the Athletic Association.²⁹⁶ In *Newton v. Slye*,²⁹⁷ 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.²⁹⁸ The court concluded that the posted pamphlet could be viewed as part of the curriculum and therefore was not protected speech.²⁹⁹ In *Baynard v. Lawson*,³⁰⁰ 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.³⁰¹ The Supreme Court of Virginia ruled, in *Linhart v. Lawson*,³⁰² 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.³⁰³

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.³⁰⁴ 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.

297. 116 F. Supp. 2d 677 (W.D. Va. 2000).

298. *Id.* at 679.

299. *Id.* at 684.

300. 112 F. Supp. 2d 524 (E.D. Va. 2000).

301. *Id.* at 532.

302. 261 Va. 30, 540 S.E.2d 875 (2001).

303. *Id.* at 37, 540 S.E.2d at 878. Virginia Code section 22.1-194 abrogates such immunity to the extent of the board's insurance or self-insurance, but the driver retains such immunity. *See* VA. CODE ANN. § 22.1-194 (Repl. Vol. 2000 & Cum. Supp. 2001).

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-

305. VA. CODE ANN. § 37.1-67.3 (Cum. Supp. 2001).

306. *Id.* §§ 2.2-5200 to -5214 (Cum. Supp. 2001).

307. *Id.* § 2.2-5206(14) (Cum. Supp. 2001).

308. *Id.* § 2.2-5208 (Cum. Supp. 2001).

309. *Id.*

310. *Id.*

311. *Id.* § 18.2-76 (Cum. Supp. 2001).

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.³¹² Informed written consent is not required in medical emergencies.³¹³

In *Taylor v. Commonwealth*,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.³¹⁵ The Supreme Court of Virginia held in *Thompson v. Skate America, Inc.*,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.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.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.³¹⁹ One major bill provides for the issuance of provisional driver's licenses to persons less than eighteen years old.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.³²¹ The holder of such a license also cannot drive between the hours of midnight and 4:00 a.m., except for cer-

312. *Id.* § 18.2-76(B) (Cum. Supp. 2001).

313. *Id.* § 18.2-76(C) (Cum. Supp. 2001).

314. 260 Va. 683, 537 S.E.2d 592 (2000).

315. *Id.* at 690, 537 S.E.2d at 596.

316. 261 Va. 121, 540 S.E.2d 123 (2001).

317. *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. *Id.* at 125-26, 540 S.E.2d at 125.

318. *Id.* at 131-32, 540 S.E.2d at 128-29. See *Bell v. Hudgins*, 232 Va. 491, 352 S.E.2d 332 (1987).

319. See generally Carlos Santos, *Tough Issues Surround Teen Driving; Group's Fatalities Rise Dramatically*, RICH. TIMES-DISPATCH, Jan. 21, 2001, at A1 (detailing an increase in teenage traffic fatalities during 2000).

320. VA. CODE ANN. § 46.2-334.01 (Cum. Supp. 2001).

321. *Id.* The statute exempts members of the minor driver's family or household from this limitation. *Id.*

tain specified exceptions.³²² 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.³²³

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.³²⁴ 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.³²⁵ 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.³²⁶

In *Lorillard Tobacco Co. v. Reilly*,³²⁷ 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 Act³²⁸ or were overly broad and violated the First Amendment.³²⁹ In *Nguyen v. Immigration & Naturalization Service*³³⁰ 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.³³¹ 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."³³²

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).

327. 121 S. Ct. 2404 (2001).

328. 15 U.S.C. §§ 1331-40 (1994).

329. *Lorillard*, 121 S. Ct. at 2430.

330. 121 S. Ct. 2053 (2001).

331. *Id.* at 2058.

332. *Id.* at 2066 (O'Connor, J., dissenting). Justice O'Connor was joined by Justices Souter, Ginsburg, and Breyer.
