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A LOOK BACK AND A LOOK FORWARD: LEGISLATIVE AND REGULATORY HIGHLIGHTS FOR 2008 AND 2009 AND A DISCUSSION OF JUVENILE TRANSFER

Andrew K. Block *

It is with a heavy heart that I set out to write what could and should only be known as the Professor Robert E. Shepherd, Jr. legislative summary. Those of us in the field of children's law and advocacy in Virginia have always taken this piece and, more specifically, Professor Shepherd's encyclopedic knowledge of all things related to the law and children for granted. While Professor Shepherd received many awards and commendations over his long, amazing career, it is only now, as we try to shoulder the various responsibilities he once assumed, that we can truly appreciate all that he did and all that he gave.

In addition to being sad about Bob's passing, I must confess to feeling intimidated at the prospect of trying to fill Professor Shepherd's shoes. He is an incredibly tough act to follow, so please proceed with patience and try not to draw too many unfavorable comparisons between Professor Shepherd's previous legislative summaries and what follows here.

I. INTRODUCTION

This article summarizes the most important legislative and budgetary changes over the last two sessions of the General Assembly which will impact at-risk children in Virginia. The article excludes discussion of family law, as that is not the author's area

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The author would like to thank the hard work of the following people on whom he relied to compile this summary: Deron Phipps, Christie Marra, Mary Dunne Stewart, Angela Ciolfi, Sarah Geddes, Kate Duvall, Corrine Kizner, Jeree Harris, and Derrick Johnson.

of expertise. For purposes of efficiency, the article lists the changes by topic rather than by year. This is a fair way to describe these acts because the Commonwealth has had the same group of elected officials during these two sessions, and all of the laws discussed are in effect by the time this article is published.

In addition to specific legislative changes, the article discusses a number of budget amendments and initiatives that have changed the landscape for the Commonwealth's children, as much as or more than the acts of the General Assembly.

Having provided this overview, the article offers a short commentary on the issue of children being tried as adults. Bob Shepherd lived through, and fought against, many dramatic changes to Virginia's juvenile justice system in the mid 1990s—changes which, in his view, made it all too easy to try more and more youths as adults. Currently, the Virginia State Crime Commission ("Crime Commission") is hard at work on a study of this specific issue, which many hope will lead to legislative changes to ensure that fewer children are subjected to this unfair and ineffective practice.¹

If the General Assembly and the next governor do agree to make changes, then surely, Bob, wherever he is, will be smiling.

II. LEGISLATIVE OVERVIEW

Even in times of difficult budgetary challenges, the Kaine administration and the current members of the General Assembly have devoted considerable attention to the needs of at-risk children. They have expanded protections and resources for children in foster care, strengthened funding for preschool, and created new financial incentives to keep children in their own communities rather than placing them in residential or other congregate treatment settings. At the same time, however, budget cuts on

1. This practice is "unfair" because of the lopsided authority that Commonwealth's Attorneys have in many transfer decisions. See VA. CODE ANN. § 16.1-269.1 (Cum. Supp. 2009); see also VA. STATE CRIME COMM'N, H. DOC. NO. 12, HJR 113 (2008) FINAL REPORT: STUDY OF VIRGINIA'S JUVENILE JUSTICE SYSTEM 17 (2009) [hereinafter CRIME COMM'N REPORT]. I say "ineffective" because the overwhelming view of research on juvenile transfer is that it increases, rather than decreases, the likelihood of re-offending. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, Washington, D.C.) Aug. 2008, at 4, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

the state and local levels have eliminated programs and cut services that are of undeniable benefit to young people.

A. *Juvenile Justice*

In comparison to some of the changes taking place in Virginia's foster care and children's mental health systems,² the recent changes to the juvenile justice system were relatively minor. The lack of change was due in part to the state's financial constraints. For example, the Crime Commission, after three years of study, made a series of recommendations for the reform of juvenile justice and the provision of additional services and resources.³ However, due to the state's budget crisis, the legislators for the most recent legislative session sought out only those recommendations with minimal fiscal impact.⁴ Some legislative change did take place, however, in the following areas.

1. Compensation for Counsel

For many years, Virginia had been rightfully labeled as one of the states with the lowest compensation for court-appointed attorneys in juvenile delinquency matters.⁵ After years of advocacy and calls for improvement, the 2007 General Assembly began to address the problems with fees for court-appointed attorneys in criminal cases, but it failed to address the problems with compensation for delinquency cases.⁶ In order to remedy the discrepancy between the compensation for lawyers representing juveniles charged with felonies and those representing adults charged with felonies, the General Assembly passed legislation in 2008 permitting attorneys for juveniles to apply for the same waivers on fee caps as attorneys who represent adult defendants.⁷

2. See *infra* Part II.B.

3. See CRIME COMM'N REPORT, *supra* note 1, at 29–30.

4. See *id.* at 30–31.

5. See *id.* at 4, 22–23.

6. See H.B. 176, Va. Gen. Assembly (Reg. Sess. 2007) (allowing circuit courts discretion to waive the cap on fees in certain criminal cases).

7. See Act of Mar. 27, 2008, ch. 760, 2008 Va. Acts 1345 (codified as amended at VA. CODE ANN. § 19.2-163 (Repl. Vol. 2008)).

2. Court Proceedings

In 2009, the General Assembly passed legislation clarifying the standard of review for appeals from juvenile and domestic relations district court to circuit court and amended Virginia Code sections 16.1-106 and 16.1-296 to clarify that an appeal from the juvenile and domestic relations district court or an appeal in a civil case from the general district court shall be heard *de novo* in the circuit court.⁸ A second enactment clause provided that the legislation was “declarative of existing law.”⁹

3. Sentencing

In 2008, the General Assembly passed legislation to remedy a longstanding flaw in the sentences of youths who received both juvenile and adult time. Prior to this change, the juveniles did not receive earned sentence credits for the time served in juvenile correctional centers.¹⁰ With the legislature’s change in 2008, they now receive such credit.¹¹

4. Confidentiality and Juvenile Records

Confidentiality, once a hallmark of both the juvenile court and the records it generated, is increasingly becoming an ideal of the past. The last three years have seen a large number of proposed bills to reduce the confidentiality protections that have traditionally attached to juvenile court records. While some of these proposed bills did not make it out of committee,¹² the General Assembly passed a number of them in the last two years.

For example, Senate Bill 1218 amended Virginia Code section 16.1-305.2 and created section 66-25.2:1 to place a duty upon the Director of the Department of Juvenile Justice (“DJJ”) to notify

8. See Act of Mar. 30, 2009, ch. 729, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 16.1-106, 16.1-296 (Cum. Supp. 2009)).

9. *Id.*

10. See VA. CODE ANN. § 16.1-272 (Cum. Supp. 2007) (containing no provision for earned sentence credits for juveniles); *id.* §§ 53.1-202.2 to 53.1-202.3 (Repl. Vol. 2005) (referring only to “persons” and not “juveniles”).

11. See Act of Mar. 10, 2008, ch. 517, 2008 Va. Acts 771 (codified as amended at VA. CODE ANN. § 16.1-272 (Cum. Supp. 2008)); *id.* § 53.1-202.2, 53.1-202.3 (Cum. Supp. 2008)).

12. See, e.g., H.B. 1781, Va. Gen. Assembly (Reg. Sess. 2009); S.B. 1178 (Reg. Sess. 2007).

the school superintendent when a juvenile is released from a juvenile correctional center and poses a credible danger of serious bodily injury or death to one or more students or school personnel.¹³ While it is hard to argue with the general premise of this law, implementing it will place DJJ staff in the difficult position of identifying who poses a credible danger to students or school personnel. The law may also create an incentive for probation offices to over-report young people as dangerous, thereby creating potential justification for the school to exclude the student. How this duty to report will interact with the obligation to immediately enroll paroled juveniles in school¹⁴ will be worth scrutinizing in the coming years. In addition to this reporting requirement, the General Assembly also amended Virginia Code section 16.1-260 to add violence by a mob to the list of offenses which intake officers must report to superintendents.¹⁵

Other legislative changes will not directly impact the education of juveniles but will still result in a greater openness of court records and law enforcement records. The General Assembly amended Virginia Code section 16.1-301 to allow Virginia police and sheriff's departments to release current information on juvenile arrests to law-enforcement agencies in other states.¹⁶ Additionally, the legislature amended Virginia Code section 16.1-305 to permit any person, agency, or institution that may inspect juvenile case files to make copies of such records, subject to any restrictions, conditions, or prohibitions the court may impose.¹⁷ Prior to the amendment, those with access could take copious notes on the contents of a file but could not make individual copies.¹⁸

To help the Office of the Attorney General pursue civil commitments of "sexually violent predators," the General Assembly

13. S.B. 1218, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 276, 2009 Va. Acts ___).

14. See 8 VA. ADMIN. CODE § 20-660-30 (2009).

15. Act of Mar. 27, 2009, ch. 385, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-260 (Cum. Supp. 2009)); see also VA. CODE ANN. § 18.2-42.1 (Repl. Vol. 2009) (defining "violence by mob").

16. Act of Mar. 27, 2009, ch. 286, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-301 (Cum. Supp. 2009)).

17. Act of Feb. 26, 2009, ch. 138, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-305 (Cum. Supp. 2009)); Act of Mar. 27, 2009, ch. 308, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-305 (Cum. Supp. 2009)).

18. VA. CODE ANN. § 16.1-305 (Repl. Vol. 2003)).

amended a variety of statutes to preserve juvenile court records of specific misdemeanor sex offenses for up to fifty years and clarified that the Office of the Attorney General will have access to confidential juvenile court records while pursuing such commitments.¹⁹

Finally, the General Assembly amended Virginia Code section 16.1-309.1, changing the name “United States Immigration and Customs Enforcement Agency” in the statute to the “Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security.”²⁰ This is the agency to which a juvenile intake officer must report a juvenile who has been detained in a secure facility based on an allegation that the juvenile committed a violent juvenile felony and who the intake officer has probable cause to believe is in the country illegally.²¹

5. Regulation of Residential Programs

Until the 2008 legislative session, Virginia had a common set of regulations that applied to all residential juvenile treatment programs.²² During the 2008 Session, the General Assembly eliminated these regulations and passed a requirement that each agency—the Departments of Mental Health, Mental Retardation and Substance Abuse Services, Social Services, and Juvenile Justice—regulate and license those residential facilities which serve children in their care or are most connected to their agency.²³ These new responsibilities include an obligation to conduct background checks on people working or volunteering in those facilities.²⁴ The bill also requires the Virginia Department of Education (“VDOE”) to license and regulate the educational programs in residential facilities.²⁵ This new responsibility will hopefully

19. Act of Mar. 30, 2009, ch. 740, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 16.1-69.55, 16.1-300, 16.1-305 (Cum. Supp. 2009); *id.* §§ 37.2-900, 37.2-901 to 37.2-909, 37.2-911 to 37.2-914, 37.2-918 (Cum. Supp. 2009); *id.* § 53.1-32 (Repl. Vol. 2009)).

20. Act of Apr. 2, 2008, ch. 798, 2008 Va. Acts 1414 (codified as amended at VA. CODE ANN. § 16.1-309.1 (Cum. Supp. 2008)).

21. *Id.*

22. See VA. CODE ANN. § 22.1-323.2 (Repl. Vol. 2006).

23. Act of Apr. 23, 2008, ch. 873, 2008 Va. Acts 2538 (codified as amended at VA. CODE ANN. § 22.1-323.2 (Cum. Supp. 2008); *id.* § 37.2-408 (Cum. Supp. 2008); *id.* § 63.2-1737 (Supp. 2008); *id.* § 66-24 (Supp. 2008)).

24. *Id.* at 2539 (codified at VA. CODE ANN. § 37.2-408.1 (Cum. Supp. 2008)).

25. *Id.* at 2538 (codified as amended at VA. CODE ANN. § 37.2-408 (Cum. Supp. 2008)).

make it more likely that youths in residential programs will have a more seamless academic transition both into and out of these programs.

6. Crime Commission Study

For the last three years and pursuant to House Joint Resolutions 136 and 113,²⁶ the Crime Commission conducted a study of Virginia's juvenile justice system. The study effectively reviewed the impact of the juvenile justice reform of the mid-1990s and attempted to clarify and clean up inconsistencies in the Virginia Code.²⁷ In October 2008, the staff of the Crime Commission presented the members of the Crime Commission with a range of options and recommendations that emerged from its study.²⁸ Due to financial and budget constraints, the Crime Commission asked the staff to report back at the December 2008 meeting with legislative options that would have minimal fiscal impact.²⁹

Ultimately, the Crime Commission recommended some technical changes to the Virginia Code as well as a further specific study of the issue of juvenile transfer.³⁰ The General Assembly passed legislation to clarify that: (1) juveniles adjudicated of underage drinking would have dispositions pursuant to the juvenile code, while underage drinkers between eighteen and twenty-one would be disposed of as adults; (2) photographs may be maintained in case files; and (3) juveniles previously adjudicated delinquent for offenses which would be felonies if committed by adults are not entitled to diversion.³¹

26. H.J. Res. 113, Va. Gen. Assembly (Reg. Sess. 2008); H.J. Res. 136, Va. Gen. Assembly (Reg. Sess. 2006).

27. See CRIME COMM'N REPORT, *supra* note 1, at 1–2; see also Robert E. Shepherd, Jr., *What Does the Public Really Want?* CRIM. JUST., Spring 1996, at 51, 51 (discussing the many studies on juvenile justice reform occurring in Virginia during 1995–1996).

28. See CRIME COMM'N REPORT, *supra* note 1, at 29–30; see also Agenda, Va. State Crime Comm'n (Oct. 14, 2008) (on file with author).

29. See CRIME COMM'N REPORT, *supra* note 1, at 30–31; see also Agenda, Va. State Crime Comm'n (Dec. 9, 2008) (on file with author).

30. See CRIME COMM'N REPORT, *supra* note 1, at 2, 29–31. For further discussion of this issue, see *infra* Part III.

31. Act of Mar. 30, 2009, ch. 726, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 4.1-305 (Cum. Supp. 2009); *id.* §§ 16.1-237, 16.1-260 (Cum. Supp. 2009); *id.* § 18.2-57.2 (Repl. Vol. 2009)).

7. Sex Offenses

Legislators proposed and the General Assembly passed numerous pieces of legislation in the last two years that will impact those youth charged with sex offenses in either juvenile and domestic relations district court or circuit court. Likewise, a number of bills were referred to the Crime Commission for further study.

One piece of legislation approved by the General Assembly that will likely have an immediate impact is the amendment to section 18.2-374.1:1 of the Virginia Code, providing that venue for prosecuting child pornography crimes under that section “may lie in the jurisdiction where the unlawful act occurs or where any child pornography is produced, reproduced, found, stored, received, or possessed.”³² This legislation addresses the issue of electronic transmission of child pornography and provides that offenders—including teens who send pictures of themselves to their boyfriends or girlfriends—may now potentially be prosecuted for possession or distribution of child pornography either in the jurisdiction from which they sent the photo or in the jurisdiction where it was received.³³

Legislators and prosecutors, however, have expressed some discomfort with prosecuting teenagers as child pornographers for the clearly adolescent act of sending pictures of themselves through a computer or cell phone.³⁴ As a result, the General Assembly has now asked the Crime Commission to study the issue and offer potential legislative recommendations for the 2010 Session.³⁵

Other legislation has moved Virginia closer to compliance with the federal Adam Walsh Child Protection and Safety Act (“Adam Walsh Act”).³⁶ The General Assembly amended various statutes to mandate sex offender registration for crimes committed against

32. Act of Mar. 27, 2009, ch. 379, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-374.1:1 (Repl. Vol. 2009)).

33. *See id.*

34. *See* Olympia Meola, *Officials Consider Minors’ “Sexting”; They Fear Changing Virginia’s Laws Might Protect Pedophiles*, RICH. TIMES-DISPATCH, May 20, 2009, at A1.

35. *See id.*

36. *See generally* The Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 169–91 (2006) (also known as the Sex Offender and Registration and Notification Act). The Act requires all states to conform their sex offender registration laws with federal requirements or risk losing federal criminal justice funds. *Id.* § 16925(a).

minors, including crimes committed by juveniles against other youths.³⁷ Despite initial attempts to the contrary,³⁸ the General Assembly did not make registration automatic for any youth adjudicated delinquent in the juvenile court, though registration is now automatic for those youths charged with specific offenses in circuit court.³⁹ In juvenile and domestic relations court, judges retain discretion over whether or not youth adjudicated delinquent of sex offenses must register.⁴⁰ This discretion continues to be at odds with the requirements of the Adam Walsh Act.⁴¹

Virginia, however, is not alone in its lack of compliance. The Department of Justice has suspended the mandates of threat for an additional year, as more and more states protest the considerable costs created by mandating registration for an increasingly large pool of accused sex offenders, including juveniles charged with “sexting.”⁴²

However, under current law youths charged as adults with sex offenses must still register as sex offenders.⁴³ The practice of applying adult punishments in identical fashion to juveniles is of questionable value. Unlike adults, juveniles who commit sex offenses are unlikely to re-offend. In Virginia, for example, the DJJ has reported that between the fiscal years 2002 and 2006, 513 juvenile sex offenders were released from DJJ facilities.⁴⁴ By the conclusion of the 2007 fiscal year, only thirteen of those who were released had been convicted of a new sex offense.⁴⁵

Beyond those pieces of legislation specifically impacting juvenile offenders, several changes in the law also protect children

37. Act of Apr. 23, 2008, ch. 877, 2008 Va. Acts 2553 (codified as amended at VA. CODE ANN. §§ 9.1-902, 9.1-908, 9.1-910 (Cum. Supp. 2008)).

38. See S.B. 372, Va. Gen. Assembly (Reg. Sess. 2008).

39. See Act of Apr. 23, 2008, ch. 877, 2008 Va. Acts 2553 (codified as amended at VA. CODE ANN. § 9.1-902 (Cum. Supp. 2008)).

40. VA. CODE ANN. § 9.1-902(G) (Cum. Supp. 2009); see *id.* § 16.1-241 (Cum. Supp. 2009).

41. Compare 42 U.S.C. § 16913 (2006) (requiring that “a sex offender shall register”) with VA. CODE ANN. § 9.1-902 (Cum. Supp. 2009).

42. See Press Release, Office of Sen. Patrick S. Leahy, Leahy Applauds Extension for State Compliance with Sex Offender Registration and Notification Act (June 2, 2009), available at <http://leahy.senate.gov/press/200906/060209a.html>.

43. See VA. CODE ANN. § 9.1-902(A), (G) (Cum. Supp. 2009).

44. Dep’t of Juvenile Justice, Overview of Program Changes and Impact on Recidivism 10 (Apr. 9, 2008), http://www.djj.state.va.us/Recources/DJIPresentations/pdf/SFC_1_08_presentation_updated.pdf.

45. *Id.*

from sex offenders. These changes include prohibiting registered offenders from living within 500 feet of parks,⁴⁶ prohibiting entry onto school property during school-related activities,⁴⁷ removing the defense of subsequent marriage to the crime of carnal knowledge of a fourteen to sixteen-year-old female victim,⁴⁸ and making it a misdemeanor offense for anyone over eighteen to “French” kiss someone under thirteen.⁴⁹ While this last offense is a misdemeanor, it is one which requires sex offender registration.⁵⁰

Finally in 2009 the General Assembly referred a number of bills to the Crime Commission for further study and recommendations.⁵¹

B. *Foster Care*

Due in large part to First Lady of Virginia Anne Holton’s advocacy to improve Virginia’s foster care system,⁵² legislators passed bills and approved budgets in the last two years that will have a real impact on the care that children in state custody receive. By creating funding incentives to keep children in their communities, expediting the adoption process, increasing the support payments available to foster parents, and giving siblings in foster care the right to see each other, the General Assembly took real

46. Act of Mar. 27, 2008, ch. 726, 2008 Va. Acts 1292 (codified as amended at VA. CODE ANN. § 18.2-370.3 (Cum. Supp. 2008)).

47. Act of Apr. 2, 2008, ch. 781, 2008 Va. Acts 1379 (codified as amended at VA. CODE ANN. § 18.2-370.5 (Cum. Supp. 2008)).

48. Act of Mar. 3, 2008, ch. 206, 2008 Va. Acts 303 (repealing VA. CODE ANN. § 18.2-66 (Repl. Vol. 2004)).

49. Act of Apr. 2, 2008, ch. 772, 2008 Va. Acts 1364 (codified at VA. CODE ANN. § 18.2-370.6 (Cum. Supp. 2008)).

50. VA. CODE ANN. §§ 9.1-902(A)(1), 9.1-902 (B)(3) (Cum. Supp. 2009).

51. These included House Bill 1898, proposing to amend sections 9.1-903 through 9.1-905 to expand the information that registrants with the Sex Offender and Crimes Against Minors Registry (“SOR”) are required to provide, H.B. 1898, Va. Gen. Assembly (Reg. Sess. 2009); House Bill 1928, which would have amended sections 9.1-903 and 9.1-904 of the Virginia Code, to expand the requirements for sex offenders who must register with SOR, H.B. 1928, Va. Gen. Assembly (Reg. Sess. 2009); House Bill 1962, which would have added section 9.1-923 of the Virginia Code to provide that a sentencing order, other court order, or plea agreement stating that a person is not required to register with SOR is invalid and void ab initio if such provision conflicts with the SOR, H.B. 1962 Va. Gen. Assembly (Reg. Sess. 2009); and House Bill 2274, which would have amended section 9.1-913 of the Virginia Code to allow the SOR information system to include a “wanted” notation for a person who is wanted for any crime, H.B. 2274, Va. Gen. Assembly (Reg. Sess. 2009).

52. For more information on the First Lady’s efforts, see <http://forkeepsvirginia.org>. (last visited Oct. 11, 2009).

and substantial steps to improve Virginia's foster care system and make it more likely that children in care will find permanent and loving homes. Such changes were needed as Virginia has ranked, by some estimates, last among the fifty states in terms of the number of youth aging out of the foster care system without permanent homes and placements.⁵³

In addition to legislative changes, the Department of Health and Human Services and the Department of Social Services have embarked on a dramatic overhaul of their provision of services, which is also likely to have positive impacts on youth for years to come.⁵⁴

1. Keeping Children with Their Families

One of the goals of the foster care system is to keep children with their families or with family members whenever possible. To this end, the Virginia Code now provides that a relative caregiver who takes physical custody of a child because of a child protective services report or complaint can begin to receive Temporary Assistance to Needy Families ("TANF") benefits even if the child's biological parents have already exhausted their twenty-four months of eligibility and are not currently able to receive services.⁵⁵ This legislation will allow relatives to assume responsibility for children without some of the financial difficulties that could be associated with such an undertaking.

Another important piece of legislation addressed the problem of parents having to relinquish custody of their children in order for the children to receive necessary residential mental and behavioral health services. There are cases where a parent places a child with a public agency—including the local board of social services—for the purpose of obtaining treatment for the child's

53. KIDS ARE WAITING & JIM CASEY YOUTH OPPORTUNITIES INITIATIVE. TIME FOR REFORM: AGING OUT AND ON THEIR OWN 8 2007, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Kids_are_Waiting_TimeforReform0307.pdf (finding that in 2004, 586 youth aged out of foster care without a permanent family, comprising twenty-one percent of those exiting foster care).

54. See Press Release, Office of the Governor Timothy M. Kaine, Governor Kaine Recognizes National Foster Care Month: Encourages Virginians to Serve as "Resource Families" for Youths in Foster Care System (May 15, 2009), <http://www.governor.virginia.gov/MediaRelationsa/NewsReleases/viewRelease.cfm?id=948> (describing some of the efforts to improve services for Virginia youth).

55. VA. CODE ANN. § 63.2-612 (Cum. Supp. 2009).

behavioral or mental health problems. This legislation eliminates the requirement of a foster care plan and periodic judicial review in these cases.⁵⁶

2. More Support for Foster Families

During the 2008 Session, the General Assembly approved a budget that dedicated an additional twenty million dollars to increase the maintenance payments made to foster and adoptive parents while children were in their custody.⁵⁷ This marked a twenty-three percent increase from previous levels.⁵⁸ While this amount was not sufficient to meet what some researchers have called a “minimum adequate rate for children,”⁵⁹ it is certainly a step in the right direction. The General Assembly also approved a \$1.8 million increase in funds to improve the recruitment and retention of foster parents.⁶⁰

3. Training for Foster Care Workers

While the state has long offered training to local foster and adoption workers,⁶¹ the state has never set minimum content requirements. In 2008, the General Assembly passed legislation giving the Department of Social Services explicit authority to establish minimum training requirements for foster and adoption workers.⁶² While Virginia prides itself on local control, the creation of core training curriculum will undoubtedly contribute to greater quality control and more expeditious implementation of

56. Act of Mar. 27, 2008, ch. 678, 2008 Va. Acts 1093 (codified as amended at VA. CODE ANN. §§ 16.1-281 to 16.1-282.1 (Cum. Supp. 2008)).

57. Mary Dunne Stewart, Editorial, *Virginia Shouldn't Provide Worst Foster Care*, RICH. TIMES-DISPATCH, Mar. 23, 2008, at E-5; see COMMONWEALTH OF VIRGINIA, EXECUTIVE BIENNIAL BUDGET 2008–2010 B-118 (2008), available at <http://dpb.virginia.gov/budget/buddoc-8/pdf/2008-2010budgetdocument.pdf>.

58. Stewart, *supra* note 57. This information was provided by Mary Dunne Stewart, the Policy Director for Voices for Virginia's Children. See Voices for Virginia's Children, About Us: Staff, <http://www.vakids.org/about/staff.htm> (last visited Oct. 11, 2009).

59. CHILDREN'S RIGHTS, NATIONAL FOSTER PARENT ASSOCIATION, UNIVERSITY OF MARYLAND SCHOOL OF SOCIAL WORK, HITTING THE M.A.R.C.: ESTABLISHING FOSTER CARE MINIMUM ADEQUATE RATES FOR CHILDREN 5 tbl.1, 10 (2007), <http://www.nf.painc.org/uploads/MARCTechReport.pdf>.

60. See Stewart, *supra* note 57; see also BUDGET, *supra* note 57, at B-118.

61. See VA. CODE ANN. § 63.2-913 (Cum. Supp. 2009).

62. Act of Mar. 2, 2008, ch. 133, 2008 Va. Acts 191 (codified at VA. CODE ANN. § 63.2-1220.1 (Supp. 2008)).

the system-wide reforms to the foster care system that state officials are currently pursuing.

4. More Support for Older Youth

Virginia made improving outcomes for teenagers in foster care a major objective of its reform. Multiple studies show that these youth do not fare well when they leave the system.⁶³ As discussed above, Virginia has ranked as the worst among the fifty states in terms of the number of teenagers aging out of foster care without a permanent placement or family.⁶⁴ The legislature passed two important bills designed to help remedy this problem.

The first piece of legislation lowered the age at which youth in foster care become eligible for “independent living services”—defined to include counseling, education, housing, employment, and money management skills development—from sixteen to fourteen.⁶⁵ This legislation also eliminated some of the ambiguity around what “independent living services” means by requiring that the social worker list the child’s needs and goals in five critical areas—counseling, education, housing, employment, and money management—in her foster care plan beginning at age fourteen.⁶⁶ Also, where too many foster care plans previously listed generic “independent living services,” this legislation also required that the social worker identify which specific services will be provided to meet the child’s specific needs.⁶⁷

The legislature also confronted the problem of youth in foster care turning eighteen and deciding to exit the system, only later to regret that decision. In response, the General Assembly passed a law that gives youth between the ages of eighteen and twenty-one who leave foster care and discontinue independent living services a limited right to return and have their independent living

63. CASEY FAMILY PROGRAMS, IMPROVING OUTCOMES FOR OLDER YOUTH IN FOSTER CARE 1 (2008); AMY DWORSKY & JUDY HAVLICEK, CHAPIN HALL, REVIEW OF STATE POLICIES AND PROGRAMS TO SUPPORT YOUNG PEOPLE TRANSITIONING OUT OF FOSTER CARE 1 (2009).

64. See discussion *supra* Part II.B.

65. Act of Mar. 8, 2008, ch. 475, 2008 Va. Acts 680, 682, 690 (codified as amended at VA. CODE ANN. § 16.1-228 (Cum. Supp. 2008); *id.* § 63.2-100 (Supp. 2008) (applying definition of “independent living services” to children aged fourteen and over in foster care)).

66. *Id.* at 683 (codified as amended at § 16.1-281 (Cum. Supp. 2008)).

67. *Id.*

services restored.⁶⁸ Specifically, in order to have independent living services restored, the youth must enter into a written agreement with the local board of social services or child placing agency within sixty days of the date of the initial discontinuance of services and otherwise meet all other obligations for remaining in care.⁶⁹

While many in the field hope this change will create a significant opportunity and second chance for the large number of youths currently departing the foster care system, the impact statement for the bill stated “the department estimates that the number of youth who would decide to return to the program within 60 days of leaving will be minimal.”⁷⁰ Hopefully, with the changes described above, the additional education, and the training they will receive, Virginia’s older foster youth will no longer need this opportunity and will see better outcomes and a brighter future.

5. Siblings

All too often, siblings who enter foster care are unable to remain in the same foster home. Two pieces of legislation addressed this problem in 2008. The first gave siblings of youth in foster care the right to petition for visitation and requires that the court address any sibling visitation issues at the time of the original foster care placement.⁷¹ The second bill went even further by requiring local departments to make all reasonable efforts to keep siblings together and, when this option is not available, to encourage frequent visitation and include plans for sibling visitation in the foster care plan.⁷² The General Assembly requires courts that remove children from their parents to order reasonable visitation between siblings.⁷³ These changes will give lawyers and guardians ad litem additional statutory tools to accomplish

68. Act of Mar. 3, 2008, ch. 187, 2008 Va. Acts 276 (codified as amended at VA. CODE ANN. § 63.2-905.1 (Supp. 2008)).

69. *Id.*

70. COMMONWEALTH OF VA. DEP’T OF PLANNING AND BUDGET, 2008 FISCAL IMPACT STATEMENT, H.B. 1141, Reg. Sess. (2008).

71. Act of Mar. 3, 2008, ch. 188, 2008 Va. Acts 276 (codified as amended at VA. CODE ANN. § 63.2-912 (Supp. 2008)).

72. Act of Mar. 3, 2008, ch. 397, 2008 Va. Acts 581 (codified at VA. CODE ANN. § 63.2-900.2 (Supp. 2008)).

73. *Id.*

the important and critical goal of maintaining family connections and relationships.

6. Adoption

The General Assembly passed two pieces of legislation that will expand the availability and speed with which certain adoptions can take place. The first succeeded in creating a limited form of cooperative adoption, which will help willing parties avoid the often lengthy and adversarial proceedings to terminate parental rights in order for adoption to take place.⁷⁴ Specifically, prospective adoptive parents adopting a youth who is in foster care may enter into an agreement with one or both birth parents that provides the birth parent or parents rights to contact and communicate with or obtain information about the child.⁷⁵ The court will then incorporate this agreement into the final order of adoption provided that it is in the child's best interests; the agency sponsoring the adoption and the child's guardian ad litem agree that the arrangement is in the child's best interests; and the child, if he or she is fourteen or older, has consented to the agreement.⁷⁶ Although the adoption remains irrevocable, either party—the birth or adopted parents—can enforce the communication and contact agreement through contempt proceedings.⁷⁷

The second piece of legislation will expedite the adoption process in some cases by permitting adoption proceedings to proceed in certain instances when notice has been provided but the biological parent does not appear at the proceeding.⁷⁸

7. Keeping Foster Children in Their Communities

Virginia has long exceeded the national average in its use of out-of-home placements to handle foster and other court-involved youth. The use of these “congregate care” facilities was encouraged, in part, by a funding system in which the state reimbursed

74. See Act of Feb. 25, 2009, ch. 98, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 16.1-283.1 (Cum. Supp. 2009)).

75. *Id.*

76. *Id.* (codified at VA. CODE ANN. § 63.2-1228.1 (Cum. Supp. 2009)).

77. *See id.*

78. See Act of Apr. 8, 2009, ch. 805, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1233 (Cum. Supp. 2009)).

localities at equal rates for the use of residential placements as for community based placements.⁷⁹ In 2008, the General Assembly changed and reversed these incentives. Specifically, the biennial budget of 2008 provided for higher reimbursements for community based placements and reduced reimbursements for residential placements.⁸⁰ While group home and residential care providers may have objected to these changes, the results for children have been positive, with the Governor's office reporting in May 2009 that the use of congregate care had been reduced and that Virginia now met national averages for its use.⁸¹

These changes are already making a difference. For example, the City of Richmond pursued its own initiative consistent with this approach and recently reported reducing the use of congregate care and placements outside of the city by more than twenty percent.⁸²

C. *Education*⁸³

The issue of education was front and center during the 2008 and 2009 legislative sessions primarily because of the difficult fiscal environment and the substantial portion of the budget that education occupies. Outside of these budget issues, legislators passed bills protecting the rights of students with one hand, while they passed bills eliminating some existing protections and opportunities with the other.

Outside of the legislature, the Virginia Board of Education ("Board of Education") also issued regulations in the areas of special education and school accreditation that will significantly impact the rights and opportunities afforded to many at-risk students.

79. Act of Apr. 4, 2007, ch. 847 § 1-89(C)(2), 2007 Va. Acts 1599, 1898–1901.

80. Act of May 9, 2008, ch. 879 § 1-88(C)(3)(b), 2008 Va. Acts 2815, 2819.

81. See Press Release, *supra* note 54.

82. Letter from Ashley Tunner, Judge, Juvenile and Domestic Relations District Court for the City of Richmond, to members of The Richmond Approach (June 2, 2009) (on file with author).

83. The author merely provides a cursory overview of some of the dramatic changes for at-risk children in Virginia. For more information, see Angela A. Ciolfi & Sarah A. Geddes, 2008–2009 Education Law & Policy Update, 14th Annual Robert E. Shepherd, Jr. Juvenile and Education Conference 238–48 (May 15, 2009); Angela A. Ciolfi & Sarah A. Geddes, *Schools, Mandates, and Money: Education in the 2009 Session of the Virginia General Assembly*, 12 RICH. J.L. & PUB. INT. (forthcoming Nov. 2009).

1. Legislation

a. Student Discipline

Student discipline remained a hot topic among education bills in the last two years. In the past year, however, and for the first time in recent memory, the General Assembly passed a bill that actually limited the use of student discipline. Specifically, the General Assembly amended Virginia Code section 22.1-277 to outlaw out-of-school suspension solely to punish truancy.⁸⁴ While pushing children out of school for their refusal to come to school may seem counterintuitive and impractical, according to the VDOE, in the 2006–2007 school year, schools resorted to suspensions for attendance violations on more than 18,500 occasions.⁸⁵ Given the risks to academic success posed by time out of school, this legislative change will hopefully result in schools addressing the real problems of truant students rather than merely sending them home again.

On the other hand, the General Assembly amended Virginia Code section 22.1-277.2:1 to make it easier to remove certain students from school.⁸⁶ Specifically, the legislation allows schools to suspend students for up to two weeks when they are charged with certain serious crimes occurring outside of school if the crime involves intentional injury to another student in the same school.⁸⁷ Although the suspension is only for two weeks, it sets a new, and potentially damaging, precedent of permitting the com-

84. Act of Feb. 25, 2009, ch. 70, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 22.1-277 (Cum. Supp. 2009)).

85. VA. DEPT OF EDUC., ANNUAL REPORT, DISCIPLINE, CRIME AND VIOLENCE: SCHOOL YEAR 2006-2007 24 (2008), available at http://www.doe.virginia.gov/VDOE/Publications/Discipline/datacoll/06_annual_report.pdf. Suspensions for attendance violations constituted over eight percent of short-term suspensions and was the fourth most frequently reported offense resulting in short-term suspensions. See Va. Comm'n on Youth, 2008 Legislative Studies 6 (2008) available at <http://coy.state.va.us/2008%20Legislative%20Study%20Recommendations%20Adopted.pdf>. House Bill 1794 originated as an initial recommendation of the Commission on Youth in its ongoing study of truancy and dropout prevention to foreclose suspension as an option for responding to attendance problems. See H.B. 1794, Va. Gen. Assembly (Reg. Session 2009) (enacted as Act of Feb. 25, 2009, ch. 70, 2009 Va. Acts ___).

86. See Act of Mar. 27, 2009, ch. 208, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 22.1-277.2:1 (Cum. Supp. 2009)).

87. See VA. CODE ANN. § 22.1-277.04 (Repl. Vol. 2006); *id.* § 22.1-277.2:1 (Cum. Supp. 2009). Pursuant to section 16.1-260(G), juvenile court service unit intake officers must report a large number of offenses to local school superintendents upon the filing of a petition. See *id.* § 16.1-260(G) (Cum. Supp. 2009).

plete removal from school of students based on a mere charge, rather than an adjudication of off-grounds delinquent activity.⁸⁸

To create additional incentives for students to stay in school, the General Assembly amended section 46.2-334.001 to allow courts to suspend driver's licenses of students under eighteen who have ten or more unexcused absences from school on consecutive school days.⁸⁹ The student has an opportunity to "show cause" for the license not to be suspended.⁹⁰ Finally, section 22.1-209.1:2 was amended to allow division superintendents to assign students to regional alternative programs if they have been merely suspended long-term at least twice in a single school year or expelled.⁹¹ While the law provides students with the right to appeal this decision all the way to the local school board,⁹² given the loose standards involved, advocates should pay careful attention to the implementation of this law.

b. Special Education

Two successful special education bills will require changes to the state's newly released regulations. The General Assembly added a new provision, Virginia Code section 22.1-213.1, to define "parent" for the purpose of making special education decisions.⁹³ While the definition of "parent" is clear for children in the custody of their biological parents, it is not so clear for children in foster care. The new legislation simplifies the identification of parents for foster children. Hopefully, it will expedite the delivery of services when the biological parent is not available or not participating in the educational decisions impacting their children. As a re-

88. *See id.* § 22.1-277.2:1(A) (Repl. Vol. 2006) (allowing school boards to require such students to attend alternative education program). Schools are permitted, however, to suspend or expel students upon receipt of notice of disposition for offenses listed in section 16.1-260(g). *Id.* § 22.1-277(B) (Cum. Supp. 20089).

89. Act of Mar. 27, 2009, ch. 439, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 46.2-334.001 (Cum. Supp. 2009)).

90. VA. CODE ANN. § 46.2-334.001(A) (Cum. Supp. 2009).

91. *See* Act of Apr. 8, 2009, ch. 792, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 22.1-209.1:2 (Cum. Supp. 2009)).

92. VA. CODE ANN. § 22.1-209.1:2(A) (Cum. Supp. 2009).

93. Act of Feb. 25, 2009, ch. 119, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-2131 (Cum. Supp. 2009)). The language of the bill mirrors 2006 federal regulations making it easier for foster parents to make educational decisions for children with disabilities in their care, but which left it up to states to prohibit or impose restrictions on when a foster parent may act as parent. *See* 34 C.F.R. § 300.30 (2009).

sult of the legislation, when the biological or adoptive parent is not fulfilling his or her responsibilities, a foster parent may act as parent even when there is no order terminating parental rights of the biological parent and the child is in foster care temporarily.⁹⁴

The General Assembly also amended Virginia Code section 22.1-214 to require that appeals of a due process hearing officer's decision in a special education dispute be brought within 180 days of the hearing officer's findings and decision.⁹⁵ This is a notable increase in time from the ninety days that had been authorized by changes to federal law in 2006.⁹⁶

2. Regulations

The Board of Education took final action on two major regulatory items: the regulations governing special education and the standards for accrediting Virginia's public schools.⁹⁷

Until this year, school accreditation in Virginia was based largely on the school's pass rates of the Standards of Learning ("SOL") exams.⁹⁸ Unfortunately, this system created incentives for schools to lose track of low-performing students in order to increase their pass rates. As one editorial observed, "[t]he easiest way for any school or school division to look better on paper is simply to boot all the bad actors out the back door."⁹⁹ As a result, some school systems' achievement rates were rising while their graduation rates were declining.¹⁰⁰

This year, however, the Board of Education made Virginia one of the first states to add graduation benchmarks to its accountability system. Hopefully, this will ensure that schools pay attention to all students, not just the high achievers. By 2016–2017 Virginia high schools must meet an eighty-five-point target on a

94. See VA. CODE ANN. § 22.1-213.1(A)(2) (Cum. Supp. 2009).

95. Act of Mar. 27, 2009, ch. 468, 2009 Va. Acts ____ (codified as amended at VA. CODE ANN. § 22.1-214 (Cum. Supp. 2009)).

96. See 34 C.F.R. § 300.516(b) (2009).

97. The changes to special education law and regulations are the subject of another article in this volume, so this author will not devote time to discussing them beyond emphasizing the significance of the changes. However, the changes in accreditation are worth a brief discussion.

98. See *Setting Standards Across the States*, VIRGINIAN-PILOT, June 10, 2009, at B10.

99. See Editorial, *The Ugly Secret in School Success*, VIRGINIAN-PILOT, Jan. 28, 2007, at J4.

100. See *id.* (describing the situation in Lee County, Virginia).

weighted graduation index in which diplomas are weighted at 100 points, GEDs at 75 points, certificates of program completion at 25 points, and dropouts at 0 points.¹⁰¹ The new regulations will also include two new diploma options for students—the Standard Technical Diploma and the Advanced Technical Diploma—as well as a new requirement for all students to have an Academic and Career Plan in place beginning in middle school.¹⁰² Given the strong correlations between failing to graduate high school and involvement in the adult corrections system,¹⁰³ one can only hope these changes will secure more prosperous and productive outcomes for more of the Commonwealth's young people.

3. Education Budget Issues

While potential cuts to the education budget dominated discussion during the last two legislative sessions, not all of the news in education funding was bad. Specifically, the 2008 expansion of the Virginia Preschool Initiative (“VPI”), Virginia’s public preschool program for at-risk four-year-olds unserved by Head Start,¹⁰⁴ was a significant development for low-income children in the Commonwealth.¹⁰⁵ Launched by Governor George Allen and expanded under subsequent administrations, VPI and the general expansion of access to preschool became an important plank in Governor Kaine’s campaign platform.¹⁰⁶ While the scope of Governor Kaine’s original proposal for preschool for all children obviously shrank, at the end of the 2008 Session the General Assembly agreed to devote an additional \$22 million to serve up to an more than additional 4600 children.¹⁰⁷

101. Regulations Establishing Standards for Accrediting Public Schools in Virginia, 25 Va. Reg. Regs., 3850, 3862 (June 22, 2009) (to be codified at 8 VA. ADMIN. CODE).

102. *See id.* 3853–55, 3860.

103. *See* Caroline Walk Harlow, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: EDUCATION AND CORRECTIONAL POPULATIONS 1, 3 (Jan. 2003); *see also* VIRGINIA FAMILY IMPACT SEMINARS, TRUANCY AND DROPOUT PREVENTION POLICIES: STRATEGIES FOR VIRGINIA YOUTH, BRIEFING BOOK 6–7 (Oct. 22, 2008).

104. Va. Dep’t of Educ., Virginia PreSchool Initiative, http://www.doe.virginia.gov/VD OE/Instruction/Elem_M/preschoolinitiative.html (last visited Oct. 11, 2009).

105. *See* Chris I. Young, *Budget Funds Could Open More Pre-K Slots; Richmond-Area Schools Set to Add Seats Though Classroom Space Limited*, RICH. TIMES-DISPATCH, Mar. 15, 2008, at B1.

106. *See* Robert C. Pianta, Editorial, *Pre-K Brings Long-Term Benefits*, RICH. TIMES-DISPATCH, Feb. 25, 2008, at A11.

107. *See* Young, *supra* note 105.

Given the substantial long- and short-term social and economic benefits of preschool,¹⁰⁸ this was a smart investment that will have a real impact on expanding the opportunities for a large number of at-risk children.

In 2009, the state's fiscal difficulties posed real threats to education funding. Governor Kaine proposed changes to the underlying education funding structure—the Standards of Quality—that upon approval would have caused millions of fewer dollars to flow each year from the state to local school systems.¹⁰⁹ The House of Delegates supported this proposal but the Senate resisted and, in the end, and at least, for now, the Senate prevailed.¹¹⁰ While the General Assembly and the Governor approved cuts, these were temporary and not permanent; yet the pain would have been much worse had the federal government not passed the stimulus package, which Virginia immediately used to fill holes in the education budget.¹¹¹ This was good news for Virginia's students in the short term but leaves some very hard issues for the future.

III. JUVENILE TRANSFER: TIME FOR A CHANGE?

Until the early 1990s, juvenile justice and the trial of children as adults had not been an important public issue for policymakers in Virginia or across the country. As the crack cocaine epidemic increased, reports of youth violence made headline news, and the rates of violent crime committed by young people rose, that situation changed. Typical of these national views that gained increased currency and traction was a *Weekly Standard* article in which John Dilulio stated:

And make no mistake. While the trouble will be greatest in black inner-city neighborhoods, other places are also certain to have burgeoning youth-crime problems that will spill over into upscale central-city districts, inner-ring suburbs, and even the rural heartland.

108. See e.g., THE COMMONWEALTH INST., INVEST NOW, SAVE LATER: THE BENEFITS OF TARGETED PRE-KINDERGARTEN (2008), [http://www.thecommonwealthinstitute.org/Portals/16/Education/Pre-K Cost Benefit Brief Final.pdf](http://www.thecommonwealthinstitute.org/Portals/16/Education/Pre-K%20Cost%20Benefit%20Brief%20Final.pdf).

109. See Olympia Meloa & Holly Prestidge, *13,000 Support Jobs in Va. Schools at Stake; Dinwiddie Educators Can't Imagine How They'd "Function with Any Less,"* RICH. TIMES-DISPATCH, Feb. 22, 2009, at A1.

110. See *id.*

111. See Lauren Roth, *Stimulus Begins a Slow Trickle to Local Schools,* VIRGINIAN-PILOT, May 18, 2009, at A8.

....

On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators.¹¹²

In testimony before the Senate Subcommittee on Youth Violence in 1996, Mr. Dilulio quoted Dan Coburn to support his dire predictions: "This new wrote horde from hell kills, maims, and terrorizes merely to become known, or for no reason at all. These teens have no fear of dying and no concept of living."¹¹³

Newspapers around the Commonwealth published articles titled, "Juvenile Crimes Escalate; Officials Say Offenses More Violent, Sophisticated,"¹¹⁴ "Youths 'Out of Control' in Northern Virginia; Officials Sound Alarm on Gangs,"¹¹⁵ and "Kids Shouldn't Be Getting Away with Murder."¹¹⁶ The articles quoted leaders in the criminal justice system in Virginia. For example, Richard Cullen, U.S. Attorney for the Eastern District of Virginia from 1991 through 1993, authored a *Washington Post* Op-Ed article in which he claimed:

[I]n growing numbers, boys are becoming killers.

Teenagers now commit a wildly disproportionate number of murders, most drug-related. . . . In Virginia, the juvenile murder rate quadrupled from 1987 to 1993. The juvenile arrest rate for rape and aggravated assault also skyrocketed.

....

. . . But while second and third chances for juveniles once entailed little risk to the public, with the new young killers, there is no room for error.¹¹⁷

112. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

113. *Fill Churches, Not Jails: Youth Crime and "Superpredators": Hearing Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary*, 104th Cong. 21, 23 (1996) (statement of John J. Dilulio, Professor of Politics and Public Affairs, Princeton University).

114. Carlos Sanchez, *Juvenile Crimes Escalate; Officials Say Offenses More Violent, Sophisticated*, WASH. POST, Mar. 3, 1994, at V1.

115. Ty Clevenger, *Youths 'Out of Control' in N. Virginia; Officials Sound Alarm on Gangs*, WASH. TIMES, Sept. 1, 1995, at A1.

116. Richard Cullen, Op-Ed, *Kids Shouldn't Be Getting Away with Murder*, WASH. POST, Oct. 22, 1995, at C8.

117. *Id.*

These articles proposed harsher punishment for youthful offenders¹¹⁸ and a “shift from protecting the juvenile defendant to protecting the public.”¹¹⁹

Informed by views such as these, Governor George Allen and Attorney General Jim Gilmore focused on stopping what they described as “an evil menace unparalleled in our history.”¹²⁰ After several legislative studies and a special commission convened under Governor Allen,¹²¹ the General Assembly acted. While the legislature directed numerous changes to Virginia’s juvenile justice system in that time period, the principal changes to the transfer system involved (1) reducing the role of the juvenile court judge in the decision-making process about where a youth should be tried and (2) handing this authority over to the Commonwealth’s Attorneys.¹²²

Specifically, until 1996, juvenile and domestic relations court judges, upon a motion from the Commonwealth, would consider a variety of evidence from the prosecution, the defense, and the probation officer before making a decision about where the child should be tried.¹²³ Following 1996, however, the General Assembly substantially curtailed the role of the juvenile and domestic relations court establishing a transfer system in which there are now three distinct routes to circuit court for juvenile offenders.

Automatic transfer. If a child is fourteen years old or older and charged with murder or aggravated malicious wounding, he receives a preliminary hearing in juvenile and domestic relations court before being automatically certified to circuit court.¹²⁴ At the preliminary hearing, the court only evaluates the youth’s age and whether or not there is probable cause.¹²⁵

Prosecutorial discretion. If a child is fourteen years old or older and is charged by the Commonwealth with one of a wide range of

118. See, e.g., *id.*

119. *Id.*

120. Governor George Allen, Remarks to the Joint Session of the Virginia General Assembly, Special Session II 3 (Sept. 19, 1994), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By&Year/5DO11995/\\$file/5D1_1995.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By&Year/5DO11995/$file/5D1_1995.pdf).

121. VA. COMM’N ON YOUTH, H. DOC. NO. 37, THE STUDY OF JUVENILE JUSTICE SYSTEM REFORM 2, 9–10 (1996).

122. See VA. CODE ANN. § 16.1-269.1 (Cum. Supp. 2009).

123. See VA. CODE ANN. § 16.1-269.1 (Cum. Supp. 1995).

124. *Id.* § 16.1-269.1(B), (D) (Cum. Supp. 2009).

125. *Id.* § 16.1-269(D) (Cum. Supp. 2009).

felonies, and the prosecution requests certification, the child receives a preliminary hearing in juvenile and domestic relations court and is certified to circuit court.¹²⁶ No aspect of the court's decision is reviewable, nor does the court have to state the reasons for electing transfer.¹²⁷ At the preliminary hearing the court only considers the youth's age whether or not the Commonwealth can establish probable cause.¹²⁸

Judicial transfer. For any other felony committed by a child fourteen years old or older, a prosecutor may ask a juvenile and domestic relations court judge to transfer the child to circuit court.¹²⁹ In these situations, however, the court holds a fully contested hearing and receives evidence on such factors as amenability to treatment, age, seriousness of offense, and the child's mental health status.¹³⁰ Either side may appeal the judge's decision to circuit court.¹³¹

Circuit court judges have the authority to sentence transferred youth to juvenile sentences, traditional adult sentences, or "blended" sentences in which the juvenile serves a portion of his sentence in the DJJ and the remainder in the Department of Corrections.¹³²

Now, thirteen years later, the Crime Commission is re-examining this system of trying and treating children as adults, and evaluating the wisdom and effectiveness of these changes.¹³³ This process of scrutinizing the changes of the 1990s is also taking place around the country, with the consensus among researchers being that policies that make it easier to try children as adults are not effective and, in fact, increase violence and recidivism among the youths who are tried as adults.¹³⁴

126. *Id.* § 16.1-269.1(C) (Cum. Supp. 2009).

127. *See id.* § 16.1-269.1(4) (Cum. Supp. 2009) ("No transfer decision shall be precluded or reversed on the grounds that the court failed to consider any factors [in a juvenile transfer hearing].").

128. *Id.* § 16.1-269.1(D) (Cum. Supp. 2009).

129. *Id.* § 16.1-269.1(A) (Cum. Supp. 2009).

130. *See id.*

131. *Id.* § 16.1-269.6 (Cum. Supp. 2009).

132. *Id.* § 16.1-272 (Cum. Supp. 2009).

133. *See CRIME COMM'N REPORT, supra note 1, at 2.*

134. *See, e.g.,* MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 59-60 (The University of Texas at Austin, LBJ School of Public Affairs) (2009); Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM.

For example, in August 2008, the Federal Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) issued a report finding no support for the proposition that trying children as adults served as a deterrent to future criminal behavior on the part of young people.¹³⁵ The bulletin, however, found substantial evidence and research to support the notion that trying and treating children as adults dramatically increases their likelihood of re-offending compared to keeping similar children in a juvenile court and juvenile facilities.¹³⁶

Similarly, a Centers for Disease Control and Prevention task force issued a report prior to the OJJDP bulletin that made comparable findings about the increased recidivism associated with transfer as well as the increased violence and victimization for those children confined in adult jails and prisons.¹³⁷

These reports, and the numerous studies upon which they are based, suggest that policymakers should not want any more children than are absolutely necessary transferred to the adult criminal justice system. In Virginia, however, based on the offenses for which young people are transferred and the sentences they receive, it appears that the opposite may be true.

While those who created our current system argued that easing the way to circuit court and adult prisons was necessary to accommodate the coming wave of cold-blooded murderers, the available data in the Commonwealth suggests that these targeted groups of youth make up a small percentage of those who are tried as adults. In fact, the crimes highlighted by policymakers in the 1990s—murder and rape—make up a small percentage of the offenses for which youth are tried as adults in Virginia. Specifically, in a 2006 presentation to the Crime Commission, Richard Kern from the Virginia Criminal Sentencing Commission explained that for the previous five fiscal years, only 7.5% of those youth tried as adults were tried for murder, and only 5.6% were tried for rape.¹³⁸

CRIM. L. REV. 371, 410 (1998).

135. Redding, *supra* note 1, at 3.

136. *Id.* at 2.

137. Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*, AM. J. PREVENTIVE MED., April 2007 Supplement, at 7, 17.

138. Richard P. Kern, Virginia Criminal Sentencing Commission, Felony Sentencing

Further a June 2009 report to the Crime Commission by the Virginia Criminal Sentencing Commission revealed that only 6% of all juveniles convicted of felonies in circuit court between 2001 and 2008 were convicted of murder or manslaughter, and only 5% were convicted of rape.¹³⁹ In fact more youth were tried as adults for larceny (12%) than both murder and rape combined.¹⁴⁰ The two charges constituting the majority of felonies for which juveniles were convicted were robbery (33%) and assault (15%).¹⁴¹

It is worth pointing out that robbery, in Virginia, has a common law definition, and the Virginia Code does not delineate between armed robbery and strong armed robbery.¹⁴² Therefore, Commonwealth's Attorneys can charge youths who grab children at school and demand their lunch money with robbery,¹⁴³ in the same way they could charge a youth who holds up a senior citizen at gunpoint. Yet, because robbery is one of those offenses over which the Commonwealth, not the juvenile and domestic relations court, has discretion, a judge could not stop the transfer of either child. Given the large percentage of transferred cases involving robbery, and the range in sentences they receive—only half of the juveniles convicted of robbery received sentences sending them to adult prisons¹⁴⁴—this appears to be what is happening.

The conviction patterns demonstrate that a broad spectrum of youths face trial and punishment as adults, not just the “cold blooded killers.” The sentencing patterns for convicted juveniles also suggest that many youths are transferred unnecessarily. Specifically, the Crime Commission's data shows that more than one in every two youth offenders convicted by a circuit court (i.e., charged and convicted as adults) between 2001 and 2008 did not go directly to adult prison.¹⁴⁵ Instead, 20% of those youths were

Patterns for Juveniles Convicted in Circuit Court 4 (2006) (on file with the author).

139. Meredith Farrar-Owens, Va. Criminal Sentencing Comm'n, *Juveniles Convicted in Circuit Court FY 2001–2008: Presentation to the Virginia State Crime Commission 5* (June 25, 2009) (on file with author).

140. *See id.*

141. *See id.*

142. *See* VA. CODE ANN. § 18.2-58 (Repl. Vol. 2008).

143. This fact pattern is from a case with which the author is familiar and resulted in a youth being tried as an adult and confined in an adult jail where he received no services or education.

144. Farrar-Owens, *supra* note 139, at 5.

145. *Id.* at 6.

placed directly on probation, 10% went to jail for a year or less, and 25% of the youth were given pure juvenile sentences.¹⁴⁶ While it is helpful that these youths receive juvenile sentences, they still receive adult felony convictions, which seem to impose substantial barriers to rehabilitation.

Indeed, it appears—at least based on convicted offenses and sentences received—that many juveniles who receive adult convictions may do so unnecessarily. A juvenile and domestic relations district court can sentence a youth to probation or impose a juvenile sentence just as easily as a circuit court can implement more effective services while the youth is on probation.

With these considerations and the current transfer structure in mind, the Crime Commission should recommend, and the General Assembly ought to approve, legislative changes that will require substantive judicial oversight and review for all transfer decisions outside those where the charges are currently subject to automatic offender status—the kinds of offenses and offenders that legislators appeared to fear most when making the changes of the mid-1990s. Such a change to current law would really be a return to previous law and would not prevent the Commonwealth from seeking adult prosecution of any juvenile currently eligible for transfer. Rather, it would only require that judges make more of the final decisions than they do under the current statutory scheme.¹⁴⁷

This re-emphasis of the judicial role will also ensure that the juvenile justice system has the most information possible, a neutral decision-maker, and a transparent and appealable decision when determining whether or not a juvenile should be tried as an adult. Given the negative outcomes generally associated with transfer and the current sentencing decisions made by circuit courts, this restoration of the traditional juvenile judge function will also ensure that court resources are used in the most effective and efficient manner possible.

Understandably, this proposal is broad and may be viewed as an affront to the role that Commonwealth's Attorneys currently

146. *Id.*

147. It is worth noting here that where juvenile and domestic relations court judges make the final decision, both the Commonwealth and the defendant have the right to appeal the decision to circuit court. *See* VA. CODE ANN. §§ 16.1-269.1(A), 16.1-269.6 (Cum. Supp. 2009).

play in the transfer process. It would, however, actually restore balance, transparency, and fairness to the adversarial system of juvenile and criminal justice. The most serious offenses—murder and aggravated malicious wounding—would still warrant automatic transfer. But the less serious offenses would require a judge to consider both the offense and, more importantly, the offender. Requiring this consideration prior to the transfer decision and giving both the defense and the prosecution the opportunity to appeal to circuit court will put more checks and balances into the system to ensure that circuit court resources are reserved for only the most hardened and dangerous youthful offenders and not those who would be better served in the juvenile system.

It is politically difficult for a legislator to take an action that some might characterize as “soft” on crime. However, given the current research, given that society’s worst fears did not come true about marauding juveniles, and given the current approach by circuit courts to transferred youth, child advocates can only hope that the Commonwealth’s elected officials will proudly take a step that most will call “smart” on crime.

At a meeting of advocates two years ago to discuss juvenile transfer and possible approaches to legislative change, Professor Shepherd urged those around the table to promote the complete restoration of the role of juvenile and domestic relations court judges in the transfer decisions. Some around the table, including the author, urged a more modest approach. However, upon more reflection and after further study, the author concedes that—as he was with most things—Bob was right. All would do well to heed his example of how to live life. The Commonwealth’s elected officials would also do well to heed his guidance on how to treat Virginia’s children.