AN ANALYSIS OF THE LEGAL RIGHTS AND RESPONSIBILITIES OF VIRGINIA PUBLIC SCHOOL EDUCATORS

by

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(ABSTRACT)

The purpose of this study was to examine and analyze federal and Virginia statutes along with selected state and federal court decisions which govern the legal rights and responsibilities of educators in the Commonwealth of Virginia in the areas of 1) liability; 2) terms of employment; 3) legal relationships with students; and 4) legal responsibilities to students with disabilities.

The legal resources for this study were the United States Constitution; the Code of Virginia; other federal and Virginia legislation; and Virginia and federal judicial opinions. The methods of research employed in this study were the "descriptive word" or "fact word" approach and the case method. The computer-assisted legal research services, Lexis and Westlaw, were used extensively in this study.

The conclusions resulting from this study are as follows:

1) The doctrine of sovereign immunity absolutely protects Virginia school boards and administrators from liability for negligence. Virginia teachers are also protected by sovereign immunity but only for acts of simple negligence. Sovereign immunity does not bar Virginia's teachers from actions involving

gross negligence and does not protect school districts and school personnel for constitutional torts.

2. To obtain employment in Virginia, an educator must hold a license issued by the State Board of Education, pass a professional teachers' examination and execute a written contract with the school board. To obtain continuing contract status in Virginia, educators must serve a three-year probationary period in the same school division. Virginia educators may be dismissed, suspended or placed on probation for cause.

3. School age children are mandated to attend school in Virginia. Local school boards possess statutory authority to employ reasonable measures to maintain discipline in the schools. Virginia students may be suspended or expelled provided they receive procedural due process. Students possess constitutional rights under the First, Fourth, and Fourteenth Amendments.

4. The Individuals with Disabilities Education Act mandates that students with disabilities be provided a free appropriate public education in the least restrictive environment. The IDEA and Virginia regulations governing special education outline comprehensive and detailed procedural requirements guaranteeing the rights of parents of children with disabilities.

Dedication

With love and eternal gratitude to my mother and father

who have always said, "Know Thyself."

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Chapter 1

Introduction

> Once thought to be the sole concern of school board attorneys, school board members, and school administrators, education-related legal problems, have, in recent years, become problems of supervisors, counselors, and teachers, as well.[1]

Education law involves constitutional provisions, statutes, regulations, policies, and common law at the federal, state and local levels. An understanding of education law is essential for educators, both for practicing professionals and teachers in training. The law protects the free speech rights of students and teachers; it guarantees due process when they are disciplined or dismissed; and it prohibits discriminatory policies based on religion, race, sex, national origin, or disability. The courts frequently are involved in and called upon to adjudicate these and other issues. Judicial intervention in public education has evolved dramatically throughout the past forty years beginning with the Supreme Court's landmark decision in 1954, Brown v. Board of Education.[2] The Brown Court stated, in part, that "education is perhaps the most important function of state and local governments."[3]

After Brown, several Supreme Court decisions from the 1960s through the late 1970s were characterized by their protection of student rights[4] and teacher rights.[5] The 1980s saw the judicial activism of the 1960s and 1970s replaced with judicial restraint in the federal courts. In the 1980s, courts emphasized that school officials can restrict the conduct and expression of students[6] and teachers.[7] Court decisions have enunciated and will continue to enunciate both the rights and the responsibilities of educators in the educational

enterprise. These decisions will have significant impact on educators' behavior regarding their employment relationship with school divisions and their interaction with students.

Education-related litigation includes legal problems with students, parents and other educators. Teachers, too often, and with increasing frequency, are named as defendants in education cases before the courts.[8] McCarthy and Cambron-McCabe opine that "many teachers and administrators harbor misunderstandings regarding the basic legal concepts that are being applied to educational questions. As a result they are uncertain about the legality of daily decisions they must make in the operation of schools."[9] Educators who lack knowledge of their professional rights and responsibilities may find themselves not only losing their constitutionally protected freedoms and possibly their jobs, but also, violating the rights of their students.

Statement of the Problem

The purpose of this study was to examine and analyze federal and Virginia statutes along with selected state and federal court decisions which govern the legal rights and responsibilities of educators in the Commonwealth of Virginia in the areas of 1) liability; 2) terms of employment; 3) legal relationships with students; and 4) legal responsibilities to students with disabilities. The results of this study provide Virginia educators with a comprehensive and convenient legal reference guide.

Need for the Study

All educators need a knowledge of school law because every facet of their professional lives is affected by law. Alexander and Alexander state that "courts have become much more actively involved in aspects of education which were heretofore left entirely to the discretion of school administrators and school boards."[10] According to Hudgins and Vacca, "a need has grown in recent years for professionals in public schools to become more knowledgeable about the interplay of courts with the day-to-day operation of schools and school systems."[11] Valente writes that "anyone interested in school law must be impressed, if not overwhelmed, by the flood of new statutes, bureaucratic regulations, and court decisions that constantly affect the operation of schools."[12] It is the combination of statutes, regulations and case law that guarantees a steady flow of education-related litigation.

We live in a litigious society, and in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975), the Supreme Court declared that school officials cannot claim ignorance of the law as a defense. The Court stated that "an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice."[13]

There have been several studies to indicate the importance for educators of having school law knowledge. Caldwell states that "teachers and school administrators who remain uninformed on school law and case law as it impacts on their professional role, do so at their own peril."[14] In response to the threat of litigation, Clay remarks that "educators should not react with fear or resentment but rather with a recognition of the growing need to be informed in the area of

school law."[15] Sametz adds that school law knowledge "will enable teachers to protect and implement both their rights and their students' rights."[16]

Studies have illustrated the level of school law knowledge among educators. The majority of these studies found a poor or inadequate understanding of education law issues among both preservice teachers and practicing educators. For example, in 1983 Sametz, Mcloughlin and Streib surveyed 248 sophomores and 140 seniors in a teacher preparation program in the midwest on their knowledge of legal issues affecting children. The results indicated no significant difference between the two groups and that "both groups have much to learn."[17] In 1983, Menacker and Pascarella administered a ten-item questionnaire to 252 teachers and 37 administrators in the Chicago area to assess their knowledge of education-related Supreme Court decisions; they reported that the total group average of 64.4% correct responses was "disappointing."[18]

Two surveys conducted for dissertation purposes had consistent results indicating that practicing educators in Virginia have inadequate school law knowledge. A 1986 dissertation by Caldwell examined the school law knowledge of public school principals. Caldwell concluded: "Since principals scored an average of 78.1% this would indicate an adequate or average knowledge of school law."[19] However, three areas require a closer look: 1) knowledge of corporal punishment; 2) non-renewal of probationary teachers; and 3) tort liability. For example, only 22.5% of the principals responded correctly to the corporal punishment question, an important fact given that it was not until 1989, three years after the survey, that Virginia law prohibited corporal punishment in the public schools. Only 47.7% of the principals had correct responses to the

question dealing with contract non-renewal, and the mean score of 54.9% in the tort liability category indicated "a serious knowledge deficit in that area."[20]

The second dissertation study of Virginia educators was completed by Dumminger in 1989. Dumminger surveyed over three hundred Virginia teachers to assess their level of school law knowledge with a thirty-item questionnaire and found that the level was less than adequate.[21] The average score on the school law test was 41.08%. Means for the subareas on the test were as follows: tort liability was 24.7%, teacher rights was 43.7%, and legal responsibilities regarding students was 54.8%. Dumminger concluded: "Teachers in Virginia are not knowledgeable about tort liability, teacher rights, or their legal responsibilities regarding students."[22]

Both the Caldwell and Dumminger studies employed survey research to determine school law knowledge among Virginia's principals and teachers, respectively. Not since Curcio's study in 1981[23] has there been a comprehensive examination and analysis of the legal rights and responsibilities of Virginia educators, thus, demonstrating the need for and significance of this study.

Virginia educators need a comprehensive, yet concise guide to their basic legal rights and responsibilities, written in language they can understand and which they can use as a consistent and convenient reference work. This study will also be useful as a text for undergraduate teacher education programs throughout the state, as inservice training for practicing educators, and, as supplemental reading for graduate programs in public school administration and supervision.

Structure of the Courts

The judicial system in the United States is a dual system comprised of one federal court structure and individually organized state courts. To understand the complex judicial structure of both federal and state courts, one must understand the principle of jurisdiction and the difference between trial and appellate courts. "Court structure is largely determined by the legal limitations on the types of cases a court may hear and decide. . . . Courts are authorized to hear and decide disputes arising within a specified geographical jurisdiction."[24] Decisions from the Supreme Court are applicable to the entire nation; decisions from the lower federal courts and from state courts are binding only in the geographic area in which the court sits. Whether in state or in federal court, all litigation begins in a trial court presided by a single judge. "Trial courts hear disputes over facts, witnesses only appear in trial courts. Trial courts are considered finders of fact, and the decision of a judge (or jury) about a factual dispute cannot be appealed."[25]

If one loses in a trial court, the party has the right to request a review of the decision by a group of judges in an appellate court.

> The primary function of the appellate court is to ensure that the trial court correctly interpreted and applied the law. A secondary function is to devise new rules, reexamine old ones, and interpret unclear language of past court decisions or statutes. . . . In appellate courts no witnesses are heard, no trials are conducted, and juries are never used.[26]

The United States Constitution provides the framework for the federal judiciary. Changes to the federal judiciary can only be limited by acts of Congress or by rulings of the United States Supreme Court.[27] Before the adoption of the Constitution, the United States was governed by the Articles of Confederation with most governmental functions vested in the Congress without

clear delineation of executive and legislative authority.[28] The provision for a federal judiciary was provided in Article III Section 1 of the Constitution: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." All Article III judges are nominated by the President, confirmed by a majority of the Senate, and receive life tenure.

The First Congress established the structure for the federal judiciary in the Judiciary Act of 1789: a Supreme Court with a chief justice and five associate justices, three circuit courts presided by two justices of the Supreme Court and one district judge; and thirteen district courts, each with one district judge.[29] The federal judiciary has undergone several changes over two centuries. The current structure includes a Supreme Court with a Chief Justice and eight associate justices; thirteen circuit courts of appeal with 179 authorized judgeships (eleven based on geographic divisions and identified by number, one for the District of Columbia and one for the federal circuit); and, ninety-four district courts with 648 authorized judgeships.[30]

The district courts were created as the trial courts in the federal judiciary. The facts of a case, which are reviewed by the circuit courts of appeals, are established in the district courts.

The circuit courts of appeals have no original jurisdiction. The circuit courts of appeals review cases primarily from the federal district courts in the circuit. Whereas Supreme Court decisions apply to the entire country, decisions from the circuit court of appeals are applicable to a specific region; yet, decisions from the circuit courts may influence decisions of similar issues in other appellate courts.[31] Since few petitions are granted certiorari by the Supreme Court, the

importance of circuit court decisions can not be overlooked; for most litigants, and for virtually all federal legislation, these decisions are the final authority.[32]

The Supreme Court is the highest court in the nation and is the court of last resort. If a party is unsuccessful in a lower court, the party may petition the Court to review the decision. If the Justices agree to hear the case, a writ of certiorari is issued to the lower court. A writ will be granted only if four of the justices agree to accept the case; denial of certiorari means that the decision of the lower court stands. "A decision by the United States Supreme Court has the force of law and may be altered or modified only by another High Court decision or an amendment to the Constitution."[33] However, the Court does not have enforcement power and compliance with a decision often is achieved through continuing court actions.[34]

State Courts

Prior to the Judiciary Act of 1789, which established the federal judiciary, state courts were already in existence.[35] Carp and Stidham state that "the organization of state courts is not as clear cut as the three-tier system found at the federal level. . . . Some states have . . . a unified court system while others still operate within a bewildering complex of courts with overlapping jurisdiction."[36] Each of the fifty states and the District of Columbia has its own court structure. Although no two states are similar, all have a scheme of trial courts, intermediate appellate courts and courts of last resort.[37]

At the lowest level of trial courts are the courts of limited jurisdiction. These courts are often presided by justices of the peace or magistrates, personnel with limited, or in some cases, no formal legal training; thus, these

courts are restricted to jurisdiction over minor litigation and are not courts of record. At the next level are the courts of general jurisdiction, which in most states are situated in judicial districts or circuits based on existing political boundaries.[38] Although the primary function of courts of general jurisdiction is as trial courts, these courts also serve as appellate courts for decisions from the courts of limited jurisdiction. The most recent addition in state court structures is the intermediate appellate court and, for most litigation, these courts are the court of last resort. Every state has a counterpart to the United States Supreme Court and many states, in fact, call their highest court a supreme court. These courts serve as the final arbiter in all matters pertaining to state law.

Virginia Courts

The Commonwealth of Virginia has two kinds of courts: 1) trial courts which hear evidence and determine the case facts, and 2) appellate courts to determine whether the trial court committed errors of law.[39] Trial courts in Virginia include general district courts, juvenile and domestic relations district and circuit courts. There are two appellate courts; at the intermediate level is the Court of Appeals and the highest appellate court is the Supreme Court of Virginia.[40] All judges in the Commonwealth are lawyers licensed to practice in Virginia, and all are appointed by the General Assembly; appointment terms vary among the various courts.[41]

Virginia is divided into thirty-one judicial districts and circuits. The trial courts of the district court system are comprised of two types of courts: general and juvenile and domestic relations courts. 192 judges serve 77 general district courts, 69 juvenile and domestic relations district courts and 57 combined district

courts. One hundred thirty-three judges preside over 122 separate circuit courts in various cities and counties throughout the thirty-one judicial circuits in the state. The circuit courts serve two functions: first, as a trial court of general jurisdiction in civil and criminal cases, and second, as appellate court over the two types of district courts. Appeals from the district courts are heard de novo (i.e., from the beginning as if there were no previous trial).[42]

The Virginia Court of Appeals is relatively new to the state's court system, having completed its seventh year in 1991.[43] Ten judges sit in panels of three throughout the state to hear appeals in criminal cases (except for the death penalty) and in civil cases.[44] Virginia's Supreme Court has seven justices and there is no automatic right of appeal to the state's highest court. The Supreme Court reviews decisions on appeal from the state's lower courts. "These decisions fall basically into two categories: decisions of lower courts in which questions of proper application of statutory or common law are raised; and decisions of lower courts based on questions of constitutionality."[45]

Delimitations of the Study

The study was limited to an examination and analysis of the legal rights and responsibilities of licensed Virginia educators (teachers, counselors and administrators) in grades K-12, in public schools. The legal issues in this study were limited to the four categories outlined in the purpose of the study. Legal issues involving parental rights, governance and finance were not addressed in this study.

Court decisions were limited to reported cases from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, the federal district courts of Virginia, and the state courts of Virginia that directly affect or bind educational policy and practice in Virginia. The study was not intended to be a national study.

Sources of law were limited to and identified from the U. S. Congress, the Virginia General Assembly, and Virginia Attorney General Opinions enacted prior to May 1994.

Procedures of the Study

According to Wren and Wren, "the purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts."[46] The facts for this study were ready-made and are contained in the Code of Virginia Title 22.1. The legal principles used to prepare this reference guide for Virginia educators were adapted from the following chapters in Title 22.1 of the Code: Chapter 14, Pupils, Sections 22.1-254 to 22.1-289 and Chapter 15, Teachers, Officers and Employees, Sections 22.1-289.1 to 22.1-318. To determine the legal consequences of Virginia school law for Virginia educators, a procedure to find the law was necessary.

There are three generally accepted methods to find the law: (1) Descriptive word or fact word, (2) Known authority, and (3) Known topic.[47] Although "the descriptive word or fact word approach is the most commonly used method for finding the law,"[48] all three methods were selected for this study. To find the law, primary sources must be distinguished from secondary sources; primary sources are the law as found in constitutions, statutes and court decisions, secondary sources include everything else.[49] The primary sources for

this study were the United States Constitution, the Code of Virginia, other federal and Virginia legislation, and Virginia and federal judicial opinions. Lexis and Westlaw, both computerized legal research services, were the primary methods used to find the law.

An essential step in legal research is to locate the most recent cases. Shepardizing a case is a process to verify the current standing of a decision. Cohen and Berring explain shepardizing "as a research step [which is] an essential consequence of the doctrine of precedent and stare decisis, and of the fact that strictly speaking, decisions and statutes remain in effect regardless of their age, unless and until they are reversed, overruled, or, in the case of statutes, repealed or judicially declared void."[50] Again, Lexis and Westlaw provided convenient methods to shepardize the cases in this study.

For each legal category in this study, the research process was as follows:

1. identify the appropriate Section of the Code of Virginia;
2. search for other primary sources through Lexis/Westlaw;
3. select, shepardize and brief cases;
4. examine related statutory and administrative regulations; and
5. review other interpretive secondary sources.

The cases and statutes in this study supplement the research from Curcio's study with the most recent court decisions and changes to the Code from January 1981 through May 1994.

Outline of the Chapters

Chapter one will include the introduction, need for the study, statement of the problem, purpose of the study, a description of the research method, a definition of terms, a summary of the federal and Virginia judicial structure, limitations, and organization of the study. Chapter two will review liability for

Virginia educators. Chapter three will discuss the issues in teacher employment, including licensing, contract, tenure, and dismissal. Chapter four will examine teachers and their legal responsibilities to students. Chapter five will discuss educator responsibility to ensure the rights of children with disabilities. A summary of the research and recommendations for further study will be included in chapter six.

Endnotes

1 H. C. Hudgins and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, 3rd ed. (Charlottesville: Michie, 1991), 23.

2 Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686,(1954).

3 Ibid., 493.

4 Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), *cert. denied* 368 U.S. 930, 82 S.Ct. 368 (1961); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975).

5 Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693 (1979).

6 New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988).

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8 Gloria J. Thomas, "Teacher-Employer Relations: A Legal Reference Guide for Public School Employees" (Ph.D. diss., Brigham Young U, 1988).

9 Martha M. McCarthy, and Nelda Cambron-McCabe, Public School Law: Teachers' and Students' Rights 3rd ed. (Needham Heights: Allyn and Bacon, 1992), vii.

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15 Gwendolyn V. Clay, "Maintaining Order and Discipline: A Duty Requiring Knowledge of the Law," High School Journal 67, no. 3 (1984): 178.

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[17] Lynn Sametz, Caven Mcloughlin and Victor Streib, "Legal Education for Preservice Teachers: Basics or Remediation?" Journal of Teacher Education 34.2 (1983): 11.

[18] Julius Menacker and Ernest Pascarella, "How Aware are Educators of Supreme Court Decisions That Affect Them," Phi Delta Kappan 64, no. 6 (1983) 424-426.

[19] M. Teressa Caldwell, "Virginia Principals and School Law" (Ed.D. diss., Virginia Polytechnic Institute and State U, 1986), 77.

[20] Ibid., 74.

[21] James C. Dumminger, "Teachers and School Law" (Ed.D. diss., Virginia Polytechnic Institute and State U, 1989).

[22] Ibid., 130.

[23] Joan L. Curcio, "An Analysis of the Legal Rights and Responsibilities of Virginia School Teachers" (Ed.D. diss., Virginia Polytechnic Institute and State U, 1981).

[24] David W. Neubauer, Judicial Process: Law, Courts and Politics in the United States, (Belmond: Wadsworth, 1992), 49, 50.

[25] Ibid., 51.

[26] Ibid.

[27] Michael W. La Morte, School Law: Cases and Concepts, 3rd ed. (Englewood Cliffs: Prentice Hall, 1990), 15.

[28] Robert A. Carp and Ronald Stidham, Judicial Process in America (Washington: Congressional Quarterly P, 1990).

[29] Ibid.

[30] The number of district courts within a state is based on population--twenty-six states have one district court; twelve states have; nine states have three; and California, New York, and Texas have four district courts. Brownson, Ann L., ed., 1991 Judicial Staff Directory, 5th ed. (Mount Vernon: Staff Directories, 1990).

[31] McCarthy and Cambron-McCabe.

[32] Ibid.

[33] La Morte, 11.

[34] Ibid.

[35] Carp and Stidham.

[36] Ibid., 52.

[37] Ibid.

[38] Ibid.

[39] Virginia State Bar, News Media Handbook on Virginia Law and Courts, Eighth Edition (Richmond: Virginia State Bar, 1992), 2.

[40] Ibid.

[41] District judges are appointed for six-year terms; circuit and court of appeal judges have eight-year terms; and, supreme court judges have twelve-year terms. News Media Handbook.

[42] Supreme Court of Virginia, Office of The Executive Secretary, Virginia State of the Judiciary Report 1991 (Richmond: Supreme Court of Virginia, 1991).

[43] Ibid.

[44] Hudgins and Vacca.

[45] Virginia State of the Judiciary Report 1991, A-21.

[46] Christopher G. Wren and Jill Robinson Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis, 2nd ed. (Madison: A-R Editions, 1986), 29.

[47] Wren and Wren, 45.

[48] Ibid., 46.

[49] Ibid., 41.

[50] Morris Cohen and Robert C. Berring, Finding The Law, (St. Paul: West, 1984), 250.

Chapter 2

Liability

Gluckman states that "professional liability refers to all of the kinds of liability for which a professional person can be held responsible."[1] Liability for public school educators can be divided into two categories: 1) common law torts, and 2) constitutional torts. A tort, according to Alexander and Alexander, "is a civil wrong independent of contract. It may be malicious and intentional or it may be the result of negligence and disregard for the rights of others."[2] "The law of torts, then, is concerned with the allocation of losses arising out of human activities . . . The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries . . . as the result of the conduct of another."[3]

A tort is different from a crime. "A criminal action is brought by the state to protect the public from actions of a wrongdoer--the state prosecutes not to compensate the injured person but to protect the public from further wrongful acts."[4] In contrast, a tort action "is initiated and maintained by the injured party for the purpose of obtaining compensation for the injury suffered."[5]

There are three categories of common law torts: 1) intentional interference, 2) strict liability, and 3) negligence. Common law torts arise under state law. A Constitutional tort is a violation of an individual's federal constitutional or statutory rights. Constitutional torts will be discussed later in this chapter.

Dunklee comments that "since tort law is essentially the result of judicial decisions--case or common law (judge-made) rather than statutory or legislative law--the study of torts is inconclusive in answering specific inquiries."[6] McCarthy

and Cambron-McCabe remark that "negligence cases include questions of law, which are determined by judges, and questions of fact, which are decided by juries."[7] Therefore, the determination of whether the alleged conduct caused harm to an individual, a question of fact, would be decided by a jury.[8] However, in some cases, according to Kionka, "the judge may decide, based on her own experiences and the legal knowledge of the underlying principles, that there is no question for the jury because the conduct in question so clearly was or was not negligent that no reasonable person could reach any other conclusions."[9]

For Virginia educators, the doctrine of sovereign immunity (which will be discussed in detail later in the chapter), in most situations, provides protection against liability for student injuries resulting from common torts.

Intentional Torts

An intentional tort results when a person acts in such a manner that the rights of another are violated. Types of intentional torts include: assault, battery, interference with peace of mind, and false imprisonment.[10] An intentional act is not necessarily malicious and physical injury may not occur. For example, assault is the overt act of placing someone in fear of bodily harm--without physical contact. Battery is committed when physical contact is made, such as striking someone.

Assault and Battery

The most common intentional torts in public education are assault and battery cases which fall under the purview of corporal punishment by school personnel, usually in the administration of discipline. In 1992, twenty-one states,

including Virginia, prohibited corporal punishment either by law or state regulation.[11]

Beginning July 1989 corporal punishment[12] was banned in Virginia. The Code states: "No teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth shall subject a student to corporal punishment."[13] To provide Virginia educators with guidance regarding physical contact with students for disciplinary measures, the Virginia corporal punishment statute further specifies:

> This prohibition of corporal punishment shall not be deemed to prevent (i) the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) the use of reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance which threatens physical injury to persons or damage to property; (iii) the use of reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) the use of reasonable and necessary force for self-defense or the defense of others; or (v) the use of reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or paraphernalia which are upon the person of the student or within his control.[14]

No corporal punishment or assault and battery cases have been decided by the Virginia courts since enactment of the 1989 statute. In other jurisdictions, a teacher's right to make reasonable use of physical discipline toward students has been upheld in the courts where permitted by state statute.[15]

Defamation

Defamation consists of the twin torts of libel and slander. Defamation results in injury to a person's reputation--slander defames through spoken words, libel defames through printed communication. Liability for defamation requires publication--communication to someone other than the person defamed. Students are rarely involved in defamation cases; the opposite is true for school

personnel. Alexander and Alexander describe the particulars with which educators are susceptible to actions in defamation:

> Teachers, as a matter of routine, process and communicate information that relates to pupil performance, the misuse of which could potentially harm the student's reputation . . . [the administrators' role] is even more complex in communication of information concerning teacher performance . . .[16]

In defamation actions, several issues may be involved in deciding a case. These issues include: truth, malicious intent, privilege, and the status of the defamed party in society as a public official, public figure or private citizen.

In Virginia, the defense against defamation is truth. Section 8.01-46 of the Code states: "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true."

Educators sued for defamation may employ defenses of absolute privilege or qualified (conditional) privilege. Absolute privilege is generally reserved for state officials, "who perform vital governmental functions that the courts have defined as judicial proceedings, legislative proceedings, and certain executive proceedings."[17] Most educators enjoy qualified privilege for statements made in good faith and without malice. A few states afford the higher standard of absolute privilege to division superintendents, particularly in the area of teacher evaluations.

In addition to the question of privilege, another standard critical to defamation actions is the status of the defamed party as either a public official or a private citizen. The Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ruled that First Amendment guarantees of freedom of speech and press require that public officials who sue cannot be awarded damages for libel or slander unless they can prove that the statements were made with actual malice--statements made either knowing they were false or with reckless

disregard for the truth of the statements. To be considered a public official, an individual must have responsibility for or control over some governmental function.[18] State courts are divided on the issue of whether public school personnel are public officials; however the issue is clear in Virginia. In Richmond Newspapers v. Lipscomb, 234 Va. 277, 362 S.E.2d 32 (1987), the Supreme Court of Virginia ruled that classroom teachers are not public officials.

In Lipscomb, supra, several parents were not pleased with the classroom behavior of Vernelle Lipscomb, a high school English teacher. After an unsuccessful attempt to have the teacher dismissed by the school administrator, a parent contacted a local newspaper reporter. The reporter wrote an article that appeared on the first page of the paper on the Sunday prior to the beginning of the school year detailing the difficulty parents experienced in gaining support to remove incompetent teachers. Lipscomb was the only teacher specifically mentioned in the article. The article stated that she was disorganized, erratic, forgetful and unfair; that she returned graded papers weeks late; was absent from the classroom for long periods; and that she demeaned and humiliated students.[19] Subsequently, the teacher sued the newspaper, the publisher and the reporter for defamation. The publisher requested that the teacher be declared a "public official" and therefore be required to prove the article was written with actual malice.

The Court concluded that Lipscomb was not a "public official" but a private person.[20] The Court reasoned that Lipscomb did not influence or control "any public affairs or school policy."[21] Consequently, the teacher was not required to prove actual malice to recover compensatory damages.

Strict Liability

Strict liability as an intentional tort is rarely an issue in education cases, and when it is the issue usually concerns activities and equipment involved with athletics and laboratory environments. According to Alexander and Alexander, "strict liability is not imposed unless the activity or thing is classified as hazardous or even 'ultrahazardous.' . . . strict liability cases . . . in the public schools are scarce, [however] the possibility of such actions nevertheless exists. . . ."[22] There are few reported cases concerning strict liability and no Virginia cases. The prudent teacher must recognize the possibility for accidents in the use of any potentially dangerous or hazardous activity or equipment. Teachers should be mindful of district policies regarding the approval and use of equipment or activities that could make the teacher strictly liable for injury.[23]

Negligence: The Unintentional Tort

As indicated in the first chapter of this study, there is an increase in education-related litigation and, Gluckman observes that "one of the major sources" of litigation, "continues to be the common law actions for negligence."[24] The most common tort with which both school districts and their employees become involved is negligence. Prosser and Keeton define negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[25] Kionka notes the term, "negligence," carries two legal meanings. First, it is the name assigned to a specific tort action (similar to the intentional tort, defamation) and, second, "negligence" describes the wrongful conduct itself which is the issue of a tort action.[26] McCarthy and Cambron-McCabe clearly state four conditions

necessary to establish an individual's wrongful conduct, e.g. negligence according to Kionka's second description:

> 1) The individual must have a *duty* to protect another from unreasonable risks.
> 2) The duty must be breached by the failure to *exercise an appropriate standard of care.*
> 3) There must be a causal connection between the negligent conduct and the resulting injury (referred to as *proximate or legal cause*).
> 4. There must be physical or mental *injury* resulting in an actual loss[27] (emphasis in original).

The four standards were also clearly enunciated by the court in Comuntzis v. Pinellas County School Board, 508 So.2d 750 (1987), in which the Florida Court of Appeals stated:

> To sustain a cause of action in negligence, a complaint must allege ultimate facts which establish a relationship between the parties giving rise to a *legal duty* on the part of the defendant to protect the plaintiff from the injury of which he complains. It must also show that the defendant negligently *breached that duty*, and that the plaintiff's *injury was proximately caused* by the defendant's negligence[28] (emphasis added).

In other words, there are four links in a valid case of negligence chain: duty, standard of care, proximate cause and injury; if any of the four elements is not present in a negligence claim, the chain is broken and no liability is assigned to the tortfeasor. If the first three links are proven to be intact by the courts, and physical or emotional injury is also proven--thereby establishing a valid negligence action--then, Gluckman concludes, such actions "can result in the largest damage awards against school defendants."[29]

To determine negligent conduct, in addition to specific case facts, the law examines two other important factors: the reasonable person standard and foreseeability. Alexander and Alexander describe the characteristics of the reasonable person as:

> a [person] of ordinary sense using ordinary care . . . [having] 1) the physical attributes of the defendant himself, 2) normal intelligence, 3) normal perception and memory with a minimum level of information and experience common to the community, and 4) such superior skill and knowledge as the actor has or holds himself out to the public as having.[30]

Courts employ the reasonable person standard in concert with the question of foreseeability. Foreseeability requires an individual to behave as a reasonable person would under the circumstances of an alleged tortious activity. Valente explains, "the law does not require that the specific risk of injury be foreseeable; only that risk of that general type were foreseeable."[31] He continues, "nor does tort law require a person to assume impractical and unreasonable burdens to prevent all possible harm. Rather, [the foreseeability standard] only requires what can reasonably be done to avoid probable (not all possible) harm."[32] Negligence can not be established if harm is unforeseeable.

In McLeod v. Grant County School District No. 128, 255 P.2d 360 (Sup. Ct. Wash, 1953), the Washington Supreme Court provides a clear statement of the test of foreseeability:

> Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable, but is whether the actual harm fell within a general field of danger which should have been anticipated.[33]

The law does not require school personnel to see every future accident, nor do the courts expect educators to insure the safety of students; however, they do bear a responsibility and a duty to maintain a school environment that is safe and healthy; in doing so, an educator's conduct is measured against what a reasonable professional of similar training and experience would do in the same or similar situation.

Virginia Educators and Negligence

In 1980, Curcio reported that "in Virginia's recorded legal history, there are just five tort cases which involve schools or teachers. All are cases of alleged negligence."[34] After 1980, only three additional school-related negligence cases have been to trial in Virginia: Banks v. Sellers, 294 S.E.2d 862 (1982), Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988), and B.M.H. by C.B v. School Board of the City of Chesapeake, Virginia, 833 F.Supp. 560 (E.D. Va. 1993). Because there is 1) a paucity of Virginia decisions in this area of tort law, and 2) Virginia educators, absent charges of gross negligence, have sovereign immunity against liability, cases from other jurisdictions are presented to review the application of education-related negligence actions. The role of sovereign immunity for Virginia educators will be discussed in detail under defenses for negligence.

The following sections illustrate the four elements in negligence actions--duty, standard of care, proximate cause and injury.

The First Element of Negligence - Duty

The question of whether a duty is owed to an individual is decided by the court.[35] Gluckman observes that "a duty exists between two people when the relationship between them is such that one is obligated to exercise at least ordinary care that the other person not be injured."[36] A school district's duty is to anticipate dangers that may reasonably be anticipated and to then take precautions to protect its pupils from such dangers.[37] According to Alexander and Alexander: "The courts generally hold that no duty exists when the defendant could not have reasonably foreseen the danger of risk involved."[38] The

following cases illustrate situations in which the courts determined the liability of school personnel based on the first element of negligence, duty.

School personnel are liable when courts find that a duty exists in cases where the school should have taken precautions to protect students from foreseeable dangers both on and off school property. For example, a school district was liable for damages to a twelve-year-old female student who was forcibly raped by fellow students during noon recess in the school gymnasium.[39] In another case, a student was successful in an action against a school board for injuries sustained when he was shot leaving a school parking lot.[40] In this case, a Florida court commented: "The school's duty to maintain the parking lot in a safe condition did not end because the student's actual injury occurred a few feet beyond its property line."[41]

Two cases from the District of Columbia indicate that a school district may be required to exercise a higher duty and an additional standard of care to protect students when there is a known condition which may pose a threat of bodily harm. In both cases, the District of Columbia public schools were held liable for damages for the sexual assault of a fourth grade student by an intruder in the school,[42] and for injuries to a six-year-old student on a construction site near the school.[43]

In contrast to the school district's liability in the above cases, courts found no duty existed in the following cases. The Georgia Court of Appeals held that a school district did not breach a duty to guard against and to prevent against an attack on a student who was stabbed three times by another student in a high school courtyard. Here, the Court held the attack was unforeseen because, as the facts were presented, there was no record of "knives being used in previous

fights on the school grounds, or that there was any particular profile of students who were likely to fight."[44] A teacher did not breach a duty to exercise reasonable care by failing to supervise a kindergarten student who took a project made with toothpicks home that later came apart and injured another child.[45] School officials did not have a duty to supervise an off-campus party on senior "release day" and were absolved of liability in the death of a student at the party;[46] and a school district was not liable for injuries sustained by a high school student when, contrary to school policy, he left a school bus en route to school to ride with a fellow student who subsequently was involved in an automobile accident.[47]

Although teachers are held to a higher standard than the average person in supervising young people, the courts do not expect school personnel to watch over every student every minute of the day, and, according to Gluckman, some courts find failure to provide adequate supervision, "a very difficult issue to determine."[48] Several school law authorities agree that the degree of supervision required is measured in part by the nature of the activity in which students are involved, and the students' age, intelligence, maturity level and past behavior.[49] Alexander and Alexander state that "a duty owed by one person to another may well intensify as the risk increases."[50] For example, more supervision is necessary for an off-campus field trip, in a technology workshop, science laboratory or gymnasium than would be required in a media center, social studies or English classroom. Courts examine the question of adequate supervision as an essential component in determining whether school personnel exercise reasonable behavior to protect students from foreseeable harm. An Arkansas court stated:

> . . . the duty owed by the [school] district is that of ordinary care. That has been defined as "adequate general supervision" not constant supervision. 'The duty of reasonable supervision does not require the [school district] to provide personnel to supervise every portion of the school buildings and campus area.' Schools are not intended to be insurers of the safety of their pupils.[51]

Courts have ruled that a momentary lack of supervision did not constitute a breach of the teacher's duty to act in a reasonable manner.[52]

Transportation Two of the five negligence cases in Virginia public schools prior to 1981 involved negligent bus operations: Wynn v. Gandy, 170 Va. 590, 197 S.E. 527 (1938) and County School Board of Orange County v. Thomas, 201 Va. 608, 112 S.E.2d 877 (1960). In both cases, the Virginia Supreme Court held that driver negligence was the proximate cause of both accidents, and damages were assessed against the drivers. In Virginia, while teachers, administrators and school boards are immune from liability, the courts have not extended this protection to school bus drivers. In Wynn, supra, a twelve-year-old student was fatally injured when he fell under the right rear wheel of a school bus driven by Wynn. In the Orange County case, the student was injured when he was struck by a truck while attempting to flag traffic so another student could cross a highway. A duty of proper supervision applies to injuries occurring on a school bus.[53]

The Second Element of Negligence - Standard of Care

The standard of care element is the second link to comprise the chain of negligence elements. Alexander and Alexander provide an interpretation of this element: "A legally recognized duty requires the actor to conform to a certain standard of conduct or care. As the risk involved in an act increases, the standard of care required of the actor likewise increases."[54] The Indiana

Supreme Court in Miller v. Griesel, 308 N.E.2d 701 (1973) provides additional commentary to illustrate how the standard of care varies according to different circumstances under which an injury may take place:

> What constitutes due care . . . depends largely on the circumstances, such as the number and age of the students left in the classroom, the activity in which they were engaged, the duration of the period which they were left without supervision, the ease of providing some alternative means of supervision, and the extent to which the school board has provided and implemented guidelines and resources to insure adequate supervision.[55]

Alexander and Alexander also note, with regard to teachers or others in the teaching profession, that the generally accepted standard of care would be that of a reasonably prudent teacher, not that of a reasonably prudent person.[56] Gluckman comments further on the reasonable person standard as it applies to school administrators:

> Defendants who are professional persons, such as school administrators will be held to a standard based on the skills and training they should have acquired in order to hold themselves out as school administrators, and this standard will be higher than that which would apply to ordinary citizens.[57]

Fischer, Schimmel and Kelly note: "When circumstances are more dangerous, as in shop or physical education, a teacher would be expected to exercise greater care. Failure to be more careful when dangers are greater--to provide careful instructions, clear warnings and close supervision--would constitute negligence."[58] For example, in Izard v. Hickory City Schools Board of Education, 315 S.E.2d 756 (1984), a North Carolina shop teacher was relieved from liability in a negligence action brought by a fourteen-year-old middle school student who severed several fingers from his left hand with a power saw in class. The Court stated that "the meticulous instruction by [the teacher] about the proper use of the power saw met the standard of care required of him by law."[59]

The Third Element of Negligence - Proximate Cause

The third link in the negligence chain is proximate or legal cause. McCarthy and Cambron-McCabe emphasize the necessity of the unbroken chain, "even in situations where a recognized duty is breached by the failure to exercise a proper standard of care, liability will not be assessed if there is not a causal connection (proximate cause) between the actions of school personnel and the injury sustained by the student."[60] In order for school personnel to be liable for negligent actions, they must be the proximate cause of the injury. According to Alexander and Alexander, "a teacher may be relieved of liability for negligent conduct if some intervening act is sufficient to break the causal connection between the act and a pupil's injury."[61] For example, in Bush v. Smith, 154 Ind. App. 382, 289 N.E.2d 800 (1972), the Indiana Court of Appeals considered an action by a student against a gym teacher and a school district for eye injuries sustained when the student was injured by another student who threw a bamboo high jump cross bar. The Court stated: "The sole proximate cause of the injury to the plaintiff was the independent, intervening, intentional act of the [other student] . . . There was no negligence on the part of the [teacher and school district]."[62]

A teacher on hall duty was absolved from liability when during her brief absence from class a student injured his eye. Here the Court remarked, "failure of supervision is not that proximate cause of an accident where injury results from an unanticipated act of a fellow pupil."[63] In contrast, the Court in Kush v. City of Buffalo, 462 N.Y.S. 2d 831 (1983) held the school district liable for the second degree burns of an eight-year-old student from playing with improperly secured chemicals that he mistook to be sand which he found on school grounds.

The school district's breach of duty was the proximate cause of the student's injury. The Court stated: "A school that negligently fails to secure dangerous chemicals from unsupervised access by children will not be relieved of liability when an injury occurs and it is reasonably foreseeable that the chemicals might be stolen by children."[64]

The presence of an intervening act by a third party does not necessarily absolve school personnel of liability for negligent conduct. For example, In one case, in which a neighborhood bully fatally injured a student, the court held that the school district's breach of duty was the proximate cause of the fatality.[65] Another court reasoned that the intervening act of a rapist on school grounds should have been reasonably anticipated and concluded that the student's harm was proximately caused by the school district's failure to act to protect the student from a foreseeable risk.[66]

The Fourth Element of Negligence - Actual Loss or Injury

The fourth and final link in the negligence chain of causation is injury. A valid negligence action requires proof of actual injury--mental or physical damage to the injured party.

Defenses to Negligence

To establish a valid claim of negligence, the four elements of negligence--duty, standard of care, proximate cause and injury--must be proven. If not proven, an educator's liability may be eliminated or reduced by proving one or more of the common defenses to negligence: contributory negligence,

comparative negligence, assumption of risk, or immunity. Governmental immunity as a defense is most significant for Virginia educators.

Immunity

Fischer, Schimmel and Kelly provide a concise definition of governmental immunity as "a common-law theory which holds that since the state and its agencies are sovereign, they cannot be sued without their consent and should not be held liable for the negligence of their employees."[67] This theory evolved from the notion that "the King can do no wrong" and originated over 200 years ago in the courts of England in Russell v. The Men Dwelling in the County of Devon.[68] According to Alexander and Alexander, the doctrine that the sovereign could not be sued without his permission found its way into American jurisprudence through its use "by early lawyers and judges of English legal books and materials . . . which were used as standard references."[69]

In the United States, the first test of the doctrine is found in Ephraim Mower v. the Inhabitants of Leicester (1812). In Mower, precedent was established that governmental agencies are not liable for negligence when performing official duties. The decision in Mower set precedent for the immunity of school districts, a precedent that remained in effect until 1959[70] when, according to Menacker, "Illinois became the first state to directly and completely reject the doctrine of sovereign immunity which had been in force to protect school districts from financial liability for tort suits."[71] Menacker further states that prior to Mower, school districts rarely were found liable for negligent actions.[72]

In Molitor v. Kaneland District, 18 Ill.2d 11, 163 N.E.2d 89 (1959), the Supreme Court of Illinois abolished immunity in that state and began a trend among other states to abolish governmental immunity.[73] In Molitor the Court repudiated the doctrine stating:, "'The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. . . .' Courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."[74] The decision also abrogated immunity in the state: "Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity."[75]

Since Molitor, the doctrine of governmental immunity has experienced a variety of changes throughout the states from both legislative and judicial actions. Currently there is considerable variance among the states regarding whether or not school districts and their employees can be sued for tort actions. Alexander and Alexander remark:

> Some state courts have abrogated immunity only to have it reinstated by the legislatures, while other courts have approached the issue in a piecemeal way by creating exceptions for proprietary functions, nuisances, or different standards for licenses and invitees. Several courts have dissected the school program, abolishing immunity for transportation injuries while maintaining it for the regular school program. Too, a trend exists for courts to sanction consensual waiver of liability by school boards through the acquisition of liability insurance.[76]

Virginia Educators and the Immunity Defense

Since 1960, in Kellam v. School Board, 202 Va. 53, 117 S.E.2d 96 (1960), "Virginia has recognized that the doctrine of sovereign immunity prevents a public school board from being held liable on account of its negligence."[77] In Kellam, the Virginia Supreme Court held that a city school board was immune when charged with negligence in failing to keep the aisles clear in a high school auditorium that had been rented to a third party for a program. Here, the Court reasoned that "school boards act in connection with public education as agents or instrumentalities of the state, in the performance of a governmental function, and consequently they partake of the state's sovereignty with respect to tort liability."[78]

In 1982, sovereign immunity was extended to Virginia's school division superintendents and high school principals in Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982). Here, the Court held that a division superintendent and a high school principal were immune for a simple negligence action alleging that they failed to provide a safe environment when a student was stabbed by another student on school grounds. However, the question remained as to whether or not public school teachers also enjoyed sovereign immunity. In 1984, the Virginia Supreme Court clearly enunciated the circumstances under which an employee of a governmental agency, such as a public school teacher, is entitled to the protection of governmental immunity in Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984).

The Messina Court examined two separate situations addressing the issue of whether the doctrine extended to two state employees: Burden, a

superintendent of buildings at a community college, and Johnson, an employee of a county government. Frank Messina was an actor in a play being performed in the college theater at Tidewater Community College. He was injured when he tripped and fell on a stairway located behind the stage and subsequently sued Burden, the college's superintendent of buildings. Burden filed a plea of sovereign immunity. Leonard Armstrong was injured when he stepped on a defective manhole cover located on a street in Arlington County. Armstrong sued Johnson, the chief of the operations division of the department of public works in Arlington County. Johnson, too, filed a plea of immunity. The question before the court was to determine under what circumstances an employee of a governmental body is entitled to the protection of sovereign immunity.

The Messina Court provided a lengthy discussion concerning the intent of the doctrine: to protect the public purse, to provide for smooth operation of government, to eliminate public inconvenience and danger that might spring from officials being fearful to act, to assure that citizens will be willing to take public jobs, and to prevent citizens from improperly influencing the conduct of governmental affairs through the threat or use of annoying litigation.[79] The Court also emphasized the importance of extending the doctrine "to some of the people who help run the government [for without such an extension] the purposes for the doctrine will remain unaddressed. . . . the reason for this is plain: the State can act only through individuals."[80]

Messina established a test that includes four factors to determine whether a person potentially entitled to sovereign immunity for liability for simple negligence is entitled to that immunity in a particular case. The four factors are:

1) the nature of the function performed by the employee;
2) the extent of the state's interest and involvement in the function;

3) the degree of control and direction exercised by the state over the employee and,
4) whether the act complained of involved the use of judgment and discretion.[81]

The Messina test was used to decide the outcome of the leading case in the area of teacher immunity, Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988).[82] Prior to the Court's decision in Lentz, as stated earlier, only Virginia school boards and school administrators enjoyed immunity from liability for negligence; this privilege was not extended to teachers.

In Lentz, supra, a high school student was injured during a physical education class while playing tackle football without wearing any protective equipment. The student alleged that the teacher's negligent supervision of the activity caused his injury. The Court held that the facts in the case "do not support a charge of either gross negligence or intentional misconduct."[83] The Court concluded "that the defendant was acting within the scope of his employment at the time of the injury."[84] Clearly the facts in Lentz satisfy the requirements established in the Messina test to grant immunity to the defendant teacher in this case:

Messina factor 1:
the nature of the function performed by the employee:

Lentz:
The defendant teacher, Jeffrey Morris, "is performing a vital important function as a school teacher."[85]

Messina factor 2:
the extent of the state's interest and involvement in the function:

Lentz:
Morris is an employee of a governmental entity, the Virginia Beach school board, which "has official interest and direct involvement in the function of student instruction and supervision."[86]

Messina factor 3:
the degree of control and direction exercised by the state over the employee:

Lentz:

The school board "exercises control and direction over the employee through the school principal."[87]

Messina factor 4:
whether the act complained of involved the use of judgment and discretion:

Lentz:

"A teacher's supervision and control of a physical education class . . . clearly involves, at least in part, the exercise of judgment and discretion by the teacher."[88]

The significance of the precedent set in Lentz goes beyond merely providing immunity for physical education teachers in the Commonwealth; the ruling is extended to all classroom teachers. The Court Commented:

> If school teachers performing functions equivalent to this defendant are to be haled into court for the conduct set forth by these facts, fewer individuals will aspire to be teachers, those who have embarked on a teaching career will be reluctant to act, and the orderly administration of the school systems will suffer, all to the detriment of our youth and the public at large.[89]

The ruling in Lentz established the common law principle that, absent a charge of gross negligence or intentional negligence, Virginia educators are protected in negligence actions by the doctrine of sovereign immunity.

In a recent case, B.M.H. by C.B. v. School Board of the City of Chesapeake, Virginia, 833 F.Supp. 560 (E.D. Va. 1993), a thirteen year-old eighth-grade middle school student was sexually assaulted by a fellow student. The victim informed the teachers that she was threatened by another student, yet the teachers failed to take any disciplinary action against the student. Following the assault, the parents brought suit against the school board and the teachers for negligence, gross negligence, and recklessness under Virginia law.[90]

Citing Kellam, supra, the Court found that the negligence claims against the school board were barred by sovereign immunity. However, the District Court refused to dismiss the claim against the two teachers for gross negligence stating that while a "public school teacher is protected by sovereign immunity for simple negligence . . . teachers may be liable for such [gross negligence] actions if they were taken in the 'absence of slight diligence, or the want of even scant care.'"[91]

Statutory Exceptions to the Immunity of Virginia School Boards

Although the doctrine of sovereign immunity is "alive and well" in Virginia, liability for accidents involving the transportation of public school students provides an exception to the doctrine (negligence involving transporting students was discussed earlier). Section 22.1-190 of the Virginia Code mandates that every vehicle that is used to transport students at public expense to or from school "shall be covered in a policy of liability and property damage . . ."[92] Section 22.1-194 further states that school boards will be liable for damages "up to, but not beyond the limits of valid and collectible insurance,"[93] "and the defense of sovereign immunity shall not be a bar to action or recovery."[94]

Another limitation on the sovereign immunity doctrine is provided in the Code in Section 15.1-7.3:1 which states that the "governing body of any political entity in the Commonwealth may provide liability insurance or self-insurance for its officers, employees and volunteers . . . [to] cover the costs and expenses incident to liability . . . arising from [their conduct] in the discharge of their official duties,"[95] but only up to the amount of the insurance.

Other Defenses to Negligence

Contributory Negligence

To defend themselves against negligence actions, educators may claim contributory negligence by the injured party. In some states, if contributory negligence is proven, the defendant is absolved of any liability.[96] Alexander and Alexander state, "contributory negligence involves some fault or breach of duty on the part of the injured person, or failure to exercise the required standard of care for his or her own safety."[97] Gluckman adds, "contributory negligence means the plaintiff has contributed to his or her own injury and that action was careless enough to constitute 'negligence' in itself."[98] The courts determine the reasonableness of a student's conduct based on the child's age, maturity, intelligence and experience. According to Gluckman, "the younger the student, the less likely contributory negligence will be available as a defense."[99] Courts use similar criteria to decide whether or not students are capable of contributory negligence; for example the contributory negligence defense can only be attributed to a student who is mature enough to be knowledgeable of the risks incurred.[100]

Assumption of risks

The provisions entitling school personnel to a valid defense of assumption of risk, like contributory negligence, require courts to examine the age and maturity level of the students and to establish whether or not the student had knowledge that a risk was present. According to McCarthy and Cambron-McCabe, "the [assumption of risks] defense is based on the premise that the injured plaintiff understood that a specific situation was dangerous and could

result in possible injury and still voluntarily consented to participate."[101] The assumption of risk defense is often found in cases involving sports injuries where voluntary athletic participants assume the risk of the normal hazards of the sport and not risks due to the negligent acts of others.[102]

Educational Malpractice

Historically, courts have rejected educational malpractice as a valid tort action. According to Parker, "Courts have reasoned that such actions do not conveniently fit into the typical negligence framework of duty, breach, proximate cause and damages."[103] Education malpractice cases generally fall under two categories: first is action alleging failure by a school district to ensure that students acquire basic academic skills; and, second is action alleging failure by school district to appropriately diagnose, classify and place students in special education programs.[104]

To date, there have been no cases of educational malpractice in the Virginia courts. However, a 1991 Maryland ruling set the standard that could lead to liability for school officials in future cases and could influence rulings in other states.[105] The case, Eisel v. Board of Education, 597 A.2d 447 (Md. 1991), involved a middle school student who died in an apparent suicide pact with her best friend. The father of the suicide victim filed a negligence suit against the district and two school counselors for failing to contact him regarding suicide statements allegedly made by his child. The Maryland Court of Appeals concluded that "school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent."[106]

Zirkel and Gluckman reported that since the first educational malpractice case, Peter W. v. San Francisco Unified School District, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976), there have been only seventeen cases decided by the courts.[107] Of these cases, only the Montana Supreme Court has recognized educational malpractice as a cause of action.[108]

In Peter W, a high school graduate claimed that he had graduated without the basic skills to read and to write. The Court rejected his claims based on its refusal to apply the four traditional elements of negligence to educational malpractice. The Court concluded that educational malpractice was not a valid cause of action stating:

> . . . To hold [school personnel] to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. . . . The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation.[109]

In addition to the public policy considerations cited above, the Court also 1) observed the difficulty in establishing the direct cause of the student's alleged failure to learn citing influences outside the school that affect a student's academic achievement; and 2) reiterated the generally accepted notion that the courts prefer not to interfere in the day-to-day school administration.[110]

In Donahue v. Copiague Union Free School District, 418 N.Y.S.2d 375 (1979), a high school graduate also claimed, like the student in Peter W., that the school breached its duty resulting in his inability to comprehend written English necessary to complete an employment application. The Court here concluded that nothing in the New York state Constitution imposed a duty on school districts "to ensure that each pupil received a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages."[111]

As stated, courts generally reject educational malpractice claims.[112] One lone exception is B.M. by Berger v. State of Montana, 649 P.2d 425 (Mont. 1982), wherein the Montana Supreme Court reasoned that the school district had a duty regarding appropriate testing and placing of special education students based on mandates in Montana's state constitution, compulsory attendance laws and legislation governing the administration special education.[113] Unlike other common law tort malpractice cases regarding inappropriate placements or misdiagnosis of a disability; in this case, test scores clearly indicated that the child's placement in a classroom for the educable mentally retarded was inappropriate.

Constitutional Torts

In Virginia, the common law principle of sovereign immunity protects Virginia educators from liability absent a charge of gross negligence or intentional negligence; however, this principle does not provide protection from liability in other types of violations, such as the deprivation of an individual's rights as guaranteed by the Federal Constitution or by Federal statute. Such deprivations are different from the common law torts previously discussed, for these are specific tort actions called constitutional torts or civil rights torts, and "under the supremacy of federal law, [these] torts are not automatically subject to defenses created by state law."[114]

Section 1983

Constitutional torts are brought under the Civil Rights Act of 1871, Section 1983, codified as Title 42 of the United States Code (hereafter Section 1983). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof of the deprivation of any rights, privilege, or immunity secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Congress originally passed the Act to provide protection for the newly freed slaves against unlawful actions by state officials who acted in their official capacities.[115] It is important to note that Section 1983 differs from more recent federal civil rights laws that address discrimination against specific "suspect classes" (race, sex, age, religion, national origin). Several authorities have written that Section 1983 was rarely used until 1961 when it was applied to acts by public officials in the Supreme Court case, Monroe v. Pape, 365 U.S. 167 (1961).[116]

In 1975, in Wood v. Strickland, 420 U.S. 308 (1975), the Court applied Section 1983 to protect violation of students' rights by school board members and provided additional clarification regarding immunity and liability for school board members. In Wood, the Court stated:

> We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all circumstances will not be punished and that they need not exercise their discretion with undue timidity.[117]

The Wood Court also held that school officials can claim qualified immunity as protection from personal liability in situations where they have acted in good faith:

> We hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[118]

School officials however, bear the burden to prove the immunity standard applies.[119] The Court in Owen V. City of Independence, Missouri, 445 U.S. 622 (1980) did not extend qualified immunity to school districts.

The Supreme Court clarified the scope of Section 1983 protection for students regarding their entitlement to damages in Carey v. Piphus, 435 U.S. 247 (1978). In Carey, two students were denied their due process rights when they were suspended without a hearing. The Court held that the students were not actually injured and were entitled to recover nominal damages not to exceed one dollar.

Municipal liability (school board liability) was not recognized until seventeen years later in Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978). In Monell, the Court overruled Monroe:

> We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.[120]

Following Monell, School boards are now considered "persons" within the scope of Section 1983 and are subject to suit under Section 1983 for policies that cause individuals to be denied federally protected rights. Subsequent cases have further established the legal criteria governing school district liability.[121]

Virginia Educators and Constitutional Torts

Virginia teachers and students have brought Section 1983 actions to gain relief where alleged school policy or practice violated their federally protected rights. In Ponton v. Newport News School Board, 632 F.Supp. 1056 (E.D. Va. 1986), a home economics teacher filed a Section 1983 action against the Newport News School Board and its employees alleging that her constitutional rights to equal protection, privacy and due process were violated when she was forced to take a leave of absence from her teaching job because she was single and pregnant. The District Court stated that the right to bear a child out of wedlock is protected by the Constitution.[122] The Court further commented, "it is undisputed that plaintiff's exercise of this right was the reason she was forced to take a leave of absence, for if she had been either married and pregnant or single and non-pregnant she would not have been forced to take the leave."[123]

In Ponton, the Court first examined the liability of the school board under Section 1983 and then reviewed the liability of various school board employees who were also named as defendants in this action. According to the standard set in Monell regarding liability for school boards, Ponton did not establish that her leave of absence was the result of a school board policy or custom of excluding single, pregnant teachers from the classroom, and therefore the Newport News school board was not liable under Section 1983. The Court clearly enunciated three ways in which a school board policy or custom could be found:

> First, it could be shown that the School Board actually initiated the policy. Second, a policy or custom could be attributed to the Board if the policy was initiated by an employee who had the final authority to make the decision to force a teacher to take a leave of absence. Finally, the action of an individual employee could be imputed to the Board if it were established that the Board was aware of the employee's action and implicitly ratified it.[124]

In assessing the merits of the three-pronged test, the Court in Ponton held:

> 1) the school board itself had not initiated a policy of excluding single, pregnant teachers from the classroom even though the district's personnel administrators understood that such teachers would be excluded from classroom duties,
>
> 2) no personnel administrator had the power to initiate school board policy, only authority to administer board policy and,
>
> 3) the board was unaware of the personnel department's treatment of single pregnant teachers.[125]

Although the school board was relieved from liability, the Court found two personnel department administrators personally liable for damages under Section 1983. The Court stated that the two administrators "were clearly acting under color of state law within the meaning of Section 1983 when they violated plaintiff's constitutional right of privacy, for they were 'clothed with the authority of state law' when they forced plaintiff to take the leave of absence."[126] As school board employees, the two administrators may have had a defense of qualified immunity; however, according to the standards set by the Supreme Court and reiterated by the Ponton Court, "such a defense, however, must be affirmatively pleaded by the defendant. [The two defendants] have not done so in this case."[127]

In B.M.H. by C.B v. School Board of the City of Chesapeake, Virginia, supra, in addition to the gross negligence charges discussed earlier, the parents also alleged that their daughter's federal civil rights under Section 1983 were violated. The basis for the suit claimed that 1) the school board and teachers failed to protect the student with whom they held a "special relationship" to protect under the due process clause of the Fourteenth Amendment, and 2) the

school board failed to provide adequate policies or instruction to deal with alleged constitutional deprivations such as this.[128]

Several courts including the Supreme Court have reviewed the issue of whether or not a "special relationship" exists.[129] Relying on these cases, the Court here dismissed both Section 1983 claims, concluding that no "special relationship" existed between the victim and the school board and teachers. Regarding the claim against the teachers, the Court stated: "Even if public schools have some duty under state law to protect students, that is not enough to place the affirmative burden of the Fourteenth Amendment Due Process Clause upon teachers, principals, and administrators to protect each child from possible harm by third parties."[130]

Section 1983 actions are significant in school cases because the statute allows individuals to obtain damages both from school officials and from school districts for violations to their federally protected rights. Sovereign immunity does not protect Virginia school districts or school personnel for constitutional tort actions. Furthermore, Kionka observes that "with the broadening of the areas in which state and local government touch the lives of all persons, it is safe to predict a continuing increase in the volume of such cases."[131] Gluckman also adds, "Section 1983 suits by school employees have replaced contract actions as the basis of legal claims arising from employment disputes."[132]

Summary

Liability is defined as a legal responsibility. There are two categories of liability for professional educators: 1) common law torts, and 2) constitutional torts.

A tort is different from a crime. A tort is a civil wrong that results in damage to an individual. The purpose of a legal suit for a tortious action is to provide compensation to the injured individual.

Common law torts are categorized as either intentional interference, strict liability or negligence. For Virginia educators, the doctrine of sovereign immunity, except for cases involving gross negligence, provides protection against liability for student injuries resulting from common torts.

Corporal punishment, the most common intentional tort in public education, has been prohibited in Virginia since 1989. Another intentional tort is defamation. Defamation consists of the twin torts of libel and slander. In Virginia, the defense against defamation is truth. Additionally, most educators may employ the defense of qualified privilege if the statements they make are in good faith and without malice. The Virginia Supreme Court ruled that classroom teachers in Virginia are not public officials. Consequently, if involved in bringing a defamation action, they are not required to prove actual malice to recover compensatory damages.

The most common tort with which both school districts and their employees become involved is negligence. There have been only seven school-related negligence cases in Virginia's recorded legal history. The courts determine an educator's negligent conduct by analyzing the person's behavior in light of the four elements of negligence, duty, standard of care, proximate cause

and injury. All four elements must be present in a negligence claim for liability to be assigned to the educator. The courts examine two other factors in determining negligence: the reasonable person standard and foreseeability. Negligence cannot be established if harm is unforeseeable. School personnel have a legal responsibility and a duty to maintain a school environment that is safe and healthy; in doing so, an educator's conduct is measured against what a reasonable professional of similar training and experience would do in the same or similar situation.

For Virginia educators, sovereign immunity is the most important defense against a negligence suit. Sovereign immunity originated in the courts of England with the notion that the King could do no wrong and therefore could not be sued for negligent actions. The common law in Virginia extends the doctrine of sovereign immunity to educators acting within the scope of their employment duties. School boards, administrators and teachers are immune from liability for negligence suits if there is no finding of gross negligence. The only exception to this protection involves injury arising from transportation accidents; bus drives are not immune from suit. In Virginia, all vehicles used to transport students must be covered by a liability and property damage policy. School boards are liable for damages in transportation accidents up to the amounts of such insurance.

Sovereign immunity does not provide protection from liability for constitutional torts--deprivation of an individual's rights as guaranteed by the Federal Constitution or by federal statute.

Endnotes

[1] Ivan Gluckman, "Professional Liability," in The Principal's legal Handbook, ed. William E. Camp, Julie K. Underwood, Mary Jane Connelly and Kenneth E. Lane (Topeka: National Organization on Legal Problems of Education, 1993), 225.

[2] Kern Alexander and M. David Alexander, American Public School Law, 3rd ed. (St. Paul: West, 1992), 459.

[3] Page Prosser, Daniel Dobbs, Robert Keeton and David Owen, Prosser and Keeton on Law of Torts, 5th ed. (St. Paul: West, 1984), 6.

[4] Alexander and Alexander, 459.

[5] Ibid.

[6] Ibid.

[7] McCarthy and Cambron-McCabe, Public School Law, 452

[8] Ibid.

[9] Edward J. Kionka, Torts in a Nutshell (St. Paul: West, 1992), 60.

[10] Alexander and Alexander, 460-461.

[11] McCarthy and Cambron-McCabe, 209, 233.

[12] Va. Ann Code Section 22.1-279.1 (1993) states: "'Corporal punishment' means the infliction of, or causing the infliction of, physical pain on a student as a means of discipline. This definition shall not include physical pain or discomfort caused by participation in practice or competition in an interscholastic sport, or participation in physical education or an extracurricular activity."

[13] Va. Ann. Code Section 22.1-279.1 (1993).

[14] Ibid.

[15] Alexander and Alexander, 290; McCarthy and Cambron-McCabe, 209.

[16] Alexander and Alexander 502.

[17] Ibid.

[18] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[19] Richmond Newspapers v. Lipscomb, 234 Va. 277, 362 S.E.2d 32 (1987), 34.

[20] Ibid., 37.

[21] Ibid.

[22] Alexander and Alexander, 461.

[23] See Fallon v. Indian Trail School, Addison Township School District No. 4, 148 Ill. App. 3d 931, 500 N.E.2d 101 (Ill. App. 1986) and Wetsel v. Independent School District I-1, 670 P.2d 986 (Okla. 1983).

[24] Gluckman, 225.

[25] Kionka, 48, citing Restatement of Torts, 282.

[26] Kionka, 47.

[27] McCarthy and Cambron-McCabe, 452.

[28] Comuntzis v. Pinellas County School Board, 508 So.2d 750 (1987), 741.

[29] Gluckman, 226.

[30] Alexander and Alexander, 464

[31] Valente, Law in the Schools, 427.

[32] Ibid.

[33] McLeod v. Grant County School District No. 128, 255 P.2d 360 (Sup. Ct. Wash 1953), 363.

[34] Curcio, 31. The cases noted were: Wynn v. Gandy, 170 Va. 590, 197 S.E. 527 (1938); County School Board of Orange County v. Thomas, 201 Va. 608, 112 S.E.2d 877 (1960); Kellam v. School Board of the City of Norfolk, 202 Va. 252, 117 S.E.2d 96 (1960); Crabbe v. County School Board of Northumberland County, 209 Va. 356, 164 S.E.2d 639 (1968) reversed; and Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979) reversed.

[35] Valente, Law in the Schools, 426.

[36] Ibid., 226.

[37] Ibid.

[38] Alexander and Alexander, 464.

[39] McLeod v. Grant County School District No. 128, supra, 362.

[40] Gutierrez v. Dade County School Board, 618 So.2d 208 (1993).

[41] Ibid.

[42] District of Columbia v. Doe, 524 A.2d 30 (1987).

[43] District of Columbia v. Royal, 465 A.2d 367 (1983), see also Doe v. Orleans Parish School Board, 577 So.2d 1024 (1991), Laneheart v. Orleans Parish School Board, 524 So.2d 138 (1988).

[44] Cooper v. Baldwin County School District, 386 S.E.2d 896 (1989), 898.

[45] Fuzie v. South Haven School District No. 30, 553 N.Y.S.2d 961 (1990).

[46] Rhea v. Grandview School District No. JT 116-200, 39 Wash.App. 577, 694 P.2d 666 (1985), 669.

[47] Hurlburt v. Noxon, 565 N.Y.S.2d 683 (1990). see also Palella v. Ulmer , 518 N.Y.S.2d 91 (1987).

[48] Gluckman, 228.

[49] Alexander and Alexander, 464; Louis Fischer, David Schimmel and Cynthia Kelly, Teachers and the Law, 3rd ed. (White Plains: Longman, 1991), 58; Gluckman, 228-230; La Morte, 395; McCarthy and Cambron-McCabe, 454; Vacca & Hudgins, 82; and Valente, 427.

[50] Alexander and Alexander, 464.

[51] Gathright v. Lincoln Insurance Company, 688 S.W.2d 931 (1985), 933.

[52] Simonetti v. School District of Philadelphia, 454 A.2d 1038 (1982), Albers v. Community Consolidated No. 204 School, 508 N.E.2d 125 (1987).

[53] Blair v. Board of Education 448 N.Y.S.2d 566 (1982).

[54] Alexander and Alexander, 465.

[55] Miller v. Griesel, 308 N.E.2d 701 (1973), 707.

[56] Ibid., 466.

[57] Gluckman, 228.

[58] Fischer, Schimmel and Kelly, Teachers and the Law, 58.

[59] Izard v. Hickory City Schools Board of Education, 315 S.E.2d 758 (1984), 758.

[60] McCarthy and Cambron-McCabe, Public School Law, 455.

[61] Alexander and Alexander, 466.

[62] Bush v. Smith, 154 Ind.App. 382, 289 N.E.2d 800 (1972), 801.

[63] Simonetti v. School District of Philadelphia, 454 A.2d 1038 (1982), 1039. See also: Fagan v. Summers, 498 P.2d 1227 (1972); Fornaro v. Kerry, 527 N.Y.S.2d 61 (1988) and Allison v. Field Local School District, 553 N.E.2d 1383 (1988).

[64] Kush v. City of Buffalo, 462 N.Y.S.2d 831 (1983), 833.

[65] Greene v. City of New York, 566 N.Y.S.2d 40 (1991).

[66] District of Columbia v. Doe, supra.

[67] Fischer, Schimmel and Kelly, 63.

[68] Alexander and Alexander, 532.

[69] Ibid., 532.

[70] Vacca and Hudgins, 85.

[71] Julius Menacker, "School Tort Law in Illinois," Education Law Reporter 62 (1990): 821.

[72] Ibid.

[73] Alexander and Alexander, 532; Vacca and Hudgins, 85

[74] Molitor v. Kaneland Community Unit District 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959), 94 quoting Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480, 482.

[75] Ibid., 96.

[76] Alexander and Alexander, 532.

[77] B.M.H. by C.B. v. School Board of the City of Chesapeake, Virginia, 833 F.Supp. 560 (E.D. Va. 1993), 573.

[78] Kellam v. School Board, 202 Va. 53, 117 S.E.2d 96 (1960), 100 quoting Bingham v. Board of Education of Ogden City, 118 Utah 582, 589, 223 P.2d 432.

[79] Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984), 660.

[80] Ibid., 661.

[81] Ibid., 663.

[82] Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988) overruled: 1) Crabbe v. County School Board of Northumberland County, 209 Va., 356, 164 S.E.2d 639 (1968). Teacher, as employee of school board was not immune in tort action instituted by student who sustained injury to his hand while operating a power saw, and 2) Short v. Griffiths, 220 Va. 53, 255 S.E.2d 479 (1979). School board employees (athletic director, coach and building and grounds supervisor) are not immune in negligence suit brought by student when he was injured by broken glass while running laps on a high school's outdoor track.

[83] Lentz, supra, 610.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Ibid.

89 Ibid., 611.

90 B.M.H. by C.B. v. School Board of the City of Chesapeake, Virginia, 833 F.Supp. 560 (E.D. Va. 1993), 563.

91 Ibid., citing Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987).

92 Va. Code Ann. Section 22.1-190 Subsection A (1993).

93 Ibid., Section 22.1-194.

94 Ibid.

95 Ibid., Section 15.1-7.3:1

96 Michael Imber and Tyll van Geel, Education Law (New York: McGraw-Hill, 1993), 599; Valente, 429.

97 Alexander and Alexander, 471.

98 Gluckman, 231.

99 Ibid.

100 Hutchison v. Toews, 476 P.2d 811 (1970); Brazell v. Board of Education of Niskayuna Public Schools; 557 N.Y.S.2d 645 (1990); Izard v. Hickory City Schools Board of Education, 315 S.E.2d 758 (1984); Arnold v. Hayslett, 655 S.W.2d 941, (1983); District of Columbia v. Royal, 465 A.2d 367 (1983).

101 McCarthy and Cambron-McCabe, 466.

102 Alexander and Alexander, 473; Imber and van Geel, 600; and Vacca and Hudgins, 83. See Leahy v. School Board of Hernando County 450 So.2d 883 (1984) and Arbegast v. Board of Education of South New Berlin Central School, 490 N.Y.S.2d 751 (1985).

103 Johnny C. Parker, "Educational Malpractice: A Tort is Born," Cleveland State Law Review 39 (1991): 302.

104 Ibid. Generally, see: Frank D. Aquila, "Educational Malpractice: A Tort *En Ventre.*" Cleveland State Law Review 39 (1991): 323-355; Laurie S. Jamieson, "Educational Malpractice: A Lesson in Professional Accountability," Boston College Law Review 32 (July 1991): 899-965; Catherine D. McBride, "Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; a State Law Cause of Action for Educational Negligence," University of Illinois Law Review 1990

(1990): 475-495; Johnny C. Parker, "Educational Malpractice: A Tort is Born," Cleveland State Law Review 39 (1991): 301-321.

[105]Jessica Portner, "Fla. Suit Blames School Officials in Pupil's Suicide," Education Week 13, no. 30 (April 20, 1994): 10.

[106] Eisel v. Board of Education, 597 A.2d 447 (Md. 1991), 456.

[107] Perry A. Zirkel and Ivan B. Gluckman, "Educational Malpractice," NASSP Bulletin 75 (October 1991): 110-114. See also: Albert C. Jurenas, "Will Educational Malpractice be Revived?" Education Law Reporter 74 (July 1992): 449.

[108] B.M. v. State, 200 Mont. 58, 649 P.2d 425 (1982).

[109] Peter W. v. San Francisco Unified School District, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976), 861.

[110] Ibid., 854.

[111] Donahue v. Copiague Union Free School District, 418 N.Y.S.2d 375 (1979), 375.

[112] DSW v. Fairbanks North Star Borough School District, 628 P.2d 554 (Alaska 1981); Tubel v. Dade County Public Schools, 419 So.2d 388 (Fla. Dist Ct. App. 1982); Hunter v. Board of Education of Montgomery County, 453 A.2d 814 (Md. 1982).

[113] B.M. v. State, 649 P.2d 425 (Mont. 1982), 427.

[114] Valente, 451.

[115] Alexander and Alexander, 488; McCarthy and Cambron-McCabe, 304-305 and Vacca and Hudgins, 105.

[116] Alexander and Alexander, 488; La Morte, 383; McCarthy and Cambron-McCabe, 13, and Vacca and Hudgins, 105.

[117] Wood v. Strickland, 420 U.S. 308 (1975), 321.

[118] Ibid., 321, 322.

[119] Imber and van Geel, 629 and McCarthy and Cambron-McCabe 305.

[120] Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978), 694.

[121] Owen v. City of Independence, Missouri, 445 U.S. 622 (1980); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); Memphis Community School District v. Stachura, 477 U.S. 299 (1986); City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), and Jett v. Dallas Independent School District, 491 U.S. 701 (1989)

[122] Ponton v. Newport News School Board, 632 F. Supp. 1056 (E.D. Va. 1986), 1061.

[123] Ibid., 1062.

[124] Ibid., 1065.

[125] Ibid.

[126] Ibid., 1067.

[127] Ibid., 1067, 1068.

[128] B.M.H. by C.B v. School Board of the City of Chesapeake, Virginia, supra, 562-563.

[129] Ibid., 565-572.

[130] Ibid., 571.

[131] Kionka, 298.

[132] Gluckman, 235.

Chapter 3

Virginia Educators and Their Terms of Employment

Licensure

Beginning in July 1992, Virginia amended the Code changing the term used to validate a teacher's fitness to teach from certification to licensure.[1] The employment conditions of Virginia educators are governed by statutes in the Virginia Code and administrative regulations from the State Board of Education. To obtain a teaching position in a Virginia school division, a teacher must first hold a valid teaching license issued by the State Board of Education. According to Alexander and Alexander:

> Because public education is exclusively a state function, the state may set the criteria for eligibility, qualifications, and certification of teachers. A state at its option may have no certificate requirements, or it can establish complex conditions precedent to employment with regard to experience, education, test scores, or any number of conditions that may be considered important to one's ability to teach.[2]

In Virginia, there are seven types of licenses available to professional educators.[3] The regulations governing the licensure of school personnel are found in the publication, Licensure Regulations for School Personnel (Regulations).[4] The Regulations state that the purpose and responsibility for licensure provisions governing teachers and other school personnel are "to maintain standards of professional competence."[5] Accordingly, the Regulations specify that applicants for licensure will: 1) be at least 18 years of age; 2) pay the appropriate fees and complete the application process; 3) have earned a baccalaureate degree from an accredited institution of higher education; and 4) possess good moral character.[6] A 1980 Amendment to the Code assigned an

additional requirement that applicants for initial licensure take a professional teacher's examination. The National Teachers Examination (now called PRAXIS) is the required examination for Virginia educators.[7]

There are exceptions for initial licensure that allow individuals to obtain teaching positions. For example, beginning July 1993, an Amendment to the Code allows the issuing of a provisional license, "valid for a period not to exceed three years, to any person who does not meet [the testing] requirement or any other requirement for licensure imposed by law."[8] All licenses are dated from July first in the year in which the application is made. A three year Provisional License may be issued to an individual at the request of the employing educational agency.[9]

As stated, licensure promotes professional competence. Alexander and Alexander comment: "This license itself is a certificate issued by the state, recognizing that a person is presumptively qualified to teach in the public schools.[10] Furthermore, a teaching license indicates employment eligibility; it is not a teaching contract. It is not an entitlement to or guarantee of employment, and it does not signify teaching competence; it merely indicates that an individual has met minimum standards established by the state's statutory and regulatory mandates.[11]

The requirement to pass a professional teacher's examination has been litigated in Virginia and elsewhere based on the allegation that the test discriminates against minorities. In 1971, under Title VII mandates, in Griggs v. Duke Power Company, 401 U.S. 424 (1971), the Supreme Court upheld using tests for employment decisions and stated that such tests must be related to the job and its tasks. In Griggs, a non-school case, a group of African American

employees alleged that a company policy requiring a high school diploma or passing of an intelligence tests as a condition of employment, was in violation of Title VII (employment discrimination) of the 1964 Civil Rights Act. The Court held that neither the high school completion requirement nor the intelligence test was shown to bear a reasonable measure of successful job performance in the jobs for which it was used.[12] The Court stated, "if an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance the practice is prohibited."[13] However, the Court further commented that "nothing in the Act precludes the use of testing or measuring procedures . . . any test used must measure the person for the job and not the person in the abstract."[14]

Although the plaintiffs in Griggs were laborers, the ruling applies to the use of screening tests for teachers. In 1978, the Supreme Court again considered a challenge regarding employment testing for teachers in U.S. v. South Carolina, 445 F.Supp 1094 (D.S.C. 1977) *aff'd* 434 U.S. 1026 (1978). Here the Court upheld South Carolina's right to use the NTE to determine teacher pay scales and eligibility for certification.

The Regulations provide a detailed description of the state's requirements to: 1) renew a license, 2) revoke a license, 3) suspend a license 4) obtain alternative certification, and 5) deny a license.[15] A license may be suspended for 1) physical, mental, or emotional incapacity as shown by a competent medical authority, 2) incompetency or neglect of duty, 3) failure or refusal to comply with school laws and regulations; including willful violation of contractual obligations; or 4) other good and just cause of a similar nature.[16] Similarly, a license may be revoked for the following reasons:

1. Obtaining or attempting to obtain such license by fraudulent means or through misrepresentation of material facts;
2. Falsification of school records, documents, statistics, or reports,
3. Conviction of any felony,
4. Conviction of any misdemeanor involving moral turpitude,
5. Conduct, such as immorality, or personal condition detrimental to the health, welfare, discipline, or morale of students or to the best interest of the public schools of the Commonwealth of Virginia,
6. Misapplication of or failure to account for school funds or other school properties with which the licensee has been entrusted;
7. Other good and just cause of a similar nature.[17]

Between 1985 and 1993, the State Department of Education has taken the following actions regarding teachers and their licenses: four denied; eight revoked, thirty-two canceled and six reinstated.[18] Following the procedures detailed in Licensure Regulations for School Personnel, a division superintendent may request that Virginia's Superintendent of Public Instruction suspend, revoke, deny, cancel or reinstate a teaching license.[19] The most significant aspect regarding loss of a license is the provision that in such an action, the educator be given his/her due process. (This issue will be discussed later in the chapter).

To maintain a valid teaching license in Virginia, educators are required to renew their licenses within a five-year validity period.[20] Prior to 1990 (when the nomenclature was "certificate" rather than "license"), six hours of college-level course work or three semester hours of college-level course work and three hours of noncollege credit course work satisfied the five-year recertification requirement.[21] Beginning in July 1990, renewal requires completing 180 professional development points from a variety of options. The options include: earning college credits; attending professional conferences; conducting peer observations and in-service workshops; engaging in educational travel, curriculum development, or mentorship/supervision; and publishing articles or

books.[22] Specific criteria to accrue points are detailed in The Virginia Renewal Manual.

Terms of Employment

In Alston v. School Board 112 F.2d 992 (4th Cir. 1940), the Fourth Circuit Court of Appeals explained that while Virginia educators who hold state-issued licenses "have acquired professional status. . . . they are not entitled by reason of that fact alone to contracts to teach in the public schools of the state . . ."[23] Local school boards have "direct control and supervision" for Virginia's public school divisions and statutory authority "to employ teachers and provide for the payment of teachers' salaries."[24]

By statute, Virginia school boards are mandated to "require on [their] application for employment certification that the applicant has not been convicted of any offense involving the sexual molestation, physical or sexual abuse or rape of a child."[25] The same statute continues: "any person making a materially false statement regarding any such offense shall be guilty of a Class 1 misdemeanor and upon conviction . . . shall be grounds for the Board of Education to revoke such person's certificate to teach."[26] Local school boards also have statutory authority to make additional requirements for employment as long as the supplemental provisions are not arbitrary or capricious and do not violate an individual's constitutional or statutory rights.[27] The legislature has provided by stated that certain localities in Virginia may require fingerprinting as a condition of employment.[28]

Section 22.1-295 of the Virginia Code further states that Virginia's public school teachers "shall be employed and placed in appropriate schools by the

school board upon recommendation of the division superintendent." The assignment and reassignment of Virginia educators to specific schools is also under authority of the division superintendent who,

> shall have authority to assign to their respective positions in the school wherein they have been placed by the school board all teachers, principals and assistant principals. If the school board adopts a resolution authorizing the division superintendent to reassign teachers, principals and assistant principals, the division superintendent may reassign any [of the same personnel] for that school year to any school within such division, provided no change or reassignment during a school year shall affect the salary of such [same personnel] for that school year.[29]

However, in the opinion of the Attorney General of Virginia, "the local school board, . . . may properly employ a candidate unfavorably recommended by the division superintendent."[30]

The Contract

According to Alexander and Alexander, "a teacher's contract must satisfy the same requirements applicable to contracts in general," and the contract "must satisfy [the state's] statutory and case law demands."[31] Teachers employed in Virginia's public schools are required to sign a uniform written contract "in a form prescribed by the Board of Education, . . . Such contract shall be signed in duplicate, with a copy thereof furnished to both parties."[32]

Virginia's uniform contract (Annual Form Contract with Professional Personnel for probationary teachers or Continuing Form Contract with Professional Personnel or teachers on continuing contract) contains the state's rules and regulations for public school teachers as prescribed in the Virginia Code. Contracts for Virginia teachers are issued for a ten-month period of 200

days.[33] Virginia teachers earn a minimum of ten sick days each year, which, if not used, may accumulate to a minimum of ninety days.[34]

After a valid employment contract is executed, teachers are employed for the contract period and are entitled to receive a contract the following year unless they are notified to the contrary by the school board by April fifteenth. If notice is not given by April fifteenth, "the teacher shall be entitled to a contract for the ensuing year in accordance with local salary stipulations including increments."[35] (see Dennis v. County School Board, 582 F.Supp. 536 (E.D. Va. 1984) and School Board v. Giannoutsos, 238 Va. 144, 380 S.E.2d 647 (1989) later in the chapter).

As stated in the Regulations, the following criteria establish eligibility for Virginia educators to obtain continuing contract status:

> A. Only persons regularly employed full time by a school board as teachers, principals, or supervisors shall be eligible for continuing contract status.
>
> B. A probationary term of service of three years in the same school division is required prior to the issuance of a continuing contract. Once a continuing contract status has been attained in a school division in the State, another probationary period need not be served in any other school division unless a probationary period not exceeding one year is made a part of the contract of employment.
>
> C. A person employed as a principal or supervisor, including a person who has previously achieved continuing contract status as a teacher, shall serve three years in such position in the same school division before acquiring continuing contract status as a principal or supervisor.
>
> D. In calculating probationary terms of service of teachers, principals, and supervisors, employment for 180 days or more teaching days during one school year shall constitute a single year of service
>
> E. If a teacher, principal, or supervisor separates from service during his or her probationary period and does not return to service in the same school division by the beginning of the year following the year of separation, such person shall be required to begin a new probationary period.
>
> F. If a teacher who has attained continuing contract status separates from service and does not return to teaching in Virginia public schools for a period longer than two years, such person shall be required to being a new three-year probationary period.[36]

Specific Terms of Employment for Principals and Supervisors

The State Board of Education defines a principal as "a person (a) who is regularly employed full time as a principal or assistant principal and (b) who holds a valid teaching certificate."[37] Similarly, a supervisor is "a person (a) who is regularly employed full time in a supervisory capacity and (b) who is required by the Board of Education to hold a certificate to be employed in that position."[38] As with teachers, the authority to employ principals and assistant principals is vested in the local school board upon recommendation of the division superintendent.[39] The Code defines the role of the principal to provide instructional leadership, and to administer and to supervise the operation and management of schools and property assigned to him/her under the supervision of the division superintendent.[40] Virginia principals have authority to submit "recommendations to the division superintendent for the appointment, assignment, promotion, transfer and dismissal of all personnel assigned to his supervision."[41] Although diminished and restricted, a principal's authority and duties in [his/her] school are analogous to the superintendent's role for the school division.[42]

Principals may acquire continuing contract status as a principal after serving "three years in such a position in the same school division."[43] This provision applies whether or not the principal has previously achieved continuing contract status as a teacher.[44] Principals may be reassigned to teaching positions with a reduced salary "at the sole discretion of the school board."[45] Notice is required by April fifteenth along with "written notice of the reason for such reduction and reassignment and an opportunity to present his or her position at an informal meeting with the division superintendent, [his/her] designee or the school board."[46]

As indicated, the Code has specific provisions distinguishing the legal rights of teachers and principals. In Lee-Warren v. School Board of Cumberland County, 241 Va. 442, 403 S.E.2d 691 (1991), the Supreme Court of Virginia held that a school principal with continuing contract status in one school division does not retain that status upon accepting a job as principal in another school division within the state. Lee-Warren was employed as a teacher in Buckingham County from 1968 to 1972 and as a principal in the county from 1972 to 1987 where she obtained continuing contract status as a principal. In 1987, she was hired to become a principal in another county in Virginia, Cumberland County. After granting her an annual contract for the 1987-1988 contract period, the Cumberland school board voted not to renew her contract for the next year--the basis for the suit. Both the Regulations, as cited earlier, and Section 22.1-294 of the Code require that a principal serve three years in the same position in the same school division before obtaining continuing contract status as a principal.

This section of the Code deals exclusively with principals, assistant principals, and supervisors and does not include the provision to transfer continuing contract status as is found in Section 22.1-303 for teachers. Lee-Warren contented that the statutory language was ambiguous; the Court disagreed and concluded that, "the language of the statutes under consideration is clear, unequivocal, and free of ambiguity. . . . the transfer language of Section 22.1-303, applicable to teachers, is missing from Section 22.1-294, applicable to principals."[47]

Therefore, if a principal changes positions, he or she must start the continuing contract process again whereas a teacher may transfer continuing

contract status from one division to another provided the school board has not specified a one year probationary service in the teacher's contract.

Property and Liberty Interests in Employment

The Fourteenth Amendment provides teachers with constitutional protection regarding their employment rights against dismissal and nonrenewal for the arbitrary and capricious acts of school officials. The Fourteenth Amendment provides, in part, that no "State deprive any person of life, liberty or property, without due process of law . . ." Constitutional due process requires fundamental fairness between governmental officials (including school boards) as employers toward their personnel.[48] Virginia educators have both procedural and substantive due process rights. "Procedural due process affects the method or procedure by which official decisions are made . . . Substantive due process identifies personal rights that school authorities may not abridge or penalize."[49] Both probationary teachers and those on continuing contracts have certain liberty and property interests protected by the provisions of the Fourteenth Amendment.

The Supreme Court established the legal principles addressing teacher liberty and property rights including due process mandates for untenured teachers in the landmark companion cases: Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972). Although both cases involve higher education faculty, the legal principles are applicable to elementary and secondary school personnel.

Property Interest

Alexander and Alexander state that, "property interests are established by 1) tenure statute, 2) dismissal during the contract year, or 3) if the individual has a legitimate and objective expectancy of reemployment."[50] For Virginia educators, continuing contract status is a property right granted by state law and the annual contract of probationary teachers is a property right--neither of which can be breached during the contract period without appropriate due process.[51]

In Roth, the Supreme Court ruled on the question of whether a nontenured teacher had a constitutional right to a statement of reasons and a hearing prior to contract nonrenewal. Here, Roth was given a one-year appointment which was not renewed for a second year. Roth challenged the nonrenewal and alleged that his procedural due process rights were violated because the University failed to give him notice of any reason for the nonrenewal and failed to provide him a hearing.

The Court rejected Roth's claim of a property interest violation because, as a probationary teacher, the nonrenewal action did not require constitutional protection. The Court remarked that, "to have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests are not created by the Constitution."[52]

However, in Sindermann, the Court explained circumstances that might give a nontenured teacher a legitimate expectancy for continued employment. Sindermann was a nontenured faculty person who after four years of teaching at a state junior college was informed that his contract would not be renewed. Sindermann's suit alleged that his Fourteenth Amendment guarantee to

procedural due process was violated by the college because: 1) the nonrenewal notice did not include a statement of reasons, and 2) he was not permitted a hearing. Sindermann claimed that he had a property interest in continued employment because the college had a de facto tenure program through its practices and policies.[53] Unlike Roth's one year of service, Sindermann claimed and the Court agreed that although the college did not have an "explicit tenure system . . . [the college] may have created such a system in practice."[54] The Court ruled that Sindermann had a "legitimate claim of entitlement to continued employment absent 'sufficient cause.'. . . [and Sindermann] must be given an opportunity to prove the legitimacy of his claim of such entitlement . . ."[55]

In contrast, the Fourth Circuit held that a North Carolina assistant superintendent who was dismissed after having been employed for eleven years on a series of two year contracts was not deprived of a property interest. In Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982), the Court stated that "there was no written school policy creating an expectation of continued employment."[56] The Court remarked that the two year contract arrangement was not "sufficient to create a protected property interest in continued employment."[57]

Liberty Interest

Due process is also required if a teacher has been deprived of a liberty interest. In Roth, the Court explained the requirements to establish a liberty violation. To do so, one must show that the action, in this case contract nonrenewal, caused serious damage to one's standing and association in the community; imposed a stigma or other disability to one's good name; reputation;

honor; or integrity in such a manner as to foreclose future employment opportunities.[58]

Four years after Roth and Sindermann, the Supreme Court ruled that establishing a liberty violation requires public communication of damaging statements. In this nonschool case, Bishop v. Wood, 426 U.S. 341 (1976), a policeman's employment was terminated without benefit of a hearing to determine the cause of his dismissal. The policeman claimed that he was deprived of liberty because 1) the reasons given for his discharge were so serious as to constitute a stigma and severely damage his reputation in the community; and 2) the reasons were false.[59] The Court held that there was no liberty violation because the reasons for the dismissal were communicated to the policeman orally and in private. Thus, the Court commented, "since the . . . communication was not made public, it cannot properly form the basis for a claim that [the policeman's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired."[60] Regarding the veracity of the dismissal reasons, the Court stated that, "the reasons stated to him in private had no different impact on his reputation than if they had been true."[61]

The Court's ruling in Bishop v. Wood established that a nontenured teacher cannot claim a liberty deprivation if the nonrenewal reasons are communicated in private only. One year later in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), the Court concluded that a nontenured teacher who was dismissed had the burden to show that his conduct was constitutionally protected and that the conduct was the substantial reason for the dismissal action.[62]

In summary, the landmark decisions from Roth and Sindermann established that nontenured teachers who are nonrenewed are not entitled to procedural due process unless they demonstrate deprivation of a property or liberty interest in the nonrenewal action. Additionally, the decisions also enumerated school board actions that would require procedural protection for nontenured teachers: 1) injury to reputation from a nonrenewal action; 2) foreclosure of future employment opportunities from a nonrenewal action; and 3) creation of policy or practice of reemployment expectancy.

The federal courts have ruled in several cases where certain charges on teachers were held to be stigmatizing enough to constitute a liberty interest and thereby require due process.[63] These cases included charges of racism,[64] mental instability,[65] and immoral conduct.[66]

Tenure

Tenure status varies from state to state and is created through state legislative action.[67] The term "continuing contract" is used in the Code of Virginia; and, in the opinion of the Attorney General, "continuing contract status in Virginia has many of the earmarks of tenure."[68] According to Alexander and Alexander, "tenure is a statutory right to hold office or employment and to receive the benefits and emoluments [salary] of the position . . . The benefit of tenure is that it bestows on the teacher a right of continued employment in the school district."[69]

Virginia teachers who complete a three-year probationary period of satisfactory teaching "shall be entitled to continuing contracts during good behavior and competent service . . . "[70] Continuing contract status provides

Virginia educators with a protected property interest that can only be terminated for good cause.[71] A recent Virginia case, Corns v. School Board of Russell County, Va., 835 F.Supp. 892 (W.D. Va. 1993), addressed the issue of what constitutes service during the three-year probationary period. In this case, a public school librarian, Diana Corns, obtained seven yearly contracts between 1985 and 1992 (four years of work, two years of medical leave and one default year where no work was performed).[72] She received a nonrenewal notice in March 1992 and brought suit alleging that her due process rights were violated. Here, the Court noted that the statute clearly uses the term "service" days as opposed to "contractual" days; thus, the Court reasoned that the statute requires a contractual year and not an actual service year.[73] The Court held that Corns had satisfied the probationary period and rejected the school board's contention that the "legislature neither intended nor contemplated that a person could 'serve' their probation by using sick leave."[74] The Court stated:

> . . . the school board made the decision to grant Corns sick leave each time. The Board continued to renew her contracts even after two years during which Corns was almost constantly on a leave of absence. . . . sick leave must necessarily be included in the term 'employment.' The teacher is still considered to be regularly employed full-time under the sick plan.[75]

Procedural Due Process for Virginia Educators

Due Process--Teachers on Continuing Contract

In Virginia, according to an opinion of the Attorney General, teachers on continuing contract are entitled to "have their employment continued during good behavior and competent service. They may only be dismissed or placed on probation after the exhaustion of certain procedures."[76] Continuing contract status in Virginia provides teachers with a "legitimate claim of entitlement" to

continued employment as established in Sindermann, supra. Once a Virginia teacher has "attained continuing contract status, that teacher has a property interest in his or her position, and is entitled to all due process of law."[77] By statute, the due process procedures are as follows:

> In the event a division superintendent determines to recommend dismissal of any teacher or the placing on probation of a teacher on continuing contract written notice shall be sent to the teacher notifying him . . . and informing him that within fifteen days after receiving the notice the teacher may request a hearing before the school board . . . or before a fact-finding panel . . . At the request of the teacher, the division superintendent shall provide the reasons for the recommendation in writing or, if the teacher prefers, in a personal interview.[78]

Section 22.1-310 of the Code provides details for a hearing before a fact-finding panel and Section 22.1-311 does the same for a school board hearing. Additionally, a teacher has the option to elect that the school board hearing be in private or in public.[79]

In a Virginia case, Grimes v. Nottoway County School Board, 462 F.2d 650 (4th Cir. 1972), the Fourth Circuit Court of Appeals addressed the minimum procedural due process requirements in cases involving the termination of a public school teacher and stated that "minimal procedural due process required . . . adequate notice, specification of the charges . . . opportunity to be heard."[80]

In Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984), a teacher on continuing contract was dismissed and filed a civil rights action alleging that her termination was in violation of procedural due process rights. The basis of the claim was that she was given only two interim conferences rather than the three required by the school board's evaluation procedure. The Fourth Circuit Court of Appeals held that Goodrich was afforded minimal procedural due process and stated:

> When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations. . . . Goodrich was afforded her procedural due process rights to notice and a hearing. Procedural due process does not require that Goodrich be given three evaluations before being notified of her termination. She received adequate notice, a specification of the charges against her, and a hearing at which she was able to present her defense. That is all she is entitled to under the federal Constitution.[81]

In another Virginia case, Bristol Virginia School Board v. Quarles, 235 Va. 108, 366 S.E.2d 82 (1988), a dismissed superintendent had not been deprived of a property interest because the school board fully compensated the superintendent for the remainder of his unexpired contract. Similarly in Schneeweis v. Jacobs, 771 F.Supp 733 (E.D. Va. 1991), the District Court held that a Virginia school board did not violate a teacher's property interest when it suspended her coaching contract. The Court stated: "The property interest at stake is the right to be paid under a contract of employment. Schneeweis' purported property interest in her Supplemental Assignment was extinguished by the school board's payment to her of the full stipend due for the . . . coaching season."[82]

In response to Schneeweis, the Code section mandating teacher contract provisions was amended in 1991 to distinguish a regular teaching contract from one provided for coaching duties. The Code states, in part:

> A separate contract shall be executed by the school board with such employee who is receiving a monetary supplement for any coaching assignment. This contract shall be separate and apart from the contract for teaching. Termination shall not constitute cause for termination of the separate teaching contract . . . the party intending to terminate the coaching contract [shall] give reasonable notice to the other party before termination.[83]

Due Process--Probationary Teachers

Probationary contracts in Virginia are valid for a one year period. At the end of the contract period, nonrenewal is at the discretion of the local school board. Nonrenewal requires no explanation. The only due process owed to probationary teachers is that "written notice of nonrenewal of the contract must be given by the school board on or before April 15 of each year."[84] In Dennis v. County School Board 582 F.Supp. 536 (W.D. Va. 1984), the District Court addressed the issue of whether or not a nonrenewal notice from the division superintendent rather than from the school board satisfied the statutory requirement.

In this case, Dennis was a probationary teacher in his second year of employment with a public school division in Virginia. He brought suit alleging that the school board failed to provide him with written notice of nonrenewal of his teaching contract until after the April fifteenth deadline. Dennis received a hand-delivered letter from the division superintendent on April 13 stating that the superintendent would recommend that the school board not renew his contract for a third year.[85] However, the school board failed to act on the recommendation at its April 13 meeting. On April 21, Dennis informed the superintendent, in writing, that since he has not received a nonrenewal notice, he intended to return to his teaching position for the ensuing school year. One week later, the superintendent informed Dennis that he would not be re-employed for the coming school year. Dennis did not receive a letter from the school board regarding its decision to nonrenew him until May 12--almost one month after the statutory deadline for such notice.

The Court rejected the board's claim that the "superintendent's notice of his intention to recommend [Dennis'] teaching contract not be renewed, . . . was legally equivalent to the requirement [in the Code] that the school board give [Dennis] written notice of nonrenewal of the contract on or before April 15."[86] The Court further stated:

> The school board's failure to comply with the clear, unequivocal, and unambiguous language of section 304 means that 'the teacher shall be entitled to a contract for the ensuring year in accordance with local salary stipulations including increments.' . . . Section 304 and 305 . . . were enacted to give public school teachers in Virginia a certain amount of employment security, particularly against the hardship of last-minute nonrenewal.[87]

In a similar case, School Board v. Giannoutsos, 238 Va. 144, 380 S.E.2d 647 (1989), a teacher who was employed in a Virginia school division for eight years moved to another state. Upon her return to the state nine years later, she was offered and accepted a one-year teaching position. During the school year, she received unfavorable evaluations from her principal, who did not intend to recommend her for contract renewal. However, the teacher did not receive a written notice of nonrenewal and subsequently sued for breach of contract. The trial court agreed and awarded the teacher $25,000 in damages. However, the Virginia Supreme Court reversed and held that the only remedy available to a probationary teacher "for failure to receive notice of nonrenewal was entitlement to a contract for the ensuing year."[88]

Due Process--Liberty Rights

As noted, the Fourteenth Amendment mandates procedural due process when an individual claims violation of a property or liberty interest. The appropriate due process required for a property interest has been discussed in connection with terminating a teacher's employment. Similarly, due process is

required when a termination action infringes upon a liberty interest "if the employer stigmatizes the employee and jeopardizes one's opportunities for future employment."[89] In Roth, supra, the Court explained that a liberty interest is involved if a school board's actions "might seriously damage his standing and association in his community."[90] However, the Court continued that "it stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[91] The Court further advised that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[92]

In Bristol, supra, the Virginia Supreme Court held that the school board's decision to remove the superintendent based on charges of "ineffective leadership" and "lack of communication with personnel" did not "involve moral turpitude or even an intrinsic character defect,"[93] and therefore did not constitute a liberty deprivation for the superintendent. More recently in Schneeweis, supra, the Court responded to charges that a high school basketball coach was deprived of liberty interests when her coaching responsibilities were suspended. The Court again disagreed and stated:

> Schneeweis' claim of deprivation of a protected liberty interest similarly fails to pass constitutional muster. . . . There are no facts to support an allegation that Schneeweis has been subjected to charges seriously damaging to her standing in the community. . . . No statements have been made to the press to disparage Schneeweis or harm her standing or associations in the community. . . . [thus] there are no facts to support her claim of injury to a protected liberty interest.[94]

In another Virginia case, Wooten v. Clifton Forge School Board, 655 F.2d 552 (1981), the Fourth Circuit Court of Appeals held that a principal who was reassigned to a teaching position was not deprived of a liberty interest. In this

case, the Court stated that the principal could not identify any specific school board action that damaged his reputation other than the statutorily authorized act of reassigning him.

The same Court one year later in Robertson, supra, held that a dismissed assistant superintendent in North Carolina was also not deprived of a liberty interest. Here, the Fourth Circuit concluded that a superintendent's statement that Robertson was terminated for "incompetence and outside activities" did not imply a serious character defect and was not entitled to a protected liberty interest.

Assignment of Teaching Duties

The assignment and reassignment of school personnel in Virginia is within the statutory authority of local school boards and has been firmly established by the courts. For example, in Wooten, supra, the Court held that the reassigned principal did not have a valid claim that the school board violated his Fourteenth Amendment rights to procedural due process by reassigning him to a teaching position. In this case, Wooten was a principal on continuing contract. He was reassigned to a teaching position in accordance with relevant Virginia law that explains that continuing contract status acquired by a principal does not prohibit a school board from reassigning a principal to a teaching position with a reduction in salary. The due process required in such an action is to provide the principal with notice by April fifteenth.[95] A 1980 Amendment to the statute states that no salary reduction and reassignment can be made without first providing the principal with written notice of the reason for the action.[96]

In Tazewell County School Board v. Gillenwater, 241 Va. 166, 400 S.E.2d 199 (1991), the Supreme Court of Virginia upheld the reassignment of a teacher from a middle school to an elementary school.

Courts in other jurisdictions have ruled 1) refusal to accept assignment within the teacher's certification area is grounds for dismissal;[97] 2) refusal to accept transfer may constitute insubordination;[98] 3) assignment to any teaching position that is within the limits of the endorsement area is permissible;[99] 4) employment agreements do not provide entitlement to teach specific courses;[100] and 4) transfer from a secondary grade to an elementary grade is permissible.[101]

Teacher Leaves of Absence

There are no specific provisions in the Virginia Code that address the issue of teacher leaves of absence. A recent Virginia case further defined the powers and duties of Virginia school boards in Flickinger v. School Board of City of Norfolk, 799 F.Supp. 586 (E.D. Va. 1992). Flickinger was a teacher in the Norfolk public schools who also had served as president of the Norfolk Federation of Teachers (NFT). An agreement between the school division and the NFT provided a year-long leave of absence for teachers who were elected presidents of their teacher organizations. During the authorized absence, the teacher on leave would accrue the same benefits as if she were teaching in the classroom including step increases, seniority, and retirement benefits with the association paying for the teacher's salary and benefits.

For seven years Flickinger was granted a leave of absence to carry out her duties as president of the NFT; however, the superintendent with school board approval denied her eighth consecutive request for leave. Flickinger

brought an action against both the superintendent and the board alleging violation of her First Amendment right of free speech and association and violation of equal protection of the law under the Fourteenth Amendment. The Court ruled for the school board and stated:

> The School Board's denial of Ms. Flickinger's leave of absence was rationally related to a legitimate governmental purpose. The School Board had a legitimate interest in seeing that teachers who remain on the school system's roster . . . actually teach; and it was rational for the Board to conclude that the skills of a teacher who has been out of the classroom for eight years have eroded. . . . The School Board's interest in the welfare of the school children, in fairness to other teachers, and in the integrity of the school system was without a doubt rationally related to the action taken by the school Board in denying Ms. Flickinger an eighth consecutive year of leave of absence.[102]

Reduction in Force

Article VIII, Section seven, of the Virginia Constitution vests a school board with the power to supervise the schools within its divisions. This authority includes the function of "adopting and applying local policies, rules and regulations for the supervision of the schools, including the management of a teaching staff."[103] Section 22.1-304 of the Code also provides that Virginia teachers, including those on continuing contract, may be terminated in a reduction-in-force action "because of decrease in enrollment or abolition of particular subjects."

Alexander and Alexander explain that "reductions in force may be brought about through enrollment declines, financial exigencies, reorganization, or the elimination of programs. . . . even a tenured teacher may be removed from the work force if justification is substantiated."[104] For example, in Underwood v. Henry County School Board, 427 S.E.2d 330 (1993), The Virginia Supreme Court

held that a school board's application of its reduction-in-force policy was neither a violation of state law nor a breach of a teacher's continuing contract.

In Underwood, the school board adopted a revised reduction-in-force (RIF) policy in the wake of declining enrollments. The policy assigned points to teachers for job performance and seniority and included a provision not to RIF teachers who performed supplemental duties such as yearbook sponsor, newspaper sponsor, band director, and head coach of football, basketball, wrestling, track, and baseball. Implementing the policy, the board eliminated seven physical education positions, including Underwood. Not terminated were four probationary teachers who held "frozen" positions as head coaches. Underwood brought suit against the school board alleging that the policy violated state law and breached her contract. The Court disagreed and held that given the language in the Code, "a school board is not required to give continuing contract teachers 'priority over probationary teachers,' or to recognize that continuing contract teachers enjoy a 'higher employment status,' during a reduction in force occasioned by a decrease in enrollment."[105] The Court also explained that Underwood was afforded due process when she was notified on April third prior to the statutory date of April fifteenth.

According to McCarthy and Cambron-McCabe, "while the fourteenth amendment requires minimal procedural protections in dismissals for cause, courts have not clearly defined the due process requirement for RIF."[106] Thus, reduction-in force regulations are often established by local school boards subject to state law. In response to Underwood, during the 1994 session of the General Assembly, a bill was introduced to provide seniority rights in RIF actions

to teachers on continuing contract. However, the bill was vetoed by the Governor.

Teacher Dismissal

A dismissal as defined in Section 22.1-306 of the Virginia Code "means the dismissal of any teacher during the term of such teacher's contract and the nonrenewal of the contract of a teacher on continuing contract." As in most states, Virginia law makes a distinction between the appropriate due process afforded to nonrenewal of a probationary teacher and the decision to dismiss a teacher on continuing contract (which was discussed earlier in the chapter). Section 22.1-307 of the Code states: "Teachers may be dismissed or placed on probation for incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, conviction of a felony or a crime of moral turpitude or other good and just cause." A 1993 Amendment to the Code adds the statement, "no teacher shall be dismissed or placed on probation solely on the basis of the teacher's refusal to submit to a polygraph examination requested by the school board."[107]

In the cases below, the courts have consistently affirmed the authority of local school boards to supervise the operation of public schools within their school division in matters regarding teacher dismissal.

Incompetency

Courts have assigned a broad interpretation to the term incompetency.[108] Alexander and Alexander explain that "a teacher who has been certified (licensed) by the state is assumed to be competent, and it is the responsibility of the school board to prove incompetency."[109] They further

comment that "as long as school boards are not arbitrary or capricious, the courts generally do not interfere."[110] Several authorities have defined incompetency to include: lack of ability or fitness to discharge a duty, lack of proper teaching certificate, lack of knowledge of subject matter, lack of ability to establish reasonable discipline in class, deficiency in teaching methodology, emotional instability, unprofessional conduct and willful neglect of duty.[111]

In Spotsylvania School Board v. McConnell, 215 Va. 603, 212 S.E.2d 264 (1975), a teacher who had been dismissed by the school board brought an action for breach of contract. In this case, a teacher encountered disciplinary problems in her classroom and had difficulty with classroom management. The Court affirmed the observations of school officials who concluded that she was incompetent stating that, "the opinions of men trained in the educational field relating to plaintiff's incompetency as a teacher were entitled to great weight and preponderated in favor of the Board's action."[112] The Virginia Supreme Court held that the dismissal was in accordance with state law and stated "the law in existence when plaintiff entered into the contract of employment became a part of the contract, and therefore the statutory provisions providing that the Board could dismiss plaintiff at any time for certain causes was a part of her contract."[113]

In Virginia, excessive punishment of pupils may also constitute incompetency. For example, in Gwathmey v. Atkinson, 447 F.Supp. 1113 (E.D. Va. 1976), the District Court upheld a school board's decision to deny renewal to a teacher on continuing contract in the face of the board's charges that the teacher was incompetent.

Immorality

Alexander and Alexander explain that the term immorality "has been generally upheld by the courts, especially when it relates to fitness to teach and where there is a rational nexus between the prohibited activity and the individual's position as a teacher."[114] Teachers are expected to be role models--as Justice Burger stated in the landmark case, Bethel v. Fraser, 755 F.2d 1356 (9th Cir 1985), *rev'd* 478 U.S. 675 (1986):

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics classes; school must teach by example the shared values of a civilized social order. consciously or otherwise teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.[115]

There have been no teacher dismissal based on the immorality issue cases before the Virginia courts; however, other jurisdictions have resolved such cases. For example, a teacher's dismissal was upheld for immoral conduct unbecoming of a teacher when he was convicted of swindling two fellow teachers out of several thousand dollars.[116] Teacher dismissals were upheld on grounds of immorality for making an obscene remark to a student;[117] for allowing students to consume alcohol[118] and to use drugs[119] in the teachers' private homes. According to Alexander and Alexander, "lying is considered to be immoral"[120] and courts have upheld the dismissal of teachers for such actions. For example, a wrestling coach was dismissed when he requested that a student wrestler lie about his status and weight in order to participate in a tournament.[121] Teacher dismissals have also been upheld for inappropriate use of sick leave.[122]

When teachers are involved in a sexual relationship with students, courts have "left little question about the seriousness" of these involvements,[123] and courts are "generally quite strict"[124] when deciding such cases. Teachers have

been dismissed for sexual conduct with students based on the belief that such conduct impairs their classroom efficiency and effectiveness.[125] Similarly, teachers have been dismissed for their private sexual conduct with nonstudents when courts conclude that the activity has an "impact on the teacher's fitness to teach."[126] However, not all dismissals have been upheld by the courts, especially when the teacher can establish that his/her private life has no bearing on his/her professional activities.[127]

Immorality--Homosexual Teachers

Concerning the dismissal of homosexual teachers, several authorities comment that the courts look for a nexus between a teacher's private lifestyle and his/her fitness to teach.[128] For example in Gaylord v. Tacoma School District No. 10, 559 P.2d 1340 (Wash. 1977), a teacher's dismissal was upheld because the Court stated that widespread knowledge about his homosexuality impaired his efficiency as a teacher. In Stephens v. Board of Education School District No. 5 429 N.W.2d 722 (Neb. 1988) a Nebraska high school teacher was dismissed for making a homosexual advance to a typewriter salesperson in the teachers' lounge. The Court reasoned that such sexual advances in school are "a clear departure from moral behavior and professional standards [which] may indicate unfitness to teach."[129] An Oregon Court also remarked that homosexual activity in a public place violates contemporary moral standards thus severely impairing the teacher's ability to function.[130]

Noncompliance with School Laws and Regulations

Noncompliance is similar in meaning to insubordination and may be defined as "willful disregard of or refusal to obey school regulations and official orders."[131] In McConnell, supra, where a Virginia teacher's dismissal was upheld, in addition to being declared incompetent to teach, McConnell also failed to comply with school rules and regulations regarding: 1)giving zeros on tests to students who talked during test periods and 2) sending unruly students from the classroom into the hall instead of bringing them to the office--actions that were explicitly prohibited in the school's handbook.

Conviction of a Felony or a Crime of Moral Turpitude

Felony, as defined in Black's Law Dictionary, is "a crime of a graver or more serious nature than those designated as misdemeanors . . . any offense punishable by death or imprisonment for a term exceeding one year."[132] The crime of moral turpitude "is difficult to define clearly according to Alexander and Alexander "because it is premised on the moral standards of the community."[133] There are no reported cases of Virginia teachers being dismissed for conviction of a felony or a crime of moral turpitude. Courts in other jurisdictions have ruled on dismissal cases of this type. For example, in a Florida case, two teachers had their teaching certificates revoked for violating the moral standards of the community by growing fifty-two marijuana plants.[134] In Pennsylvania, the revocation of a teacher's certificate was upheld after the teacher pleaded guilty to mail fraud which in Pennsylvania is a crime involving moral turpitude.[135]

Other Good and Just Cause

In Russell County School Board v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989), a teacher on continuing contract was dismissed for unacceptable conduct in the classroom and filed suit alleging that the school board did not have good cause to dismiss him. The Court upheld the dismissal and commented:

> There was substantial evidence to support the Board's decision. Anderson was a teacher who was already on probation. Nevertheless, he made disparaging remarks about female colleagues, male supervisors, and the school board. He told 13-year-old students how to make a bomb; in their presence he was disrespectful to his superiors; he made a vulgar query to a young female student about kissing; he permitted his immature students to place drawings on the walls of his classroom that depicted violent themes, disrespect for the school's principal, and disdain for the school board.[136]

The Court reasoned that the teacher "should not be allowed to continue working with those with tender minds."[137]

Constitutional Rights of Teachers

Beginning in the 1960s, both federal and state courts began to establish the constitutional rights of educators. Prior to this time, according to Alexander and Alexander, "school boards had unlimited control over the employment and dismissal of teachers."[138] McCarthy and Cambron-McCabe add that, "it was generally accepted that public school teachers could be dismissed or disciplined for expressing views considered objectionable by the school board."[139] As Alexander and Alexander further explain, "the dismissal of teachers was sustained by the courts based on the doctrine that employment was a privilege and not a right."[140] Beginning with the Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 (1968), the Court began the sequence of judicial precedents establishing teachers' constitutional rights to free speech.

Free Speech Rights

In this case, Marvin Pickering, a tenured teacher, was dismissed after sending a letter to a local newspaper criticizing: 1) the school board's allocation of school funds between educational and athletic programs; and 2) the methods of informing taxpayers about the reasons for additional tax revenues. The board dismissed Pickering because publication of the letter was "detrimental to the efficient operation and administration of the schools of the district."[141] Pickering claimed that writing the letter was protected by freedom of speech rights guaranteed by the First Amendment--the Supreme Court agreed and reversed his dismissal. In analyzing the case, the Court applied a balance test stating: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[142] The letter addressed issues considered by the Court to be matters of public importance, and, as such, speech protected by the First Amendment. The Court concluded that, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[143]

The Court also examined the impact of Pickering's protected speech on his working environment. The Court found no indication that the protected speech would jeopardize Pickering's employment relationship with the school board or his classroom effectiveness. The Court concluded that, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[144]

The Court clarified the meaning of what constitutes matters of "public concern" in Connick v. Myers, 461 U.S. 138 (1983). In this nonschool case, an assistant district attorney (Myers), displeased with a proposed transfer, circulated a questionnaire throughout the office. The questionnaire concerned office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Subsequently, Myers was dismissed and brought suit alleging that she was wrongfully discharged for exercising her constitutionally protected right to free speech. The Court upheld the dismissal concluding that the questionnaire contained statements primarily addressing a personal grievance Myers had with her supervisors and was not a matter of public concern entitled to First Amendment protection. The Connick Court established that the test for determining the existence of speech on matters of public concern involves examining the content, form, and context of the communication, as well as the manner, time, and place of the speech.[145] The Court reasoned: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[146]

In summary, the decisions from Pickering to Connick established constitutional protection for public employee speech that is 1) a matter of public rather than personal concern and, 2) not disruptive to the working environment or to employee-employer harmony. Additionally, teachers have the initial burden of proving that their protected speech was the substantial or motivating factor in a school board's adverse personnel action.

The free speech rights of Virginia teachers are well established in the common law, particularly from the Fourth Circuit Court of Appeals. In two nonschool cases, Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984) and Lewis v. Blackburn, 759 F.2d 1171 (4th Cir. 1985), the Fourth Circuit relied on the principles established in Connick to rule that matters not related to public concern, but more related to personal grievances or concerns about working conditions, are not entitled to First Amendment protection.

In Johnson v. Butler, 433 F.Supp. 531 (W.D. Va. 1977) a probationary Virginia teacher, Donna Johnson, challenged her nonrenewal as retaliation against exercising her free speech rights in complaining about her status as a floating teacher. Johnson's complaint was based on her belief that floating adversely affected her teaching effectiveness. Although Johnson received satisfactory evaluations during her probationary teaching period, she was recommended for nonrenewal. The reasons given for her nonrenewal, as noted by the principal, were for being insubordinate and for having a poor attitude. The specific allegations included leaving her class unattended, departing from school before the end of the contract day, and holding class six minutes after the bell rang.[147] In response to the allegations, Johnson explained that,

> she held her class over for the purpose of disciplining the students for misbehavior. . . . she never left [class] for any reasons unrelated to school business nor would she leave without notifying the teacher on hall duty that she would have to be absent from the classroom. She would leave school premises prior to the end of the contract day only for the purpose of transporting students and cheerleaders to extra-curricular activities . . .[148]

At the trial, Johnson's principal admitted that "he first took note of [Johnson's] alleged insubordination and bad attitude after she had threatened to file a grievance and was not given a room." In its ruling, the Court relied on the two-part Mt Healthy standard, cited earlier, and concluded that 1) the alleged

insubordination and poor attitude was "a mere pretext to obtain [Johnson's] dismissal for exercising her First Amendment rights" and, 2) Johnson's "complaint to her principal was a substantial, motivating factor in the decision to terminate her contract. . . . the Board would not have reached the same result in the absence of such complaint."[149] The Court ordered Johnson reinstated on continuing contract.

In a more recent Virginia case, Seemuller v. Fairfax County School Board, 878 F.2d 1578 (4th Cir. 1989), a high school physical education teacher wrote a sarcastic letter to the school paper in response to an anonymous letter complaining of chauvinistic physical education teachers. The letter prompted complaints from the community and faculty at the high school which were received by the principal. The teacher subsequently received a "needs improvement" in professional responsibility on his annual evaluation, and he was denied a step increment in pay for the ensuing school year. He filed a grievance with the school board. The grievance was denied and he brought suit against the school board alleging that his evaluation was a disciplinary measure because he exercised his freedom of speech. The Fourth Circuit Court of Appeals stated that the teacher's "use of satire to comment on a matter of public concern did not deprive him of the protection afforded by the first amendment."[150]

In Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir. 1987), the Fourth Circuit again ruled for a teacher concluding that speech in support of tenure for a principal was a matter of public concern. In applying the Pickering-Connick balance test, the Court stated that the teacher's "support was simply the informed viewpoint of a concerned faculty member. This sort of

speech must not be chilled. Teachers should have an important voice in decisions about the employment of school officials. . ."[151]

In contrast, in Daniels v. Quinn 801 F.2d 687 (4th Cir. 1986), the Fourth Circuit upheld the discharge of a teacher's aide who complained to a school board member about the lack of remedial reading materials available for classroom use. Here the Court stated: "Speech does not . . . become of public concern under Connick solely because it is communicated to a public official."[152]

The Fourth Circuit also upheld the dismissal of a teacher In Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1992). In this case, a tenured teacher was dismissed after he wrote and circulated a letter to fellow teachers complaining about a change in district policy to pay teachers, and encouraging teachers to engage in a sick-out during final exam week. The Court refused to separate the two parts of the letter as to which part was protected speech and which was not. In analyzing the letter as a whole, the Court held:

> Any First Amendment interest inherent in the letter . . . is outweighed by the *public interest* in having public education provided by teachers loyal to that service . . . and the School District's *employer interest* in having its employees abide by reasonable policies to control sick leave and maintain morale and effective operation of the schools[153] (emphasis in original).

Academic Freedom

Fischer, Schimmel and Kelly explain that "academic freedom includes the right of teachers to speak freely about their subjects, to experiment with new ideas, and to select appropriate teaching materials and methods."[154] Although it is not specifically mentioned in the Constitution, the concept of academic freedom is held to be within the protections afforded to teachers in the First Amendment. However, according to McCarthy and Cambron-McCabe, "courts have not extended the broad protections found in higher education to public

elementary and secondary schools."[155] There have been no specific cases in Virginia public schools concerning this concept. However, similar to other First Amendment rights, a teacher's right to academic freedom must be balanced against the state's interest "in assuring an appropriate instructional program and efficient school operations."[156]

Free Association Rights

Certain constitutional protections are implicit in the First Amendment such as freedom of association. The right to take part in the political process, like the right to exercise free speech, must be balanced against the orderly and efficient operation of the public school. Alexander and Alexander explain:

> A school board may reasonably expect a teacher not to use his or her position to promote a particular action, or to use the classroom for political purposes, or to be involved in any activity that will interfere with or disrupt the educational environment of the school, or detract from job performance.[157]

In 1960, the Supreme Court prohibited school boards from requiring teachers to disclose their organizational memberships.[158] The Court also invalidated the use of vaguely worded loyalty oaths.[159] However, the Court has held as constitutional a school board's requirement that its teachers sign an oath supporting the federal and state constitutions.[160] The oath on Virginia's standard contract for professional personnel contains the statement that the teacher "swears or affirms allegiance and loyalty to the Constitution of Virginia and the Constitution of the United States."

In Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), the Fourth Circuit addressed the issue of a teacher's constitutionally protected right to freedom of association. In this case, an African American teacher with twelve years of excellent service was nonrenewed. The teacher and her family were actively

involved in civil rights activities in a rural North Carolina community--activity that did not go unnoticed by her principal and local school board. The Court stated that the teacher's "exercise of her personal and associational liberty to express her feelings about segregation would not justify refusal to renew her contract."[161]

Freedom of Religion

Virginia educators are guaranteed the right to freedom of religion not only by the First Amendment, but also by protections provided in Title VII against religious discrimination. The only case in Virginia regarding this issue was heard as a Title VII case and is discussed later in the chapter.

A significant case in this area is In Palmer v. Board of Education of the City of Chicago, 603 F.2d 1271 (7th Cir. 1979). Here, a probationary teacher who was a Jehovah's Witness challenged her proposed discharge for failure to adhere to the school's prescribed curriculum which including: 1) participating in the pledge; 2) singing patriotic songs; and 3) celebrating certain holidays She claimed that following the curriculum would violate her First Amendment right to religious freedom. In upholding her discharge, the Court stated:

> There is a compelling state in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please. . . some of the students may be called upon in some way to defend and protect our democratic system and Constitutional rights, including [the teacher's] religious freedom.[162]

Privacy Rights

The Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) established that privacy rights related to marriage and family relationships are constitutionally protected against governmental intrusion. the Court has also ruled that freedom of personal choice regarding marriage and family life is a fundamental liberty right

protected by the due process clause of the Fourteenth Amendment.[163] However, teachers serve as role models for students; therefore, the privacy rights of teachers are not as broad as those of the general public.

In a Virginia case discussed in chapter two, Ponton v. Newport News School Board, supra, the Court concluded that a school board violated a teacher constitutional right to privacy when she was forced to take a leave of absence because she was single and pregnant.[164]

Search and Seizure

Although the majority of search and seizure issues in public schools concern students, public school educators in Virginia, like all citizens, are protected against unreasonable search and seizure by the Fourth Amendment. A 1987 Supreme Court decision requires a closer look at the rights of educators concerning Fourth Amendment protection of their private property in school. In O'Connor v. Ortega, 480 U.S. 709 (1987), the Court addressed the warrrantless search of the office, desk and filing cabinets of a physician employed at a state hospital. The Court concluded that workplace searches should employ a reasonableness standard--balancing the individual's Fourth Amendment rights against the government's need for efficient operation of the workplace.[165]

Drug testing of teachers constitutes search and seizure under Fourth Amendment protection. The issue has not been before the courts in Virginia or in the Fourth Circuit. However, the New York Court of Appeals held that a school district's policy requiring all probationary teachers to submit to urinalysis to detect illegal drug use, without reasonable suspicion that a teacher used drugs, violated the Fourth Amendment.[166] Because of public safety concerns, mandatory drug

testing has been upheld for certain public school employees, such as bus drivers.[167]

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction, the equal protection of the laws." Because education is a state function, this clause is often invoked in education-related litigation along with the due process clause of the same amendment (which was discussed in relation to teacher licensure earlier in the chapter). Two recent Virginia cases alleging equal protection violations against teachers are Schneeweis, supra, and Rountree v. Fairfax County School Board, 933 F.2d 219 (4th Cir. 1991).

In Schneeweis, supra a female basketball coach was suspended from her coaching duties by her principal. She claimed her equal protection of the laws was violated because her assistant coach was not suspended at the same time (both coaches were the subject of complaints concerning their coaching conduct and judgment). The District Court disagreed and stated:

> As head coach of the girls' varsity basketball team, Schneeweis was responsible for the success or failure of the entire program. It was entirely rational for the school board to remove Schneeweis and not her assistant coach. . . . [her] claim that she was denied equal protection of the law is not justiciable in this court.[168]

Similarly, the Fourth Circuit, In Rountree, dismissed an action brought by seven African American teachers who claimed equal protection violations after being denied promotion under a school district's merit plan.

Statutory Rights

Title VII

Title VII of the Civil Rights Act of 1964, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Two Virginia cases illustrate Title VII violations based on race and religion, respectively. In the first case, Thomas v. Washington County School Board, 915 F.2d 922 (4th Cir. 1990), an African American woman, was successful in her Title VII challenge of a district's hiring policy when the district failed to notify her about teaching vacancies.

As stated, Title VII of the Civil Rights Act of 1964 prohibits religious discrimination and requires employers to accommodate reasonably an employee's "religious observance or practice without undue hardship on the conduct of the employer's business."[169] In Edwards v. School Board of City of Norton, Virginia, 658 F.2d 951 (4th Cir. 1981), a teacher's aide was dismissed for excessive absences from work to observe holy days per her religious beliefs. She was successful in challenging her dismissal that the school board's failure to accommodate her religious practices was in violation of Title VII.

Sexual Harassment

Title VII also protects educators from sexual harassment in the workplace. The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for establishing guidelines and for investigating allegations of sexual harassment. The guidelines establish two categories of sexual harassment, quid pro quo (this for that) harassment and non quid pro quo harassment. A quid pro quo case involves harassment that includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical

conduct of a sexual nature" that directly effects an employee's employment opportunities.[170] A non quid pro quo case is also defined as a hostile environment case. Non quid pro quo harassment "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[171]

According to Alexander and Hughes, the EEOC guidelines state that an employer is responsible for sexual harassment by supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[172] Alexander and Hughes further comment that "an employer is responsible for sexual harassment between fellow employees where the employer 'knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.'"[173]

In the leading case on sexual harassment, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), the Supreme Court upheld the EEOC guidelines.[174] In this case, the Court dealt with hostile environment harassment and stated that for such conduct to be actionable under Title VII, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'"[175] Sexual harassment may occur when there is a mutual relationship between the individuals. In Vinson, supra, the Court established that a sexual relationship could be both voluntary and unwelcome, and, as such, voluntary participation can not be used as a defense.

Several authorities suggest that the best defense against sexual harassment in the workplace requires school districts to adopt and enforce

sexual harassment policies.[176] Further discussion concerning sexual harassment and students is discussed in chapter four.

Disciplinary Action: Suspension of Teachers

In Virginia, a teacher may be disciplined for inappropriate conduct through suspension. Section 22.1-315 of the Code states, in part:

> A teacher may be suspended for good and just cause when the safety or welfare of the school division or the students therein is threatened or when the teacher has been charged by summons, warrant, indictment or information with the commission of a felony, a crime of moral turpitude or any offense involving the sexual molestation, physical or sexual abuse, or rape of a child.

The teacher may be suspended for no longer than sixty days except in situations when a teacher has been charged with a felony, a crime of moral turpitude or any offense involving the sexual molestation, physical or sexual abuse or rape of a child. The Code is very specific concerning the procedural due process afforded to a suspended teacher, stating that a teacher may not be suspended for more than five days unless the teacher is "advised in writing of the reason for the suspension and afforded an opportunity for a hearing . . ."[177] When a teacher is suspended, he/she will continue to receive his/her salary "unless and until the school board, after a hearing, determines otherwise."[178] The Attorney General provided further comment on this issue and stated:

> The school system has the authority in an appropriate case to suspend without pay provided there is first a hearing before the school board. The exception is in the case where a teacher is suspended because of being charged . . . with a felony . . . In such a case, the teacher may be suspended with pay prior to a hearing before the board.[179]

A teacher who has been charged with a felony, or crime of moral turpitude or offense involving a child as stated above may be suspended with or

without pay. If the suspension is without pay, "an amount equal to the teacher's salary while on suspension"[180] will be placed in an interest-bearing escrow account. After disposition of the charges, the funds will be returned to either the school board "in the event a teacher is found guilty . . . [and] after all available appeals have been exhausted . . ."[181] or to the teacher along with reinstatement; however, payment can not exceed one year's salary. Additionally, "no teacher shall have his or her insurance benefits suspended or terminated because of such suspension . . ."[182]

In Wilkinson v. School Board of the County of Henrico, 566 F.Supp. 766 (E.D. Va. 1983), a teacher challenged her five day suspension without pay and without a hearing as a violation of the Code as outlined above. The District Court agreed and concluded that under Section 22.1-315:

> A school board must provide a hearing before suspending a teacher for any length of time without pay. If the school administrators wish to avoid putting the School Board to the effort of holding a hearing . . . they may simply suspend a teacher with pay for five days or less[183] (emphasis in original).

In Schneeweis, supra, a Virginia coach who was suspended from her coaching responsibilities alleged, among other claims, that her suspension violated the mandate in Section 22.1-315 because she was not given a presuspension hearing. The Court concluded that this section of the Code "governs the suspension of teachers and does not apply to supplemental salary employees who have undertaken extra duties . . . separate and apart from their teaching contracts."[184]

Grievance Procedures for Teachers

Section 22.1-308 of Virginia Code provides the Board of Education with statutory authority to apply a step-by-step grievance procedure for Virginia educators. The Code defines a grievance as "a complaint or dispute by a teacher relating to his or her employment . . ." Such complaints include, but are not limited to:

1. disciplinary action including dismissal or placing on probation,
2. the application or interpretation of personnel policies, procedures, rules and regulations, ordinances and statutes,
3. acts of reprisal against a teacher for filing or processing a grievance, participating as a witness in any step relating to a grievance, or serving as a member of a fact-finding panel, and
4. complaints of discrimination on the basis of race, color, creed, political affiliation, handicap, age, national origin or sex.[185]

Additionally, the statute outlines the circumstances that do not constitute a grievance, including a complaint or dispute by a teacher relating to:

1. establishment and revision of wages or salaries, position classifications or general benefits,
2. teacher suspension or nonrenewal of a probationary teacher,
3. establishment of contents of ordinances, statutes or personnel polices, procedures, rules and regulations,
4. failure to promote,
5. discharge, layoff or suspension from duties because of decrease in enrollment or abolition of a particular subject or insufficient funding,
6. hiring, transfer, assignment and retention of teachers within the school divisions,
7. suspension from duties in emergencies, and
8. the methods, means and personnel by which the school division's operations are to be carried on.[186]

In Tazewell County School Board v. Gillenwater, supra, a teacher filed a grievance in response to a teaching reassignment. The school superintendent advised her that personnel transfers were not grievable and the Supreme Court of Virginia agreed. The Court concluded that the applicable statute clearly states

that the term grievance does not include complaints or disputes by a teacher relating to among other items, "transfer, assignment and retention of teachers within the school division."[187]

The procedural framework for a teacher's grievance is clearly detailed in the Code.[188] Except in cases of dismissal or probation, the first step requires an informal discussion with the teacher's immediate supervisor.[189] Beyond this first step in the grievance process, all other stages are required to be in writing on forms prescribed by the State Board of Education.[190] The teacher may elect to have the hearing before a fact-finding panel prior to a school board decision.[191] However, "once such a request is made, the teacher loses the right to a hearing before the school board."[192] The school board retains "final authority over matters concerning employment and supervision of its personnel, including dismissal, suspensions and placing on probation."[193] If the school board's decision differs from the fact-finding panel's recommendations, the school board "shall be required to conduct an additional hearing [in] public unless the teacher requests a private one."[194]

In Russell County School Board v. Anderson, supra, the Virginia Supreme Court said with respect to school board decisions that disagree with fact-finding panels' recommendations:

> . . . a local school board can and will, on occasion, disagree with the recommendations of a fact-finding panel. . . . [the Code] requires a school board to consider the transcript and any other evidence from the panel hearing. . . . [after reviewing the materials] the legislature requires . . . a school board explain itself if it reaches a different conclusion.[195]

Lee v. Albemarle County School Board, 648 F.Supp. 744 (W.D. Va. 1986) is another Virginia case involving dispute with a fact-finding panel. In this case, Lee, the administrative assistant to the school division's superintendent,

was dismissed for intermixing his private business affairs as owner and manager of rental properties with his public duties as a school division employee. He brought suit alleging violation of his constitutional rights to due process and equal protection of the law by the fact-finding panel and others. Specifically, he claimed that the school board failed to notify him of a hearing after the board reviewed the findings of the panel. The District Court concluded that Lee was not entitled to notice, concluding that the statute requires notice "only if the school board were to hear evidence beyond the transcript, findings, and recommendations of the fact-finding panel."[196]

Summary

Virginia teachers are required to obtain a valid teaching license in order to secure employment. Licenses are issued by the State Board of Education to indicate an individual's fitness to teach in the Commonwealth. To obtain a license, teachers must satisfy the requirement of passing a professional teacher's examination. The Supreme Court has upheld the use of such tests for licensure as long as the test is rationally related to employment objectives.

A Virginia license may be denied, revoked or suspended according to regulations of the State Board of Education. A license is issued for a five-year period and may be renewed through earning professional development points for a variety of activities.

School division superintendents employ and assign Virginia educators in schools. Beginning teachers are issued annual contracts for a three-year probationary period. Once the probationary period has been completed in the same school district, teachers are entitled to receive continuing contract status.

A contract provides teachers with a property right requiring procedural due process. However, the property rights are different for probationary and continuing contract. During the probationary period, teachers must be notified by April fifteenth if his/her contract will not be renewed for the ensuing year. In Virginia, a division superintendent is not required to provide probationary teachers with a reason for any nonrenewal action. However, failure to receive notification, requires that the teacher be given a contract for the ensuing school year. Virginia teachers on continuing contract may only be dismissed for good cause and are entitled to a hearing and a statement of reasons for any dismissal action. Virginia teachers may be dismissed or placed on probation for incompetency, immorality, noncompliance with school laws and regulations, disability , conviction of a felony or a crime of moral turpitude or other good and just cause.

Teachers also have liberty rights. A liberty infringement requires that the teacher demonstrate they were stigmatized in such a manner that opportunity for future employed is jeopardized.

Virginia teachers have First Amendment rights of free speech. They cannot be dismissed or disciplined for speaking out on matters of public concern. Matters of public concern are determined by the court by balancing the free speech rights of the individual teacher and the rights of the school to operate an orderly and efficient educational environment. A teacher may not hide under the First Amendment if the school board proves that conduct, other than protected speech, is the basis for the dismissal action.

Virginia educators have constitutional guarantees to protect their freedom of association and the right to privacy.

A loyalty oath is included as part of the standard contract required to secure employment for all Virginia educators.

Teachers are provided with Fourth Amendment protection against unreasonable search and seizure which includes mandatory drug testing. However, public school employees involved in transporting students, for public safety reasons, may be subject to drug testing.

The equal protection clause of the Fourteenth Amendment provides protection against governmental action discriminating against certain classes of individuals. Additional protections are extended to educators by Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Teachers are also protected from sexual harassment by Title VII.

Virginia teachers may be disciplined for cause when the safety or welfare of the school division or its students is in jeopardy. The Virginia Code details the reasons for and the procedures to suspend teachers.

The Code also provides the authority for Virginia's step-by-step grievance procedure, including a description of items which do and do not constitute a grievance.

Endnotes

[1] Va. Code Ann., Section 22.1-298 (1993).

[2] Alexander and Alexander, American Public School Law, 557.

[3] Provisional License, Technical Professional License, Collegiate Professional License, Postgraduate Professional License, Pupil Personnel Services License, and Superintendent License, Vocational Evaluator License. Virginia Department of Education, Office of Professional Licensure, Division for Compliance Coordination Licensure Regulations for School Personnel, (Richmond, VA: 1993), 6.

[4] Virginia Department of Education, Office of Professional Licensure, Division for Compliance Coordination Licensure Regulations for School Personnel, (Richmond, VA: 1993).

[5] Ibid., 6.

[6] Ibid.

[7] Va. Code Ann., Section 22.1-298 (1993).

[8] Va. Code Ann., Section 22.1-298 (1993).

[9] Licensure Regulations, 7.

[10] Alexander and Alexander, 559.

[11] Ibid.

[12] Griggs v. Duke Power Company, 401 U.S. 424 (1971), 431.

[13] Ibid.

[14] Ibid., 436.

[15] See generally Licensure Regulations, 10-16.

[16] Ibid.

[17] Ibid., 10.

[18] Telephone interview with Mrs. Patty Pitts, Associate Specialist for Licensure, Virginia Department of Education, Division for Compliance Coordination, Office of Professional Licensure, May 16, 1994.

[19] Licensure Regulations, 10.

[20] Ibid., 9.

[21] Commonwealth of Virginia, Department of Education, Office of Professional Development and Teacher Education, The Virginia Renewal Manual, July 1993.

[22] See, Licensure Regulations, 9

[23] Alston v. School Board of City of Norfolk, 112 F.2d 992 (1940), 996.

[24] Ibid., 994, and Va. Code Ann., Section 22.1-296 (1993).

[25] Va. Code Ann., Section 22.1-296-1 (1993).

[26] Ibid.

[27] Alexander & Alexander, 559; Imber & van Geel, Education Law, 396; McCarthy & Cambron-McCabe, Public School Law, 244.

[28] Va. Code Ann., Section 22.1-296.2 (1993).

[29] Ibid., Section 22.1-297 (1993).

[30] Commonwealth of Virginia, Office of the Attorney General, Richmond Opinions of the Attorney General of Virginia and Report to the Governor of Virginia, July 21, 1982 ,436. A footnote to this opinion includes the caveat that his Opinion, "concerns the employment of a teacher who is new to the school system and that [the] question does not involve a situation in which renewal of a teacher's contract in the school system is being considered by the school board, despite the division superintendent's recommendation of nonrenewal under Section 22.1-305 of the Code of Virginia."

[31] Alexander and Alexander, American Public School Law, 570.

[32] Va. Code. Ann., Section 22.1-302 (1993).

[33] Board of Education, Virginia Department of Education, Regulations of the Virginia Board of Education, January 1993. The 200 days include a minimum of both 180 teaching days and ten inservice days for activities such as planning, evaluating, record keeping and attending conferences. An additional ten days for either teaching or inservice activities are left to the discretion of the local school board.

[34] Ibid. The Regulations state that accumulated sick leave ends when employment expires. However, a teacher may transfer accumulated leave if the school board in the new division signifies acceptance of the transfer. Employment expires when the teacher accepts employment outside the public school of Virginia or is unable to teach for three consecutive years.

[35] Va. Code Ann., Section 22.1-304.

[36] Regulations of the Virginia Board of Education, 270-01-0042 (1993).

[37] Bylaws and Regulations of the Board of Education of the Commonwealth of Virginia, 1980, 9.

[38] Ibid.

[39] Va. Code Ann., Section 22.1-293 (1993)

[40] Ibid.

[41] Ibid.

[42] Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982).

[43] Va. Code Ann., Section 22.1-294 (1993).

[44] Ibid.

[45] Ibid.

[46] Ibid.

[47] Lee-Warren v. School Board of Cumberland County, 241 Va. 442, 403 S.E.2d 691 (1991), 692, 693.

[48] La Morte, School Law: Cases and Concepts, 6.

[49] Valente, Law in the Schools, 1994, 222.

[50] Alexander and Alexander, Law of Schools, Students and Teachers, 308.

[51] Ibid., 306.

[52] Ibid., 577.

[53] Perry v. Sindermann, 408 U.S. 593 (1972), 600

[54] Ibid., 602.

[55] Ibid., 602, 603.

[56] Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982), 1091.

[57] Ibid.

[58] Ibid., 573.

[59] Bishop v. Wood, 426 U.S. 341 (1976), 347.

[60] Ibid., 349.

[61] Ibid.

[62] Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

[63] Alexander, Law of Schools, Students, and Teachers, 310-313, Imber and van Geel 419, McCarthy and Cambron-McCabe, 381.

[64] Wellner v. Minnesota State Junior College Board, 487 F.2d 153 (8th Cir. 1973)

[65] Bomhoff v. White, 526 F.Supp. 488 (D.Ariz. 1981)

[66] Vanelli v. Reynolds School District No. 7, 677 F.2d 773 (9th Cir. 1982).

[67] McCarthy & Cambron-McCabe, 251.

[68] Office of the Attorney General of Virginia, Opinions of the Attorney General of Virginia, 1980-1981, 294.

[69] Alexander & Alexander, 544.

[70] Va. Code Ann., Section 22.1-304.

[71] Wooten v. Clifton Forge School Board, 655 F.2d 552 (4th Cir. 1981), 554.

[72] Corns v. School Board of Russell County, Va., 835 F.Supp. 892 (W.D. Va. 1993), 897.

[73] Ibid., 895.

[74] Ibid., 896.

[75] Ibid.

[76] 1980-81 Opinions of the Attorney General of Virginia, March 23, 1981, 295.

[77] Corns v. School Board of Russell County, Va., 835 F.Supp. 892 (W.D. Va. 1993), 898, quoting Wilkinson v. School Board, 566 F.Supp. 766 (E.D. Va. 1983), 769.

[78] Va. Code Ann., Section 22.1-309 (1993).

[79] Ibid., Section 22.1-311.

[80] Grimes v. Nottoway County School Board, 462 F.2d 650 (4th Cir. 1972), 653.

[81] Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984), 226, 227. See also Corns v. School Board of Russell County, Va., 835 F.Supp. 892 (W.D. Va. 1993).

[82] Schneeweis v. Jacobs, 771 F.Supp. 733 (E.D. Va. 1991), 737.

[83] Va. Code Ann., Section 22.1-302 (1993).

[84] Ibid., Section 22.1-304 (1993).

[85] Dennis v. County School Board 582 F.Supp. 536 (W.D. Va. 1984), 539.

[86] Ibid., 542.

[87] Ibid.

[88] School Board v. Giannoutsos, 238 Va. 144, 380 S.E.2d 647 (1989), 649.

[89] Alexander and Alexander, Law of Schools, Students and Teachers, 306.

[90] Board of Regents v. Roth, 408 U.S. 564 (1972), 573

[91] Ibid., 575.

[92] Ibid., 573.

[93] Bristol Virginia School Board v. Quarles, 235 Va. 108, 366 S.E.2d 82 (1988), 87.

[94] Ibid., 737, 738.

[95] Va. Code Ann., Section 22.1-294 (1993).

[96] Ibid.

[97] Commonwealth ex. rel. Wesenberg v. School District of Bethlehem, 24 A.2d 673 (Pa. Super. 1942).

[98] Goodwin v. Bennett County School Independent School District, 226 N.W.2d 166 (S.D. 1975).

[99] Wells v. Del Norte School District C-7, 753 P.2d 770 (Colo. Ct. App. 1987).

[100] Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985).

[101] Appeal of Santee 397 Pa. 601, 156 A.2d 830 (Pa. 1959).

[102] Flickinger v. School Board of City of Norfolk, 799 F.Supp. 586 (E.D. Va. 1992).

[103] School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978), 472.

[104] Alexander and Alexander, 589.

[105] Underwood v. Henry County School Board, 427 S.E.2d 330 (1993), 333.

[106] McCarthy and Cambron-McCabe, 400.

[107] Va. Code Ann., Section 22.1-307 (1993).

[108] Alexander and Alexander, American Public School Law, 578.

[109] Ibid.

[110] Ibid.

[111] Alexander and Alexander, 578; Imber and van Geel, 399; Valente, 210; R. Craig Wood and Grover H. Baldwin, "Dismissal Process for Classroom Teachers" in The Principal's Legal Handbook, William E. Camp, Julie K. Underwood, Mary Jane Connelly, Kenneth E. Lane, (Topeka: 1993).

[112] Spotsylvania School Board v. McConnell, 215 Va. 603, 212 S.E.2d 264 (1975), 268.

[113] Ibid.

[114] Alexander and Alexander, 584.

[115] Bethel v. Fraser, 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986), 683.

[116] Matter of Shelton, 408 N.W.2d 594 (Minn. App. 1987).

[117] Fiscus v. Board of School Trustees, 509 N.E.2d 1137 (Ind.App. 1987).

[118] Coupeville School District No. 204 v. Vivian, 677 P.2d 192 (Wash.App. 1984), Barcheski v. Board of Education of Grand Rapids Public Schools, 412 N.W.2d 296 (Mich. App. 1987).

[119] Board of Education of Hopkins County v. Wood, 717 S.W.2d 837 (Ky. 1986).

[120] Alexander and Alexander, 585.

[121] Florian v. Highland Local School District Board of Education, 493 N.E.2d 249 (Ohio App. 1983).

[122] See Bethel Park School District v. Krall, 67 Pa.Cmwlth. 143, 445 A.2d 1377 (1982), Board of Education of Laurel County v. McCollum, 717 S.W.2d 703 (Ky. 1986). In Contrast see, Fontau Unified School District v. Burman, 753 P.2d 689 (Cal. 1988).

[123] Alexander and Alexander, 585

[124] Fischer, Schimmel and Kelley, Teachers and the Law, 239.

[125] Elvin v. City of Waterville, 573 A.2d 381 (Me 1990) Sauter v. Mount Vernon School District 320, 791 P.2d 549 (Wash.App. 1990), In Re Etienne, 460 N.W.2d 109 (Minn.App. 1990), Johnson v. Beaverhead City High School District, 236 Mont. 532, 771 P.2d 137 (1989).

[126] Alexander and Alexander, 585.

[127] Stoddard v. School District No. 1, Lincoln County, Wyoming, 590 F.2d 829 (10th Cir. 1979), Sherburne v. School Board of Suwannee County, 455 So.2d 1057 (Fla. App. 1984).

[128] Alexander and Alexander, 586, McCarthy and Cambron-McCabe, 392.

[129] Stephens v. Board of Education School District No. 5 429 N.W.2d 722 (Neb. 1988)

[130] Ross v. Springfield School District No. 19, 691 P.2d 509 (Ore.App. 1984).

[131] McCarthy and Cambron-McCabe, 394.

[132] Black's Law Dictionary, 6th Ed. (St. Paul: West, 1990), 617.

[133] Alexander and Alexander, 586.

[134] Adams v. State Professional Practices Council, 406 So.2d 1170 (Fla.App. 1981).

[135] Startzel v. Commonwealth Department of Education, 562 A.2d 1005 (Pa.Cmwlth.Ct. 1989).

[136] Russell County School Board v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989), 606.

[137] Ibid.

[138] Alexander and Alexander, The Law of Schools, Students & Teachers, 287.

[139] McCarthy and Cambron-McCabe, 275.

[140] Alexander and Alexander, 287.

[141] Pickering v. Board of Education, 391 U.S. 563 (1968), 564.

[142] Ibid., 568.

[143] Ibid., 574.

[144] Ibid., 574.

[145] Connick v. Myers, 461 U.S. 138 (1983), 147-148, 152.

[146] Ibid., 146.

[147] Johnson v. Butler, 433 F.Supp. 531 (W.D. Va. 1977), 534.

[148] Ibid.

[149] Ibid., 536.

[150] Seemuller v. Fairfax County School Board, 878 F.2d 1578 (4th Cir. 1989), 1583.

[151] Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir. 1987), 1080.

[152] Daniels v. Quinn, 801 F.2d 687 (4th Cir 1986), 690.

[153] Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1992), 159.

[154] Fischer, Schimmel and Kelly, 132.

[155] McCarthy and Cambron-McCabe, 285.

[156] Ibid.

[157] Alexander and Alexander, Law of Schools, Students, & Teachers, 293.

[158] Shelton v. Tucker, 364 U.S. 479 (1960).

[159] Baggett v. Bullitt, 377 U.S. 360 (1964), Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 207 (1971).

[160] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971).

[161] Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), 182.

[162] Palmer v. Board of Education of the City of Chicago, 603 F.2d 1271 (7th Cir. 1979), 1274.

[163] Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), Griswold v. Connecticut, 381 U.S. 479 (1965).

[164] Ponton v. Newport News School Board, 632 F.Supp. 1056 (E.D. Va. 1986), 1069.

[165] O'Connor v. Ortega, 480 U.S. 709 (1987), 734, 736.

[166] Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford, 510 N.E.2d 325 (1987).

[167] Independent School District No. 1 of Tulsa County v. Logan, 789 P.2d 636 (1989), Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989).

[168] Schneeweis v. Jacobs, 771 F.Supp. 733 (E.D. Va. 1991), 738.

[169] 42 U.S.C. Section 2000e-2(a)(1).

[170] 29 C.F.R. Section 1604.11(a) (1985.) cited in M. David Alexander and Mary F. Hughes, "Sexual Harassment in the Workplace," in The Principal's Legal Handbook, ed. William E. Camp, Julie K. Underwood, Mary Jane Connelly and Kenneth E. Lane (Topeka: National Organization on Legal Problems of Education, 1993), 148.

[171] Ibid.

[172] Ibid., 149.

[173] Ibid.

[174] Ibid.

[175] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), 60.

[176] Alexander and Hughes. See also, Donald F. Austin, "Handling Allegations of Sexual Harassment," Paper presented at the annual convention of NOLPE November 1992; Ernest Calderon, "Sexual Harassment in the Workplace and Franklin v. Gwinnett County Public School District," Paper presented at the annual convention of NOLPE, November 1992; John Lewis, Susan Hastings, and Anne Morgan. Sexual Harassment in Education. Kansas: National Organization on Legal Problems of Education, 1992.

[177] Va. Code Ann., Section 22.1-315 (1993).

[178] Ibid.

[179] Opinions of the Attorney General of Virginia, 1982-1983 Report of the Attorney General, 420.

[180] Va. Code Ann., Section 22.1-315. (1993).

[181] Ibid.

[182] Ibid.

[183] Wilkinson v. School Board of the County of Henrico, 566 F.Supp. 766 (E.D. Va. 1983), 773.

[184] Schneeweis v. Jacobs, 771 F.Supp. 733 (E.D. Va. 1991), 737.

[185] Va. Code Ann., Section 22.1-306 (1993).

[186] Ibid.

[187] Ibid., Section 22.1-306.

[188] Va. Code Ann. Sections 22.1-308 through 22.1-313 (1993).

[189] Ibid., Section 22.1-308.

[190] Ibid.

[191] Ibid., Section 22.1-310.

[192] Russell County School Board v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989), 604.

[193] Va. Code Ann., Section 22.1-313 (1993).

[194] Ibid.

[195] Russell County School Board v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989), 603-604.

[196] Lee v. Albemarle County School Board, 648 F.Supp. 744 (W.D. Va.. 1986), 748.

Chapter 4

Legal Responsibilities Regarding Students

Since 1869, the Virginia Constitution has mandated that the citizens of Virginia be provided with a system of public schools.[1] Specifically, Article VIII, Section 1, of the Virginia Constitution states that the Virginia General Assembly "shall provide for a system of free public and secondary schools for all children of school age [and] ensure that an educational program of high quality is established and continually maintained." Furthermore, the General Assembly "has the power to enact any legislation in regard to the conduct, control, regulation of the public free schools which does not deny to the citizen the constitutional right to enjoy life and liberty, to pursue happiness and to acquire property."[2]

Compulsory Attendance

Every state has some type of compulsory education statute. The Supreme Court recognized a state's interest in compulsory education in order to "prepare citizens to participate effectively and intelligently in our political system [and to] prepare individuals to be self-reliant and self-sufficient participants in society."[3] In Rice v. Commonwealth, 49 S.E.2d 342 (1948), the Supreme Court of Appeals of Virginia stated:

> The legitimate interest of the State in the welfare and education of its children is universally recognized . . . There is nothing which contributes more to the development of the highest type of citizenship than the intelligence, training, and character-building which are the products of our

> schools . . . to accomplish this end the State may resort to what is generally referred to as compulsory education or school attendance of children.[4]

Virginia law mandates compulsory school attendance for "any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday . . ."[5] Virginia law further states that compulsory school attendance may be satisfied by attendance at a public school; a private, denominational or parochial school; or by home instruction.[6] Also, any person who violates Virginia's compulsory education laws will be guilty of a Class 4 misdemeanor[7] and the commonwealth attorney in the school division has jurisdiction to prosecute such cases.[8] Additionally,

> Every teacher in every school in the Commonwealth shall keep an accurate daily record of attendance of all children in accordance with regulations prescribed by the Board of Education. Such record shall, at all times, be open to any officer authorized to enforce the provisions of this article who may inspect or copy the same and shall be admissible in evidence in any prosecution for a violation of this article . . . [9]

Virginia's compulsory attendance law provides a clear distinction for exempting children from attending the public schools. Section 22.1-254.1 of the Code states the requirements for home instruction, specifically, that a parent may elect to instruct his/her child at home if he/she:

> (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Superintendent of Public Instruction; or (iv) provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adapted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.[10]

Virginia law provides exemption from its compulsory attendance requirement based on religious grounds. Virginia school boards "shall excuse

from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school."[11] According to the Virginia Attorney General, the religious belief exception to the compulsory school attendance law "was enacted by the General Assembly to assure that the free exercise of religion, . . . is respected by government. . . . [however a] religious objection to public school attendance does not automatically constitute a 'bona fide religious belief.'"[12] The Opinion also states that "it is the responsibility of the local school board to make the determination whether the religious belief exception in [the applicable statute] applies to the facts of a particular case."[13]

The meaning of the statute was the subject of litigation in two recent cases. In the first case, Johnson v. Prince William County School Board, 241 Va. 383, 404 S.E.2d 209 (1991), a school board denied the Johnsons" request for a religious exemption from compulsory school attendance for their two sons, aged five and six. The Virginia Supreme Court upheld the board's decision on two key points, 1) the Johnsons did not qualify as approved tutors to provide home instruction (neither parent had a baccalaureate degree); and, 2) the law does not require a school board to state its reasons for denying a religious exemption. The Code clearly states that the term "'bona fide religious training or belief' does not include essentially political, sociological or philosophical views or a merely personal moral code."[14] Here the Court stated:

> From reading the testimony given by the Johnsons at the school board hearing, we have great difficulty in ascertaining what their beliefs really are, let alone in discerning whether, 'by reason of bona fide religious training or belief, [they are] conscientiously opposed to attendance at school.'[15]

The Fourth Circuit ruled on the issue of balancing religious beliefs against the state's compulsory attendance law in Duro v. District Attorney,

Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983) In this case, parents refused to have their children enroll in a public school or in the available nonpublic school based on their belief that "exposing [their] children to others who do not share [their] religious beliefs would corrupt them."[16] The parents alleged that North Carolina's compulsory school attendance law violated the First and Fourteenth Amendments. The Court concluded:

> Despite, Duro's sincere religious belief, we hold that the welfare of the children is paramount and that their future well-being mandates attendance at a public or nonpublic school. Furthermore, we conclude that North Carolina has demonstrated an interest in compulsory education which is of sufficient magnitude to override Duro's religious interest.[17]

Maintenance of Order and Discipline in the Schools

Reasonable Rules and Regulations

According to Holiday, "the right of public school attendance is necessarily conditioned on compliance by the student with the reasonable rules and requirements of the school authorities."[18] Courts in Virginia and throughout the nation have firmly established not only the authority, but also, the duty of school personnel to maintain "an orderly and responsible learning environment."[19] In 1926, the Virginia Supreme Court stated, "the county school board [has] the power to make local regulations for the conduct of the schools and for the proper discipline of students. . . ."[20] The same Court further added that "in the conduct of the public schools it is essential that power be vested in some legalized agency in order to maintain discipline and promote efficiency . . . The only concern of the court is the reasonableness of the regulation promulgated."[21] In Bernstein v. Menard, 557 F.Supp. 90 (E.D. Va. 1982), the Court, stated that "no

schoolchild has a constitutional right to be free from discipline. Indeed, discipline in school is a boon, not a curse."[22]

In Pleasants v. Commonwealth, 214 Va. 646, 203 S.E.2d 114 (1974), the Supreme Court of Virginia designated the school principal, "as the duly authorized agent of the school board, required to supervise the teaching and instruction of the students and . . . charged with maintaining order and discipline in the school."[23] The Court further emphasized the principal's role to maintain discipline stating that the principal is "vested with the inherent power to revoke, for good cause, the right of any student to remain upon school property when that student, alone or in concert with others, disrupted regular school activities or maintenance of good order and discipline."[24] Furthermore, the principal's role is "not only [a] right, but [a] duty . . . to take reasonable measures to restore order so that the education process might continue."[25]

According to Virginia's Attorney General, school boards may use alternative methods of disciplining students, aside from the more stringent methods of suspension or expulsion which are discussed below. The alternatives include:

> requiring the offending student to work for the school. For example, if a student is unsubordinate, the student may be required to perform constructive work, such as shelving library books, repairing damaged textbooks, or picking up litter on the school grounds . . . the disciplinary 'work off' must not endanger the student's health or safety, be excessive to the infraction or unreasonable under the circumstances.[26]

Additionally, school boards also have legislative authority to adopt bylaws and regulations maintaining discipline of students, "including their conduct going to and returning from school."[27]

Suspension and Expulsion

If a student violates the rules, regulations and requirements established by school officials, the student may be punished with suspension or expulsion from school. Holiday remarks, "there is no controversy concerning expulsion as a method of punishment. Controversy exists only over the procedures used in deciding when this punishment may be used."[28] However, parents with children in Virginia's public schools are granted an opportunity to challenge disciplinary action as mandated in the Code which states, in part, "any parent, custodian, or legal guardian of a pupil attending the public schools . . . . who is aggrieved by an action of the school board may, . . . petition to the circuit court . . . to review the action of the school board."[29] The Code further states that "the action of the school board shall be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion."[30] The Virginia code specifically states that "pupils may be suspended or expelled from attendance at school for sufficient cause."[31]

The 1993 General Assembly enacted two new laws related to school disciplinary records as part of the Virginia School Crime and Violence Prevention Act. The first law states that "any school record related to disciplinary action taken against a student for violating school board rules or policies on school property or at school-sponsored events must be included in the student's scholastic record."[32] The second act mandates that before a pupil is admitted to a Virginia public school, the parent or guardian of the pupil is required to provide:

> A sworn statement or affirmation indicating whether the student has been expelled from school attendance at a private school or in a public school division of the Commonwealth or in another state for an offense in violation of school board policies relating to weapons, alcohol or drugs, or for the willful infliction of injury to another person.[33]

Fourteenth Amendment Responsibilities

As discussed in Chapter three concerning teacher's employment rights, the Fourteenth Amendment provides that government may not deprive a person of "life, liberty, or property without due process of law." Similar to the property right of continuing contract for Virginia educators, McCarthy and Cambron-McCabe state that "students have a state-created property right to attend school that cannot be denied without procedural requisites."[34] They further comment, "If this right to attend is withdrawn for disciplinary reasons, due process (as mandated by the Fourteenth Amendment) is required."[35]

Alexander and Alexander explain that there are two types of due process--procedural and substantive. If a state deprives a person of his/her life, liberty, or property, procedural due process requires that a "prescribed constitutional procedure must be followed", and substantive due process mandates that "the state must have a valid objective and the means used must be reasonably calculated to achieve the objective."[36] The Supreme Court commented, "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[37]

In several landmark cases, the Court has clearly established that students do not "shed their constitutional rights . . . at the schoolhouse gate,"[38] and "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[39] In West Virginia v. Barnette, 319 U.S. 624 (1943), the Court remarked:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly

> discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[40]

Procedural Due Process

The Supreme Court's landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), established that a student's interest and involvement in education is beyond a mere privilege, stating: "Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."[41] According to Curcio, "in applying disciplinary measures, educators may not deprive a student of his/her 'personal right' to a public education without according that student the appropriate procedural due process."[42] Daniel and Coriell opine that "procedural due process concerns the method or procedure by which decisions are made. Its central core is fairness."[43] La Morte further adds that "procedural due process . . . deals with the question of whether or not a person has been accorded fair and proper treatment or procedure . . ."[44]

In 1961, the Fifth Circuit Court of Appeals in Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) established judicial precedent that exclusion from school required due process. In this higher education case, the question before the Court was whether due process required notice and some opportunity for hearing before students could be expelled for misconduct. The Fifth Circuit Court stated:

> In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles

> of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense[45] (emphasis added).

After Dixon, the federal courts inconsistently applied the due process requirement enunciated by the Dixon Court until 1975. In 1975, the Supreme Court firmly settled students' rights to procedural due process in Goss v. Lopez, 419 U.S. 565 (1975). In Goss the Court noted that although there is no constitutional obligation to establish and maintain a public school system, in doing so, the state's authority to:

> prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. . . . the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[46]

Consequently, Goss specifically addressed due process requirements for short exclusions from school--suspensions of ten days or less. The minimum due process for short suspensions requires that "the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[47] The Court further commented that the minimum requirements to provide notice and a hearing are "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."[48] However, the Court was also very clear about stating that in a situation where a student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process [the student] may be immediately removed from school [with the required notice and hearing] "to follow as soon as practicable."[49]

A Virginia case applying the Goss mandate is found in Hillman v. Elliott, 436 F.Supp. 812 (W.D. Va. 1977). Here, a student challenged the school board's actions as violating his due process rights when he was suspended for three days for being disrespectful to a teacher and using abusive language to fellow students. The District Court reiterated Goss stating, "any time a child misses his classes, he is deprived of a learning experience that cannot be repeated. . . . therefore, due process is required in the suspension of this plaintiff."[50] In a meeting in the principal's office, the student, with his mother present, received notice of the charges and admitted to using abusive language to one student; thus, the Goss mandate of notice and opportunity to be heard were satisfied. The Court concluded that due process was afforded to the student and emphasized that "due process in the school setting does not have to adhere to prescribed patterns."[51] The Court noted that it is unnecessary for school systems to go beyond what is constitutionally mandated to ensure students' rights to due process.[52] The Court also remarked that having the principal act as the hearing officer did not violate due process guarantees.[53] To be denied due process, "prejudice by the principal stemming from a source other than knowledge of the case" must be shown.[54]

Regarding the suspension and expulsion of Virginia's public school students, and consistent with the Goss mandate, the Code mandates the following requirements:

> A pupil may be suspended for not more than ten school days by either the school principal, any assistant principal or in their absence any teacher. . . . [after] giving the pupil oral or written notice of the charges against him and, if he denies them, an explanation of the facts as known to school personnel and an opportunity to present his versions of what occurred.[55]

However, if a student's presence "poses a continuing danger to persons or property or an ongoing threat of disruption, the pupil may be removed from school immediately and the notice, explanation of facts and opportunity to present his version given as soon as practicable thereafter."[56] A suspension action, if requested, may be reviewed by the division superintendent "to confirm or disapprove such action based on an examination of the record of the pupil's behavior."[57] This decision may be appealed to the school board.

Regarding suspensions for more than ten days and expulsions, Virginia students must be provided with written notice of the suspension or expulsion indicating the reasons for the action and informed of the student's right to a school board hearing.[58] A suspension hearing may be before the superintendent or his/her designee; however, an expulsion hearing can only take place before the local school board, either in toto or in committee and, in both instances, students have the right to an appeal before the full school board.[59] In a 1993 amendment to the Code, the General Assembly mandated school boards to develop additional guidelines governing student conduct policies.[60]

The due process rights of handicapped students will be discussed in Chapter five.

Substantive Due Process

Substantive due process is concerned with the reasonableness of governmental laws, rules, regulations and policies. To satisfy substantive due process requirements, Alexander and Alexander remark, "if a state is going to deprive a person of his life, liberty, or property, the state must have a valid objective and the means used must be reasonably calculated to achieve the objective."[61] Students may argue that their right to substantive due process was

denied if they show that a school board's decision was arbitrary or capricious.[62] For example, while excessive corporal punishment may violate substantive due process rights,[63] the same rights are not given for participation in interscholastic athletics.[64]

In a Virginia case, Bernstein v. Menard, 728 F.2d 252 (4th Cir. 1984), the Fourth Circuit Court awarded attorneys' fees to the school district after finding that a parent's suit against the school district over her son's demotion in band was "frivolous and vexatious."[65] The Court rejected the notion that a student has a constitutionally protected right to play a trumpet in a high school band.

Due Process: Academic Sanctions

In Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978), a procedural due process case involving the dismissal of a medical school student, the Supreme Court remarked: "Courts are particularly ill-equipped to evaluate academic performance [and advise] against any such judicial intrusion into academic decisionmaking."[66] Applying Horowitz, the Fourth Circuit decided a Virginia case concerning an issue akin to academic sanction. In Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981), a group of parents of second grade students filed a complaint after only one student, in a class of twenty-two students, was promoted to the third grade because the other twenty-one students failed to demonstrate the required reading level for promotion. The parents alleged that retaining the students "damaged them by delaying the completion of their education and their obtaining employment. . . . burdening them with the stigma of failure."[67] The Court stated that judicial review is inappropriate concerning "decisions by educational authorities which turn on evaluation of the academic performance of a students as it relates to promotion . . ."[68]

Regarding the legal issues concerning academic sanctions, Alexander and Alexander remark that "courts confine themselves to determining whether due process is given, whether discrimination exists, or if a student suffers ill treatment from arbitrary or capricious action by the school."[69] For example, a school district generally can not withhold a diploma[70] or reduce grades[71] as disciplinary measures.

Equal Protection

The significance of the equal protection clause of the Fourteenth Amendment was discussed with respect to teachers' rights in Chapter three. Like all other constitutional rights, students also are protected by the equal protection provision of the Fourteenth Amendment which states, in part, that ". . . No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

According to Imber and van Geel, "a typical equal protection case begins with an individual or group complaining that they have been denied a benefit or suffered a burden unfairly."[72] Such was the situation which led to the historic desegregation case, Brown v. Board of Education, 347 U.S. 483, (1954). In the four decades after Brown, courts have continuously addressed public school actions in light of the equal protection clause. La Morte opines:

> From an educational standpoint, the Equal Protection Clause represents the legal basis for prohibiting unreasonable classification. Although some type of classification is often necessary in laws, rules, or policies, arbitrariness may not play a part. Methods of classifying students in public school have often been based on such factors as sex, age, intelligence, marital status, parents' residence, race, pregnancy or motherhood, conduct, test scores, and wealth of their community.[73]

In determining equal protection violations, courts apply a two-level test. According to La Morte:

> One is a 'rational basis' test, which is employed when a 'fundamental interest' is not involved. Under this test, there must be a sound reason for the classification, and all those classified alike must be treated as uniformly as possible. . . . the burden of proof is on the complainant to demonstrate that a challenged law or policy has no rational basis to achieve a legitimate state objective. . . . A strict scrutiny test is applied when a 'fundamental interest' or 'suspect classification' is involved. A presumption of constitutional validity disappears when a classification is 'suspect.' Examples of such classification include race, national origin, alienage, indigency, and illegitimacy. . . . sex is not considered a suspect classification[74] (emphasis added).

In addition to the equal protection clause, there are federal and state statutes which protect students from various forms of discrimination on the basis of race, sex, national origin, age, religion, alienage, and disability. Title VI of the Civil Rights Act of 1964 addresses the treatment of racial and ethnic minority group students and states, in part, "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[75] Title IX of the Education Amendments of 1972 prohibits gender discrimination in institutions with federally assisted educational programs.[76] The Equal Educational Opportunities Act of 1974 guarantees all students equal educational opportunity with regard to race, color, gender or national origin. Section 504 of the Vocational Rehabilitation Act of 1973 prohibits discrimination against otherwise qualified handicapped individuals in programs receiving federal financial assistance; and the Individuals with Disabilities Education Act of 1990 (IDEA) mandates a free appropriate education for children with disabilities.

The following cases illustrate litigation involving equal protection challenges based on student classifications.

Discrimination in Extracurricular Activities

As previously stated, Courts are divided on the question of whether student participation in extracurricular activities is a protected property interest which entitles the activity to Fourteenth Amendment due process and equal protection guarantees. The Fourth Circuit upheld the dismissal of an equal protection claim brought by a female student who was cut from a high school varsity baseball team in Croteau v. Fair, 686 F.Supp. 552 (4th Cir. 1988). This Virginia case of sex discrimination required the plaintiff to demonstrate that the discrimination was intentional.[77] The Court commented that the student "failed to prove that the decision to cut her from the varsity baseball team was tainted or motivated, in whole or in part, by gender bias. . . . the decision to cut her was made in good faith and for reasons unrelated to gender."[78] The Court further stated: "There is no constitutional or statutory right to play any position on any athletic team. Instead, there is only the right to compete for such a position on equal terms and to be free from sex discrimination in state action. Plaintiff was afforded this right."[79]

In an earlier Virginia case involving a private school, Denis J. O'Connell High School v. Virginia High School League, 581 F.2d 81 (1978), *cert denied*, 440 U.S. 936 (1979), the Fourth Circuit upheld the exclusion of a parochial school from membership in the state's athletic association (Virginia High School League). The Court dismissed the equal protection violation and held that the

exclusion was rationally related to the state's legitimate interest in deterring abuse of student athletes.

Title IX

Sexual harassment of students in a federally aided educational program is a form of gender discrimination and is regulated by Title IX of the Education Amendments of 1972 Act.[80] Title IX states, in part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."[81]

Prior to 1992, Title IX provided "only injunctive relief to stop discriminatory practices, allowing only 'equitable' relief to make the victim whole (e.g., back pay)."[82] First and Rossow opine that "the lack of a real remedy - a money remedy - has kept [Title IX] from being a major deterrent to sex discrimination."[83] However, in Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992), a landmark decision, the Supreme Court strengthened Title IX protections and authorized monetary damages for Title IX violations.

In this case, a female student alleged that she was sexually harassed by a teacher over a period of years; that the school district was aware of and investigated her claims, but without action to end the harassment. The Court explained that traditional Title IX remedies were not available in this case because the student no longer attended school in the district and the teacher no longer was employed in the school. The Court noted that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal

statute."[84] The Court concluded that "a damages remedy is available for an action brought to enforce Title IX."[85] Consequently, Splitt remarked, "Sexual harassment and other forms of sex-based discrimination by school employees are not only wrong and unlawful but are now likely to be expensive as well."[86] Additionally, several authorities further comment that the Court's ruling in Franklin will encourage a surge of litigation against school districts.[87]

First Amendment Responsibilities

The First Amendment provides that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." According to McCarthy and Cambron-McCabe, "free expression rights are perhaps the most preciously guarded of individual liberties."[88] Although judicial restraint vis-a-vis judicial interference is the rule concerning public school operation, the Supreme Court notes that the judiciary has "not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief."[89]

Freedom of Speech

There is general agreement that school officials may and indeed have a duty to implement reasonable rules to ensure orderly and efficient school operation. The legal term describing the relationship between school authority and student behavior is the term *in loco parentis*--in place of the parent. Prior to 1969, school officials exerted "almost unlimited authority in disciplining children."

in the school setting[90] Although *in loco parentis* has been modified by the courts, Alexander and Alexander remark that the doctrine remains "an active legal concept, . . . [with] new and more definitive meaning."[91] The change in the way *in loco parentis* applies to public school began in 1969.

In 1969, the Supreme Court handed down the landmark decision, Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The significance of Tinker is found in the decision's frequently quoted statement:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teacher and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[92]

In Tinker, students wore black armbands to school as a symbolic antiwar protest against American's involvement in the Vietnam war. Prior to the incident, but aware of the protest, school officials established a policy prohibiting the armbands. Students wore the armbands and were suspended from school. The Court stated that "school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[93] The Court further remarked that a school cannot justify prohibiting "a particular expression of opinion" in an attempt "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[94] Consequently, prohibiting such actions without evidence that the conduct would cause "material and substantial interference with schoolwork or discipline is not constitutionally permissible."[95]

While Tinker established that students have constitutional rights, the current picture has changed somewhat and must be examined in light of the Supreme Court's two significant student rights' decisions in the 1980s, Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) and Hazelwood School

District v. Kuhlmeier, 484 U.S. 260 (1988). Together, the judicial principles from Bethel and Hazelwood increased the authority of school officials to impose time, place, and manner restrictions over student expression. Additionally, McCarthy remarks that the impact of Bethel and Hazelwood reaches "beyond cases dealing with school-sponsored student expression to decisions involving student attire, nonschool student publications, curriculum censorship, and academic freedom."[96]

At issue in Bethel was the alleged violation of a student's right to freedom of speech after the student was suspended for delivering a nominating speech in a school-wide assembly--a speech replete with numerous sexual metaphors. The Court upheld the suspension and made several observations regarding the degree of free speech guarantees available to students. The Court reiterated school board authority to: 1) determine the appropriateness of speech in the classroom or in school assembly;[97] 2) impose sanctions on the student for his lewd and indecent speech;[98] and, 3) act per the doctrine of *in loco parentis*, to protect students and teachers from exposure to sexually explicit, indecent, or lewd speech.[99]

The Court noted the differences between this case and Tinker, stating: "Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint."[100] Alexander and Alexander comment that "Bethel . . . provides more definition for student conduct than does Tinker, [and] represents somewhat of a retrenchment of pre-Tinker precedents where school boards were given much greater latitude in controlling student behavior."[101]

Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988) is a Virginia case concerning students' constitutional rights to symbolic speech. Similar to the banned armbands in Tinker, the banned symbol in Crosby was a high school mascot, a "Johnny Reb" cartoon. Here, responding to concerns from African American students who were offended by the mascot, the principal banned the symbol. Students protested the principal's action and were not appeased by the opportunity to choose another mascot. Students brought suit alleging the ban was in violation of their First Amendment rights.

The District Court dismissed the case as frivolous and awarded attorneys' fees to the principal. The Circuit Court reversed.[102] On remand, the District Court held for the principal, and students again appealed. The Circuit Court reaffirmed the Tinker doctrine that students have constitutional rights to freedom of speech, however "school officials need not sponsor or promote all student speech."[103] The Court further commented:

> school authorities are free to disassociate the school from such a symbol because of educational concerns. Here, Principal Holsinger received complaints that Johnny Reb offended blacks and limited their participation in school activities so he eliminated the symbol based on legitimate concerns. . . . this decision has an educational component, we will not interfere, and it is clear that educational concerns prompted Holsinger's decision.[104]

Freedom of Press

In Hazelwood the issue centered around a high school principal's decision to remove several pages from the school newspaper. The newspaper was a project of the school's journalism class. The deleted pages contained articles on the impact of divorce on students at the school and students' experiences with pregnancy. Student staff members of the paper brought suit alleging that their First Amendment rights had been violated. The Court

concluded that the students' First Amendment rights were not violated and stated:

> We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.[105]

The Hazelwood Court ruled that the school newspaper was not a public forum, but "a supervised learning experience for journalism students."[106] Thus, as a closed forum, "school officials were entitled to regulate [its] contents in any reasonable manner."[107] The Court emphasized the difference between the issue in Tinker of censoring a student's personal expression that happened to occur on the school premises from school sponsored activities such as publications and theatrical productions.[108] On the latter point, the Court stated that school officials are entitled to exercise greater control over forms of student expression that appear to have the school's stamp of approval. The Court remarked:

> A school must be able to set high standards for the student speech that is disseminated under its auspices -- standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real world' . . . a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, . . . A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.[109]

The Fourth Circuit addressed student rights to freedom of the press, particularly regarding distribution of student publications, in several cases during the 1970s without benefit of Hazelwood.[110] Currently, Hazelwood establishes the standard for judicial review of all curriculum-related decisions by school boards.[111] However, while McCarthy remarks that Hazelwood "changed the

landscape of first amendment litigation in public school controversies,"[112] Alexander and Alexander caution that even with the Hazelwood standard, "school officials do not have an entirely free hand in censorship of student newspapers."[113] The Hazelwood Court was very clear that "when the decision to censor . . . student expression has no valid educational purpose . . . the First Amendment [requires] judicial intervention to protect students' constitutional rights."[114]

Underground newspapers

The leading case from the Supreme Court regarding underground newspapers is from higher education, Papish v. Board of Curators of University of Missouri, 410 U.S. 667 (1973). In Papish, the Court held that it was unconstitutional to expel a graduate student for distributing an independent newspaper with an offensive front page cartoon of a policeman raping the Statue of Liberty. The Papish Court stated, "The mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name of 'conventions of decency.'"[115] Clearly, the environment and degree of authority over students' free expression rights differs between higher education and high school; moreover, according to the Tinker Court, First Amendment rights of public school students are not "co-extensive with those of adults"[116] attending a postsecondary institution.

Litigation involving underground newspapers has often challenged the constitutionality of prior review policies. Prior review policies require school administration review prior to publication or distribution of underground publications. In Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988), the Ninth Circuit Court of Appeals held: 1) school district policy requiring prior review of all

nonschool publications was overbroad; and, 2) school district's suspension of a student for distributing the unapproved newspaper violated the student's first amendment rights. In contrast, the Eighth Circuit in Bystrom v. Fridley High School, 855 F.2d 855 (8th Cir. 1988), upheld the constitutionality of a school district's prior review guidelines. However, the Bystrom Court emphasized that the guidelines could not be used "to suppress or punish speech simply because they disagree with it, or because it takes a political or social viewpoint different from theirs, or different from that subscribed to by the majority of the adults within any given school district. . . ."[117]

Since schools are generally considered as nonpublic forums; and, "speech on such property can be prohibited in order to achieve governmental purposes,"[118] schools may impose time, place, and manner regulations which are content-neutral on nonschool-sponsored publications.

Freedom of Religion

Included in the First Amendment is the provision that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . " According to the Virginia Attorney General, Freedom of religion principles in the Federal Constitution are embodied in the provisions of the Constitution of Virginia and the Virginia Act for Religious Freedom.[119]

In 1994, the General Assembly extended the religious rights of Virginia's public school students. The extension is an Amendment to the Code relating to student-initiated prayer, which states:

> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil not be subject to pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, consistent with

> constitutional principles of freedom of religion and separation of church and state, students in the public schools may voluntarily engage in student-initiated prayer.[120]

To help the new law withstand constitutional challenges, the legislature also passed an additional law relating to guidelines for constitutional compliance for student prayer, which states, in part:

> To promote compliance with constitutional restrictions as well as observance of constitutional rights, the Board of Education shall, in consultation with the Office of the Attorney General, develop guidelines on constitutional rights and restrictions related to prayer and other religious expression in the public schools. The Board's guidelines shall include, . . . the initiative and involvement of local school boards, individual schools, administrators, teachers, and students; the use of school facilities and equipment, including audio systems, and class time for prayer or other religious expression; and relevant state and federal constitutions concerns, such as freedom of religion and speech and separation of church and state.[121]

The Supreme Court first addressed the issue of religion and the public schools in the landmark decision, Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947). Here, the Court applied the "child benefit theory"[122] and reasoned that providing transportation services benefited individual students and not the religious purposes of the parochial schools. In Everson, the Court interpreted the First Amendment stating:

> The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'[123]

Beginning with its ruling in Everson, the Supreme Court left intact Jefferson's metaphor establishing a wall of separation between church and state. For example, landmark decisions from the Court prohibited public schools from 1) sponsoring daily prayer[124] and Bible reading[125]; 2) posting the Ten Commandments in public school classrooms[126]; and, 3) sharing public school facilities for Title I instruction of parochial school students.[127] The Court also invalidated state statutes in Alabama requiring a daily period of silent mediation or voluntary prayer;[128] in Louisiana mandating equal instruction in the teaching of both creation science and evolution;[129] and in Arkansas' anti-evolution law prohibiting the teaching of Darwinian theory.[130] In the aforementioned cases decided after 1971, the Supreme Court's decisions were based on a three-part test established in Lemon v. Kurtzman, 403 U.S. 602 (1971).

Since 1971, courts have employed the Lemon test as the benchmark in determining violations to the establishment clause. The three-part test requires that to avoid violating the Establishment Clause, a governmental policy or practice must: 1) have a secular legislative purpose; 2) have a principal or primary effect that neither advances or inhibits religion; and 3) not create excessive governmental entanglement with religion.[131]

In a Virginia case, Crockett v. Sorenson, 568 F.Supp. 1422 (W.D. Va. 1983), the District Court held that a Bible class program for fourth and fifth grade students in the public schools was a "religious activity which violates the Establishment Clause."[132] In this case, the Court remarked that "public schools may offer courses of Bible instruction provided they are presented in an objective manner."[133] Furthermore, the Court provided guidelines detailing the manner in which the Bible could be taught in the public schools.[134]

Release Time for Religious Instruction

In two significant decisions, the Supreme Court provided clear doctrine regarding release time for religious instruction in the public schools. In McCollum v. Board of Education, 333 U.S. 203 (1948), the Court ruled that religious instruction in the public schools by members of the clergy during the school day violated the establishment clause. In 1952, the Supreme Court upheld a release program for religious instruction in Zorach v. Clauson, 343 U. S. 306 (1952) where students were dismissed from the public school during the day to attend religious instruction at religious centers outside the public school facility. Here, the Court found no constitutional violation in the public school accommodating religion as opposed to promoting religion.

In a release-time program involving a Virginia school district, Doe v. Shenandoah County School Board, 737 F.Supp. 913 (W.D. Va. 1990), the constitutionality of the school board's practice in accommodating a release-time program for religious instruction was challenged as violating the First Amendment. Here, students, with parental permission, were released to attend religious instruction outside the public school building in privately owned school buses parked on the road directly in front of the school's main entrance.[135] A private sectarian organization provided the instruction. However, school officials were actively involved in the program: 1) the instructors entered the school building to recruit students; 2) an instructor, on one occasion, removed an entire class to the bus for recruitment purposes; 3) classroom teachers assisted and encouraged students to complete program enrollment cards; and, 4) the instructors entered the classrooms and escorted enrolled students to the bus.[136]

In its defense, the school board argued that although the practices occurred, some of the activities were against board policy; consequently, had the board been aware of the violations, corrective measures would have been in place. The Court did not embrace this defense, stating that the board "had indications that there were constitutional problems with their policy, as well as violations of the policy, for some time" without taking any corrective actions.[137] The Court emphasized the role teachers played exerting pressure on students to participate in the program.[138] The Court concluded:

> While it is true that some of the activity complained of is indeed prohibited by the Board's policy, and the Board has indicated its willingness to ensure strict compliance with the policy in the future, there is before the court, nonetheless, evidence of serious violations of that policy in the past. The Board may abide by its policy; however it appears to the court that activities forbidden by the Constitution are allowed under the policy and the court shall enjoin those activities.[139]

Ceremonial Prayers and Invocations

Several lawsuits have been brought challenging the constitutionality of religious exercises at public school ceremonies. Even with the Supreme Court's historic decision in Lee v. Weisman, 112 S.Ct. 2649 (1992), the lower courts continue to rule inconsistently regarding such practices in public schools.[140]

The fate of the Lemon test was at stake in 1992 when the High Court decided to review Lee v. Weisman.[141] However, the Court let the test stand while adding another dimension to Establishment Clause analysis. In Lee, the Court held that public school graduation prayers violated the Establishment Clause. The issue in Lee stemmed from a parent's objection to a school district's policy to have a member of the clergy deliver a prayer at his daughter's graduation. Applying the Lemon test, the District Court held the practice in violation of the Establishment Clause-- specifically offending the second prong of

the test by promoting religion.[142] On Appeal, the First Circuit affirmed the District Court's decision holding that the practice violated all three prongs of the Lemon test.[143] The school district appealed to the Supreme Court. In its 5-4 ruling, upholding the lower court's conclusions that graduation prayers violated the Establishment Clause, the majority Court neither applied nor abandoned the Lemon test. The Court focused its review on the coerciveness[144] of the school's action. The majority commented: "A school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students . . . This pressure, though subtle and indirect, can be as real as any overt compulsion."[145]

The Court examined the school district's pervasive role including: 1) deciding to have the invocation or benediction; 2) selecting the speaker from the clergy; 3) providing guidelines for the prayer; and, 4) supervising the ceremony. The Court reasoned that while students may choose not to pray, the practice is not free from the limitations of the Establishment Clause: "The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid."[146]

The following two cases illustrate the inconsistent application of Lee in the lower courts. In the first commencement prayer case decided after Lee, Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), the Fifth Circuit upheld student-initiated prayer at graduation. The Court concluded that none of Lee's three elements of coercive effect (direction, religiosity, participation) existed in the student-initiated practice stating that the

graduation prayers as proposed in the school district's policy "do not unconstitutionally coerce objectors into participation."[147]

In contrast to the Fifth Circuit's decision in Jones, the District Court in Virginia has clearly enunciated that prayer at Virginia public school graduations violates the Establishment Clause.[148] In this recent case, Gearon v. Loundon County School Board, (1993), the constitutionality of allowing graduation prayers at four county high schools in Virginia was challenged. School officials, relying on Lemon, Lee, and Jones, contended that the student-initiated and student-led graduation remarks would pass constitutional muster; the Court disagreed.

Applying the Lemon Test, the Court (in direct contrast to the Fifth Circuit's reasoning in Jones) commented that the First Amendment is offended "regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks."[149] The Court dismissed the student-initiated claim by comparing the validity of the student vote with a vote to exclude a certain race from the graduation ceremonies stating that "the notion that a person's constitutional rights may be subject to a majority vote is itself anathema. . . . To be excluded from graduation ceremonies because of one's religion or lack of religion is not a great deal different."[150]

The Court reasoned that the principals were intimately involved in the students' decisions to have graduation prayer by: 1) initiating a mandatory senior class meeting to vote on the issue; 2) reviewing the remarks prior to the ceremony, and 3) preparing a standard ballot for the vote.[151]

Upon reviewing each of the four graduation remarks,[152] the Court concluded that not only did the remarks "advance the religion of those who believe in a deity at the expense of non-believers, Jews, or other non-Christians,"

but also, the remarks "effectively excluded Jews or other non-Christians, thus inhibiting their religion."[153]

Use of Public School Buildings by Church Groups

In a unanimous decision at the end of the 1992-1993 term, the Supreme Court established the precedent in determining the use of public school facilities by church groups. The case was Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993). At issue in this New York case was a school district's policy limiting building access to social, civic, or recreational uses and use by political organizations.[154] By statute, New York law authorized local school boards to adopt reasonable regulations regarding after-hours use of school property except for meetings for religious purposes. The controversy in Lamb's Chapel surrounded the school district's refusal to allow a local church to use school facilities to hold a public showing of a film series dealing with family and child-rearing issues. The church filed suit, alleging the denial amounted to First Amendment violations. Both the district court and the Second Circuit Court of the Appeals found for the church; however, the Supreme Court reversed both decisions.

The Court stated that the district's policy denying Lamb's Chapel's films based on "the fact that the presentation would have been from a religious perspective" was invalid.[155] The Court explained:

> The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. . . there would have been no danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.[156]

The Court reasoned that if public schools permit after school use of their facilities by some community groups, they cannot prohibit such use by religious groups. Public forum analysis, discussed earlier regarding student publications, prohibits viewpoint discrimination as violative of free speech guaranteed by the First Amendment.

The Fourth Circuit, in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), applied public forum analysis in a Virginia case similar to the controversy in Lamb's Chapel. The issue here concerned a school board regulation that permitted a broad range of community groups to meet in its schools. Churches and religious groups are entitled to the same rental rate as all other groups for the first five rental years; however, after five years, churches pay increasingly higher rates.[157] Fairfax Covenant Church rented the county's school facilities for over ten years.

The church brought suit alleging that the rent differential applicable to religious organizations violated the free speech clause of the First Amendment. The school board agreed that it had created a public forum by opening its facilities to various community groups.[158] However, the board defended its rental fee regulation arguing that "long-term or permanent use by a church of public school facilities runs afoul of the Establishment Clause."[159] The Court disagreed. In its analysis, the Court concluded that the school board 's rental regulation "discriminates against religious uses of the School Board's public forum, [and] violates the Free Speech and Free Exercise Clause of the First Amendment."[160]

Equal Access Act and Voluntary Student Religious Meetings

The Equal Access Act was ratified by Congress in 1984. The Act applies to public secondary schools that receive federal funds and maintain a limited open forum. The Act prohibits such schools from denying "access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[161] According to the Act, a limited open forum exists when a "school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[162] The Supreme Court settled the question concerning the constitutionality of the Equal Access Act in Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

In Mergens, a group of students were denied permission to form an after-school Christian club--a club, they contend, like any of the other thirty clubs officially recognized and sanctioned by the school administration.[163] The students brought suit alleging that the school's refusal to permit the club to meet violated the Equal Access Act and denied them their First and Fourteenth Amendment rights to freedom of speech, association, and the free exercise of religion.[164] The school district argued that the Equal Access Act did not apply to its schools, and that, "if the Act did apply, it violated the Establishment Clause of the First Amendment and was therefore unconstitutional."[165]

The Court concluded that the Equal Access Act does not violate the Establishment Clause and that the school district's actions violated the Act.[166] The Court interpreted the phrase "noncurriculum related student group" stating that the term:

> is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[167]

In its analysis, the Court stated that among the existing student clubs there were noncurriculum related student groups.[168] Thus, the school had created a limited open forum within the meaning of the Act, and the school was "prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time."[169] In interpreting the Act, Mergens reiterated the school's authority to:

> structure its course offerings and existing student groups to avoid the Act's obligations, . . . to prohibit meetings that would 'materially and substantially interfere with the orderly conduct of education activities within the school.' . . . 'to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.'[170]

Other Legal Responsibilities Towards Students' Right of Expression

Hair Length Regulations

Controversies concerning student appearance, according to Alexander and Alexander, rest on several legal issues including First Amendment freedom of speech; Fourteenth Amendment due process and equal protection guarantees; the Ninth Amendment; and federal Civil Rights Acts.[171] Valente notes that while the Supreme Court has not addressed the issue of student appearance, conflicting rulings are found in the circuit courts. The Fourth Circuit ruled on the issue of hair length regulations in two cases finding "it constitutionally impermissible for public schools to impose 'hair codes' on their students."[172] In

the first case, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972), the Court stated "We think the proof of the disruptive effect of some students having long hair was insufficient to justify the regulation and its enforcement."[173] The Court further commented that the school's justification of the regulation based on discipline and safety concerns could be served with "faculty leadership in promoting and enforcing an attitude of tolerance."[174] While the Court acknowledged that hair length may be symbolic speech entitled to First Amendment protection, here, the Court stated: "We prefer in this case to treat their right to wear their hair as they wish as an aspect of the right to be secure in one's person guaranteed by the due process clause."[175]

At issue in the second case, Long v. Zopp, 476 F.2d 180 (4th Cir. 1973) was a football coach's denial of an athletic letter and invitation to athletics banquet to a player who allowed his hair to grow beyond the coach's prescribed length. The Court cited Massie as controlling and remarked that "Awards, properly earned . . . cannot be used as instruments to enforce compliance with a 'hair code', for the enforcement of which there is no compelling necessity."[176]

Dress Regulations

In Broussard v. School Board of the City of Norfolk, 801 F.Supp. 1526 (E.D. Va. 1992), a twelve year-old, seventh grade student was suspended for refusing to change out of a T-shirt with the words "Drugs Suck!" on the front of the shirt. The student was also given options of wearing the shirt on the wrong side or borrowing another student's shirt. The student refused to comply with any of the requests. Consequently, she was suspended from school, and she and

her parents filed a civil action in District Court alleging that the daughter's rights to due process and free speech were violated by school officials.

The District Court held that the one day suspension did not violate the student's due process and free speech rights. During the trial, expert testimony was presented by both the sides concerning the interpretation of the etymology and meaning of the word "suck."[177] The Court concluded that regardless of the anti-drug message, "a reasonable middle school administrator could find" the word "offensive and vulgar to many people, . . . [thus] the use of the expression under these circumstances [imprinted on a student's T-shirt] in this school was disruptive."[178]

The Court stated that the school met the Tinker requirements.[179] However, in its analysis, the Court relied on the principles in Fraser that defined the school's authority to establish free speech boundaries, stating "Speech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation."[180] The Court found that the school administration's action was "a permissible decision . . . to regulate middle school children's language and channel their expression into socially appropriate speech."[181]

Fourth Amendment Responsibilities

Search and Seizure

The Fourth Amendment guarantees students protection against unreasonable searches and seizures. Specifically, the Fourth Amendment states, "The right of the people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause . . ." According to Alexander and Alexander, the Fourth Amendment, as it applies to student searches in public school, includes three important elements: 1) students have a right to privacy--to be secure in their persons, papers and effects and are protected against unreasonable searches and seizures; 2) any search must be specific as to what is sought in the search and the location where it is secreted; and 3) school officials need only have reasonable suspicion to conduct a legal search.[182]

Similar to the evolution of students' free speech rights, students' Fourth Amendment protections have evolved with judicial modification to the *in loco parentis* doctrine. Where the watershed decision in students' free speech rights started with Tinker, the leading decision affecting students' Fourth Amendment rights began in New Jersey v. TLO, 469 U.S. 325 (1985).

TLO provides specific guidelines for teachers and school administrators regarding searches. The TLO Court emphasized that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place."[183] In the school setting, the reasonableness standard must be balanced between the "schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."[184] Reiterating the special relationship between students and the public schools, the Court held that "school officials need not obtain a warrant before searching a student who is under their authority."[185] The Court opined:

> Requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. . . . The legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.[186]

The Court explained that reasonableness is determined by a

> twofold inquiry: first, one must consider whether the . . . action was justified at its inception, [and] second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[187]

A search will satisfy the TLO standard if a school official has reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or school rules.[188] Additionally, a search is "permissible in its scope when the measures adopted" while conducting the search are "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[189]

A Virginia case applying the TLO standard is Burnham v. West, 681 F.Supp. 1160 (E.D. Va. 1987). In West, middle school students brought suit against a principal and teachers alleging unconstitutional actions in three separate searches. The principal directed teachers to conduct the challenged searches on students' bookbags, pockets and pocketbooks for magic markers,[190] Walkmen or radios,[191] and marijuana.[192] Relying on TLO, the District Court concluded that the radio and marijuana searches violated the Fourth Amendment.

The principal and teachers argued that the searches did not fall under the purview of Fourth Amendment searches. The Court disagreed stating that requiring students to "empty purses, bookbags, and pockets, exposing the contents to view, were 'searches' within the meaning of the Fourth Amendment."[193] In contrast, the Court concluded that the hand-sniff incident did not qualify as a search.[194] The Court also dismissed the magic marker search challenge.[195] In its analysis, the Court applied the twofold inquiry from TLO to determine reasonableness finding that the West searches "were unjustified [from

the inception] for lack of individualized suspicion;" consequently, the second part of the analysis requiring a review of the actual search techniques was moot.[196]

TLO and West require that public school searches in Virginia must be particularized. The Court explained:

> It might be expedient to allow a general search of students in a public school setting at the whim of the principal. Such a result might indeed enhance the principal's stated goal of increased order in the school. However, neither the Constitution nor its primary guardian--the federal judiciary--should bow to expediency.[197]

Neither the Supreme Court nor other courts with jurisdiction over Virginia's public schools have ruled on the constitutionality of canine, and strip searches; other courts provide legal guidance regarding these issues.

Canine Searches

In 1981, the Tenth Circuit upheld the use of dogs to search lockers for drugs reasoning that the lockers were under the joint control of both students and the school.[198] The Fifth Circuit, in Horton v. Goose Creek Independent School District, 690 F.2d 470 (5th Cir. 1982), ruled that because lockers and parked cars were in the public view; the sniffing of them did not constitute a search under the Fourth Amendment. However, the Court stated that it was unconstitutional for the dogs to sniff students when there is no individualized suspicion to do so. Similarly, a District Court in Texas concluded that using dogs to sniff students is a search that requires prior individualized suspicion.[199]

The issue concerning the Fourth Amendment and the use of dogs to detect illegal drugs in schools is unsettled. Generally, the Fourth Amendment permits canine searches of lockers and cars. However, sniffing of students raises the reasonableness standard to protect the personal dignity of students.

Strip Searches

Prior to a few years ago, no court upheld strip searches of students. But, times have changed and with the rising concern over drugs and violence in the public schools, it appears the judiciary is responding. For example, two recent cases that upheld the strip search of high school students may indicate a shift in judicial policy, particularly when drugs are involved.

In Williams By Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991), the Sixth Circuit was the first court in history to uphold the strip search of student. Here, based on information by a student who said two other students offered her drugs, an initial administrative investigation produced a vial of "rush," an illegal inhalant. One of the students, Williams, was then strip searched. The student emptied her pockets, removed her T-shirt, lowered her blue jeans to her knees, and removed her shoes and socks; however, again, no drugs were found.[200] Williams filed suit alleging that the warrantless strip search was unconstitutional. Applying the Supreme Court's two-prong test from TLO, the Court concluded that "the search was not unreasonable at its inception. Nor was the scope of the search unreasonable, taking into account the size of the clear, glass vial that was sought and the suspected nature of the white powdery substance contained in the vial."[201]

Similarly, in the second case, Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993), the Seventh Circuit also upheld the strip search of another high school student. In this case, Cornfield, a special education student, was observed with a suspicious bulge in his crotch area. Suspecting that the student was "crotching" drugs, school personnel initiated a strip search that involved the student removing his street clothes and putting on a

gym uniform to facilitate visual inspection of his body and physical inspection of his clothes. No drugs or other contraband was found.[202] Cornfield brought suit alleging that the search violated his constitutional rights.

Again, addressing the search issue in this case, the Court relied on TLO. First, the Court noted that although Cornfield was in a behavioral disorder program in the high school, other independent factors supported the school's reasonable suspicion of his drug possession. Second, the Court reasoned that the search was reasonable in scope--Cornfield was not physically touched; he was not subjected to a body cavity search, and he was permitted to put on gym clothes rather than stand naked in front of school personnel conducting the search.[203]

In contrast to Williams and Cornfield, the West Virginia Supreme Court of Appeals in State ex rel. Galford v. Mark Anthony B, 189 W.Va. 538, 433 S.E.2d 41 (1993), concluded that the strip search of a middle school student for the alleged theft of one hundred dollars was unreasonable.

In sum, one can glean from the decisions cited above that it appears that the courts are more willing to place school safety concerns over the privacy rights of students when the search issue involves drug-related contraband.[204]

Drug Testing

The Supreme Court's examination of drug testing in public schools was discussed in Chapter three regarding teacher's rights. Legal challenges to school drug testing programs are addressed under the Fourth Amendment. There are no such cases with jurisdiction for Virginia public schools, and other courts have reached conflicting decisions.[205] For example, the Fifth Circuit Court of Appeals

ruled that a school district's drug testing program as a precondition for participation in extracurricular activities was unconstitutional.[206] In contrast, the Seventh Circuit upheld a drug testing scheme for interscholastic athletes.[207]

In the most recent case regarding this issue, Acton v. Vernonia School District, (9th Cir. 1994), the Ninth Circuit concluded that an Oregon school district's random drug testing policy was an unconstitutional search in violation of the Fourth Amendment. In this case, the policy required that all students who wanted to participate in interscholastic athletics sign a form authorizing the district to perform a drug test on a urine sample. Any student who refused to submit to the test was suspended from the team. James Acton challenged the policy claiming the policy violated his right to be free from unreasonable government searches under both the Fourth Amendment and the Oregon Constitution. The Ninth Circuit agreed, concluding that the district's alleged drug problem did not justify a random testing program.[208]

Contrary to the judicial trend regarding student privacy and warrantless searches for drugs; the Acton Court stated that "students, do not have to surrender their right to privacy in order to secure their right to participate in athletics."[209] In its analysis, the Court relied on Supreme Court rulings that upheld drug testing of railroad and U.S. Customs Service employees, wherein the government's compelling interest for safety outweighed individual privacy interests.[210] Although the Court noted that the district's goals to prevent unnecessary athletic injuries, to reduce the attraction of drugs among other students, and to improve discipline,[211] were worthy goals; the Court remarked that such goals did not constitute a "governmental interest compelling enough to permit suspicionless testing."[212]

Student Records

Legal controversies regarding student records typically involve access rights and content challenges.[213] The Family Education Rights and Privacy Act (FERPA), often called the Buckley Amendment, enacted by Congress in 1974, is the federal statute that governs such controversies.[214] The purpose of the FERPA is to protect the privacy of students and parents concerning school records. According to the Act's provisions, records belong to parents until the student reaches eighteen years-old.

Generally, FERPA requires that 1) parents have access to school records within forty-five days of a request; 2) parents have a right to request changes in information they deem inaccurate, misleading, or in violation of the student's privacy; and 3) parents have a right to a hearing to dispute challenged information. FERPA further mandates that student records be kept confidential--prohibiting access without parental consent with certain exceptions.

Consistent with FERPA, the Virginia Code provides that:

> No teacher, principal or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school except under judicial process unless the person is . . .
>
> 1) a parent or a guardian;
> 2) a person designated in writing by the parent (or by the student if the student is eighteen);
> 3) the principal, or his/her designee of a school where the student attends, has attended, or intends to enroll;
> 4) the current teachers;
> 5) a state or local law-enforcement officer;
> 6) the Superintendent of Public Instruction or a member of his/her staff, or the division superintendent (or his/her designee) of schools where the student attends, has attended, or intends to enroll;
> 7) an officer or employee of a county or city agency responsible for protective services to children.[215]

The Code states that a Parent (guardian or student) need only appear in person during regular school hours to request access to records.[216] Exceptions to access restrictions include giving information concerning participation in athletics and other school activities, the winning of scholastic or other honors and awards, and other like information.[217]

FERPA and the Code permit the release of directory information such as the student's name, sex, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and other similar information.[218] If directory information is to be made public, Virginia regulations require school districts to publicly give notice of such disclosure and afford parents and eligible student to notify the district in writing within fifteen days that any part of or all such information about the student shall not be disclosed without prior consent. Virginia's school divisions are not required to maintain a record of the disclosure of directory information.[219]

Summary

The Virginia Constitution mandates that citizens in the state be provided with a system of free public schools of high quality. Compulsory school attendance for school age children is required by Virginia law. Virginia law permits its compulsory attendance requirement to be satisfied by attendance at a public school; a private, denominational or parochial school; or by home instruction. However, exceptions to mandatory school attendance based on religious grounds are also provided in the law.

Local school boards possess statutory authority to maintain Virginia's public schools in an orderly and responsible manner. However, since 1989,

corporal punishment has been prohibited in Virginia's public school. Principals, as the agent of the school board, have a duty to employ reasonable measures to maintain discipline in the schools. If a student breaches the rules, regulations and requirements established by school officials, the student may be punished with suspension or expulsion form school. However, The Fourteenth Amendment provides students with both property and liberty rights regarding their education; and, before a student is suspended or expelled, procedural due process comes into play.

For suspensions of ten days or less, the minimum due process for Virginia students requires that the student be given notice, an explanation of the facts, and an opportunity to be heard. For suspensions of more than ten days and expulsions, Virginia students must be provided with more formal procedures including written notice indicating the reason for the action and of the student's right to a school board hearing. Students generally do not have a property right to participate in extracurricular activities.

Courts are generally reluctant to intervene in matters concerning academic decisionmaking. While the courts examine whether any federal statutory or constitutional rights have been violated, the courts prefer to give deference to the judgment of professional educators.

The equal protection clause and federal statutes protect students from discrimination based on unreasonable classification because of their sex, age, intelligence, marital status, disability and race. Regarding equal protection claims, courts require that any classification scheme used by a school board to classify or categorize students must be related to a legitimate state interest.

Title IX provides protection for students against sexual harassment. Recently the Supreme Court concluded that students may collect damages if they prevail in a sexual harassment action.

While students have First Amendment rights, these rights are not coextensive with those of adults. Students' First Amendment rights must be balanced with the right of the school to maintain an orderly and efficient educational environment. School officials may impose time, place, and manner restrictions on student expression. However, curbing expression of unpopular viewpoints will not be tolerated by the courts when there is little to no indication that such expression will disrupt the learning environment.

In analyzing the constitutionality of most freedom of religion issues, the courts apply the three-part Lemon test. In Virginia, release-time programs have been litigated often and with mixed results. Generally, such programs will withstand constitutional muster if 1) school officials are not involved in the recruitment and management of students participating in the program; and 2) the instruction takes place off school property.

Controversy and conflicting rulings are the norm among some states regarding prayers at high school graduations. In December 1993, the District Court concluded that ceremonial prayers and invocations at public school graduations, even if student-led and student-initiated, were prohibited in Virginia. However, a 1994 Amendment to the Code authorizes student-initiated prayer.

In Virginia, public schools that create an open forum by renting their facilities to various community groups must charge similar fees to all groups regardless of the content of the group's speech.

The Equal Access Act prohibits public schools that have created limited open forums from denying access and from discriminating against any student-led group based on the group's religious, political, philosophical speech content. A limited open forum is created if a school permits noncurriculum related student groups with access to after school meeting facilities. However, schools have authority to structure their courses to avoid offending the Act.

Virginia public schools may not impose hair code restrictions on Virginia students. School officials may restrict clothing that they deem disruptive to the school environment or socially inappropriate.

Students are protected against unreasonable search and seizure by the Fourth Amendment. School officials are only required to have reasonable suspicion to search, rather than the higher standard of probable cause, required for criminal cases. However, the Supreme Court established that the reasonableness of student searches must be examined with the age and sex of the student in mind along with the nature of the infraction.

The Family and Educational Rights and Privacy Act (FERPA) and corresponding Virginia law provide students and their parents with the legal means to protect the privacy and confidentiality of school records.

Endnotes

[1] Flory v. Smith, 145 Va. 164, 134 S.E. 360, 48 A.L.R. 654 (1926), 361-362.

[2] Ibid., 362.

[3] Wisconsin v. Yoder, 406 U.S. 205 (1972), 221.

[4] Rice v. Commonwealth, 49 S.E.2d 342 (1948), 346.

[5] Va. Code Ann. Section 22.1-254 (effective July 1, 1994).

[6] Ibid.

[7] Ibid., Section 22.1-263 (1993).

[8] Ibid., Section 22.1-268. (1993).

[9] Ibid. Section 22.1-259 (1993).

[10] Ibid. Section 22.1-254.1 (1993).

[11] Va. Code Ann. Section 22.1-257 (A) (2) (1993).

[12] 1987-88 Opinions of the Attorney General of Virginia, 331.

[13] Ibid., 332.

[14] Ibid. Section 22.1-257 (D) (1993).

[15] Johnson v. Prince William County School Board, 241 Va. 383, 404 S.E.2d 209 (1991), 213.

[16] Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983), 97.

[17] Ibid., 99.

[18] Todd Holiday, "Virginia Public Schools--Student Right," University of Richmond Law Review 22 (August 1988): 254.

[19] Alexander and Alexander, Law of Schools . . . . , 147.

[20] Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926), 362.

[21] Ibid.

[22] Bernstein v. Menard, 557 F.Supp. 90 (E.D. Va. 1982). 90.

[23] Pleasants v. Commonwealth, 214 Va. 646, 203 S.E.2d 114 (1974), 116.

[24] Ibid.

[25] Ibid.

[26] 1982-1983 Opinions of the Attorney General of Virginia, June 20, 1983, 449.

[27] Va. Code Ann. Section 22.1-78. (1993).

[28] Holiday, 254.

[29] Va. Code Ann. Section 22.1-87 (1993).

[30] Ibid.

[31] Ibid. Section 22.1-277 (1993).

[32] Va. Code Ann., Section 22.1-289 (1993).

[33] Ibid., Section 22.1-3.2

[34] McCarthy and Cambron-McCabe, 514.

[35] Ibid.

[36] Alexander and Alexander, 289.

[37] In re Gault, 387 U.S. 1 (1967), 20.

[38] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 1969, 506.

[39] In re Gault, 387 U.S. 1 (1967), 13.

[40] West Virginia v. Barnette, 319 U.S. 624 (1943), 637.

[41] Brown v. Board of Education, 347 U.S. 483 (1954), 493.

[42] Curcio, 125.

[43] Philip T. K. Daniel and Karen Coriell, "Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted form a Narrowing of Due Process?", Hamlin Journal of Public Law and Policy 13, no. 1 (Spring 1992), 5.

[44] La Morte, 6.

[45] Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), 157.

[46] Goss v. Lopez, 419 U.S. 565 (1975), 574.

[47] Ibid., 581.

[48] Ibid.

[49] Ibid., 582-583.

[50] Hillman v. Elliott, 436 F.Supp. 812 (W.D. Va. 1977), 815.

[51] Ibid.

[52] Ibid., 817.

[53] Ibid.

[54] Ibid., 816.

[55] Va. Code Ann. Section 22.1-277 (1993).

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] See Va. Code Ann. Sections 22.1-277.2 and 22.1-278 (1993).

[61] Alexander and Alexander, 289.

[62] Brands v. Sheldon Community School, 671 F.Supp. 627 (N.D. Iowa 1987), 633.

[63] Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980); Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), *cert. denied.* 485 U.S. 959 (1988).

[64] Brands v. Shelton, supra.

[65] Bernstein v. Menard, 728 F.2d 926 (4th Cir. 1984), 91.

[66] Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978), 92.

[67] Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981), 1028.

[68] Ibid., 1029.

[69] Alexander and Alexander, 262.

[70] Valentine v. Independent School District of Casey, 183 N.W. 434 (Iowa 1921); Shuman v. Cumberland Valley School District Board of Directors, 536 A.2d 490 (Pa. 1988).

[71] New Braunfels Independent School District v. Armke, 658 S.W.2d. 330 (Tex. 1983); in contrast, see Katzman v. Cumberland Valley School District, 479 A.2d 671 (Pa. 1984).

[72] Michael Imber and Tyll van Geel, Education Law, 248.

[73] La Morte, School Law: Cases and Concepts, 4th ed., 8-9

[74] Ibid., 9.

[75] 42 U.S.C. Section 2000 et.seq.

[76] 20 U.S.C. Section 1681 et.seq.

[77] Croteau v. Fair, 686 F.Supp. 552 (4th Cir. 1988), 554.

[78] Ibid.

[79] Ibid.

[80] John Lewis, Susan Hastings, and Anne Morgan. Sexual Harassment in Education. Kansas: National Organization on Legal Problems of Education, 1992, 20

[81] 20 U.S.C. Section 1681(a).

[82] Lewis, Hastings and Morgan, 22.

[83] Patricia First and Lawrence Rossow. "An Enormous Victory for Women and Girls." School Law Reporter 34 (May 1992): 1.

[84] Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992).

[85] Ibid.

[86] David Splitt. "Sexual harassment can cost you money," Executive Educator, May 1992, 13.

[87] M. David Alexander and Mary Hughes, "Sexual Harassment in the Workplace," in The Principal's Legal Handbook (Kansas: NOLPE, 1993), 147-154; Patricia First and Lawrence Rossow. "An Enormous Victory for Women and Girls." School Law Reporter 34 (May 1992): 1-2; Ralph Mawdsley and Frederick Hampton, "Sexual Misconduct by School Employees Involving Students," Education Law Reporter 73 (June 1992): 883-895; Charles Russo, Virginia Davis Nordin and Terrence Leas, "Sexual Harassment and Student Rights: The Supreme Court Expands Title IX remedies," Education Law Reporter 75 (August 1992): 733-744; David Tatel, "Supreme Court Authorizes Money Damages for Title IX Violations," NOLPE Notes 27 (April 1992): 1-2; William Valente, "Liability for Teacher's Sexual Misconduct with Students--Closing and Opening Vistas," Education Law Reporter 74 (July 1992): 1021-1031.

[88] McCarthy and Cambron-McCabe, 110.

[89] Epperson v. Arkansas, 393 U.S. 97 (1968), 104.

[90] Hudgins and Vacca, 312.

[91] Alexander and Alexander, 282.

[92] Tinker v. Des Moines Independent Community School District, supra, 506.

[93] Ibid., 508.

[94] Ibid., 509.

[95] Ibid., 511.

[96] Martha McCarthy. "Post-Hazelwood Developments: A Threat to Free Inquiry in Public Schools," 81 Education Law Reporter 685 (June 1993), 689.

[97] Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), 683.

[98] Ibid., 685.

[99] Ibid., 684.

[100] Ibid.

[101] Alexander and Alexander, 317.

[102] Crosby v. Holsinger, 816 F.2d 162 (4th Cir. 1987).

[103] Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988), 802.

[104] Ibid.

[105] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), 273.

[106] Ibid., 270.

[107] Ibid.

[108] Ibid., 271.

[109] Ibid., 271-272.

[110] Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Nitzberg v. Parks, 5254 F.2d 378 (4th Cir. 1971); Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980).

[111] Derrick Cox, "A School Board's Power to Make Curriculum Decisions," Education Law Reporter 60 (August 1990), 1043.

[112] Martha McCarthy, "Post-Hazelwood Developments, 685.

[113] Alexander and Alexander, 333.

[114] Hazelwood, supra., 273.

[115] Papish v. Board of Curators of University of Missouri, 410 U.S. 667 (1973), 670.

[116] Tinker, supra, 515.

[117] Bystrom v. Fridley High School, 855 F.2d 855 (8th Cir. 1988), 755.

[118] Gail Sorenson. "The 'Public Forum Doctrine' and its Application in School and College Cases," 20 Journal of Law and Education 445 (Fall 1991), 448.

[119] 1990-91 Opinions of the Attorney General of Virginia, 216 note 1.

[120] Va. Code Ann. Section 22.1-303.1 (1994).

[121] Ibid., Section 22.1-280.3 (1994).

[122] See Cochran v. Louisiana State Board of Education, 281 U.S. 270 (1930).

[123] Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), 15.

[124] Engel v. Vitale, 370 U.S. 421 (1962).

[125] School District of Abington Township v. Schempp, 374 U.S. 203 (1963)

[126] Stone v. Graham, 449 U.S. 30 (1980).

[127] Grand Rapids v. Ball, 473 U.S. 373 (1985).

[128] Wallace v. Jaffree, 472 U.S. 38 (1985).

[129] Edwards v. Aguillard, 482 U.S. 578 (1987).

[130] Epperson v. Arkansas, 393 U.S. 97 (1968).

[131] Lemon v. Kurtzman, 403 U.S. 602 (1971), 612, 613.

[132] Crockett v. Sorenson, 568 F.Supp. 1422 (W.D. Va. 1983), 1430, 1431.

[133] Ibid., 1427.

[134] Ibid., 1431.

[135] Doe v. Shenandoah County School Board, 737 F.Supp. 913 (W.D. Va. 1990), 915.

[136] Ibid.

[137] Ibid., 920-921.

[138] Ibid., 919.

[139] Ibid. 920.

[140] Doe v. Duncanville Independent School District, 994 F.2d 160 (5th Cir. 1993); Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992); Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992); Berger v. Rensselaer Central School Corporation, 782 F.2d 1160 (7th Cir. 1993); Gearon v. Loundon County School Board, slip opinion, No. 93-730-A, Dec. 22, 1993.

[141] Martha McCarthy, "Is the Wall of Separation Still Standing?" 77 Education Law Reporter 1 (November 1992); Ralph Mawdsley and Charles Russo, "Lee v. Weisman: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers," 77 Education Law Reporter 1071 (December 1992).

[142] Weisman v. Lee, 728 F.Supp. 68 (D.R.I. 1990).

[143] Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

[144] Coercion standard first established in Lynch v. Donnelly, 465 U.S. 668 (1984). For detailed analysis of the coercion standard applied in Lee v. Weisman, generally see, David Schimmel, "Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman," Education Law Reporter 76 (November 1992): 913-927; Ralph Mawdsley and Charles Russo, "Lee v. Weisman: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers," Education Law Reporter 77 (December 19920: 1071-1088; Martha McCarthy, "Is the Wall of Separation Still Standing," Education Law Reporter 77 (November 1992): 1-13; Patricia First and Lawrence Rossow, "Lee v. Weisman Prayer at School Graduation Invalid," School Law Reporter 34 (August 1992): 1-3.

[145] Lee v. Weisman, 112 S.Ct. 2649 (1992), 2658.

[146] Ibid., 2661.

[147] Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), 972.

[148] Gearon v. Loundon County School Board, slip opinion, No. 93-730-A, Dec. 22, 1993. See new law in Virginia relating to student-initiated prayer, Va. Code Ann., Section 22.1-303.1 (1994).

[149] Ibid., 4.

[150] Ibid., 6.

[151] In one of the high school, the principal reserved the right to review the remarks prior to the ceremony, the other three high school mandated prior review by either a faculty member or the principal. The ballot used in each of the four high schools stated:

> Do we, the Senior Class at [school name],
> wish to have a nonsectarian, non-proselytizing
> invocation/benediction/prayer or inspirational
> message presented at graduation?
> Yes, I vote in favor of the above proposition.
> No, I vote against the above proposition.

[152] Ibid., 9-11.

[153] Ibid., 11.

[154] Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993) slip opinion, 2

[155] Lamb's Chapel v. Center Moriches Union Free School District, supra, 9.

[156] Ibid., 10.

[157] Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), 705.

[158] Ibid., 706.

[159] Ibid., 707.

[160] Ibid., 709.

[161] 20 U.S.C.A. Section 4071 (a).

[162] 20 U.S.C.A. Section 4071 (b).

[163] Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), 243. The School Board policy concerning student clubs required that clubs and organizations have a faculty sponsor, not be sponsored by any political or religious organization, and not deny membership on the basis of race, color, creed, sex or political belief. However, there was no written Board policy detailing the formation of student clubs. The provisions to form a club simply required interested students make such a request to the school administration to determine whether the proposed club's goals and objectives were consistent with School Board policy. Ibid., 232.

[164] Ibid., 233.

[165] Ibid.

[166] Ibid., 253.

[167] Ibid., 239-240.

[168] Ibid., 245. The Court stated that among the clubs categorized as noncurriculum were the Subsurfers(scuba diving), Chess club, and Peer Advocates (service program working with special education classes). Ibid., 245-246.

[169] Ibid., 246-247.

[170] Ibid.

[171] Alexander and Alexander, 317.

[172] Long v. Zopp, 476 F.2d 180 (4th Cir. 1973), 181.

[173] Massie v. Henry, 455 F.2d 779 (4th Cir. 1972), 783

[174] Ibid..

[175] Ibid.

[176] Long v. Zopp, supra, 181.

[177] Broussard v. School Board of the City of Norfolk, 801 F.Supp. 1526 (E.D. Va. 1992), 1533, 1534.

[178] Ibid., 1534.

[179] Ibid., 1535, note 2. Tinker requires that prohibited actions must show more than a potential of disruption. Here, both administrators and teachers claimed that the shirt disruptive because middle school students "are easily distracted by language with sexual connotations."

[180] Ibid., 1536.

[181] Ibid. 1537.

[182] Alexander and Alexander, 338.

[183] New Jersey v. TLO, 469 U.S. 325 (1985), 337.

[184] Ibid., 340.

185 Ibid.

186 Ibid., 340-341.

187 Ibid., 341.

188 Ibid., 342.

189 Ibid.

190 Burnham v. West, 681 F.Supp. 1160 (E.D. Va. 1987), 1163. The search followed after the principal discovered defacement of school property. Male students were required to turn their pockets inside out. No students were physically touched during the search. School policy prohibited Magic Markers except for class use.

191 Ibid. The search proceeded after a teacher noticed students entering school with Walkmen or radios. This search included one teacher's inspection of purses and another teacher placing her hand into a student's purse.

192 Ibid., 1164. The search was directed after a teacher smelled marijuana smoke in hallway areas near the cafeteria. Again, male students were required to have their pockets inspected. One student had to empty her purse on the teacher's desk, another had his/her hands sniffed to detect the marijuana odor.

193 Ibid., 1164.

194 Ibid.

195 Ibid., 1164-1165.

196 Ibid., 1166.

197 Ibid., 1167-1168.

198 Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

199 Jones v. Latexo Independent School District, 499 F.Supp. 223 (E.D. Tex. 1980).

200 Williams By Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991), 883.

201 Ibid., 887.

202 Cornfield by Lewis v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993), 1319.

203 Ibid., 1323.

204 Generally see: Lawrence Rossow and Jerry Parkinson, "Yet Another Student Strip Search Upheld: Cornfield by Lewis v. Consolidated High School District No. 230," 36 School Law Reporter 1-2, (March 1994); Lawrence Rossow and Brenda L. Stubblefield, "Student Strip Search Upheld: Williams by Williams v. Ellington," 75 Education Law Reporter (August 1992): 723-731.

205 See Eugene Bjorklun. "Drug Testing High School Athletes and the Fourth Amendment," 83 Education Law Reporter 913-925. (September 1993).

206 Brooks v. East Chambers School District, 730 F.Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

207 Schaill v. Tippecanoe School Corporation, 864 F.2d 1309 (7th Cir. 1988).

208 Ibid.

209 Acton v. Vernonia School District, slip opinon, 13. (9th Cir. 1994).

210 Skinner v. Railway Labor Executives Association, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

211 Ibid.

212 Ibid.

213 McCarthy and Cambron-McCabe, 92.

214 20 U.S.C.A. Section 1232h (1988).

215 Va. Code Ann., Section 22.1-287 (1993).

216 Ibid.

217 Ibid.

218 Section 22.1-287.1 (1993).

219 Virginia Department of Education, Regulations of the Virginia Board of Education (January 1993).

Chapter 5

Legal Responsibilities Toward Students With Disabilities

Historical Legal Perspective

Children with disabilities have historically been denied access to education, and, in fact, social and judicial history indicate that such children were purposefully excluded from attending the Nation's public schools.[1] In the public schools, the exclusion of children with disabilities, according to Johnson, "expressed society's belief that the handicapped child could not benefit from education and that his or her presence in the public schools would have an adverse effect on the welfare of the other students."[2] For example, former Virginia law excluded children with "bodily or mental conditions rendering attendance inadvisable."[3] The landmark decision, Brown v. Board of Education, 347 U.S. 483 (1954), opened the door for children with disabilities to claim a right to a public education.

Brown, supra, established the legal precedent extending both equal protection and due process guarantees to all students.[4] Highlighting the importance of education, the Brown Court stated:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms"[5] (emphasis added).

Relying on the concept of equal educational opportunity for all enunciated in Brown, two district courts' rulings began the work of ensuring both access to education and equal educational opportunity for children with

disabilities. The two cases were Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972) (PARC) and Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972).

PARC, supra, was a class action suit brought on behalf of the mentally retarded children in Pennsylvania against the Pennsylvania statute that denied children with disabilities access to publicly supported education. Here, the Court's consent decree required the state to provide children with disabilities with a free public education. Several aspects of the case set the stage for future litigation: 1) children with disabilities have a constitutionally protected right to a free education;[6] and 2) mentally retarded persons have the capacity to benefit from an education.[7]

Mills, supra, was decided three months after PARC. Mills involved school children in the District of Columbia who were mentally retarded, emotionally disturbed, and/or had behavioral problems. Evidence at trial indicated that the children were denied admission to school and were suspended and expelled after they entered school without benefit of a hearing.[8] The District's school board admitted its failure to provide these children with access to an education, but the board argued that lack of funds was the reason.[9] The Court commented that denying a child with disabilities "not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause."[10] Furthermore, the Court rejected the School Board's lack of funding argument as a viable defense, stating:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is

entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.[11]

After the District Court rulings in PARC and Mills, similar lawsuits in other states, and lobbying from disabled rights' groups,[12] Congress responded by developing comprehensive federal legislation to ensure the educational rights of children with disabilities. Much of the language from PARC and Mills provided the foundation of two federal laws establishing the legal basis requiring states to protect children with disabilities from discrimination and to provide them with an appropriate education at public expense--Section 504 of the Vocational Rehabilitation Act of 1973[13] and the Education for All Handicapped Children Act in 1975.[14]

Virginia's first legislative effort for educating children with disabilities was in 1968--a law mandating special education programs for the hearing impaired.[15] The legislation was extended in 1972 to cover all disabled children between the ages of two and twenty-one years-old.[16]

Federal Legislation for Children with Disabilities

Individuals With Disabilities Education Act

In 1990, the Education for All Handicapped Children Act was retitled the Individuals with Disabilities Education Act (IDEA). While the substance of the Act remained the same, the 1990 revisions changed the terminology in the Act from handicap to disability and adopted the term "child with a disability" rather than "handicapped child."[17] The stated purpose of the IDEA is to:

> . . . assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are

> protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.[18]

The procedural elements defined in the Act serve to protect the interests of children with disabilities. The IDEA provides minimum requirements which must be in place for the states to receive federal assistance including: 1) a policy that assures all children with disabilities between the ages of three and twenty-one the right to a free appropriate public education;[19] 2) a plan to identify, locate and evaluate these children and provide them with special education and related services;[20] 3) a policy for local school districts to develop appropriate Individualized Education Programs;[21] and 4) a policy that establishes procedural safeguards.[22]

Vocational Rehabilitation Act

Section 504 of the Vocational Rehabilitation Act of 1973 prohibits institutions that receive federal funds, such as public schools, from discriminating against individuals with disabilities. The Act provides that:

> No otherwise qualified individual with handicaps . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[23]

McCarthy and Cambron-McCabe provide an explanation distinguishing the IDEA and Section 504. They remark, "Section 504 is a civil rights law that stipulates what *cannot* be done in the treatment of individuals with disabilities, while the IDEA contains a blueprint of what *can* be done to upgrade educational opportunities for these children with special needs."[24] In Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court clearly stated that the IDEA

(then EHA) was the exclusive vehicle for legal challenges to enforce the rights of children with disabilities to a free appropriate education, stating:

> We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. . . Congress intended handicapped children . . . to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.[25]

Attention Deficit Hyperactivity Disorder

Attention Deficit Hyperactivity Disorder (ADHD) is not included as a category or a subcategory in the IDEA for purposes of special education eligibility. In 1991, the U.S. Department of Education issued a policy memorandum which stated that students with ADHD may be eligible for special education services under the "other health impaired" category in the IDEA[26] if problems of limited alertness negatively affected academic performance; and, if the students were determined to need special education services due to the disorder.[27] The memorandum stated that a medical diagnosis was not sufficient to render the child eligible for services under the IDEA; rather, students who are suspected of needing services must be evaluated by the school district.

If a student with ADHD does not qualify under the Act, he or she may meet the definition of a "qualified individual with disabilities" under Section 504. If so, they are entitled to an IEP developed in accordance with the IDEA.[28] However, the memorandum added that these students must be provided with educational services "in the regular classroom unless it is demonstrated that

education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."[29]

Courts have found school districts in violation of Section 504 by failing to evaluate; provide appropriate education; administer Ritalin, and provide procedural safeguards to students with ADHD.[30]

Americans With Disabilities Act

In addition to the IDEA and Section 504, the relationship between public education and individuals with disabilities is also governed by the Americans with Disabilities Act (ADA)[31] enacted by Congress in 1990. The ADA extends the provisions of Section 504 by prohibiting discrimination against the disabled in institutions not receiving federal funds. While the ADA will have its greatest impact on the private sector, public schools must abide by the Act's provisions to reasonably accommodate students and teachers with disabilities.[32] According to Imber and van Geel, students with disabilities not covered under the IDEA, (e.g. AIDS, tuberculosis) such as AIDS, may legally challenge discriminatory behavior against them under Section 504 and the ADA.[33]

In summary, the rights of children with disabilities in the public schools are specifically protected by the IDEA. However, children with disabilities not covered under the IDEA, and all other adult with disabilities, are protected from discrimination by provisions in Section 504 and in the Americans with Disabilities Act.

Virginia Law and Regulations Governing Students with Disabilities

Virginia's Regulations Governing Special Education Programs for Children With Disabilities (hereafter Regulations) states:

> In addition to the requirements of the Individuals with Disabilities Education Act and these regulations, local school divisions must comply with the requirements of Section 504 of the Rehabilitation Act of 1972, as amended, the Americans with Disabilities Act, and the Virginians with Disabilities Act.[34]

The Virginia Code mandates the specific requirements to provide special education services to Virginia students with disabilities. In accordance with the IDEA, the state Board of Education has responsibility:

> to prepare and supervise the implementation by each school division of a program of special education designed to educate and train handicapped children . . . The program . . . shall be designed to ensure that all children with disabilities have available to them a free and appropriate education, including specially designed instruction to meet the unique needs of such children.[35]

The Code extends the IDEA eligibility age by one year and defines handicapped children to mean:

> those persons (i) who are aged two to twenty-one inclusive . . . (ii) who are mentally retarded, physically handicapped, seriously emotionally disturbed, speech impaired, hearing impaired, visually impaired, multiple handicapped, other health impaired including autistic or who have specific learning disability or who are otherwise handicapped [e.g. ADHD] as defined by the Board of Education and iii) who because of such impairments need special education.[36]

Virginia's Regulations define special education as: "specially designed instruction, at no cost to the parent, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals, and institutions and in other settings and instruction in physical education."[37]

Related services are included as a fundamental requirement to provide eligible children with a free appropriate public education. The Regulations are consistent with the IDEA's definition of related services and state:

> transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.[38]

Virginia's Special Education Process

Under the IDEA and Virginia laws and regulations, the combination of special education and related services assuring all eligible children with disabilities a free appropriate public education designed to meet their unique needs is implemented by an individualized education program. In Virginia, the process of identifying, locating and evaluating children with disabilities is completed by various committees.

The process begins with the child study committee. The Regulations require schools to establish a formal child study committee to identify and locate children who may need special education services.[39] The committee includes the referring source; principal, or designee; teachers; and specialists.[40] Following a referral, the child study committee must meet within ten administrative working days and include at least three persons at the meeting.[41] Parental permission is not necessary before a child is discussed by the committee. If the child study committee determines that a child is suspected of having a disability, a referral must be made to the school district's special

education administrator within five days and the administrator notifies the child's parent to obtain permission for the next step--assessment/evaluation.

Evaluations are made by a multidisciplinary team that includes "at least one teacher or other specialist with knowledge in the area of suspected disability."[42] Evaluations must be completed within sixty-five days after a request is received by the special education administrator.[43] Parents are entitled to obtain an independent educational evaluation (IEE) at public expense if the parent disagrees with the results of the evaluation.[44] An eligibility committee reviews the evaluation results to determine the child's need for special education programs and related services, and, if present, all relevant data is forwarded to the individualized education program (IEP) committee.[45]

The IEP committee must include a representative of the school district, other than the child's teacher; the child's teacher; one or both of the child's parents; the child, if appropriate; and other individuals at the discretion of the parents or the school district.[46] A member of the evaluation team or other person familiar with the evaluation results is required when the child has been evaluated for the first time.[47] An IEP is a written plan specifying the special education and related services the child will receive to obtain a free appropriate public education. Consistent with the IDEA, the Regulations state that the IEP must include:

> a) A statement of the child's present level of educational performance; b) A statement of annual goals, including short-term instructional objectives; c) A statement of the specific special education and related services to be provided for the child, and the extent to which the child will be able to participate in regular educational programs; d) The projected dates for initiation of services and the anticipated duration of the services (month, day, and year); and e) Appropriate objective criteria and evaluation procedures and schedules for determining, at least annually, whether the short-term instructional objectives are being achieved.[48]

In Virginia, the IEP also includes how the child will participate in Family Life Education, the Literacy Testing Program, and the Virginia State Assessment Program.[49]

Virginia regulations require that the IEP must:

> be in effect before special education and related services are provided to a child; and be developed within thirty calendar days of a determination that the child needs special education and related services, and be implemented as soon as possible following the IEP meeting.[50]

In Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), the Fourth Circuit held that an IEP must be developed prior to placement. In this Virginia case, a severely retarded child was educated in a private school in Pennsylvania paid by a Virginia school district. Upon reevaluation of the placement, the district concluded that the child could be educated at a local school.[51] The Court stated that the decision to place the child at the local school "before developing an IEP on which to base that placement violates the [IDEA regulations]. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough."[52] Additionally, the Court concluded that by failing to follow the EHA procedures, the school district also failed to provide the child with a free appropriate public education and ordered the child to remain at the private school.[53]

Procedural Due Process

The IDEA contains comprehensive and detailed procedural requirements to ensure that children with disabilities and their parents have the means to ensure their educational rights as provided in the Act. The purpose of the requirements is to make sure that parents are given notice to participate throughout the special education process from initial identification and

evaluation of the child's needs to placement in the least restrictive environment through redress of disputes with the sponsoring agency. Both the IDEA and Virginia Regulations state that parents "shall be given written notice within a reasonable time before the LEA [school district] proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of free appropriate public education for the child."[54]

Virginia Regulations require that parents are given notice "written in language understandable by the public; and provided in the native language of the parent or other mode of communication used by the parent."[55] The notice must include:

> 1) a full explanation of all available procedural safeguards available to the parents; 2) a description of the action proposed or refused by the LEA, an explanation of why the LEA proposes or refuses to take the action, and a description of any options the LEA considered and the reasons why those options were rejected; 3) a description of the nature, purpose, and use of any evaluation procedure, test, record, or report the LEA used as a basis for the proposal or refusal; and 4) a description of any other factors which are relevant to the LEA's proposal or refusal.[56]

Also consistent with the IDEA, Virginia Regulations require school districts to obtain written parental consent before: 1) pre-placement evaluation; 2) initial placement in a special education program or related services; and 3) any change in program or placement.[57] After written consent is given, parents may revoke their consent up until the first day of the placement.[58] Once a child with disabilities is involved in a school's special education services, written parental consent is then required for any changes in the child's identification or evaluation for special education services.[59]

If a parent does not provide his or her written consent within ten administrative working days after receiving notice, "the LEA may proceed as if

consent had been granted, and the parent must initiate due process to contest the action."[60]

An impartial due process hearing is the vehicle to resolve disputes on matters relating to the identification, evaluation, placement or provision of a free appropriate public education to a child with disabilities. Both parents and school districts have the right to initiate a due process hearing. A school district may also "initiate due process to appeal parental withholding of consent" where the Regulations require consent.[61]

The Regulations specify that an impartial hearing officer must be selected from a list of such persons maintained by the Office of the Executive Secretary of the Supreme Court of Virginia. Furthermore, a hearing officer can not be employed by a public agency involved with the care or education of the child; nor can the person have a personal or professional interest which would conflict with his or her objectivity in the hearing.[62]

Virginia has a two-tiered due process hearing procedure. Requests for a due process hearing must be made in writing. It is the school district's responsibility 1) to inform the parent of any free or low-cost legal services as well as the availability of attorney fees, 2) to secure a hearing officer within five administrative working days following the request, and 3) to ensure that the hearing is completed within forty-five calendar days of the request.[63] The hearing officer's decision is final at the first level unless either party appeals to the state for an administrative review--the second tier in Virginia's due process hearing procedure. Such an appeal "must be instituted within thirty administrative working days of the date of the [first level] hearing decision."[64] It

is the state's responsibility to ensure that a decision from the administrative review is provided "no later than thirty calendar days following the request."[65]

The entire due process scheme is at no cost to parents. School districts and the state equally share costs for local hearings, except for attorney's fees which are paid by the school district, and the state is responsible for costs for state reviews.[66] Within forty-five calendar days of a decision at either the local or state hearing level, the school district must develop an implementation plan:

> Such a plan shall be based upon the decision of the hearing officer, the reviewing officer, or agreement between the parties. The implementation plan must state how and when the decision or agreement will be put into operation. If the decision or agreement affects the child's educational program, the revised IEP shall be made a part of the implementation plan. . . . Failure of either of the parties to comply with the implementation plan shall be reported to the SEA for investigation and/or appropriate action.[67]

The IDEA and Virginia Regulations require that a child must remain in the current placement while awaiting a decision from a level I hearing or a Level II review.[68] The only exception permitted for a change in placement is if the child poses a danger to him/herself or to others; then, time-out, detention, restriction of privileges, or suspension up to ten days may be employed as disciplinary measures.[69]

The next step for either party displeased with the state's reviewing officer's decision is to bring a civil suit in either a state court or in the federal district court within one year: "In any such action, the court shall receive the records of the administrative proceedings, shall hear additional evidence in its discretion at the request of either party, and basing its decision on the preponderance of the evidence, shall grant such relief as it determines to be appropriate."[70] Several cases provide judicial precedent for Virginia educators concerning exhaustion of the state's administrative process prior to bringing

court action[71] and application of the statute of limitations for litigation under the IDEA.[72]

Zero Reject

The IDEA requires the states to provide all eligible children with disabilities a free appropriate public education--regardless of the severity of the disability--the zero reject principle.[73] Tucker and Goldstein note that "the zero reject principle has also been extended to children with communicable diseases" such as AIDS.[74] In a Delaware case involving a profoundly retarded child with cerebral palsy, the Third Circuit Court of Appeals stated:

> Admittedly, the unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap, . . . places a substantial burden on states in certain instances. The language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable.[75]

The leading case in this area is Timothy W. v. Rochester, New Hampshire, 875 F.2d 954 (1st Cir. 1989). This case involved a student with multiple disabilities including profound mental retardation, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness.[76] Timothy responded to sounds and his parent requested the local school district to provide him with an appropriate education consisting of appropriate therapy and stimulation to increase his response to his environment. However, at trial, one expert concluded that the child had no educational potential. After reviewing several reports and testimony, the District Court concluded that the student was not capable of benefiting from special education.[77] The First Circuit reversed this decision stating that the IDEA gives priority to the most severely handicapped. The Court also commented that the Act contains no language to indicate:

> that a handicapped child must demonstrate that he or she will 'benefit' from the educational program. Rather, the Act speaks of the state's responsibility to design a special education and related services program that will meet the unique 'needs' of all handicapped children. The language of the Act in its entirety makes clear that a 'zero-reject' policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed at the time of the Act's passage.[78]

However, in an earlier case from the Seventh Circuit, the Court addressed the hypothetical case of a nonresponsive child in a coma.[79] The Court reasoned that "if the child is so far handicapped as to be unconscious, and is thus wholly uneducable, he falls outside the protection of the [IDEA] even though his handicap is more rather than less severe than that of children protected by the Act."[80]

Free Appropriate Public Education

The IDEA mandates that every state have a policy to ensure that a free appropriate public education is provided to children with disabilities.[81] However, both the federal statute and the Virginia Regulations define the mandate in general terms. The Regulations state:

> Free appropriate public education (FAPE) means special education and related services which: 1) Are provided at public expense, under public supervision and direction, and without charge; 2) Meet the standards of the Board of Education; 3) Include preschool, elementary school, middle school, or secondary school, and/or vocational education; and 4) Are provided in conformity with an individualized education program. FAPE is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP).[82]

The issue of what constitutes an appropriate education has been and continues to be a major source of controversy between parents and school districts

involving an ever increasing volume of judicial intervention. However, the foundation for resolving this issue was provided by the Supreme Court in 1982 in Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982). Rowley was the Court's first case interpreting the IDEA (then the Education for All Handicapped Children Act).[83]

In this case, the parents of Amy Rowley, a deaf student with minimal hearing, requested a sign language interpreter for her academic classes. The school district denied the request basing its decision on evidence that Amy was achieving educationally, academically and socially without the interpreter's services. The parents disagreed and filed suit in the District Court alleging that the district's failure to provide the interpreter constituted a denial of a free appropriate public education.[84] The District Court agreed with the parents concluding that a free appropriate public education was denied to Amy because of disparity between her achievement and her potential. The Court defined a free appropriate public education as "an opportunity to achieve full potential commensurate with the opportunity provided to other children."[85] In other words, an appropriate education maximizes a child's potential. The decision was affirmed by the Circuit Court.[86]

The Supreme Court reversed the lower court and found that the school district had provided Amy with a free appropriate public education. The Court explained that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[87] The Court concluded that the Act provides a "'basic floor of opportunity' [consisting] of access to specialized instruction and related services which are individually designed to provide

educational benefit to the handicapped child."[88] The Court also remarked that a state satisfies the requirement of assuring a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[89]

In addition to defining appropriateness, the Rowley Court also established the standard of judicial review of special education controversies as a two-fold inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[90] The Court further emphasized that:

> Courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the education method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.[91]

According to Johnson, "the Supreme Court's decision in Board of Education v. Rowley has been of seminal importance in shaping lower courts' subsequent interpretations of the EAHCA."[92]

Several cases applying the Rowley standard have been decided to provide guidance for Virginia educators. In Barnett v. Fairfax County School Board, 721 F.Supp. 755 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 175 (1991), parents brought suit to compel the school district to provide a cued speech program in their child's neighborhood school rather than at the high school located five miles further from the home. The Court noted that in the current placement the student excelled academically and participated in extracurricular activities.[93] The Court explained that educational policy is best left to state and local school officials including "whether a

particular service or method can feasibly be provided in a specific special education setting."[94] The Court concluded that the district had provided the student with an appropriate education and that the district's decision to centralize the cued speech service was reasonably based.[95]

In Hessler v. State Board of Education of Maryland, 700 F.2d 134 (4th Cir. 1983), parents alleged that a private school placement for their daughter with learning disabilities was more appropriate than a public school placement because the private school was closer to their home, less costly, and provided the daughter with more interaction with nondisabled children. The Fourth Circuit concluded that the parents did not have a valid action, stating, "because a given educational placement is allegedly more appropriate than another, it does not follow that the less appropriate program is not 'appropriate' within the meaning of the Act."[96]

The Fourth Circuit has ruled that as long as a school district is providing an appropriate education under the Act in a day program in the local schools, it is not violating the Act by refusing to fund in-home services[97] or to provide further enhancement to a day program.[98] In contrast, the Fourth Circuit held that a school district denied a dyslexic child a free appropriate public education in Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985). In this case, the school board repeatedly failed to provide parents notice and to inform them of their procedural rights under the Act.[99]

Related Services

The IDEA and Virginia law require a myriad of related services to ensure that children with disabilities are provided a free appropriate public education.[100] According to McCarthy and Cambron-McCabe, "the most difficult question in connection with related services is the distinction between medical and school health services."[101] The IDEA includes medical services among other related services required to assist a child with a disability to benefit from special education with the caveat that "such medical services shall be for diagnostic and evaluation purposes only."[102] Conflicts between parents and school districts often arise over the district's provisions of such services, particularly medical services, transportation and psychological services.

The leading case providing a framework for resolving the provision of medical services is Irving Independent School District v. Tatro, 468 U.S. 883 (1984). This case involved an eight year-old child with spina bifida who also suffered from orthopedic and speech impairments and a neurogenic bladder. The bladder condition required a procedure known as clean intermittent catheterization (CIC) every three or four hours. Without the procedure, the child could not attend school. The school district refused to perform the procedure and the child's parents filed suit alleging that CIC was a related service under the Act necessary for their child to receive a free appropriate public education. After the case proceeded through the state's administrative hearings and subsequent federal courts, the Supreme Court granted certiorari to answer two issues: 1) whether CIC is a supportive service required to assist a child with disabilities to benefit from special education; and 2) whether CIC is excluded

from the Act's definition as a medical service because the procedure is not for diagnosis or evaluation.[103]

On the first issue, the Court concluded that clean intermittent catheterization services "fall squarely within the definition of a 'supportive service.'"[104] To answer the second issue--distinguishing CIC from medical services--the Court referred to the federal regulations governing the Act. The regulations state that medical services are provided by a licensed physician,[105] while school health services are provided by a qualified school nurse or other qualified person.[106] Therefore, the Court concluded that since CIC could be performed by a school nurse or trained layperson, CIC was not subject to exclusion as a medical service.[107]

The Tatro Court clearly enunciated four guidelines for deciding a state's obligation to provide related services to children with disabilities:
1) to be entitled to related services, a child must be disabled so as to require special education; 2) only those services necessary to aid a child with disabilities to benefit from special education must be provided, regardless of how easily a school nurse or layperson could furnish them; 3) the regulations governing the Act state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician; and 4) a school district is only obligated to perform the needed service not to provide the necessary equipment.[108]

Psychological services are included in the IDEA's definition of related services. Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990) is a Virginia case involving reimbursement for psychological services. In this case, parents admitted their child into a private hospital where he received

educational, psychological and medical services. The Fourth Circuit remanded the case to the District Court to determine if the hospital placement was appropriate under the Act and, if so, to determine which expenses were incurred for special education and related services and to order reimbursement of those expenses.[109]

The IDEA includes transportation among the list of related services required to assist a child with disabilities to benefit from special education.[110] The Virginia Regulations define transportation to include: "1) Travel to and from school and between schools; 2) Travel in and around school buildings; and 3) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability."[111] In Bales v. Clarke, 523 F.Supp 1366 (E.D. Va. 1981), the District Court denied a request for reimbursement to pay for parents' transportation to and from their disabled child's private school in Pennsylvania.[112]

In a recent Supreme Court case, Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993), the Court ruled that public funds to provide a sign language interpreter for a child with disabilities attending a Catholic high school does not violate the First Amendment's Establishment Clause. The Court commented:

> The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.[113]

Least Restrictive Environment

The IDEA mandates that school districts provide educational services to children with disabilities in the least restrictive environment. According to Alexander and Alexander, the purpose of this mandate "is to give the handicapped child opportunity to socialize and interact with other nonhandicapped children, and further, to reduce as much as possible any formal education processes that would tend to stigmatize or differentiate the handicapped child.[114] While the term "mainstreaming" is generally used to describe least restrictive environment, the term is not specifically mentioned in federal or Virginia laws.[115]

Specifically, the IDEA mandates that school districts establish:

> procedures to assure that, to the maximum extent appropriate, children with disabilities, . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .[116]

Both the federal regulations governing the IDEA and the Virginia Regulations extend the least restrictive environment mandate to include "providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and other services and activities provided for nondisabled children . . . to the maximum extent appropriate to the needs of the child with a disability."[117]

The IEP is the mechanism to provide children with disabilities an appropriate education and, according to Osborne, "the mainstreaming decision is one of the most difficult a school district faces when developing an Individualized education Program (IEP).[118] In Spielberg, supra, the Fourth

Circuit commented that "placement should be based on the IEP."[119] However, judicial intervention is often necessary to settle controversies over the two concepts and must be done on a case-by-case basis.[120] Several Virginia cases illustrate this notion.

In DeVries v. Fairfax County School Board, 882 F.2d 876 (4th Cir. 1989), the school district's IEP called for an autistic child's placement in a county vocational center. The child's mother preferred a public school placement that provided a less restrictive environment among nondisabled students. The Fourth Circuit remarked that the IDEA indicates a "strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child."[121] In this case, the Court concluded that the appropriate placement in the least restrictive environment was in the vocational center rather than the neighborhood high school where even with the use of supplementary aids and services, the child's special needs could not be met appropriately.[122]

In Barnett, supra, discussed earlier under free appropriate public education, parents requested the district to duplicate a program for the hearing impaired at their child's neighborhood school. The parents' claim was based on IDEA regulations requiring a school district to ensure that the educational placement of each child with a disability is as close as possible to the child's home.[123] In response, the Fourth Circuit stated, "we do not interpret this section as imposing upon a school board an absolute obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making

these decisions."[124] The Court found that the Act's least restrictive mandate was provided in the district's centralized program.

In Matthews by Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984), the Fourth Circuit denied parents' request to rescind an order from the District Court releasing the school district from providing twenty-four hour residential care and educational services for their severely handicapped child. The District Court stated that "the child had done as well as could be expected, and whatever can be done in the home outside of the school can be done . . . in the least restrictive place, which is his home."[125]

Inclusion

Recent rulings concerning the Act's least restrictive environment mandate require school districts to provide students with disabilities with more inclusive placements. At issue in these rulings is the "apparent tension within the Act between the strong preference for mainstreaming, and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child."[126] To resolve the inclusion issue, the question before the courts is to determine whether the school districts have complied with the IDEA's mainstreaming mandate.

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) was the first circuit court case to interpret the mainstreaming requirement. The Court stated that it is the court's decision to determine if the services in a segregated facility that make it superior could feasibly be provided in a non-segregated setting. If they can, the segregated placement would be inappropriate under the Act.[127] However, this standard was rejected as being too intrusive on educational

policy choices best made by state and local school officials in Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). In Daniel R.R., the Fifth Circuit established a two-part test that has become the standard for determining compliance with the IDEA's least restrictive environment requirement.

In Daniel R.R, the Court stated that the two-part test requires:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. . . . If it cannot and the school intends to provide special education or to remove the child from regular education we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.[128]

Additionally, the Court broadly defined other factors that courts should examine to determine answers to its two-part test including: 1) the nature and severity of the child's disability; 2) the needs and abilities of the child; and 3) the school's response to the child's needs.[129] If a court finds that the school district violates the first part of the test, it need not address the second part of the test.

In a recent case that applied the Daniel R.R. test, Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3rd Cir. 1993), the Third Circuit ruled that a segregated special education class was not the least restrictive environment for a student with Down's Syndrome. In Oberti, the Court affirmed the District Court's conclusions that the school district: 1) violated the IDEA by not taking meaningful steps to try to include the child in a regular classroom with supplementary aids and services; and 2) failed to comply with the IDEA by neglecting to compare the educational benefits of a segregated versus an integrated placement for the child.[130] The District Court found that both the child and the nondisabled children in the class would benefit academically and socially from the child's inclusion in a regular classroom.[131]

Osborne states, "Until now most of the [least restrictive environment] lawsuits have involved a single student. In the future we may witness class action suits similar to those in the 1970s that provided the impetus for the passage of the IDEA."[132] He also opines that recent decisions may signal an end to the era of judicial restraint regarding inclusion of students with disabilities.[133]

Discipline

According to Sorenson, "the disciplinary exclusion of students with disabilities from the regular school program (by suspension, expulsion, or other means) continues to be a problem of exceptional practical importance to school [personnel]."[134] The central issue regarding disciplining children with disabilities includes the IDEA's mandate to provide an appropriate education in the least restrictive environment.[135] Another major concern is whether or not exclusion from school constitutes a change of placement under the IDEA. Yudof, Kirp and Levin posit that "the extensive procedural protections built into the Act, . . . have been read to create procedural rights in disciplinary situations."[136] For example, the Act requires school districts to provide parents with written notice prior to any change in the current placement.[137] Additionally, the Act's "stay put" provision requires that during the pendency of any proceeding, unless the district and the parents otherwise agree, the child shall remain in the then current educational placement.[138]

Before the Supreme Court heard its first case involving special education discipline, several lower courts addressed the issue. In Stuart v. Nappi, 443 F.Supp. 1235 (D.Conn. 1978), the District Court ruled that a school

district could not expel a disruptive handicapped student. The Court explained: "The expulsion of handicapped children not only jeopardizes their right to an education in the least restrictive environment, but is inconsistent with the procedures established by the Handicapped Act for changing the placement of disruptive children."[139] However, the Court also stated that handicapped children are not "immune from a school's disciplinary process . . . school authorities can take swift disciplinary measures, such as suspension . . ."[140]

In Doe v. Koger, 480 F.Supp. 225 (N.D.Ind. 1979), the Court also concluded that a school is "prohibited from expelling students whose handicaps cause them to be disruptive. The school is allowed only to transfer the disruptive student to an appropriate, more restrictive, environment."[141] The Court further commented that the Act "prohibits the expulsion of handicapped children who are disruptive because of their handicap. . . .[but] if the reason is not the handicap, the child can be expelled."[142]

In S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1982), the Fifth Circuit agreed with the rulings in Stuart and Koger. However, the Court here concluded that though children with disabilities could be expelled, such an action required 1) procedural due process as described in the Act and 2) a determination by specially trained professionals that the misbehavior was not caused by the disability. The Court also stated that a school district must continue to provide educational services to an expelled child with disabilities.[143]

In 1988, the Supreme Court addressed the issue of disciplining children with disabilities in Honig v. Doe, 484 U.S. 305 (1988). In this case, two emotionally disturbed students were suspended indefinitely pending expulsion

proceedings. The suspensions resulted from several acts against school rules, including stealing, destroying school property, and physical and verbal assaults against other students. The students challenged the suspensions as violating the "stay put" provision of the IDEA. The school district asked the Court to read a "dangerousness" exception into the stay put provision asserting that in passing the Act, 1) Congress thought the exception was "too obvious for comment," and 2) Congress "inadvertently failed to provide such authority."[144] The Court concluded that the omission of a "dangerousness" exception was intentional.[145] The Court stated: "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school"[146] (emphasis in original). In accord with the Act's procedural mandates, the Court further commented that students could be removed from school "only with the permission of the parents or, as a last resort, the courts."[147]

However, school districts are not without legal recourse to deal with disruptive students with disabilities. If a student poses an immediate threat to the safety of others, the student may be suspended for up to ten school days without violating the Act's "stay put" mandate.[148] The Court also explained that districts may impose other disciplinary measures such as "study carrels, timeouts, detention, or the restriction of privileges."[149] The Act requires exhaustion of its administrative proceedings before judicial review However, in the case of a truly dangerous child with disabilities, the Court commented that school officials can request an injunction to prohibit the child from attending school until the IEP committee can meet and develop a more restrictive placement.[150] School officials are also entitled to seek injunctive relief from the

court to extend the ten-day suspension restriction to maintain a safe learning environment for all their students.[151] And, the Court stated in such cases the burden rests with the school to demonstrate the futility or inadequacy of administrative review.[152]

Two Virginia cases were decided prior to Honig, supra; however, both cases were consistent with the Court's ruling. The first case is School Board of Prince William County v. Malone, 762 F.2d 1210 (4th Cir. 1985). Here, the school district attempted to expel a learning disabled student because of his involvement in the distribution of drugs. Specifically, the student acted as a "go-between" for two non disabled students who asked him to purchase speed for them from another student. After a ten day suspension and a determination that there was no causal relationship between the student's disability and the drug involvement, the school board voted to expel the student, and the parents requested a due process hearing.[153]

The hearing officer concluded that the child's disability was related to the illegal behavior; thus, he could not be expelled.[154] The decision was affirmed by a state reviewing officer and the school board brought suit to reverse the ruling. On appeal, the Fourth Circuit affirmed the District Court's finding that the child's disability caused the drug involvement and concluded that the child could not be expelled. The Court further stated: ". . . an expulsion is a change in placement triggering the procedural protections of the EAHCA . . . [however] if, following EAHCA procedures, it is determined that the child's behavior was not caused by his handicap, that child may then be expelled."[155]

In the second Virginia case, Doe v. Rockingham County School Board, 658 F.Supp. 403 (W.D. Va. 1987), an elementary student was given a twenty-

nine day suspension, without a hearing, for frequent and sometimes violent behavior which included kicking and scratching teachers and hitting other students.[156] When the student was suspended, he had not been identified as learning disabled. However, during the suspension period, the child was evaluated and identified as learning disabled. Thus, the Court had to complete a two-part review of the student's due process rights under the twenty-nine day suspension--first, as a nondisabled child; and second, as a child with disabilities.

In the first instance, the Court concluded that the student's due process rights were violated.[157] Regarding the second part, the Court also found that the child's rights were violated. The Court commented that once the child's handicapped condition was known, the requirements of the Act should have been met.[158] The Court explained, ". . . leaving a handicapped child under disciplinary suspension during the pendency of administrative proceedings violated both the legislative language and intent of the 'stay-put' rule found in [the Act]."[159]

The Virginia Regulations regarding suspension or expulsion of children with disabilities were recently revised (effective January 1, 1994) to reflect the case law described above. The current Regulations now state:

a. Suspensions of 10 Days or Less
A short term suspension is when the child is removed from class (i.e., an in-school suspension) or school for ten school days or less. It does not constitute a change in placement. The child is subject to normal disciplinary procedures whether or not there is a causal connection between the child's disability and the misconduct.

b. Long-term Suspension greater than 10 days and Expulsions
1) When the child is removed from class or school for more than 10 consecutive school days, a determination must be made as to whether or not there is a direct causal relationship between the child's disability and the misconduct. 2) This determination must be made pursuant to

the change in placement procedures by a committee . . . 3) A series of suspensions which aggregate to more than 10 days may be considered a significant change in placement requiring reevaluation and procedural protections. Factors to consider in determining whether aggregate suspensions of greater than 10 days are long-term suspensions include length of each suspension, proximity of suspensions, and total amount of time suspended. 4) If there is a causal connection or if the child was inappropriately placed at the time of the misconduct, the child may not be expelled, nor may the [school district] impose a long-term suspension. If there is no causal connection and if the child was appropriately placed at the time of the misconduct, the child may be disciplined the same as a nondisabled child. 5) In the case of an expulsion or long-term suspension, parental consent is not required.

c. Dangerous Student With a Disability
[School districts] may not unilaterally change the placement of a student with dangerous behavior when the misconduct is caused by the disability. [School districts], however, may use normal disciplinary measures for a child who exhibits dangerous behavior to include, for example, time outs or suspension up to 10 days. A [school district] may only impose an expulsion or long-term suspension on a student with a disability whose misconduct has been determined to be caused by his disability by obtaining an injunction, based on dangerousness of the student, from a court of competent jurisdiction.[160]

Virginia's policy regarding the long-term suspension and expulsion of students with disabilities, cited above, a policy contrary to IDEA guidelines, was at issue in a recent Fourth Circuit decision, Virginia Department of Education v. Riley (1994). Here, the Court ordered the U.S. Department of Education (USDOE) to release over fifty million dollars in special education funds to the state which had been withheld because of the controversial policy.

The USDOE withheld the funds claiming that Virginia

> was required to provide education to all disabled student regardless of the reasons underlying a particular student's expulsion . . .the [USDOE's] position on the discipline of disabled children, although not formally published as a regulation, had been publicly circulated as early as 1989. As a result, the USDOE informed the Commonwealth that its 1993-1995 [special education] plan would be disapproved, and the earmarked funding discontinued, if Virginia failed to amend its regulations to comply with USDOE policy[161]

The Court stated that the U.S Department of Education's "failure to provide Virginia with notice and the opportunity for a hearing dictates that Virginia's [IDEA funds] not be withheld."[162] Interestingly, the Court did not rule on the discipline dispute stating: "We express no view on the merits of these questions. We hold only that the Department must follow statutorily mandated procedures before denying further funding to a participant in a federal-state grant program."[163]

Eleventh Amendment Immunity

The Eleventh Amendment provides that a private person may not sue a state agency or state official in federal court. However, Congress has authority to "remove a state's Eleventh Amendment protection by specifically abrogating it for particular and specified purposes"[164] Congress did just that in the 1990 Amendments to the Education for All Handicapped Children Act in response to the Supreme Court's decision in Dellmuth v. Muth, 491 U.S. 223, 109 S.Ct. 2397, (1989)

In Muth, supra, the Supreme Court concluded that under the Eleventh Amendment, local school districts could be sued under the EHA, but states were immune from EHA liability. Congress responded to this ruling by enacting Section 1403 of the IDEA that states, in part: "A State shall not be immune under the eleventh amendment . . . from suit in Federal court for violation of this act."[165] Therefore, according to Alexander and Alexander, "a school district may be financially responsible for reimbursement for tuition and other costs for special educational services beyond the public school." [166]

Tuition Reimbursement

In 1985, the Supreme Court examined the issue of whether or not parents who disagree with a district's individualized education program and then unilaterally place their child in a state-approved private school may be reimbursed for private school expenses.[167] The Court ruled that reimbursement was proper if 1) the district's IEP was inappropriate; and 2) the private school placement was appropriate.[168] On November 9, 1993, the United States Supreme Court handed down its most recent special education decision addressing parental rights to place their children in unapproved private schools. In Florence County School District Four v. Carter, 114 S.Ct. 361 (1993), the Court resolved conflicting rulings in the Fourth[169] and Second[170] Circuits regarding such placements. Rossow and Parkinson opine that the decision "could have a profound impact on financially strapped public school districts."[171]

The case involved Shannon Carter, a child with a learning disability. Shannon's parents disagreed with the district's proposed individualized education program, withdrew her from the local school and enrolled her in a private school which specialized in educating children with disabilities.[172] Both the local and state hearing officers concluded that the district's IEP was appropriate.[173] The parents disagreed and brought suit in federal district court. The suit alleged that the district failed to provide Shannon with a free appropriate public education mandated by the IDEA. Additionally, they sought reimbursement for tuition and other costs incurred at the private school.[174] The District Court held for the parents and the Fourth Circuit affirmed the decision. In a unanimous decision, the Supreme Court affirmed the lower court's ruling.

The Court concluded that the courts may order reimbursement to parents "who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA."[175]

At issue in this case was the Act's provision which states: "The term 'free appropriate public education' means special education and related services that--A) have been provided at public expense, under public supervision and direction, and without charge, B) meet the standards of the State educational agency, . . ."[176] The Court held that this provision of the IDEA "cannot be read as applying to parental placements."[177] The school district claimed that reimbursement should be barred because in this case 1) the private school was not state-approved; and 2) the reimbursement costs imposed an unreasonable burden on financially strapped districts.[178] On the first point the Court commented:

> Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, 'it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's need in the first place.[179]

Regarding the second claim, the Court remarked that school districts can avoid high cost reimbursements quite simply: "give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice."[180]

However, the Court emphasized that its ruling did not authorize blanket parental reimbursement for unilateral placements and identified two such instances. First, the Court stated parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA, and that

the private school placement was proper under the Act."[181] Second, reimbursement will not be granted "if the court determines that the cost of the private education was unreasonable."[182]

Virginia law only permits reimbursement to nonsectarian private schools approved by the State Board of Education.[183] Consistent with the Supreme Court's ruling, the Regulations state:

> If a child with a disability has available a free appropriate public education and the parents choose to place the child in a private school or facility, then the local school division is not required to pay for the child's education at the private school or facility. However, the local school division shall make services available to the child as follows: Each local school division shall provide 1) special education and related services designed to meet the needs of private school children with disabilities residing in its jurisdiction; [and] 2) provide school children with disabilities with genuine opportunities to participate in special education and related services consistent with the number of children and their needs.[184]

Attorney's Fees

The Supreme Court in Smith v. Robinson, supra, concluded that the IDEA was the exclusive remedy to enforce the educational rights of children with disabilities and it also precluded parents from receiving attorney's fees under Section 1983 and Section 504 claims. In response, a 1986 amendment to the EHA, The Handicapped Children's Protection Act (HCPA), provided the awarding of "reasonable attorneys' fees as part of the costs" to the parents of a child with disabilities who prevails in any civil actions.[185] Alexander and Alexander comment that "this amendment was considered necessary because Congress observed that the weight of heavy attorney's fees could conceivably make parents reluctant to raise valid complaints challenging school district actions."[186]

The question of whether the Act permits the awarding of Attorney's fees in administrative hearing actions is settled for Virginia educators. In a 1985 action, parents were successful in a suit against a school board that wrongly expelled a child with disabilities for behavior which resulted from his disability.[187] The parents returned to Court shortly after passage of the HCPA and were awarded retroactive attorney fees for prevailing at the administrative hearing level.[188] In another Virginia case, Rossi v. Gosling, 696 F.Supp. 1079 (E.D. Va. 1988), the District Court concluded that reasonable attorneys' fees are available under the HCPA for pre-hearing services.[189] The Court stated:

> . . . in light of the purpose, language and structure of the HCPA, there is no reason in principle for flatly prohibiting fees incurred before a mandatory administrative proceeding occurs. An award of attorneys' fees for preparation for an administrative hearing and for negotiations with a school system, even where a dispute is resolved prior to a due process hearing, is entirely consistent with the language and spirit of the HCPA.[190]

AIDS

One of the most controversial issues regarding children with disabilities is whether to allow children infected with the AIDS (Acquired Immune Deficiency Syndrome) virus to attend public schools. There have been no such cases litigated in Virginia or by the Supreme Court. However, other courts have relied on the Supreme Court's ruling in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) to conclude that children with AIDS cannot be denied an education. In Arline, the Court ruled that tuberculosis (and other chronic infectious diseases such as AIDS) was a handicapping condition under Section 504.

A student who has tested positive for the HIV virus may be a regular student. However, when the student develops AIDS symptoms resulting in diminished life activity, Arline requires that the student receive IDEA assistance. Generally, courts have concluded that children with AIDS must be provided a free appropriate public education in the least restrictive environment if their attendance does not pose a health threat to others.[191]

For example, in Thomas v. Atascadero Unified School District, 662 F.Supp. 376 (C.D.Cal. 1987), the District Court ruled that a kindergarten student infected with AIDS was both a "handicapped person" and "otherwise qualified" under Section 504 and therefore entitled to attend school.[192] The Court commented: "Any theoretical risk of transmission of the AIDS virus by [a child] in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the School District."[193]

In Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988), the Eleventh Circuit reversed a district court ruling ordering the school district to construct a separate classroom (a cubicle within the regular trainable mentally handicapped classroom))for the child with AIDS to receive an appropriate education. On remand, the District Court ordered the child returned to her special education classroom.[194]

Summary

Children with disabilities were historically denied the opportunity to receive a public education. Virginia enacted its first special education legislation in 1968.

The Supreme Court's decision in Brown v. Board of Education opened the door for children with disabilities to claim their rights to public education. Mills and PARC followed the lead of Brown by applying the Fourteenth Amendment's equal protection clause to the plight of children with disabilities. Congress responded to the consent agreements in Mills and PARC, along with an increasing awareness by the public toward Americans with disabilities by enacting the Vocational Rehabilitation Act in 1973 and the Education for All Handicapped Children Act in 1975. The Education for All Handicapped Children Act was renamed in 1990 the Individuals With Disabilities Education Act (IDEA). The IDEA requires the states to establish policies and plans to identify, locate and evaluate all children with disabilities between the ages three and twenty-one years-old and to provide the children with a free appropriate public education.

Section 504 of the Vocational Rehabilitation Act prohibits discrimination against "otherwise qualified" individuals with disabilities. Section 504 governs all institutions receiving federal funds. Section 504 provides special education services to eligible children with ADHD. The Americans With Disabilities Act is another federal statute prohibiting discrimination against individuals with disabilities. Students with disabilities not covered under the IDEA, such as AIDS, may bring legal actions both under Section 504 and the Americans With Disabilities Act.

Virginia statutes, and the Virginia Regulations Governing Students with Disabilities provide a comprehensive and detailed framework consistent with the IDEA to ensure all eligible students the substantive due process right to a

free appropriate public education. The statutes and Regulations also include the procedural due process requirements mandated by the IDEA.

The IDEA mandates that children with disabilities be provided an individualized and appropriate education in the least restrictive environment. This is accomplished thorough the individualized education program (IEP). An IEP must be developed before placement decisions are made. In Virginia, various committees in every local school are charged with implementing the Act's requirements to identify, locate and evaluate children with disabilities in need of special education and related services. The IDEA requires that parents be actively involved throughout the special education process once a child is identified and located.

Virginia law requires that parents be notified and give written consent obtained before the school proposes, implements, or changes any action involving a child's special education services. At any point in the process, parents and the school district are entitled to address disagreements through Virginia's impartial due process hearing procedures. Local hearing decisions may be appealed to a state reviewing officer. Appeals from a state review go to state or federal court. The Fourth Circuit has clearly enunciated that a denial of due process constitutes violation of the IDEA.

The zero reject principle means that the IDEA covers all eligible student regardless of the severity of disability. The only exception would be providing special education services to a child in a coma.

The Supreme Court has established that the IDEA ensures children with disabilities a basic floor of opportunity to benefit from education, not necessarily the best education to maximize educational benefits. In

determining what constitutes a free appropriate public education, the courts generally do not examine educational policy or methodology.

The IDEA includes nonmedical services and transportation among the related services available to permit eligible children to benefit from special education. The Supreme Court ruled, for example that the Establishment Clause was not offended by providing a sign-language interpreter in a parochial school.

The IDEA's mainstreaming requirement must be settled on a case-by-case basis. Courts generally are required to balance the often competing concepts of appropriate education and least restrictive environment. The Fourth Circuit has concluded that centralizing special education programs does not violate the least restrictive mandate. Virginia school districts may be required to provide more inclusive placements for students with disabilities.

Disciplining children with disabilities is one of the most challenging areas for educators. Children with disabilities can be suspended for up to ten days provided they are given the same due process rights afforded to nondisabled students. A suspension greater than ten days constitutes a change in placement under the IDEA and requires that the child stay put in the current placement. School officials may seek injunctive relief from the courts to extend a ten-day suspension as needed to maintain a safe learning environment for all their students Children with disabilities cannot be expelled if the misbehavior is causally related to their disability; however, if the misbehavior is not related to the child's disability, expulsion is permitted.

The Supreme Court has ruled that parents may be reimbursed for unilaterally placing their child with a disability in an unapproved private school if

the public school placement was inappropriate. However, Virginia law only permits reimbursement to state-approved nonsectarian private schools.

Parents may recover attorney's fees if they are successful in administrative hearings or in court actions.

Students infected with AIDS or with other contagious diseases are considered disabled when the disease impairs their major life functions. The IDEA mandates that such children be permitted to attend the public schools. This issue has yet to be litigated in Virginia, but there is adequate legal precedent elsewhere.

Endnotes

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[2] Johnson, 1.

[3] Va. Code Ann. Section 22.275.3 (1973) (repealed).

[4] Alexander and Alexander, 359.

[5] Brown v. Board of Education, 347 U.S. 483 (1954), 493.

[6] Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972), 302.

[7] Ibid., 296.

[8] Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972), 869-870.

[9] Ibid., 871, 875.

[10] Ibid., 875.

[11] Ibid., 876.

[12] generally see Rothstein, 2-9.

[13] 29 U.S.C. Section 794.

[14] 20 U.S.C. Section 1401.

[15] Va. Code Ann., Section 22-9.1:1 (1968).

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[17] Bonnie Tucker and Bruce Goldstein, The Educational Rights of Children With Disabilities: An Analysis of Federal Law (Horsham, PA: LRP Publications, 1992).

[18] 20 U.S.C. Section 1400(c).

[19] Ibid., Section 1412(1), Section 1412(2)(B)

[20] Ibid., Section 1412(2)(C).

[21] Ibid., Section 1412(4).

[22] Ibid., Section 1412(5).

[23] 29 U.S.C. Section 794.

[24] McCarthy and Cambron-McCabe, Public School Law, 166.

[25] Smith v. Robinson, 468 U.S. 992 (1984), 1009.

[26] 20 U.S.C. Section 1401(a)(1)(A).

[27] U.S. Department of Education, Office of Special Education and Rehabilitative Services, Memorandum of September 16, 1991, Washington, D.C.

[28] 34 C.F.R. Section 104.33.

[29] U.S. Department of Education memorandum, 1991.

[30] See Perry Zirkel, "Section 504: The New Generation of Special Education Cases," 85 Education Law Reporter (December 1993): 601, 606-608.

[31] 42 U.S.C. Section 12101.

[32] see generally, Albert Miles, Charles Russo and William Gordon, "The Reasonable Accommodations Provisions of the Americans With Disabilities Act," 69 Education Law Reporter (October 1991) 1; Ronald Wenkard. "The Americans With Disabilities Act and It's Impact on Public Education," 82 Education Law Reporter (July 1993) 291.

[33] Imber and van Geel. Education Law, 298-299.

[34] Virginia Department of Education, Regulations Governing Special Education Programs for Children With Disabilities 1994, 1.

[35] Va. Code Ann. Section 22.1-214 (A) (1993).

[36] Ibid., Section 22.1-213.

[37] Regulations, 8.

[38] Ibid., 7.

[39] Ibid., Section 3.2(C)(3).

[40] Ibid.

[41] Ibid.

[42] Ibid., Section 3.2(E)(2)(e).

[43] Ibid., Section 3.2(E)(6).

[44] see generally Virginia Department of Education. "A Parent's Guide to Special Education," 1990. See also Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) where the Fourth Circuit concluded that a parent is entitled to reimbursement for only one independent educational evaluation.

[45] Regulations, Section 3.2(F).

[46] Ibid., Section 3.2(B)(3)(a).

[47] Ibid., Section 3.2(B)(3)(b).

[48]Ibid., Section 3.2(B)(5)(a-e).

[49] Parent's Guide, 17.

[50] Regulations, Section 3.2(B)(2)(a)(1)(2).

[51] Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), 257.

[52] Ibid., 259.

[53] Ibid.

[54] 20 U.S.C. 1415 (b)(c) and Regulations, Section 3.4 (A)(1)(d).

[55] Regulations, Section 3.4 (A)(1)(f).

[56] Ibid., Section 3.4 (A)(1)(e).

[57] Ibid., Section 3.4 (A)(1)(g).

[58] Ibid.

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[60] Ibid., Section 3.4(A)(1)(i).

[61] Ibid., Section 3.4(A)(2).

[62] Ibid., 4.

[63] Ibid., Section 3.4 (A)(5)(a-c).

[64] Ibid., Section 3.4 (A)(10)(i).

[65] Ibid., Section 3.4(A)(13)(b).

[66] Ibid., Section 3.4(A)(14).

[67] Ibid., Section 3.4(A)(15).

[68] 20 U.S.C. Section 1415(e)(3), Regulations, Section 3.4(A)(3).

[69] Ibid., Section 3.4(A)(3).

[70] Ibid., Section 3.4(A)(11)(b). See also Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991).

[71] Harris v. Campbell, 472 F.Supp. 51 (E.D. Va. 1979); Davenport v. Rockbridge County School Board, 658 F.Supp. 132 (W.D. Va. 1987). In contrast, see DeVries by DeBlaay v. Spillane, 853 F.2d 264 (4th Cir. 1988).

[72] School Board of the County of York v. Nicely, 408 S.E.2d 545 (1991) detailed discussion applying statue of limitations in IDEA litigation for Virginia educators). See also Richards v. Fairfax County School Board, 798 F.Supp. 338 (E.D. Va. 1992), Kirchgessner v. Davis, 632 F.Supp. 616 (W.D Va. 1986), Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987), School Board of Campbell County v. Beasley, 380 S.E.2d 884 (1989).

[73] 20 U.S.C. Section 1412(2)(C).

[74] Bonnie Tucker and Bruce Goldstein. The Educational Rights of Children with Disabilities: A Guide to Federal Law, 12:21. See also Martinez v. School Board of Hillsborough County, Florida, 861 F.2d 1052 (11th Cir. 1988).

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[76] Timothy W. v. Rochester, New Hampshire, 875 F.2d 954 (1st Cir. 1989), 956.

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[81] 20 U.S.C. Section 1412(1).

[82] Regulations, 3-4.

[83] Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 187.

[84] Ibid., 185.

[85] Ibid., 186, citing 483 F.Supp 528 at 534.

[86] 632 F.2d 945 (1980).

[87] Rowley, 192.

[88] Ibid., 201.

[89] Ibid., 203.

[90] Ibid., 206-207.

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[95] Ibid., 155.

[96]Hessler v. State Board of Education of Maryland, 700 F.2d 134 (1983), 139.

[97] Burke County Board of Education v. Denton, 895 F.2d 973 (4th Cir. 1990).

[98] Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984).

[99] Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985), 634-635. See also In re Conklin, 946 F.2d 306 (4th Cir. 1991).

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[109] Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990), 1209.

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[111] Regulations, 10. See also Va. Code Ann. Section 22.1-221 (1993).

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[113] Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993), slip opinion, 12.

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[115] Alexander and Alexander, 381.

[116] 20 U.S.C. Section 1412(5)(B). See also Regulations, Section 3.3(A)(3)(a).

[117] Regulations, Section 3.3(A)(3)(b).

[118] Allan Osborne, "The IDEA's Lest Restrictive Environment Mandate: Implications for Public Policy," 71 Education Law Reporter (February 1992): 370.

[119] Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), 259.

[120] See Daniel R.R. v. State Board of Education, 874 F.2d 1036 (3rd Cir. 1989); Greer v Rome City School District, 950 F.2d 688 (11th Cir. 1991); Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) *cert. denied*, 464 U.S. 864 (1983); Thornock v. Boise Independent School district, 767 P.2d 1241(Idaho 1988).

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[131] Ibid., citing Oberti v. Board of Education of Clementon School District, 801 F.Supp. 1392 (D.N.J. 1992).

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[153] School Board of Prince William County v. Malone, 762 F.2d 1210 (4th Cir. 1985), 1212.

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[163] Ibid., 15-16.

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[171] Lawrence Rossow and Jerry Parkinson, "Florence County School District v. Carter: The Supreme Court Extends Reimbursement to Unilateral Placements of Disabled Children in Unapproved Private Schools," School Law Reporter 36 (February 1994): 1

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[175] Ibid., 363.

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[179] Ibid., 365 quoting 950 F.2d 156, 164.

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[182] Ibid.

[183] Va. Code Ann., Section 22.1-218 (1993). See also Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987).

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[187] School Board of the County of Prince William v. Malone, 762 F.2d 1210 (4th Cir. 1985); See also Doe v. Rockingham County School Board, 658 F.Supp. 403 (W.D. Va. 1987).

[188] School Board of the County of Prince William v. Malone, 662 F.Supp. 999 (E.D. Va. 1987).

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[192] Thomas v. Atascadero Unified School District, 662 F.Supp. 376 (C.D.Cal. 1987), 381-382.

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[194] Martinez v. School Board of Hillsborough County, Fla., 711 F.Supp. 1066 (M.D.Fla. 1989).

Chapter 6

Summary of Legal Principles and Implications for Further Study

The purpose of this study has been to examine and analyze federal and Virginia statutes as well as federal and state court decisions which govern the legal rights and responsibilities of educators in the Commonwealth of Virginia. The study has reviewed constitutional and statutory law and judicial interpretations which have significance for Virginia educators. Virginia educators are bound by the judicial opinions of the United States Supreme Court, the Fourth Circuit Court of Appeals, Virginia federal district courts and the appellate courts of Virginia. Federal and state statutes as well as administrative agency regulations and Attorney General opinions also govern Virginia educators. The following legal principles specifically define the legal rights and responsibilities of Virginia educators and affect them in the daily administration of the Commonwealth's public schools.

Summary of Legal Principles

Liability

Liability is defined as a legal responsibility. There are two categories of liability for Virginia educators: 1) common law torts, and 2) constitutional torts. The most common tort with which both school districts and their employees become involved is negligence. Negligence is wrongful conduct that results in injury. Virginia's school boards and school administrators are immune from liability for negligence by the common law doctrine of sovereign immunity.

Virginia's public school teachers are also protected by sovereign immunity but only for simple negligence. Sovereign immunity does not bar Virginia's teachers from actions involving gross negligence. Virginia law mandates exceptions to sovereign immunity: 1) school boards are liable for damages in accidents involving the transportation of public school students, and 2) school boards may provide liability insurance for its officers, employees and volunteers.

By statute, corporal punishment is prohibited in Virginia's public schools.

Defamation which results in injury to a person's reputation, consists of the twin torts of libel and slander. Students are rarely involved in defamation cases; school personnel often are. Defamation results in injury to a person's reputation, and slander defames through spoken words. Libel defames through printed communication. In Virginia, the defense against defamation is truth.

A constitutional tort as defined by the Civil Rights Act of 1871, Section 1983, involves actions taken by any person under color of any law that deprives an individual of rights protected by the federal Constitution and by federal law. Virginia school board and educators are persons under Section 1983 and may be liable for damages if found to have violated an individual's federally protected rights.

The Terms and Conditions of Teacher Employment

Virginia's public schools are under the direct control and supervision of the local school boards who are authorized to employ and assign teachers and principals on the recommendation of the division superintendent.

To be employed in Virginia's public schools, professional educators must obtain a license from the State Board of Education. Licensing requirements in the state include satisfactory completion of a professional teachers examination. Division superintendents have authority to request that the State Board of Education revoke, suspend or deny a Virginia teaching license. Virginia licenses are issued for a five-year period and may be renewed through a variety of individualized professional development activities.

All school divisions are required by law to execute a written contract with each educator they employ. Teachers are employed annually unless they are notified in writing by April fifteenth. By law, Virginia teachers may be dismissed or placed on probation for incompetency, immorality, noncompliance with school laws and regulations, disability, conviction of a felony or a crime of moral turpitude or other good and just cause.

To obtain continuing contract status in Virginia, teachers must serve a three-year probationary period in the same school division. A probationary teacher may be recommended by the division superintendent for nonrenewal, without cause, as long as written notification is given by April fifteenth. Nonrenewal requires no explanation. However, Virginia law provides that a probationary teacher who has been nonrenewed is entitled to receive a conference and explanation of the action, if any. Failure to receive written notification requires that the teacher be given a contract for the ensuing school year.

Once continuing contract status is achieved, a teacher has earned a property right and can only be dismissed for cause. Having a property right requires that the teacher receive procedural due process, which mandates

notification by April fifteenth, the opportunity for a hearing, and a statement of reasons for any dismissal action. Probationary teachers are not entitled to procedural due process unless they can demonstrate that the employment decision implicates either a property or liberty right. A liberty infringement means that the teacher be stigmatized in such a manner that his or her opportunity for future employment is jeopardized.

Coaching contracts for Virginia teachers are separate from their teaching contracts. Termination of a coaching contracts in no way implicates the individual's teaching contract.

Virginia principals and supervisors may earn continuing contract status. However whereas classroom teachers may transfer their continuing contract status with only one year of probationary service required in the new school division, principals and supervisors must begin a new three-year probationary term; their continuing contract status cannot be transferred to another school division. Principals who are reassigned to teaching positions have a salary reduction.

Virginia teachers, regardless of contract status, may be terminated in a reduction-in force action because of declining enrollment or elimination of subject areas.

Virginia law mandates detailed procedures involving teacher suspensions. Teachers may be suspended for good and just cause. State law also details a step-by-step grievance procedure for Virginia educators.

All educators have First Amendment rights guaranteeing freedom of expression, freedom of religion, freedom of association, and privacy rights. Teachers may not be disciplined or dismissed when they exercise their free

speech rights, particularly regarding matters of public concern. If a teacher challenges an adverse employment decision as a violation of free speech, courts will balance the teacher's right to free speech with the right of the school board to maintain an efficient learning environment. Similarly , courts will examine whether factors, other than protected speech, are sufficient to justify the adverse action. Freedom of personal choice regarding marriage and family life is a fundamental liberty right. Virginia teachers who are unmarried and pregnant can not be forced to take a leave of absence from their teaching positions.

Federal law prohibits discrimination on the basis of sex, race, religion, color, national origin, or disability.

Legal Responsibilities Regarding Students

The Virginia Constitution mandates that citizens in the state be provided with a system of free public schools of high quality. Virginia law requires compulsory school attendance for school age children either in the public schools, private schools, or in the home. Virginia law provides exceptions to school attendance based on religious grounds.

Local school boards possess statutory authority to maintain Virginia's public schools in an orderly condition. Principals have a duty to employ reasonable measures to maintain discipline in the schools. If a student breaches the rules and regulations established by school officials, the student may be suspended or expelled from school, provided the student has been afforded appropriate due process.

Students have property and liberty interests in their education that are covered by Fourteenth Amendment due process guarantees. Virginia students may be suspended for ten days or less; however, the minimum due process required for these short-term suspensions is notice and opportunity to be heard. For long-term suspensions, over ten days, and for expulsions, Virginia students must be provided with more formal procedures including written notice indicating the reason for the action and information regarding the right to a school board hearing.

The equal protection clause of the Fourteenth Amendment and federal statutes protect students from discrimination based on unreasonable classification because of their sex, age, intelligence, marital status, disability and race. Equal protection claims require demonstration that discrimination is intentional Title IX provides protection for students against sexual harassment from teachers and fellow students. Recently, the Supreme Court concluded that students may collect damages if they prevail in a sexual harassment action.

The First Amendment rights of students are not the same as those of adults. Students' First Amendment rights must be balanced with the duty of the school to maintain an orderly and efficient educational environment. School officials may impose time, place, and manner restrictions on student expression. For example, Virginia educators may prohibit students from wearing t-shirts that are considered to be lewd, indecent, or offensive. However, Virginia students are not subject to hair code restrictions.

While the courts have expressly prohibited the use of ceremonial prayers at public school graduations in Virginia, a recent 1994 law now permits student-initiated prayer in Virginia's public schools. The Equal Access Act

mandates that if a public secondary school provides a limited open forum for noncurriculum student groups to have access to school facilities during noninstructional time, equal access cannot be denied to other student groups based on the content of the group's religious, political or philosophical speech.

The Fourth Amendment guarantees students protection from unreasonable search and seizure. For a search to pass constitutional muster, courts generally require that the search be reasonable based on the student's age, history, and behavior record at school and that the search also be based on particularized suspicion.

The Family and Educational Rights and Privacy Act (FERPA), along with Virginia law, provides students and their parents with the legal means to protect the privacy and confidentiality of school records.

Legal Responsibilities Regarding Students With Disabilities

The rights of children with disabilities in Virginia to have access to a free appropriate public education is guaranteed by a comprehensive set of federal and Virginia laws, regulations and guidelines.

The Individuals with Disabilities Education Act (IDEA) mandates that the states have in place a policy that assures all children between the ages of three and twenty-one who are in need of special education services be identified, located, evaluated, and provided with an individualized program of special education and related services. The IDEA also requires that such services be provided in the least restrictive environment.

Virginia law extends the IDEA eligibility age by one year. In Virginia, the process of identifying, locating and evaluating children with disabilities is

completed by various committees. The hallmark of free appropriate public education is the individualized education program (IEP). The IEP must be developed prior to placement. In Virginia, the IEP also includes how the child will participate in Family Life Education, the Literacy Testing Program, and the Virginia State Assessment Program.

The IDEA contains comprehensive and detailed procedural requirements to ensure that children with disabilities and their parents have the means to guarantee their educational rights as provided in the Act. The procedural requirements mandate that parents are given notice to participate throughout the special education process from initial identification and evaluation to redress of disputes with the school division. In the event of a dispute, Virginia has a two-tiered due process hearing procedure.

The courts have interpreted the Act in a number of significant decisions: 1) special education is required for all eligible children regardless of the severity of the disability; 2) appropriate education is defined as a basic floor of opportunity consisting of access to specialized instruction and related services individualized for children with disabilities to benefit from education.

The Fourth Circuit Court of Appeals has ruled that Virginia's public schools satisfy the Act's least restrictive requirement by providing special education services in a centralized program rather than providing such services in every school in the division.

Virginia school districts must provide transportation for children with disabilities including transportation to and from school, and in and around school buildings. Virginia parents are not entitled to receive reimbursement to pay for their transportation to and from their child's out of state placement.

The Supreme Court has ruled that the use of public funds to provide a sign language interpreter for a child with disabilities attending a Catholic school does not violate the First Amendment's establishment clause; however, recently, a similar case in Virginia was ruled in the opposite way.

Regarding the disciplining of children with disabilities, the IDEA requires that parents be provided with written notice prior to any change in their child's placement, such as suspension from school. Children with disabilities may not be suspended for misconduct that is causally related to their disability. The Supreme Court has ruled that suspensions of ten days or less do not constitute a change in placement, and in Virginia, such short-term suspensions do not require a determination whether or not there is a causal connection between the child's disability and the misconduct. For suspension greater than ten days and expulsions, Virginia educators must first determine if there is a causal relationship between the child's disability and the misconduct prior to any placement change.. Virginia regulations are unique in that parental consent is not required for expulsion or long-term suspensions if it is determined that the misconduct is not causally related to the child's disability.

The Supreme Court has ruled that parents are entitled to tuition reimbursement for unilaterally placing their child with disabilities in an unapproved private school; 1) if the court determines that the public placement violated the IDEA and the private placement was proper under the Act, and 2) if the court determines that the cost of the private education was reasonable.

The Handicapped Children's Protection Act provides the awarding of reasonable attorneys' fees for parents who prevail in any civil actions involving special education disputes. In Virginia, attorneys' fees are also available to

parents for pre-hearing services such as administrative hearings and negotiations with school systems.

Children with AIDS and other contagious diseases are considered regular students. When the symptoms appear in such a way as to affect their academic performance, these children fall under the purview of both the IDEA and Section 504 protections and can not be denied access to the public schools as long as their attendance does not pose a health threat to others in the schools.

Emerging Legal Issues

Education-related litigation of particular importance for Virginia educators is most likely to continue in the following areas:

1. religion in the public schools, particularly prayers in schools and at graduation ceremonies, as a consequence to the 1994 law on student-initiated prayer;
2. special education services to students with "other health impaired" concerns such as Attention Deficit Hyperactivity Disorder;
2. inclusion mandates to maximize the least restrictive environment for students with disabilities; and
3. free speech and equal access issues related to the public forum doctrine.

Recommendations for Further Study

As a result of this study, the following recommendations are being made:

1. that a similar study be conducted in other states which lack this specific synthesis of school law.
2. that areas left unexamined in this study such as the financing of Virginia public schools be studied;
3. that an ongoing study of Virginia law regarding student-initiated prayer be initiated;
4. that this study be updated on an ongoing basis to reflect the current status of Virginia law at the time.

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