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D. Patrick Lacy Jr.
Reed Smith LLP

Kathleen S. Mehfoud
Reed Smith LLP

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EDUCATION LAW

D. Patrick Lacy, Jr. *

Kathleen S. Mehfoud **

I. CASE DECISIONS

In the past year, the most significant decisions affecting education in Virginia were decided in the federal courts. Students and parents challenged the practices of public education institutions on a number of constitutional grounds, including the establishment of religion, invasion of privacy rights, and violations of due process and equal protection. The decisions that are likely to have the greatest impact on school systems are discussed below.

A. *Establishment Clause*

Two cases arising out of Virginia addressed the impact of the Establishment Clause of the First Amendment on the activities of public education institutions.¹ In *Brown v. Gilmore*,² several students challenged Virginia's "moment of silence" law, which required a daily minute of silence in public school classrooms.³ The stated purpose of the law is to provide each student with the opportunity to, "in the exercise of his or her individual choice, medi-

* Partner, Reed Smith LLP, Richmond, Virginia. A.B., 1966, Belmont Abbey College; LL.B., 1969, University of Richmond.

** Partner, Reed Smith LLP, Richmond, Virginia. B.S., 1970, Mary Washington College; M.C., 1974, University of Richmond; J.D., 1978, University of Richmond School of Law.

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1. U.S. CONST. amend. I.
2. 258 F.3d 265 (4th Cir. 2001).
3. VA. CODE ANN. § 22.1-203 (Repl. Vol. 2000).

tate, pray, or engage in any silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice."⁴ The Fourth Circuit utilized the three-prong *Lemon* test⁵ to find the statute constitutional.⁶

In its holding, the court noted that a statute with a clearly secular purpose can satisfy the first prong of the *Lemon* test despite the presence of a religious purpose.⁷ It found that the language of the moment of silence statute and its legislative history demonstrated a clearly secular purpose—nonreligious meditation.⁸ Therefore, while one purpose of the law was secular, namely the accommodation of religion,⁹ the court held that the statute was facially neutral and therefore, it neither advanced nor inhibited religion.¹⁰ The Fourth Circuit also rejected as "speculative" the contention that the law would promote prayer because of the impressionability of young children.¹¹ The court found no reason to presume that, by facilitating the moment of silence, teachers would fail to follow the letter of the law and "inform the students of their statutory options . . ."¹² Thus, the third prong of the *Lemon* test, a lack of excessive entanglement, was satisfied.¹³

Finally, the court distinguished the Virginia moment of silence statute from a similar Alabama statute that was struck down by the United States Supreme Court in *Wallace v. Jaffree*.¹⁴ The *Wallace* decision invalidated a one-minute moment of silence created for Alabama school children to meditate or pray.¹⁵ The Su-

4. *Id.* In apparent anticipation of a challenge to the statute, the General Assembly provided that the Attorney General would defend any school board sued over the implementation of the moment of silence law. *See id.*

5. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* three-prong test is commonly used by courts to determine Establishment Clause constitutionality. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 610-13 (citations omitted).

6. *Brown*, 258 F.3d at 276.

7. *Id.*

8. *See id.*

9. *Id.*

10. *Id.* at 276-77.

11. *Id.* at 277-78.

12. *Id.* at 277.

13. *Id.* at 278.

14. 472 U.S. 38 (1985).

15. *Id.* at 61.

preme Court could not find any secular purpose on the part of the Alabama lawmakers.¹⁶ The Fourth Circuit distinguished the two cases by pointing out that the Virginia statute had at least one stated secular purpose, while the Alabama statute had none.¹⁷

Another moment of silence policy for students in the Commonwealth did not fare as well in the courts. *Mellen v. Bunting*¹⁸ involved a challenge by two students of the Virginia Military Institute ("VMI"), a four-year state-operated military college where prayers were offered every day at dinner.¹⁹ The students argued that this activity violated the Establishment Clause.²⁰

VMI uses the "adversative method" to teach students.²¹ As the district court explained, the system "emphasizes physical rigor, mental stress, absence of privacy, detailed regulation of behavior, and indoctrination of a strict moral code," to prepare its graduates to be "citizen-soldiers."²² As part of its "supper roll call," members of the Corps of Cadets would march into the mess hall and stand while a student read a prayer composed by the VMI chaplain.²³ The prayer would begin with "Almighty God" and similar phrases, depending on the day of the week.²⁴ The chaplain would close the prayer with the language "Now O God, we receive this food and share this meal together with thanksgiving. Amen."²⁵

VMI argued that the court should view the dinner prayer under either: (1) the analysis employed by the United States Supreme Court in *Marsh v. Chambers*,²⁶ or (2) as an academic freedom case under *Keyishian v. Board of Regents*.²⁷ The court

16. *Id.* at 59.

17. *Brown*, 258 F.3d at 280.

18. 181 F. Supp. 2d 619 (W.D. Va. 2002).

19. *Id.* at 622.

20. The students also challenged the practice under Article I, § 16 of the Virginia Constitution and the Virginia Act for Religious Freedom. See VA. CODE ANN. § 57-1 (Repl. Vol. 1995 & Cum. Supp. 2002).

21. *Mellen*, 181 F. Supp. at 622.

22. *Id.*

23. *Id.* at 623.

24. *Id.*

25. *Id.*

26. 463 U.S. 783 (1983) (upholding the practice by the Nebraska legislature to open each day's session with a prayer).

27. 385 U.S. 589 (1967) (striking down a requirement that faculty members sign an oath regarding personal involvement in Communist activities).

rejected the invitation, holding that “the present case cannot be subjected to a *Marsh* analysis, because public colleges and universities like VMI did not exist at the time the First Amendment was drafted.”²⁸ The court further held that *Keyishian* was inapplicable because it does not stand for the proposition that a college’s right to academic freedom, assuming one exists, “should trump the First Amendment rights of individual citizens.”²⁹

In its analysis, the court found VMI’s practice of offering prayer at dinner violated each prong of the *Lemon* test.³⁰ It found that VMI had not produced evidence of any legitimate secular purpose.³¹ The court rejected VMI’s arguments that the prayer was generic and part of the educational mission of exposing cadets “to an important means that many others use to deal with the spiritual dimension.”³²

It observed that VMI failed to appreciate the “distinction of constitutional importance between teaching about religion and the practice of religion.”³³ Furthermore, the court similarly rejected VMI’s rather tenuous assertion that the prayer solemnized a public occasion, the supper roll call; and that the prayer, while mandatory, simply accommodated the religious needs of the students.³⁴

The argument made by VMI regarding the effect of the prayer was similarly rejected by the district court.³⁵ VMI attempted to distinguish cases involving addressing prayer in public schools from those involving colleges and universities based on the concept of age.³⁶ Specifically, VMI argued that differing constitutional protections existed depending on the ages of the students.³⁷

28. *Mellen*, 181 F. Supp. 2d at 625. In rejecting the *Marsh* analysis, the court could have relied upon the fact that VMI had abandoned the dinner prayer when mandatory chapel was dropped and that it did not resume until a short time before the suit was brought.

29. *Id.* at 625–26.

30. *See id.* at 637.

31. *Id.* at 633.

32. *Id.* at 629 (alteration in original).

33. *Id.* at 630 (citations omitted).

34. *Id.* at 630–31.

35. *Id.* at 636.

36. *See id.* at 634.

37. *See id.* Compare *Lee v. Weisman*, 505 U.S. 577 (1992) (holding prayer at high school graduation unconstitutional), with *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997) (holding prayer at college graduation permissible).

The court observed that prior decisions illustrate the necessity for a case-by-case analysis, rather than the application of weaker constitutional standards for college-aged students.³⁸ The adversative methods employed by VMI led the court to conclude that the practice of requiring prayer before dinner had the primary effect of coercing the members of the Corps of Cadets to engage in religious activity.³⁹

In light of court rulings relating to the purpose and effect of the prayer, the finding of excessive entanglement with religion was predictable.⁴⁰ After all, the prayers were written by the college chaplain and were read at the direction of the college superintendent.⁴¹

B. *Privacy and FERPA*⁴²

The United States Supreme Court rendered a much anticipated decision relating to the Family Educational Rights and Privacy Act ("FERPA")⁴³ in *Owasso Independent School District v. Falvo*.⁴⁴ Teachers in the school district used the practice known as peer grading in the classrooms, having their pupils grade each other's homework and test papers and then call out the grades to the teacher in class.⁴⁵

Kristja Falvo, the mother of a partially mainstreamed disabled student, objected to the practice because it embarrassed her children to announce their grades in front of the other students.⁴⁶ When the teachers refused to discontinue peer grading, Falvo brought a class action suit against the school district.⁴⁷ Falvo claimed that the practice of peer grading violated FERPA's prohibition against any "policy or practice of permitting the release of education records . . . of students without the written consent of their parents."⁴⁸

38. *Mellen*, 181 F. Supp. 2d at 634–35.

39. *See id.* at 636.

40. *See id.* at 636–37.

41. *Id.* at 637.

42. 20 U.S.C. § 1232g (2000).

43. *Id.*

44. 122 S. Ct. 934 (2002).

45. *Id.* at 937.

46. *Id.*

47. *Id.*

48. *Id.* (quoting 20 U.S.C. § 1232g(b)(1) (2000)).

The decision from the Tenth Circuit Court of Appeals agreed with *Falvo*.⁴⁹ The court held that the “grades which students record on one another’s homework and test papers and then report to the teacher constitute ‘education records’ under FERPA.”⁵⁰ Since the students “maintained” the records for the teacher until the grades could be recorded in the grade book, peer grading was found to violate the statute.⁵¹

The United States Supreme Court unanimously reversed the Tenth Circuit.⁵² Speaking for the Court, Justice Kennedy rejected the proposition that students “maintained” the grades until the teachers could record them in their grade books.⁵³ The Court found the term “maintain” to suggest that records will be stored in a secure cabinet or database.⁵⁴ Kennedy’s opinion observed that “[i]t is fanciful to say [that students] maintain the papers in the same way the registrar maintains a student’s folder in a permanent file.”⁵⁵

The Court also disagreed with the Tenth Circuit’s holding that students who grade the papers of other students are to be considered “person[s] acting for” the school within the meaning of FERPA.⁵⁶ Absent more express language in the statute, the Court was unwilling to conclude that Congress had intended “to intervene in this drastic fashion with traditional state functions . . . [and] exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country.”⁵⁷

The holding in *Falvo* raises the question of whether files kept by teachers and other school employees must be placed in a secure cabinet or database in order to be classified as “educational

49. *Falvo v. Owasso*, 233 F.3d 1203, 1215 (10th Cir. 2000).

50. *Id.* “Educational record” is defined as “those records, files, documents, and other materials” containing “information directly related to a student and which are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A)(i)–(ii) (2000).

51. *Owasso*, 233 F.3d at 1216.

52. *Owasso*, 122 S. Ct. at 935, 938.

53. *Id.* at 939. The Court did not decide whether a teacher’s grade book is an “education record” under FERPA. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 939; *see also* 20 U.S.C. § 1232g(a)(4)(A)(ii) (stating that one of the necessary characteristics of “educational records” under FERPA is that they are maintained by person’s “acting for” an agency or institution).

57. *Id.* at 940.

records” under FERPA.⁵⁸ Such an interpretation substantially curtails the reach of FERPA.

C. “Zero Tolerance”

Another “hotly contested” issue was addressed by the Fourth Circuit Court of Appeals in *Ratner v. Loudoun County Public Schools*.⁵⁹ This “zero tolerance” case arose after a classmate confided in Benjamin Ratner (“Ratner”), an eighth grade public school student, that she had suicidal thoughts and that she had brought a knife to school.⁶⁰ Ratner took the knife, and put it in his locker without informing the school administration.⁶¹ He intended to inform both his parents and the other student’s parents about the knife, but before he did so an assistant principal learned that a classmate might have given Ratner the knife and questioned him about the matter.⁶² Ratner admitted he had the knife and retrieved it at the direction of an administrator.⁶³ The administrator acknowledged that she thought Ratner acted in what he believed to be in the best interests of his classmate and that his possession of the knife did not pose a threat to anyone.⁶⁴

Nevertheless, Ratner was suspended for ten days⁶⁵ under a policy which calls for expulsion from school, but permits a less severe disciplinary action “as may be deemed appropriate.”⁶⁶ Several days into the suspension, the superintendent of schools notified Ratner that he was recommending that Ratner be suspended for the remainder of the semester.⁶⁷ The extended suspension was upheld at a subsequent administrative hearing and appeal.⁶⁸

58. *See id.* at 939.

59. No. 00-2157, 2001 U.S. App. LEXIS 16941 (4th Cir. July 30, 2001) (unpublished decision). Under Fourth Circuit Rules, an unpublished opinion does not constitute binding precedent in that circuit. *See* 4TH CIR. R. 36(c).

60. *Ratner*, 2001 U.S. App. LEXIS 16941, at *1.

61. *Id.* at *2.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at *3.

66. *Id.* at *4 n.2 (quoting Ratner’s description of the board policy in his original complaint).

67. *Id.* at *3.

68. *Id.*

Ratner brought suit against the administrators and school system alleging violations of his due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.⁶⁹ He also brought a claim for cruel and unusual punishment under the Eighth Amendment.⁷⁰ In affirming the dismissal of the case, the Fourth Circuit stated that “[h]owever harsh the result in this case, the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged [by Ratner] . . . or of its application to Ratner.”⁷¹ The court held that its role was limited to determining whether the “complaint allege[d] sufficient facts which if proved would show that the implementation of the school’s policy in th[e] case failed to comport with the United States Constitution.”⁷² According to the court, the school’s policy was in fact constitutional.⁷³

The court accepted Ratner’s description of the policy as one “that precludes officials from considering the circumstances of a particular case when meting out punishment.”⁷⁴ The *Ratner* case, however, may not have presented a definitive test of zero tolerance policies because it is clear that the policy in question authorized administrators to impose a lesser disciplinary action when appropriate.⁷⁵ The administrator therefore clearly acted within the boundaries of his discretion in imposing a different penalty from the one that was recommended for Ratner.⁷⁶

D. *Supervisory Liability of Administrators*

In *Baynard v. Malone*,⁷⁷ a student sought damages against a school principal, the school system’s personnel director, the superintendent of schools, and the school board pursuant to 42

69. *Id.* at *3–4.

70. *Id.*

71. *Id.* at *6. The court affirmed dismissal of the case pursuant to FED. R. CIV. P. 12(b)(6).

72. *Id.* at *6.

73. *Id.*

74. *Id.* at *4 n.2.

75. *See id.*

76. *But see* *M.M. v. Chesapeake City Sch. Bd.*, 52 Va. Cir. 356 (Cir. Ct. 2000) (Chesapeake City). In *M.M.* the court rejected a student’s challenge to his expulsion for multiple threats of violence under the school system’s mandatory expulsion policy holding that “[m]andatory sentences for certain criminal offenses is a staple of the laws of the Commonwealth. A school board that adopts mandatory discipline actions based upon certain offenses is likewise not acting in an arbitrary or capricious manner.” *Id.* at 358.

77. 268 F.3d 228 (4th Cir. 2001).

perintendent of schools, and the school board pursuant to 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972.⁷⁸ The suit alleged sexual molestation by a teacher.⁷⁹

The teacher began molesting the student in the sixth grade and did not stop until the student entered college.⁸⁰ The abuse took place within the school, before, during, and after school hours; on camping trips; and at the teacher's home.⁸¹ Only after being told by different individuals that the teacher had sexually molested another student and was engaged in inappropriate conduct with the plaintiff did the principal counsel the teacher to limit physical contact with students.⁸² A few months later, the principal was informed by another individual that the teacher had abused children.⁸³ It was at this time that the principal advised the personnel director of the allegations.⁸⁴ The personnel director instructed the principal to watch the teacher carefully and launched an investigation.⁸⁵

The investigation failed to result in charges by either the Department of Child Protective Services or the police department.⁸⁶ The teacher resigned shortly thereafter.⁸⁷ The plaintiff was awarded substantial damages against the defendants by the district court.⁸⁸ However, the court granted the motions of all the defendants, except the principal, for judgment as a matter of law.⁸⁹

A plaintiff must satisfy three elements to prove supervisory liability under 42 U.S.C. § 1983: (1) the supervisor had actual or constructive knowledge of conduct by a subordinate resulting in an unreasonable risk of a constitutional injury to the plaintiff; (2) the response to the knowledge constituted deliberate indifference;

78. *Id.* at 232. *See generally* 42 U.S.C. § 1983 (2000); 20 U.S.C. §§ 1681–1688 (2000).

79. *Baynard*, 268 F.3d at 233.

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. *Id.* at 234.

86. *See id.*

87. *Id.*

88. *See id.*

89. *Id.* at 236–37.

and (3) the deliberate indifference caused the plaintiff to suffer a constitutional injury.⁹⁰

The Fourth Circuit concluded that sufficient evidence existed from which a jury could conclude that the principal had constructive knowledge of the teacher's abuse and that the principal's "failure to respond to mounting evidence of potential misconduct by Lawson [the teacher] exhibited deliberate indifference."⁹¹ However, the court held that the personnel director acted promptly and properly, launching an investigation upon learning of the allegations regarding the teacher and instructing the principal to closely monitor the teacher's actions.⁹² The superintendent was also exonerated because he properly relied upon the steps taken by the personnel director.⁹³

The importance of this case lies in the court's treatment of the Title IX claim. A school board is only liable under Title IX for its own misconduct or that of an official who has the authority to address the discrimination and to institute corrective action on behalf of the board.⁹⁴ Despite finding against the principal on the § 1983 supervisory liability claim, the court held that a jury could not reasonably conclude the principal had *actual* knowledge of the abuse.⁹⁵ More importantly, the court did not consider the principal an official with authority to institute corrective action on behalf of the school board.⁹⁶ While recognizing that a principal exercises broad powers over the school to which he or she is assigned.⁹⁷ A principal does not possess the authority under state law to suspend, transfer, or fire teachers.⁹⁸ The court found that these powers were necessary to act on behalf of the school board.⁹⁹ Consequently, it would appear that under the *Baynard* decision, the deliberate indifference of a principal does not give rise to liability of a school board under Title IX.

90. *Id.* at 235 (citing *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)).

91. *Id.* at 236.

92. *Id.*

93. *Id.* at 237.

94. *Id.* at 238. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999).

95. *Baynard*, 268 F.3d at 238.

96. *Id.* at 238-39.

97. The court listed the supervision of teachers and transfer and dismissal recommendations as examples of this broad power. *Id.*

98. *Id.* at 239.

99. *Id.*

E. Arbitration

The enforceability of an arbitration clause against a school board was at issue in *Russell County School Board v. Conseco Life Insurance Co.*¹⁰⁰ The school board filed suit in state court against the insurance company for failing to reimburse certain medical expenses.¹⁰¹ The insurance company removed the case to federal court and filed a motion to dismiss and a motion to compel arbitration pursuant to a clause in the contract between the company and the school board.¹⁰² The clause required arbitration of all disputes between the parties to be conducted in Chicago, the location of the company's home office.¹⁰³

The school board argued that under the holding in *W.M. Schlosser v. School Board of Fairfax County*,¹⁰⁴ it was ultra vires for a Virginia school board to enter into an arbitration agreement.¹⁰⁵ However, after the holding in *W.M. Schlosser*, the General Assembly amended the Virginia Public Procurement Act¹⁰⁶ to expressly authorize school boards to enter into arbitration agreements.¹⁰⁷ While any such arbitration is nonbinding,¹⁰⁸ the court rejected the school board's contention that nonbinding arbitration is unenforceable.¹⁰⁹ The court also did not agree that the board should not be required to participate in an arbitration in Chicago due to financial difficulties confronted by the school district.¹¹⁰ The court said that the school board failed to provide evidence as to why it was *unable* to pay the costs associated with the arbitration in Chicago.¹¹¹ Consequently, the school board was ordered to participate in the arbitration in Chicago.¹¹²

100. No. 1:01CV00131, 2001 U.S. Dist. LEXIS 20691 (W.D. Va. Dec. 12, 2001) (unpublished decision).

101. *Id.* at *2.

102. *Id.* at *2-3.

103. *Id.* at *2.

104. 980 F.2d 253 (4th Cir. 1992) (holding that a school board had no authority under Virginia law to arbitrate contract disputes).

105. *Russell County Sch. Bd.*, 2001 U.S. Dist. LEXIS 20691, at *3.

106. VA. CODE ANN. § 2.2-4300 (Repl. Vol. 2001).

107. *Id.* § 2.2-4366 (Repl. Vol. 2001).

108. *Id.*

109. *Russell County Sch. Bd.*, 2001 U.S. Dist. LEXIS 20691, at *12.

110. *Id.* at *11-12.

111. *Id.* at *12.

112. *Id.*

F. *Compliance with IDEA*¹¹³

In the past year, there have been few statutory and regulatory changes in the area of special education law. A period of regulatory quietude was expected following the changes that occurred with the 1997 reauthorization of the Individuals with Disabilities Education Act ("IDEA"),¹¹⁴ the 1999 revision of the federal regulations,¹¹⁵ and the issuance of Virginia's revised state regulations in 2001.¹¹⁶

The IDEA statutes and supporting federal regulations have remained unchanged this year. The cases that were decided primarily dealt with the issue of tuition reimbursement and procedural compliance. It can be expected that next year will provide many new legal considerations as the IDEA is scheduled for reauthorization.

The following cases demonstrate the importance placed by the courts on substantial compliance with the complicated procedures of the IDEA. These cases show that a school division's significant lapse in compliance with IDEA's procedures may result in liability for tuition reimbursement. Similarly, parents may be barred from recovering tuition reimbursement for the private placements they make without school division participation if they fail to comply with the notice procedures of the IDEA prior to making the placement. Despite the lack of statutory and regulatory development, some significant cases demonstrate that school divisions have a responsibility for notifying parents of the specifics of IDEA's procedures.

1. Tuition Reimbursement

In *Faulders v. Henrico County School Board*,¹¹⁷ parents disagreed with the school division's proposal for extended school year services and provided those services to the child at their own

113. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (2000).

114. *Id.*

115. 34 C.F.R. §§ 300.1-.197 (2001).

116. 8 VA. ADMIN. CODE § 20-80-10 (2002).

117. 190 F. Supp. 2d 849 (E.D. Va. 2002), *appeal filed*, No. 02-1418 (4th Cir. Apr. 22, 2002).

expense.¹¹⁸ The parents then sought reimbursement for those services through administrative proceedings.¹¹⁹ The hearing officer found that the school division should have provided the level of services requested by the parents, yet also found that reimbursement was not required for the services the parents had provided and paid for themselves.¹²⁰ The hearing officer explained that “a goal of ‘reasonable progress’ over the summer months was acceptable and that ‘mastery’ of skills was not required.”¹²¹ The parents subsequently brought suit under the IDEA.¹²²

The district court granted summary judgment for the school division on appeal, finding that any delay by Henrico County in developing the extended school year Individual Education Program (“IEP”) did not prejudice the parents, because they had the option of making their own placement and seeking reimbursement.¹²³ The court also criticized the hearing officer’s reliance on testimony of expert witnesses who had not observed the child in school, finding that he ignored the testimony of school division witnesses with first hand knowledge of the child in the school environment.¹²⁴ Finally, the court found that an IEP which was designed to achieve “reasonable progress” in the summer months as opposed to “mastery,” was sufficient.¹²⁵ The court held that the IDEA and supporting regulations do not require the school division to maximize a child’s education.¹²⁶

This case provides some insight into the standard by which extended school year services will be judged by the courts. These services are not required to be written into the IEP at a level which will provide the student with the same opportunity for mastery of goals as is required during the school year. Furthermore, the case clearly calls into question the feasibility of employing experts who have had little or no contact with the student in

118. *See id.* at 850–52.

119. *Id.* at 852.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 854 (“In making his decision, the Hearing Officer placed too much, if not exclusive, reliance on the expert testimony, and failed to give appropriate consideration to the basis for each witness’ opinion.”).

125. *Id.*

126. *Id.* at 853 (citing *Hartmann v. Loudoun County Bd. Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997) (citation omitted)).

the school setting. Their opinions will not be afforded the same weight as the school division experts who work with the student on a daily basis. This ruling underscores a tendency on the part of the courts to give deference to the opinions of those professionals who actually work with the student.

The Virginia Court of Appeals also addressed the issue of tuition reimbursement in *White v. Henrico County School Board*.¹²⁷ In *White*, the parents unilaterally removed their child from public school and placed him in a private school for learning disabled students for the school year.¹²⁸ Prior to his removal, the parents had reviewed and agreed to the child's IEP for that year.¹²⁹ A year later, the parents requested a due process hearing in which they sought reimbursement for the private school tuition payments for the previous and future school years.¹³⁰

Henrico County initiated a full evaluation of the child after receiving the hearing request and developed an IEP for him after school started.¹³¹ No teacher from the private school attended the IEP meeting.¹³² The school division did have information from the private school for its review.¹³³ The information showed that the child had actually regressed during his year of placement in the private school.¹³⁴ During the administrative proceedings, the local hearing officer found for the school division, but the state review officer reversed the decision and found for the parents.¹³⁵ The school district then challenged this ruling in the circuit court.¹³⁶ The circuit court found in favor of the school division, and the parents appealed.¹³⁷

In its analysis of the case, the Virginia Court of Appeals first reviewed the parents' argument that the circuit court did not conduct an appropriate review of the case.¹³⁸ The court of appeals

127. 36 Va. App. 137, 549 S.E.2d 16 (Ct. App. 2001).

128. *See id.* at 149, 549 S.E.2d at 22.

129. *Id.* at 147-49, 549 S.E.2d at 21-22.

130. *Id.* at 149, 549 S.E.2d at 22.

131. *Id.*

132. *Id.*

133. *Id.* at 149-50, 549 S.E.2d at 22.

134. *Id.* at 150, 549 S.E.2d at 22.

135. *Id.*

136. *Id.* at 151, 549 S.E.2d at 22.

137. *Id.* at 151, 549 S.E.2d at 23.

138. *Id.* at 151-52, 549 S.E.2d at 23.

found that the circuit court was not required to state its reasons for rejecting the state review officer's decision, even though that was the standard established by federal case law.¹³⁹

The appellate court then found that the procedural violations were not significant "because any procedural inadequacies in this case did not hamper the [parent's] opportunity to participate in the development of [the child's] IEP and did not result in a loss of an educational opportunity or benefit . . ." ¹⁴⁰ The court also held that the mother's absence from the IEP meeting was not a fatal procedural violation because she agreed for the meeting to proceed without her.¹⁴¹ Further, she had an opportunity to participate in its development.¹⁴² The court went on to note that the delay in holding the IEP meeting for the next school year and the absence of the private school teacher from the IEP meeting were not significant procedural violations because they did not deny a free appropriate public education.¹⁴³ Finally, the court reaffirmed the appropriateness of constructing draft IEPs for discussion at IEP meetings.¹⁴⁴

This case is significant because it demonstrates that while the IDEA's procedures are important, the failure to follow the procedures will not automatically result in a finding that the IEP was inappropriate or that tuition reimbursement must be awarded. Procedural violations will only be found to have invalidated the IEP if those violations were so serious that they resulted in a denial of a free appropriate public education.

The case also underscores that different case law will be applied depending on whether the IDEA appeal is brought in state or federal court. Federal case law would have required the circuit court to state with specificity and in writing its reasons for rejecting the review officer's findings, while Virginia case law provides no similar requirement.¹⁴⁵ The court found that the standard of review under the IDEA espoused through federal court decisions,

139. *Id.* at 152-53, 549 S.E.2d at 23.

140. *Id.* at 154, 549 S.E.2d at 23.

141. *Id.* at 156, 549 S.E.2d at 25.

142. *Id.*

143. *Id.* at 156-57, 549 S.E.2d at 26.

144. *Id.* at 159-60, 549 S.E.2d at 27.

145. *See, e.g., Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100 (4th Cir. 1992).

while persuasive, was not binding in state court appeals.¹⁴⁶ This decision creates an additional factor for parties to consider when deciding whether to appeal adverse administrative proceedings in state or federal court.

2. Notification Requirements Under IDEA

a. Parental Rights

The effect of the failure to notify parents of their IDEA rights was addressed by the Fourth Circuit in *Jaynes v. Newport News School Board*.¹⁴⁷ The *Jaynes* case involved a preschool autistic child whose parents unilaterally removed him from public school and provided education services to him using the educational methodology known as Applied Behavioral Analysis Therapy ("ABA").¹⁴⁸ The school division originally delayed in offering a special education program to the child and did not involve the parents in the initial IEP meeting.¹⁴⁹ Furthermore, the IEP was not implemented for several months.¹⁵⁰

In the fall of 1994 another IEP was drafted and the parents signed consent for implementation.¹⁵¹ Both IEPs contained language above the parents' signatures that stated the parents had received a copy of procedural safeguards.¹⁵² These safeguards notify parents of their rights, including the ability to request a due process hearing if there is any disagreement over the IEP.¹⁵³

The parents removed the child from the public school program in January 1995 and began providing the ABA program at home.¹⁵⁴ They initiated a hearing in January 1997.¹⁵⁵ When the school division defended the claim by arguing that the statute of

146. *White*, 36 Va. App. at 152, 549 S.E.2d at 23.

147. Nos. 00-2312, 00-2575, 2001 U.S. App. LEXIS 15580, at *1 (4th Cir. July 10, 2001) (unpublished decision).

148. *Id.* at *4.

149. *Id.* at *3.

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.* at *3-4.

155. *Id.* at *4.

limitations barred the administrative proceedings, the parents alleged that they did not in fact receive their procedural safeguards and asked that the statute of limitations be tolled.¹⁵⁶

Both the local hearing officer and the state review officer found for the parents.¹⁵⁷ However, the state review officer reduced the overall reimbursement amount to those expenses incurred on and after the date that the parents requested the due process hearing.¹⁵⁸ Part of the rationale for this decision was a finding by the review officer that the parents had actually received the procedural safeguards.¹⁵⁹

The parents appealed the decision to the district court, seeking reimbursement dating back to January 1995 for the ABA services.¹⁶⁰ The district court granted summary judgment for the parents and awarded reimbursement from July 1, 1995.¹⁶¹ The court found evidence of failures by the school division to comply with the IDEA's procedures and a failure to notify the parents of their right to initiate a due process hearing.¹⁶²

The Fourth Circuit affirmed the district court's opinion.¹⁶³ The court found that the statute of limitations for cases under the IDEA is one year for causes of action accruing prior to July 1, 1995, and two years for causes of action arising on or after that date.¹⁶⁴ The court discounted the school division's argument that the parents' cause of action arose in October 1994 when the last IEP meeting was held or, at the latest, in January 1995 when the parents removed the child from public school.¹⁶⁵

The Fourth Circuit opined that the real injury in this case was the school division's failure to notify the parents of their right to

156. See *id.* at *4. The statute of limitations was one year for causes of action accruing before July 1, 1995 and two years for causes of action accruing on or after July 1, 1995. See VA. CODE ANN. § 8.01-248 (Repl. Vol. 2000 & Cum. Supp. 2002).

157. *Jaynes*, 2001 U.S. App. LEXIS 15580, at *4.

158. See *id.* at *5.

159. See *id.* at *3.

160. *Id.* at *5.

161. *Id.*

162. *Id.*

163. *Id.* at *6.

164. *Id.* (citing *Manning v. Fairfax County Sch. Bd.*, 176 F.3d 235, 239 n.2 (4th Cir. 1999)).

165. See *id.* at *7-8.

request a due process hearing.¹⁶⁶ The court noted that “[i]t follows that the moment [the parents] learned they had a right to a hearing was the moment they learned Newport had a duty to inform them of such a right.”¹⁶⁷ The parents’ factual contention that they were not aware of their rights until late in 1996 was affirmed.¹⁶⁸ The Fourth Circuit also noted that the local hearing officer’s findings of fact should generally prevail over those of the state review officer if the two are in conflict over matters of witness credibility.¹⁶⁹

The *Jaynes* case illustrates that school boards have an obligation to notify parents of their rights under the IDEA. This case also underscores the importance of the need to document the provision of procedural safeguards to parents. Documentation of the provision of rights is critical to the imposition of a time limitation. One method of documentation is to have the parents sign and date an actual copy of the procedural safeguards, provide them with the copy, and maintain the signed document in the student’s file. This approach is not entirely feasible because the procedural safeguards are twenty-five pages long. An alternative approach would be to include an additional provision for the parents to sign with the written acknowledgement in the IEP. The provision could require parents to acknowledge awareness of their right to initiate a due process hearing if they have a disagreement over identification, evaluation, placement, or the provision of a free appropriate public education.

b. Parental Rejection of the IEP

The importance of compliance with procedures also arose in *Pollowitz v. Weast*.¹⁷⁰ Unlike the *Jaynes* case, the *Pollowitz* decision penalized the parents because they failed to follow IDEA’s procedures. In *Pollowitz*, the parents did not notify the school division within ten business days regarding their intent to reject

166. *Id.* at *8.

167. *Id.*

168. *Id.*

169. *Id.* at *9 (citing *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1992); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998)).

170. No. 00-1690, 2001 U.S. App. LEXIS 6729 (4th Cir. Apr. 17, 2001) (unpublished decision).

the proposed IEP program and to unilaterally place their child in private school.¹⁷¹

The parents attended an IEP meeting for the 1998–99 school year on March 23, 1998 and agreed to that IEP.¹⁷² Without telling the school division, the parents then sought enrollment for the child at a private school and paid the initial deposit on June 2, 1998.¹⁷³ The parents' attorney subsequently sent a letter to the school division on June 29, 1998 indicating that the parents intended to place the child privately and requesting that the school division support that placement.¹⁷⁴ A subsequent IEP meeting was conducted and the school division once again proposed public placement.¹⁷⁵ The parents then requested a due process hearing to seek reimbursement.¹⁷⁶

The school district sought to dismiss the matter because the parents had failed to provide appropriate notice of their rejection of the IEP.¹⁷⁷ The administrative law judge dismissed the case and, on appeal, the district court granted summary judgment for the school district.¹⁷⁸ The district court found that the attorney's letter provided insufficient notice to the school district because it did not reject the proposed IEP and because it did not provide the required notice.¹⁷⁹ The letter from the attorney was sent after the child was already enrolled in the private placement.¹⁸⁰

On appeal, the Fourth Circuit affirmed the district court's ruling that the parents failed to provide proper and timely notice of the rejection of the IEP prior to removing their child from public school and that this served as a bar to their claim for reimbursement.¹⁸¹ The court further held that the school district could bar reimbursement without showing that the letter's inadequacies prejudiced the school division.¹⁸² It was sufficient for the school district to prove that the required notice was not given.¹⁸³

171. *See id.* at *10–11.

172. *Id.* at *5.

173. *Id.*

174. *Id.* at *6.

175. *Id.* at *7.

176. *See id.*

177. *Id.*

178. *See id.* at *7–8.

179. *See id.* at *8–9.

180. *Id.* at *11.

181. *See id.* at *16–17.

182. *Id.* at *13–14.

183. *Id.*

This holding is significant because it illustrates how important it is for parents to follow the notice requirements of the IDEA if they expect to recover tuition reimbursement. The requirement that notice must be given ten business days prior to removal was added to the IDEA to allow schools to have time to satisfy the parents' concerns and, hopefully, avoid the need for the private school placement.¹⁸⁴ Consequently, the holding is not surprising. Without this notice, hearings could be initiated without first having the claims properly presented to the school division.

Special education law has had a quiet year with the exception of some significant case decisions. Those decisions make clear that parents must be informed of their rights under the IDEA and must be given notice of their procedural safeguards. School divisions must be in a position to prove that these rights were provided in order to assert a statute of limitations defense. Furthermore, school divisions must comply with IDEA procedures or risk having the IEPs which they develop invalidated. Nonetheless, minor procedural violations which do not result in a denial of a free appropriate public education will be given little credence by the courts. Parents must also be mindful of compliance with procedures if they are seeking reimbursement for a private school placement in which they have placed their child. It is likely that there will be many new issues raised after the reauthorization of the IDEA in 2002.

II. STATUTORY AND REGULATORY CHANGES

A. *Federal*

The most significant legislative development impacting public education in Virginia and the nation is the No Child Left Behind Act of 2001 (the "Act"),¹⁸⁵ which was signed into law on January 8, 2002. The Act, which amended Title I of the Elementary and Secondary Education Act of 1965,¹⁸⁶ has as its stated purpose "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a mini-

184. See 20 U.S.C. § 1412(a)(10)(C)(i) (2000).

185. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

186. 20 U.S.C. §§ 6301-8962 (2000).

mum, proficiency on challenging State academic achievement standards and state academic assessments.”¹⁸⁷ It is beyond the scope of this article to discuss the many aspects of this complex legislation. However, the Act does contain some provisions which, depending on their interpretation and application, may bring it squarely in conflict with the Virginia Constitution.

The Act, among other things, requires a state to develop standards and to measure progress toward achieving those standards in order to ensure proficiency of all students in the areas of reading/language arts, mathematics, and science.¹⁸⁸ The state is also required to develop an accountability system containing rewards and sanctions for both local school divisions and schools based on their progress in meeting interim targets and the ultimate proficiency goal.¹⁸⁹ The sanctions that the Act permits—and in some situations requires—a state to impose on school divisions, include the following: (1) permitting students to transfer to a school in another school division; (2) instituting new curricula; (3) replacing school division personnel; (4) removing a school from the jurisdiction of the school board; (5) appointing a trustee or receiver to run the division; and (6) abolishing or restructuring the division.¹⁹⁰

Depending on whether and how some of these sanctions are administered, they could bring the state into conflict with the requirement in the Virginia Constitution that “[t]he supervision of schools in each school division shall be vested in a school board.”¹⁹¹ This is especially true in light of the broad construction placed upon that provision by previous court decisions.¹⁹² Whatever else is certain, the Virginia Constitution requires that a school board, and not a third party, supervise the schools in the

187. No Child Left Behind Act § 1001, 115 Stat. at 1439.

188. *See id.* § 1111(b), 115 Stat. at 1445.

189. *See id.* §§ 1111, 1116, 115 Stat. at 1444–62, 1478.

190. *Id.* § 1116(b)(7)(C), 115 Stat. at 1484.

191. VA. CONST. art. VIII, § 7.

192. *See, e.g.,* *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973) (holding that the State Board of Education, acting alone, cannot consolidate school divisions); *Harrison v. Day*, 200 Va. 439, 452, 106 S.E.2d 636, 646 (1959) (declaring the massive resistance law authorizing the closing of schools and the vesting of control over schools in the Governor violative of VA. CONST. § 133, now VA. CONST. art. VIII, § 7). *But see* *De Febio v. County Sch. Bd.*, 199 Va. 511, 513, 100 S.E.2d 760, 762 (1957), *appeal dismissed*, 357 U.S. 218 (1958) (“The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised.”).

division.¹⁹³ Consequently, conflict may be inevitable. In addition, the Act leaves unanswered a myriad of questions, including whether tuition will be charged for students transferring from one division to another and, if so, by whom.¹⁹⁴ These and other questions will cause the state and local school boards to grapple with the implementation of the Act in the future.

B. *State*

The Virginia General Assembly enacted several education bills of particular interest to public schools. School boards are now required to “prominently” post the statement: “In God We Trust,” the National Motto, enacted by Congress in 1956” in a “conspicuous” place in each school, but not necessarily in each classroom.¹⁹⁵ School boards may accept in-kind or cash contributions to assist it in meeting this new mandate.¹⁹⁶

Another noteworthy piece of legislation is an amendment of Virginia Code section 22.1-60 to prohibit school boards from renegotiating a superintendent’s contract during the period following the election or appointment of new school board members, and when those new members are qualified to take office.¹⁹⁷ The amendment does not prohibit the appointment of, or contract negotiation with, a new superintendent during that period.¹⁹⁸ Nor does it prohibit the reappointment of and renegotiation of a contract with a sitting superintendent prior to an election, even though the reappointment and contract will not become effective until after the election.¹⁹⁹ This bill was introduced in reaction to a contract amendment and buyout of a superintendent by an outgoing school board, thus affirming the old adage that bad facts make bad law.

193. See *Sch. Bd. v. Parham*, 218 Va. 950, 958–59, 243 S.E.2d 468, 473 (1978) (holding the school board’s delegation of a State Board of Education grievance procedure to a fact-finding panel to be unconstitutional).

194. See VA. CODE ANN. § 22.1-5 (Repl. Vol. 2000).

195. *Id.* § 22.1-1 (Cum. Supp. 2002) (editor’s note).

196. *Id.*

197. *Id.* § 22.1-60 (Cum. Supp. 2002).

198. *Id.*

199. See *id.*

In a significant step towards total autonomy for elected school boards, Virginia Code section 22.1-32 was also amended to authorize elected school boards to pay their members an annual salary that is consistent with the salary procedures.²⁰⁰ The salary must be within the limits provided for county boards of supervisors in Title 15.2 or for cities in their charters.²⁰¹ This eliminates the need for a school board to have a bill introduced in the General Assembly to increase the salary limits for its members.

The General Assembly also made changes to school budgetary procedures. One bill amended Virginia Code section 22.1-115 to create a new major classification of contingency reserves for budget purposes.²⁰² This action may be more symbolic than substantive, because many school boards already include a contingency reserve in their budgets and any unexpended contingency reserve funds will revert at the end of fiscal year, the same as any other fund balance. Moreover, this new law does not mandate the appropriating body to fund such a reserve.²⁰³ Finally, this year the General Assembly granted school boards the power to accept credit or debit card payments and to add a service charge for accepting this means of payment.²⁰⁴

One of the most noteworthy legislative actions was the amendment of the charter school law, Virginia Code section 22.1-212.6 to -212.15, to mandate that school boards accept charter school applications.²⁰⁵ The scope of the legislation may be limited, however, because school boards retain the discretion to refuse to grant a charter to applicants.²⁰⁶ The General Assembly explicitly rejected further reaching legislation that would have made virtually every decision of a school board related to charter schools subject to judicial review.²⁰⁷ This legislation also would have re-

200. *Id.* § 22.1-32 (Cum. Supp. 2002).

201. *See id.*

202. *Id.* § 22.1-115 (Cum. Supp. 2002).

203. *See id.*

204. *Id.* § 22.1-116.1 (Cum. Supp. 2002).

205. *Id.* §§ 22.1-212.6 to -212.9, -212-11, -212.12, -212.14, -212.15 (Cum. Supp. 2002).

206. *Id.*

207. *See* H.B. 734, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 17, 2002, ch. 874, 2002 Va. Acts 714); S.B. 625, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 17, 2002, ch. 851, 2002 Va. Acts 600). The bills were changed by an amendment in nature of a substitute. The House Committee on Education enacted the amendment on Feb. 6, 2002 and the Senate Committee on Education and Health made a similar amendment on Feb. 12, 2002.

quired school boards to give charter schools the entire federal, state, and local per pupil funding received by the school board.²⁰⁸ Consequently, the amount of funding remains a matter to be negotiated between the charter school applicant and the school board.²⁰⁹

It is also important to note that students and employees were not forgotten by the General Assembly during the 2002 session. In response to the sale of student information for commercial purposes, Virginia Code section 22.1-79.3 was amended to require school boards to develop policies to prohibit the administration of student questionnaires and surveys during the regular school day or at school-sponsored events.²¹⁰ The Code now requires parental consent if the questionnaire or survey may result in the sale of student information for commercial purposes.²¹¹

School personnel also are now prohibited from recommending that students use "psychotropic medications."²¹² However, they are not prohibited from recommending that students be evaluated by a healthcare provider, or from consulting with the provider with the parent's consent.²¹³ In addition, students must now be taught the "benefits of adoption as a positive choice in the event of an unwanted pregnancy" as part of the family life curriculum.²¹⁴

The General Assembly also addressed the issue of teacher employment in 2002. It amended Virginia Code section 22.1-304(f) to require school boards to notify teachers of a reduction in force due to a decrease in the proposed school board budget.²¹⁵ This notification must occur within two weeks of the approval of the budget by the appropriating body or by June 1, whichever is earlier.²¹⁶

This amendment presents difficulties, however, because Virginia Code section 22.1-93 requires the appropriating bodies to approve the school board budget in May "or within thirty days of

208. *See id.*

209. *See id.*

210. VA. CODE ANN. § 22.1-79.3 (Cum. Supp. 2002).

211. *Id.*

212. *Id.* § 22.1-274.3 (Cum. Supp. 2002).

213. *Id.*

214. *Id.* § 22.1-207.1 (Cum. Supp. 2002).

215. *Id.* § 22.1-304(F) (Cum. Supp. 2002).

216. *Id.*

the receipt by [the appropriating body] of the estimates of state funds, whichever shall later occur."²¹⁷ In addition, funds are not available for use by the school board until they are appropriated, and the appropriating body can make appropriations as infrequently as it appropriates funds to its own departments.²¹⁸ Moreover, a school board is prohibited from expending or contracting to expend funds beyond those made available to it without the consent of the appropriating body,²¹⁹ and nothing in a teacher's continuing contract authorizes the school board to be bound beyond the period for which funds have been made available.²²⁰ The General Assembly may therefore have inserted greater confusion into the network of laws regarding teacher employment and compensation.

There have been a few state statutory changes made regarding special education law in the past year. One change was made in Virginia Code section 22.1-215.1 to require the State Board of Education to "publicize and disseminate" information regarding "current federal law and regulation addressing procedures and rights related to the placement and withdrawal of children in special education."²²¹ This information must be provided to parents of children who are currently placed in special education programs or who have been recommended for those programs.²²² The statute appears designed to insure that parents of children with disabilities are aware of their rights under the IDEA. This theme of insuring that parents are aware of their rights is one that is frequently repeated in case decisions and statutory provisions.

Another statutory revision affects the expulsion of students from public schools.²²³ The new provision requires consideration of the results of special education assessments when making an expulsion decision, except when the basis for the discipline falls within the firearm and drug offenses specified in Virginia Code

217. *Id.* § 22.1-93 (Repl. Vol. 2000).

218. *Id.* § 22.1-94 (Repl. Vol. 2000).

219. *Id.* § 22.1-91 (Repl. Vol. 2000).

220. *Id.* § 22.1-304(D) (Cum. Supp. 2002).

221. *Id.* § 22.1-215.1 (Cum. Supp. 2002).

222. *Id.*

223. *See id.* § 22.1-277.06 (Cum. Supp. 2002). This code section demonstrates an increased consideration of the needs of special education students in making disciplinary decisions.

sections 22.1-277.07 and 22.1-277.08.²²⁴ There is, however, language which provides that “[n]o decision to expel a student shall be reversed on the grounds that such factors were not considered.”²²⁵

The Virginia regulations regarding special education were substantially rewritten in January 2001 and minimal revisions occurred this year. The changes to the state regulations were mostly technical in nature and were required by the United States Department of Education to bring Virginia’s regulations into compliance with federal regulations.²²⁶ The revised Virginia regulations became effective on March 27, 2002.²²⁷

One amendment to the state regulations required the State Education Advisory Committee to publicly announce its meeting and agenda items “enough in advance of the meeting to afford interested parties a reasonable opportunity to attend.”²²⁸ There is also a requirement that these meetings be open to the public.²²⁹ The former regulatory language only required that notice of these items be given “prior to” the meeting.²³⁰ It appears that the intent of the change is to promote participation by the public in the advisory meetings.

Language was also added to the Virginia Administrative Code regarding the reporting provisions for state and local assessment programs.²³¹ The test reports must incorporate the results for students with disabilities “if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children.”²³² This language brings the state into conformity with federal requirements and furthers the goal of including children with disabilities in assessment programs.

224. *Id.* § 22.1-277.07, -277.08 (Cum. Supp. 2002).

225. *Id.* § 22.1-277.06 (Cum. Supp. 2002).

226. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 18 Va. Regs. Reg. 1657 (Feb. 25, 2002) (to be codified at 8 VA. ADMIN. CODE § 20-80).

227. *Id.*

228. *Id.* at 1659.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

The revised state regulations also altered the administrative code section regarding the “responsibility of local school divisions and state-operated programs”²³³ as it applies to non-educational placements made under the Virginia Comprehensive Services Act.²³⁴ The regulations previously required local school divisions to ensure the availability of, “to the extent reasonable, a free appropriate public education” for disabled children placed in private schools for non-educational reasons via the Comprehensive Services Act.²³⁵ The concern had been that a child placed in private day or residential placement for non-educational reasons might be placed in a setting that did not meet the least restrictive environment requirements associated with a free appropriate public education.²³⁶ The regulatory amendment now requires the local school division to develop an IEP “appropriate for the child’s needs while the child is in the residential placement.”²³⁷ The prior language appeared to limit the rights of children with disabilities to receive a free appropriate public education.²³⁸ The new language clarifies that, even when the impetus for the placement is not educational, a child is still entitled to a free appropriate public education. An additional amendment also makes it clear that the parents of children placed through the Comprehensive Services Act retain their right to participate in IEP and placement decisions unless they choose not to participate.²³⁹

One of the major changes in this set of regulatory amendments occurred in the section addressing the free appropriate public education (“FAPE”) requirements.²⁴⁰ Under the section entitled “Age of Eligibility,” the regulatory language was changed to reflect that it is a goal for special education services to be available to disabled children from birth through age twenty-one by the year 2010.²⁴¹ Currently, services in Virginia are required for chil-

233. *Id.* at 1660.

234. *See* VA. CODE ANN. § 2.2-5200 to -5214 (Repl. Vol. 2001).

235. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 18 Va. Regs. Reg. at 1660.

236. 8 VA. ADMIN. CODE § 20-80-64 (2002) (providing a list of the least restrictive environment requirements).

237. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 18 Va. Regs. Reg. at 1660.

238. *See id.*

239. *Id.* at 1672.

240. *Id.* at 1666.

241. *Id.*

dren ages two through twenty-one, and in the federal regulations they are required for children ages three through twenty-one.²⁴²

Finally, the provisions of the due process hearing section²⁴³ were amended to provide that the twenty business day timeline for decisions in expedited due process hearings applies regardless of whether the parents or the school division requests the hearing.²⁴⁴ The regulation also inserted specific language to clarify that an appeal of any hearing officer's decision can be made to either a state circuit court or a federal court within one year of the decision.²⁴⁵ Previously the regulations only referred to appeals to state courts.²⁴⁶

III. CONCLUSION

In comparison to the No Child Left Behind Act of 2001, the other developments in education law this past year were relatively insignificant and, to a great extent, predictable. Without a doubt, the interpretation and implementation of the Act will spawn litigation and legislation on the state level for years to come. There were few developments in the area of special education law, with the exception of case decisions regarding compliance with IDEA's procedures and tuition reimbursement. It can be expected that the imminent reauthorization of the IDEA will result in significant changes in the next year.

242. *See id.*, 34 C.F.R. § 300.121(a)(2001).

243. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 18 Va. Regs. Reg. at 1676.

244. *Id.* at 1681.

245. *Id.* at 1682.

246. 8 VA. ADMIN. CODE § 20-80-76(O)(1) (2002).