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EDUCATION LAW

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I. CASE DECISIONS

This year saw a dearth of significant developments affecting general education law in Virginia. Indeed, the most anticipated case affecting public education this year, the constitutional challenge to the pledge of allegiance,¹ was perhaps the biggest disappointment for those looking forward to further guidance on issues relating to religion in public schools, because the Supreme Court of the United States decided the case on procedural, rather than constitutional, grounds.² The Court did clarify a question that had been plaguing higher education for twenty-five years—whether Justice Powell’s plurality opinion in *Regents of the University of California v. Bakke*³ was binding precedent—in a pair of cases involving admissions to the University of Michigan and its law school.⁴ The United States Court of Appeals for the Fourth Circuit, on the other hand, predictably brushed aside the Virginia Military Institute’s position that its “supper prayer” was not a violation of the Establishment Clause of the First Amendment.⁵ On the legislative front, the General Assembly passed few laws that are likely to bring about significant changes in public educa-

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1. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

2. *See id.* at 2312.

3. 438 U.S. 265 (1978).

4. *See Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

5. *See Mellen v. Bunting*, 327 F.3d 355, 368–69, 371–72 (4th Cir. 2003).

tion⁶—certainly nothing having the impact of the Standards of Learning requirements⁷ or the No Child Left Behind Act.⁸

A. *Establishment and Free Exercise Clauses*

In *Elk Grove Unified School District v. Newdow*,⁹ the atheist father of an elementary school student claimed that a requirement that students recite the pledge of allegiance each day violated the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States.¹⁰ The father specifically complained about the use of the words “under God,” which Congress added to the pledge in 1954.¹¹ The United States Court of Appeals for the Ninth Circuit struck down the pledge requirement as violative of the Establishment Clause.¹²

The Supreme Court of the United States did not reach the First Amendment issue that held the public interest. Rather, it reversed the Ninth Circuit’s decision on the grounds that the father lacked standing to challenge the school district policy in federal court:

[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing.¹³

6. See Act of Apr. 15, 2004, ch. 967, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 22.1-3, -5, -270 (Supp. 2004)); Act of Apr. 12, 2004, ch. 965, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 2.2-4018 (Cum. Supp. 2004), 22.1-253.13:3, 13:6, 13:8 (Supp. 2004)); Act of Apr. 12, 2004, ch. 560, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-277.07:1 (Supp. 2004)); Act of Apr. 12, 2004, ch. 530, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 2.2-3109 (Cum. Supp. 2004), 22.1-212.5, -6, -8, -9, -11, -12 (Supp. 2004)); Act of Apr. 12, 2004, ch. 528, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-289.2 (Supp. 2004)); see also *infra* Part II.B (discussing statutory changes in state law).

7. VA. CODE ANN. § 22.1-253.13:1 (Supp. 2004).

8. 20 U.S.C. § 6301-8962 (2000).

9. 124 S. Ct. 2301 (2004). For further discussion of the case, see Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Family and Juvenile Law*, 39 U. RICH. L. REV. 241, 244-45 (2004).

10. *Id.* at 2305.

11. *Id.* at 2305-06.

12. *Newdow v. United States Cong.*, 292 F.3d 597, 612 (9th Cir. 2002).

13. *Newdow*, 124 S. Ct. at 2312.

Chief Justice Rehnquist and Justices O'Connor and Thomas filed separate opinions joining in the judgment of the Court, but finding that the father had standing and that the pledge requirement does not offend the Establishment Clause.¹⁴ These separate opinions did little to clarify the appropriate test to be employed in resolving challenges under the religion clauses to practices in the public education setting. Indeed, these opinions illustrate the problem encountered in cases involving the religion clauses—determining the appropriate test to apply to an Establishment or Free Exercise challenge.

In his opinion, in which Justice O'Connor joined, the Chief Justice asserted that the national culture in the United States “allows public recognition of our Nation’s religious history and character,”¹⁵ citing numerous references to God in the official life of the United States since the country’s inception.¹⁶ He contrasted the pledge with the explicit religious exercise at issue in *Lee v. Weisman*¹⁷ and observed that the pledge is a patriotic exercise, which is not converted into a religious exercise by the inclusion of the phrase “under God.”¹⁸

Justice O'Connor reaffirmed her view that the “endorsement test” should be utilized to decide Establishment Clause challenges to government-sponsored speech and displays.¹⁹ The endorsement test asks “whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders.”²⁰ Justice O'Connor concluded that the answer is no in this case.²¹ Relying on the role of religion in the history of the nation and “the inevitable consequence of our Nation’s origins,”²² Justice O'Connor found the references to God that appear in the pledge of allegiance, the na-

14. See *id.* at 2312–20 (Rehnquist, C.J., concurring); *id.* at 2321–27 (O'Connor, J., concurring); *id.* at 2327–33 (Thomas, J., concurring).

15. *Id.* at 2319 (Rehnquist, C.J., concurring).

16. *Id.* at 2317–19 (Rehnquist, C.J., concurring).

17. 505 U.S. 577 (1992). The Court in *Lee* found that coercion existed where a prayer was delivered at a high school graduation. *Id.* at 593.

18. *Newdow*, 124 S. Ct. at 2319–20 (Rehnquist, C.J., concurring).

19. *Id.* at 2321 (O'Connor, J., concurring).

20. *Id.* at 2326 (O'Connor, J., concurring).

21. See *id.* at 2323–27 (O'Connor, J., concurring).

22. *Id.* at 2322 (O'Connor, J., concurring).

tional motto, the Star-Spangled Banner, and at the opening of sessions of the Court to be “ceremonial deism,” in which the government can “refer to the divine without offending the Constitution.”²³ Even the religious motivations by the legislators who inserted “under God” into the pledge did not make its recitation in public school classrooms unconstitutional, because the continued repetition of that phrase changed its cultural significance.²⁴ Justice O’Connor also noted that such references to God had been “employed pervasively without engendering significant controversy,”²⁵ that they did not refer to a particular religion,²⁶ and that the brevity of the reference to God distinguished the pledge from the prayers and invocations at issue in prior cases before the Court.²⁷

Justice Thomas, on the other hand, opined that under *Lee* the pledge requirement is unconstitutional, but that *Lee* was wrongly decided.²⁸ According to Justice Thomas, *Lee* incorrectly concluded that peer pressure could constitute coercion under the religion clauses.²⁹ Rather, in his view, only the “force of law and threat of penalty” can constitute coercion sufficient to violate the Establishment Clause.³⁰ Perhaps Justice Thomas’s most far-reaching pronouncement was that the Establishment Clause is not made applicable to the states through the Fourteenth Amendment and “is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.”³¹ This view did not appear to gain a foothold among any of the other justices.

In a case decided before *Newdow*, the United States District Court for the Eastern District of Virginia, in *Myers v. Loudoun County School Board*,³² had little difficulty disposing of First Amendment challenges brought by the father of two elementary

23. *Id.* at 2322–23 (O’Connor, J., concurring).

24. *Id.* at 2325 (O’Connor, J., concurring).

25. *Id.* at 2324 (O’Connor, J., concurring).

26. *Id.* at 2325–26 (O’Connor, J., concurring).

27. *Id.* at 2326 (O’Connor, J., concurring).

28. *Id.* at 2330 (Thomas, J., concurring).

29. *Id.* (Thomas, J., concurring).

30. *Id.* (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

31. *Id.* at 2331 (Thomas, J., concurring).

32. 251 F. Supp. 2d 1262 (E.D. Va. 2003).

school students.³³ The father challenged the Virginia statutes that require the daily recitation of the pledge of allegiance and the posting of the national motto, "In God We Trust," in public schools.³⁴ As noted by the court, the challenge to the pledge statute was somewhat unique because it was not based on the use of the words "under God" in the pledge.³⁵ Rather, the father objected to the pledge statute because it created a "civil religion" that requires students to worship the country or the flag.³⁶ The court noted that the concept of a civil religion, which the court equated with ceremonial deism, has long been recognized,³⁷ "[b]ut no court that has acknowledged the existence of a civil religion has ever found that government sponsored activities that encourage patriotism violate the Establishment Clause."³⁸ Moreover, a student is not required to participate in the recitation of the pledge "if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise."³⁹

Applying the test set forth in *Lemon v. Kurtzman*,⁴⁰ the district court held that the statute did not violate the Establishment Clause in four ways: (1) it has the secular purpose of fostering and inspiring patriotism, love of country and respect for constitutional principles;⁴¹ (2) it does not advance or inhibit religion because "the statute itself practically conveys no religious message, and at most it conveys a message of government appreciation;"⁴² and (3) it does not foster an excessive government entanglement with religion because the pledge is secular, not religious.⁴³

The father also argued that the school's implementation of the pledge statute violated the Free Exercise Clause because "through a system of reward and punishment, the School effectively coerce[d] participation in the pledge recitation."⁴⁴ The al-

33. *See id.* at 1275-77.

34. *Id.* at 1264.

35. *Id.* at 1266.

36. *Id.* at 1266-67.

37. *See id.* at 1267-68.

38. *Id.* at 1268.

39. *Id.* at 1268 (quoting VA. CODE ANN. § 22.1-202(C) (Repl. Vol. 2003 & Supp. 2004)).

40. 403 U.S. 602, 612-13 (1971).

41. *Myers*, 251 F. Supp. 2d at 1269.

42. *Id.*

43. *Id.* at 1269-70.

44. *Id.* at 1270.

leged reward was the distribution of Chick-Fil-A meal coupons to students who displayed patriotism.⁴⁵ The district court rejected this argument, noting that students received the reward for engaging in a number of patriotic exercises, and not solely the recitation of the pledge.⁴⁶ Therefore, the reward program was “neutral and generally applicable” and did not violate the Free Exercise Clause.⁴⁷

According to the father, his children were punished for their refusal to recite the pledge because: (1) students who stay seated are disciplined until their parents make “an acceptable objection” to their participation in the pledge; (2) his children must remain seated during the pledge while all their classmates stand; (3) his children are forced to listen to the pledge; and (4) he had not been given an adequate opportunity to explain to his children’s classmates why his children stay seated during the pledge.⁴⁸ The court noted that the alleged punishment “is not similar to any of the traditional punishments recognized as implicating constitutional rights,”⁴⁹ and held that it also did not rise to the level of violating the Free Exercise Clause.⁵⁰

In addition to his challenges to the pledge statute, the father argued that the school’s implementation of the motto statute violated the Establishment Clause because by using posters that were supplied by a conservative religious group, “the School is effectively establishing a religion.”⁵¹ Again, the father did not object to the word “God” in the national motto, but he did request that the court order the flag removed from the poster and that the poster clearly state that “In God We Trust” is the national motto and not a religious statement.⁵² The court rejected the father’s novel arguments and held that the donation of the posters by a religious organization, regardless of its religious motivation, did not turn the posters into religious statements.⁵³

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1271. Apparently, the only argument the father did not make was that eating fast food is a form of punishment.

49. *Id.*

50. *Id.* at 1273.

51. *Id.*

52. *Id.*

53. *Id.* at 1274–75.

B. *Affirmative Action*

As noted earlier, the Supreme Court of the United States issued two opinions clarifying the contours of affirmative action in higher education. In *Grutter v. Bollinger*,⁵⁴ a Caucasian applicant, Barbara Grutter, who was denied admission to the University of Michigan Law School, claimed that her application was rejected because race was a “predominant factor” in the law school’s admissions decisions in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.⁵⁵

The law school’s admissions policy “requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”⁵⁶ The applicants’ grade point averages and Law School Admission Test scores are considered, but admissions officials are to look beyond these factors to “applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’”⁵⁷ Diversity was considered in admissions decisions, but was not defined “solely in terms of racial and ethnic status.”⁵⁸ The school did attempt to ensure that a “critical mass of underrepresented minority students”⁵⁹ was enrolled, but did not have a certain “number, percentage, or range of numbers or percentages that constitute[d] [a] critical mass.”⁶⁰

54. 539 U.S. 306 (2003).

55. *Id.* at 316–17. Title VI of the Civil Rights Act of 1964 states that “[n]o 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.” 42 U.S.C. § 2000d (2000). Furthermore, “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. § 1981(a) (2000).

56. *Grutter*, 539 U.S. at 315.

57. *Id.*

58. *Id.* at 316.

59. *Id.*

60. *Id.* at 318.

The Court left no doubt regarding the viability of Justice Powell's opinion in *Regents of the University of California v. Bakke*.⁶¹ As Justice O'Connor expressed, "[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."⁶² The Court also rejected the notion "that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."⁶³ After deferring to "[t]he Law School's educational judgment that such diversity is essential to its educational mission,"⁶⁴ and finding "the Law School has a compelling interest in attaining a diverse student body,"⁶⁵ the Court turned to the question of whether the admissions policy was narrowly tailored to achieve its purpose.

The Court emphatically rejected the idea that an admissions policy that uses a quota system can be narrowly tailored.⁶⁶ In order to pass muster, "a university may consider race or ethnicity only as a "plus' in a particular applicant's file, without 'insulat[ing] the individual from comparison with all other candidates for the available seats."⁶⁷ "The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota,"⁶⁸ because, as stated by Justice Powell in *Bakke*, there is "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted."⁶⁹ Accordingly, the Court found the law school's admission policy to be narrowly tailored to achieve its ends.⁷⁰ While the Court upheld the policy, it did qualify its holding by stating that the policy cannot last forever, but must have a "termination point."⁷¹ The Court accepted

61. 438 U.S. 265 (1978).

62. *Grutter*, 539 U.S. at 325.

63. *Id.* at 328.

64. *Id.*

65. *Id.*

66. *Id.* at 334.

67. *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

68. *Id.* at 335-36.

69. *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323).

70. *Id.* at 334.

71. *Id.* at 342.

the law school's pledge to terminate its race-based policy "as soon as practicable."⁷²

In *Gratz v. Bollinger*,⁷³ the companion case to *Grutter*, two Caucasian applicants denied admission to the University of Michigan's College of Literature, Science and the Arts claimed that the university's consideration of race in its undergraduate admissions decisions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981(a).⁷⁴ Although the university's admission guidelines had changed several times prior to the institution of this case,⁷⁵ the Court focused on the guidelines in effect at the time the case was heard.⁷⁶ Under those guidelines, admissions decisions were made based on the number of points accumulated by the applicant.⁷⁷ Points were awarded "based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership."⁷⁸ In addition, members of "an underrepresented racial or ethnic minority group" were awarded twenty points under a miscellaneous category.⁷⁹ "Underrepresented minorities" were defined to include African Americans, Hispanics, and Native Americans.⁸⁰

Applicants with 100 or more points automatically gained admission.⁸¹ Therefore, the points awarded to underrepresented minorities constituted twenty percent of the total points needed to be guaranteed admission. Admissions personnel could also flag applications to be individually reviewed by a committee if the applicant: (1) would not otherwise be automatically admitted, (2) achieved a minimum number of points, (3) was academically prepared to succeed at the university, and (4) had some quality or

72. *Id.* at 343.

73. 539 U.S. 244 (2003).

74. *Id.* at 249–51.

75. *Id.* at 253.

76. *Id.* at 255–57.

77. *Id.* at 255.

78. *Id.*

79. *Id.*

80. *Id.* at 253–54.

81. *Id.* at 255.

characteristic that would be valuable to the freshman class.⁸² The university admitted virtually every qualified applicant from the underrepresented minorities groups during the period of time relevant to this litigation.⁸³

The Court struck down the undergraduate admissions program because a system that automatically awards points based on race, rather than simply considering race as a plus in an individualized selection process, is not narrowly tailored to achieve a compelling interest in diversity.⁸⁴ Undoubtedly, the university considered its racial and ethnic minority selection program to be a positive addition to its admissions process. The Supreme Court, on the other hand, was not enamored with the flagging program, finding that it "only emphasizes the flaws of the University's system" because individualized consideration is the exception rather than the rule.⁸⁵ The Court observed that this individualized attention occurred only after the points were added to "make[] race a decisive factor for virtually every minimally qualified underrepresented minority applicant."⁸⁶ In addition, the Court dismissed the university's argument that administrative challenges such as the volume of applications, justify an otherwise constitutionally infirm admissions policy.⁸⁷

The Supreme Court's decisions in *Gratz* and *Grutter* have obvious implications for public institutions of higher education. Such institutions have now been given a model to follow when establishing an admissions policy that takes an applicant's race into consideration. It is doubtful, however, that the standards established in the University of Michigan cases will be applicable to public elementary and secondary schools. Most notably, K-12 institutions normally do not have applicants, at least not in the model of higher education. At least one commentator has noted that the contexts of a university admissions policy and K-12 integration have significant differences and, therefore, may not warrant identical treatment.⁸⁸

82. *Id.* at 256-57.

83. *Id.* at 254.

84. *Id.* at 275.

85. *Id.* at 273.

86. *Id.* at 274.

87. *Id.* at 273-75.

88. See James E. Ryan, *The Limited Influence of Social Science Evidence in Modern*

The United States Court of Appeals for the Fourth Circuit has considered two cases that involved race-based admissions in the K–12 context.⁸⁹ It is unlikely that the outcomes in those cases would have been different had the cases been decided after the *Gratz* and *Grutter* decisions. In *Eisenberg v. Montgomery County Public Schools*,⁹⁰ a white student's application to transfer to the county's math and science magnet program was denied based upon the school's diversity profile.⁹¹ In *Tuttle v. Arlington County School Board*,⁹² a magnet school used a weighted lottery system to increase the representation of racial minorities in the school.⁹³ In both *Eisenberg* and *Tuttle*, the schools failed to provide individualized consideration to the applicant or to use race as merely a plus factor.⁹⁴ Thus, even after *Gratz* and *Grutter*, it is unlikely that the policies in *Eisenberg* and *Tuttle* would be considered narrowly tailored to meet a compelling state interest.

C. Special Education

Special education disputes continue to be a source for litigation in matters arising under the Individuals with Disabilities Education Act ("IDEA"),⁹⁵ and the Rehabilitation Act of 1973.⁹⁶ Recent cases dealt with issues of tuition reimbursement for private schools,⁹⁷ procedural compliance,⁹⁸ extended school year services,⁹⁹ notice requirements,¹⁰⁰ and "stay-put" provisions.¹⁰¹ Cases decided within the Fourth Circuit also reaffirmed the judicial

Desegregation Cases, 81 N.C. L. REV. 1659, 1687 (2003).

89. See *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000).

90. 197 F.3d 123 (4th Cir. 1999).

91. *Id.* at 124–25.

92. 195 F.3d 698 (4th Cir. 1999).

93. *Id.* at 702.

94. See *Eisenberg*, 197 F.3d at 130–31; *Tuttle*, 195 F.3d at 707.

95. 20 U.S.C. §§ 1400–1487 (2000).

96. 29 U.S.C. §§ 701–796 (2000).

97. See *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *County Sch. Bd. v. Palkovics*, 285 F. Supp. 2d 701 (E.D. Va. 2003).

98. See *Lawson*, 354 F.3d 315; *Palkovics*, 285 F. Supp. 2d 701.

99. See *Palkovics*, 285 F. Supp. 2d 701.

100. See *R.R. v. Fairfax County Sch. Bd.*, 338 F.3d 325 (4th Cir. 2003); *Smith v. Isle of Wight County Sch. Bd.*, 284 F. Supp. 2d 370 (E.D. Va. 2003).

101. See *Wagner v. Bd. of Educ.*, 335 F.3d 297 (4th Cir. 2003).

standard of review for an individualized education program ("IEP")¹⁰² and the precept that deference must be afforded to public school educators when they make educational determinations.¹⁰³ These significant recent holdings are analyzed in the following discussion.

1. FAPE, Private Placement, Tuition Reimbursement, and ESY Services

In *A.B. v. Lawson*,¹⁰⁴ the United States Court of Appeals for the Fourth Circuit considered a parent's request for tuition reimbursement for a placement in a private school and ultimately denied reimbursement.¹⁰⁵ The Fourth Circuit's opinion reaffirmed the notion that deference must be given to the educational judgments of public educators.¹⁰⁶ The court agreed that "once education authorities have made a professional judgment about the substantive content of a child's IEP, that judgment must be respected."¹⁰⁷ The court also discussed the standard for reviewing an IEP.¹⁰⁸ The court reaffirmed that the student's IEP provided the student with a free appropriate public education ("FAPE") and satisfied IDEA requirements if the IEP was reasonably calculated to provide the student with some educational benefit.¹⁰⁹ The Fourth Circuit clarified that an IEP was not required to replicate a private school program¹¹⁰ or "maximize' a student's potential."¹¹¹ The correct standard for review of an IEP is whether the student could obtain some educational benefit in the public school program.¹¹²

Undergirding all of [the parent's] arguments are [their] claims that because [their child], a child of above-average IQ, was not fulfilling

102. *Lawson*, 354 F.3d at 328-30.

103. *Id.* at 326.

104. 354 F.3d 315 (4th Cir. 2004).

105. *Id.* at 318, 332.

106. *See id.* at 325.

107. *Id.* at 326 (quoting *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1208 (4th Cir. 1990)).

108. *See id.* at 328-30.

109. *Id.* at 326-28.

110. *Id.* at 328.

111. *Id.* at 327 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982)).

112. *See id.* at 328-30.

his potential within a general education setting—and, in contrast, allegedly was “thriving” and “getting the help he needs” at the [private school]—[the public school system] was not in compliance with IDEA. Although, . . . nowhere does IDEA require that a school system “maximize” a student’s potential.¹¹³

The case affirms three important principles under IDEA. First, the expertise of public school educators must be granted deference.¹¹⁴ Second, IDEA does not require that a public school maximize a student’s potential, but rather requires that the student obtain some benefit from a public education.¹¹⁵ Finally, the case reaffirmed the position that a public school is not required to duplicate a program provided by a private school.¹¹⁶

The Fourth Circuit also considered in *G v. Fort Bragg Dependent Schools*¹¹⁷ the application of IDEA to a school operated by the federal government.¹¹⁸ Although the case was remanded, the court found that the federal FAPE standard articulated by the Supreme Court of the United States in *Board of Education v. Rowley*¹¹⁹ governed the student’s IEP and not North Carolina’s “full potential” standard.¹²⁰ The Fourth Circuit also determined for the first time that compensatory education services were available to remedy the failure of a school division to provide FAPE.¹²¹

As noted previously, courts continue to affirm that judgments of public school educators are due deference. In *County School Board v. Palkovics*,¹²² the United States District Court for the Eastern District of Virginia reviewed the parents’ unilateral placement of an autistic student in a private school and their resulting request for tuition reimbursement.¹²³ The district court found “while expert testimony may be relevant, reviewing officials should not second-guess the educational judgments of school

113. *Id.* at 327 (quoting *Rowley*, 458 U.S. at 189).

114. *Id.* at 326. This position was also affirmed in a district court opinion, *County School Board v. Palkovics*, 285 F. Supp. 2d 701, 706–08 (E.D. Va. 2003).

115. *Lawson*, 354 F.3d at 319, 327.

116. *Id.* at 328.

117. 343 F.3d 295 (4th Cir. 2003).

118. *Id.* at 298–99.

119. 458 U.S. at 190–205 (1982).

120. *Fort Bragg Dependent Schs.*, 343 F.3d at 306.

121. *Id.* at 308–09.

122. 285 F. Supp. 2d 701 (E.D. Va. 2003).

123. *Id.* at 703–04.

employees.”¹²⁴ The court also held that schools are entitled to have a reasonable time period in which to determine whether extended school year (“ESY”) services are required and that the need for ESY services does not have to be determined by any particular date.¹²⁵ Likewise, the school was found not to have an obligation to establish a behavioral intervention plan (“BIP”) by any particular date because IDEA regulations do not require the inclusion of a BIP until a student’s behavior impedes his own learning or the learning of others.¹²⁶ Finally, the court held that a procedural violation of IDEA was not significant unless the violation denied FAPE.¹²⁷ In this case, the school’s failure to check the assessment methods on four of the annual goals did not prevent the student from receiving FAPE from the public school program.¹²⁸

Not only is the ESY holding of *Palkovics* a fair reading of the statute, as neither IDEA nor its regulations require that ESY services be determined by a particular time, but the holding is appropriate from a practical perspective. ESY services by definition are provided in the summer, and it is often unknown whether ESY services will be appropriate when the IEP is drafted earlier in the school year. By allowing the school officials the flexibility of determining ESY services later in the school year, school officials may more accurately determine whether ESY services are appropriate and which services are needed.

2. Statute of Limitations and Notice Requirements

The Fourth Circuit considered in *R.R. v. Fairfax County School Board*¹²⁹ the issue of whether IDEA requires educational agencies in Virginia to provide notice to parents of the limitations period applicable to requests for a due process hearing.¹³⁰ The parent filed for a due process hearing, requesting reimbursement for the student’s private school tuition expenses.¹³¹ The hearing request was filed over twenty-nine months after the parent had rejected

124. *Id.* at 707–08.

125. *Id.* at 708–09.

126. *Id.* at 709.

127. *Id.*

128. *Id.*

129. 338 F.3d 325 (4th Cir. 2003).

130. *Id.* at 327.

131. *Id.* at 328.

the school's proposed IEP and withdrawn the student from school.¹³² The court held that IDEA did not require the school board to provide the parents with notice of Virginia's two-year statutory limitations period.¹³³ In reaching its conclusion, the Fourth Circuit considered that courts that have adopted very short limitations periods have often imposed notice requirements; however, where courts have adopted longer limitations periods, such as Virginia's two-year period, notice requirements have not been imposed.¹³⁴

3. Section 504 of the Rehabilitation Act of 1973

In *Power v. School Board*,¹³⁵ the parents initiated a suit alleging that the school board's procedural policies violate Section 504 of the Rehabilitation Act of 1973 ("Section 504")¹³⁶ by not providing adequate safeguards.¹³⁷ The parents did not make any allegations of discrimination by the school board on account of a disability.¹³⁸ In dismissing the claim, the United States District Court for the Eastern District of Virginia held that there was no private cause of action to enforce section 504's regulatory due process provision.¹³⁹ Section 504 "does not provide for a cause of action to assert a claim for procedural inadequacy, separate and apart from a claim of discrimination."¹⁴⁰ Because there was no private right of action, the court lacked subject matter jurisdiction over the case.¹⁴¹ Simply stated, the court held that parents cannot challenge a school division's Section 504 procedures absent a claim of discrimination.

132. *Id.*

133. *Id.* at 330-31.

134. *Id.* at 331-32; *see, e.g.*, *CM v. Bd. of Educ.*, 241 F.3d 374, 383-84 (4th Cir. 2001) (holding that a North Carolina statute granting a 60-day limitations period was consistent with IDEA policies because the statute contained a notice requirement); *Strawn v. Miss. State Bd. of Ed.*, 210 F.3d 954, 957-58 (8th Cir. 2000) (refusing to impose a notice requirement with a two-year limitations period).

135. 276 F. Supp. 2d 515 (E.D. Va. 2003).

136. 29 U.S.C. § 794 (2000).

137. *Power*, 276 F. Supp. at 518.

138. *Id.*

139. *Id.* at 519.

140. *Id.* at 520.

141. *Id.* at 521-22.

Another federal district court case examined Section 504 and its provisions in *Smith v. Isle of Wight County School Board*.¹⁴² In dismissing the Section 504 claim as untimely, the United States District Court for the Eastern District of Virginia held that both the one-year statute of limitations and “the 180-day notice requirement contained in the Virginia Rights of Persons with Disabilities Act¹⁴³ applie[d] to claims brought pursuant to § 504 of the Rehabilitation Act.”¹⁴⁴ Likewise, the court found that the claims under 42 U.S.C. § 1983 were barred by the two-year statute of limitations for personal injuries.¹⁴⁵ The court held that the cause of action alleging failure to place the student in a special education class accrued when the decision was made not to place the student in special education.¹⁴⁶

The holding in *Smith*—that the 180-day notice requirement in the Virginia Rights of Persons with Disabilities Act applies to claims pursuant to Section 504 of the Rehabilitation Act¹⁴⁷—is significant. If a student or parent is going to bring a claim against a school board under Section 504, the school board must be provided with the statutory notice of the alleged violation within 180 days of the alleged violation.

4. The Stay-Put Provision

IDEA requires that a student with a disability “stay-put” in the current placement during any dispute:

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents other-

142. 284 F. Supp. 2d 370 (E.D. Va. 2003).

143. VA. CODE ANN. §§ 51.5-40 to -46(B) (Repl. Vol. 2002 & Cum. Supp. 2004). The Virginia Rights of Persons with Disabilities Act states in relevant part:

An action may be commenced pursuant to this section any time within one year of the occurrence of any violation of rights under this chapter. However, such action shall be forever barred unless such claimant or his agent, attorney or representative has commenced such action or has filed by registered mail a written statement of the nature of the claim with the potential defendant or defendants within 180 days of the occurrence of the alleged violation.

Id. § 51.5-46(B) (Repl. Vol. 2002 & Cum. Supp. 2004).

144. *Smith*, 284 F. Supp. 2d at 376.

145. *Id.* at 378.

146. *Id.*

147. *Id.* at 376.

wise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.¹⁴⁸

The United States Court of Appeals for the Fourth Circuit addressed this provision in *Wagner v. Board of Education*.¹⁴⁹ The child's placement was no longer available, and as a result, there was no placement to which the child could be ordered to stay-put.¹⁵⁰ "Ordering the child to enter an alternative placement, as the district court did here, causes the child not to remain in his or her then-current educational placement, a result that contravene[d] the statutory mandate. . . ."¹⁵¹ Thus, this case holds that there is no stay-put placement for a student when the placement is no longer available, but that a new placement may be judicially ordered if proper grounds for a preliminary injunction are established.¹⁵²

II. STATUTORY AND REGULATORY CHANGES

A. *Changes in Federal Law*

There was a change in the federal regulations implementing the No Child Left Behind Act¹⁵³ which affects special education:

In calculating adequate yearly progress for schools, LEAs, and the State, a State—

(i) Must, consistent with § 200.7(a), include the scores of all students with disabilities, even those with the most significant cognitive disabilities; but

(ii) May include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in § 200.1(d), provided that the number of those students who score at the proficient or advanced level on those alternate achievement standards at the LEA and at

148. 20 U.S.C. § 1415(j) (2000).

149. 335 F.3d 297 (4th Cir. 2003).

150. *Id.* at 301.

151. *Id.* at 301–02.

152. *Id.* at 302–03.

153. 20 U.S.C. §§ 6301–8962 (2000).

the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics.¹⁵⁴

The new regulations permit a state or local educational agency ("LEA") to use alternate achievement standards to evaluate students with the most significant cognitive disabilities for adequate yearly progress ("AYP").¹⁵⁵ The regulations do not define "students with the most significant cognitive disabilities," and, therefore, the states and LEAs appear to have greater latitude in identifying the population of students that should be evaluated using alternative standards. The regulations further provide that for purposes of achieving AYP, the LEA and the state may give equal weight to the proficient and advanced scores achieved by the use of these alternate achievement standards as is given to the scores of those students who take the standard assessment.¹⁵⁶ The number of proficient scores based on the alternate standards was capped at one percent of all the students tested at that grade level.¹⁵⁷ It should be noted that this one percent cap does not limit the number of students who may take an alternate assessment.¹⁵⁸ It limits only the number of proficient and advanced scores that can be counted toward AYP goals.¹⁵⁹ Obviously, this cap creates a disincentive for large numbers of students to be approved for alternate assessments. If a large number of students are exempted through the IEP process, a school division will have a problem meeting the No Child Left Behind requirements.¹⁶⁰ Under IDEA, the IEP team continues to make the decision regarding the need for an alternate assessment.¹⁶¹

The one percent cap was placed on alternative assessments to prevent an unwarranted number of students from participating in such assessments and thereby evading the accountability central to No Child Left Behind.¹⁶² The United States Department of Education anticipates that by limiting the number of students

154. 68 Fed. Reg. 68,698, 68,703 (Dec. 9, 2003) (to be codified at 34 C.F.R. § 200.13(c)(1)).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 68,706.

159. *Id.*

160. *Id.* at 68,704

161. *See* 29 U.S.C. § 1414(d)(1)(A)(v)(II) (2000).

162. 68 Fed. Reg. at 68,704.

that may achieve proficient scores toward AYP goals through alternate assessments, more special education students will be directed toward the general curriculum in an effort to prepare the special education students for the general state-wide assessments.¹⁶³

B. *Changes in State Law*

There were few significant education-related bills passed by the 2004 Session of the General Assembly. It enacted portions of the Charter School Excellence and Accountability Act, which substantially revised charter school law.¹⁶⁴ For the first time, the Virginia Board of Education was directly inserted into the charter school process.¹⁶⁵ Persons wishing to file an application to operate a charter school may first submit it to the Board of Education for review and comment.¹⁶⁶ If an applicant takes advantage of this opportunity, it must include the Board's comments when it submits the application to the local school board.¹⁶⁷ The General Assembly also eliminated the cap on the number of charter schools a school board may approve,¹⁶⁸ eliminated the requirement that half of the charter schools in a school division must serve at-risk students,¹⁶⁹ and extended the maximum term of a charter from three to five years.¹⁷⁰

The General Assembly also authorized the Board of Education to require local school boards to submit and implement corrective action plans to address the failure of individual schools to implement the Standards of Quality and to seek court enforcement should a school board fail to develop or implement the corrective action plan.¹⁷¹ In response to an opinion of the Attorney General that cast doubt on the authority of local school boards to adopt

163. *Id.* at 68,706.

164. Act of Apr. 12, 2004, ch. 530, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 2.2-3109 (Cum. Supp. 2004), 22.1-212.5, .6, .8, .9, .11, .12 (Supp. 2004)).

165. VA. CODE ANN. § 22.1-212.9(C) (Supp. 2004).

166. *Id.*

167. *Id.* § 22.1-212.8(C) (Supp. 2004).

168. *Id.* § 22.1-212.11(A) (Supp. 2004).

169. *Id.*

170. *Id.* § 22.1-212.12(A) (Supp. 2004).

171. Act of Apr. 15, 2004, ch. 965, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 2.2-4018 (Cum. Supp. 2004), 22.1-253.13:3, .13:6, .13:8 (Supp. 2004)).

student discipline policies prohibiting the possession of any type of firearm on school property or at school sponsored events,¹⁷² the General Assembly passed legislation “declaratory of existing law” clarifying that school boards may prohibit the possession of firearms by students, even if such possession would not constitute a crime.¹⁷³ In an effort to ease the burden on the children of persons called upon to engage in the war on terrorism as members of the military, the General Assembly passed legislation to make school enrollment more flexible.¹⁷⁴ School boards are now required to permit a student who is living with a person pursuant to a special power of attorney executed by a custodial parent deployed outside the United States to attend, tuition free, either the schools in the school division in which that person resides or, when practicable, in which the custodial parent resides, at the option of the student.¹⁷⁵ Also, school boards are required to supplement the pay of full-time employees called to active duty in the regular armed forces of the United States or the National Guard or other reserve component.¹⁷⁶ The amount and duration of the supplement, however, are left entirely to the discretion of the school board.¹⁷⁷

172. Op. to Hon. Kevin G. Miller (Oct. 15, 2003), *available at* <http://www.oag.state.va.us> (last visited Sept. 24, 2004).

173. Act of Apr. 12, 2004, ch. 560, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-277.07:1 (Supp. 2004)).

174. Act of Apr. 15, 2004, ch. 967, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 22.1-3, 22.1-5, -270 (Supp. 2004)).

175. VA. CODE ANN. § 22.1-3(2) (Supp. 2004).

176. Act of Apr. 12, 2004, ch. 528, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-289.2 (Supp. 2004)).

177. VA. CODE ANN. § 22.1-289.2 (Supp. 2004).