

EDUCATION LAW

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This article presents a survey of the significant developments in the area of K–12 education law in Virginia from 2012 to the present. After two of the most active legislative and judicial sessions for education policy in recent years, this review can present only a select number of the many education-related statutes and judicial decisions introduced during this time. This survey places a special emphasis on the Virginia General Assembly’s recent legislative updates to the Virginia education code. The volume and significance of these updates reflects Governor Robert McDonnell’s commitment in 2013 to pursuing a bold education agenda. As Congress begins to seriously consider the reauthorization of the Elementary and Secondary Education Act of 1965, however, the education community may need to prepare for additional significant changes to the K–12 school law landscape.

I. CASE DECISIONS

A. *Affirmative Action*

In June 2013, the Supreme Court issued its latest decision regarding affirmative action in higher education admissions programs in the case of *Fisher v. University of Texas at Austin*.¹ In a 7-1 decision,² the Court vacated and remanded the Fifth Circuit’s

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1. 570 U.S. ___, 133 S. Ct. 2411 (2013).

2. *Id.* at ___, 133 S. Ct. at 2414. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito, and Sotomayor. *Id.* at ___, 133 S. Ct. at 2414. Justices Scalia and Thomas filed concurring opinions. *Id.* at ___, 133 S. Ct. at 2422 (Scalia, J., concurring); *Id.* at ___, 133 S. Ct. at 2422 (Thomas, J., con-

judgment upholding a race-based admissions program at the University of Texas at Austin (“UT Austin”).³ The Court held that although the Fifth Circuit properly deferred to UT Austin’s conclusion that a diverse student body would serve UT Austin’s educational goals, the circuit court ultimately erred by not performing a “searching examination” of UT Austin’s admissions program under the strict scrutiny standard.⁴ The Court remanded the case to the Fifth Circuit for a strict scrutiny analysis.⁵ The admissions program at issue, adopted in 2004, was created out of a concern that the student body at UT Austin lacked a “critical mass” of minority students.⁶ In order to ensure that the student body was sufficiently diverse, UT Austin began giving “explicit consideration” to race in its admissions decisions.⁷ Abigail Fisher, a Caucasian high school graduate, was denied admission to the University in 2008 despite being a Texas native and in the top twelve percent of her high school graduating class.⁸ Fisher challenged UT Austin’s admissions program under the Equal Protection Clause.⁹ The Fifth Circuit upheld UT Austin’s race-based admissions program after deferring to UT Austin’s “good faith” assurances that race is only *a* factor in the University’s admissions decisions.¹⁰

In his majority opinion, Justice Kennedy stated that the Fifth Circuit’s reliance on UT Austin’s “good faith” assurances was not

curing); Justice Ginsburg filed a dissenting opinion. *Id.* at ___, 133 S. Ct. at 2432 (Ginsburg, J., dissenting). Justice Kagan did not take part in this decision. *Id.* at ___, 133 S. Ct. at 2422 (taking no part in the consideration or decision of the case).

3. *Id.* at ___, 133 S. Ct. at 2422; *see generally* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011).

4. *Fisher*, 570 U.S. at ___, 133 S. Ct. at 2419–20. “Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only ‘whether [the University’s] decision to reintroduce race as a factor in admissions was made in good faith.’” *Id.* at ___, 133 S. Ct. at 2420 (alteration in original).

5. *Id.* at ___, 133 S. Ct. at 2421.

6. *Id.* at ___, 133 S. Ct. at 2416.

7. *Id.* at ___, 133 S. Ct. at 2416. This explicit consideration involves giving racial minorities an unspecified number of extra points towards their application’s “personal achievement index score” (“PAI”), a score reflecting the strength of a student’s non-academic qualities. *Id.* at ___, 133 S. Ct. at 2416. Once a student is provided a PAI score, their academic credentials are similarly scored. *Id.* at ___, 133 S. Ct. at 2416. A student is admitted or denied from the University based on the combination of these two scores. *Id.* at ___, 133 S. Ct. at 2416–17.

8. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009); Joint Appendix at 65a, Fisher v. Texas, 570 U.S. ___, 133 S. Ct. 2411 (2013) (No. 11-345).

9. *Fisher*, 570 U.S. at ___, 133 S. Ct. at 2417.

10. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 231–32 (5th Cir. 2011).

a proper application of the strict scrutiny standard.¹¹ In cases implicating race-based admissions programs, the strict scrutiny standard defined in *Grutter v. Bollinger* must be applied.¹² Under this standard, a court must ask whether a university's race-based admissions program is narrowly tailored to achieve the university's compelling interest of obtaining educational benefits from a diverse student body.¹³ A university is owed no deference at this stage of the inquiry, but it instead bears the burden of showing that there are no workable race-neutral alternatives available to achieve the university's compelling interest in having a diverse student body.¹⁴ A showing that race is considered in "good faith" is insufficient to meet the university's burden.¹⁵ Without deciding whether UT Austin's program meets this burden, the Supreme Court remanded this case back to the Fifth Circuit to apply the strict scrutiny standard.¹⁶

In his concurring opinion, Justice Scalia noted that *Fisher* did not ask the Court to determine whether *Grutter*, which held that obtaining the educational benefits from a diverse student body is a compelling government interest at the higher education level, should be overturned.¹⁷ In their separate concurring opinions, both Justice Scalia and Justice Thomas suggested that were *Grutter* to be challenged directly, they would overturn its holding.¹⁸ The Justices may get an opportunity to do so next term when a new affirmative action challenge involving the University of Michigan will be heard.¹⁹

Justice Ginsburg was the lone dissenter in *Fisher* on the ground that the lower courts did, in fact, properly consider

11. *Fisher*, 570 U.S. at ___, 133 S. Ct. at 2420–21.

12. *Id.* at ___, 133 S. Ct. at 2421 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

13. *Grutter v. Bollinger*, 539 U.S. 306, 333–34 (2003).

14. *Fisher*, 570 U.S. at ___, 133 S. Ct. at 2420.

15. *Id.* at ___, 133 S. Ct. at 2421 ("*Grutter* did not hold that good faith would forgive an impermissible consideration of race. . . . Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.>").

16. *Id.* at ___, 133 S. Ct. at 2421.

17. *See id.* at ___, 133 S. Ct. at 2422 (Scalia, J., concurring).

18. *See id.* at ___, 133 S. Ct. at 2422 (Scalia, J., concurring); *id.* at ___, 133 S. Ct. at 2422 (Thomas, J. concurring).

19. *Schuetz v. Coal. to Defend Affirmative Action*, 701 F.3d 466 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 1633 (2013).

whether UT Austin's program was narrowly tailored.²⁰ According to Justice Ginsburg, UT Austin fulfilled its burden under *Grutter* by demonstrating that race is only considered as a “factor of a factor of a factor” in its admissions program and that “race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity.”²¹ This opinion is unsurprising for Justice Ginsburg who has been a strong advocate for affirmative action programs throughout her tenure on the Court.²²

B. *First Amendment*

1. Establishment Clause

The Fourth Circuit recently reconsidered the constitutionality of religious released time programs in South Carolina public schools. Such programs allow a public school to excuse students during the school day to participate in, and sometimes receive elective credit for, private religious instruction.²³ In *Moss v. Spartanburg County School District Seven*, the court reviewed the First Amendment implications of a religious released time program facilitated by the Spartanburg School District (the “District”) in South Carolina, which awarded students two academic credits for participating in an off-campus Christian education program during the school day.²⁴ Under the South Carolina Released Time Credit Act, a school district may award high school students no more than two elective credits for religious education taught outside of the school by private instructors.²⁵ Parents of two students attending schools in the District challenged the pro-

20. *Fisher*, 570 U.S. at ___, 133 S. Ct. at 2434 (Ginsburg, J., dissenting).

21. *Id.* (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 608 (W.D. Tex. 2009)).

22. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 344–46 (2003) (Ginsburg, J. concurring); *see also* *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J. dissenting) (arguing the need to distinguish between policies of exclusion and inclusion); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting) (discussing the “persistence of racial inequality and a majority’s acknowledgment of Congress’ authority to act affirmatively, not only to end discrimination, but also to counteract discrimination’s lingering effects”).

23. *See* Samuel Ericsson et al., *Religious Released Time Education: The Overlooked Open Door in Public Schools*, CHRISTIAN LEGAL SOCIETY 2 (1996), <http://www.clsnet.org/document.doc?id=131>.

24. 683 F.3d 599, 601 (4th Cir. 2012).

25. S.C. CODE ANN. § 59-39-112(A) (Cum. Supp. 2012).

gram as a violation of the Establishment Clause of the United States Constitution.²⁶ The parents alleged that after the District sent promotional materials about the program, they felt the District had engaged in “Christian favoritism” that made non-Christian families “feel like ‘outsiders’ in their own communities.”²⁷

The court held that the Spartanburg program did not create an excessive government entanglement with religion²⁸ because the religious classes were conducted off campus²⁹ by nongovernmental educators without the use of the public school’s staff or funds.³⁰ Additionally, the court noted that students who completed the Spartanburg Bible School course were awarded academic credit through an accredited private school with which it had partnered.³¹ A record of this credit was then sent to Spartanburg High School in the form of a private school transfer transcript.³² This arrangement placed the difficult responsibility of evaluating the religious curriculum and educational value of the Spartanburg Bible School on the accredited private school.³³ Although Virginia does not by statute authorize the use of religious released time programs, such programs are permitted in Virginia public schools so long as they avoid practices that will excessively entangle the

26. *Moss*, 683 F.3d at 601.

27. *Id.* at 607.

28. *Id.* at 610; *see* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). To satisfy the requirements of the Establishment Clause, a public entity must show that a policy implicating religion (a) has a secular purpose; (b) has a principal or primary effect that neither advances nor inhibits religion; and (c) does not foster an “excessive government entanglement with religion.” *Id.* (quoting *Walz v. Tax Comm’r*, 397 U.S. 664, 674 (1969)).

29. *Moss*, 683 F.3d at 609; *see* *Zorach v. Clauson*, 343 U.S. 306, 308–09, 312 (1952) (upholding a time release program under the First Amendment where no student was forced to enroll in the program and the program was held off-campus through the use of private funds); *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 209, 231 (1948) (holding that it is unconstitutional to allow religious instruction as part of a religious released time program to occur on school premises); *Smith v. Smith*, 523 F.2d 121, 122 (4th Cir. 1975) (upholding a time release program in Harrisonburg, Virginia under the First Amendment because the program was conducted off-campus and satisfied all prongs of the *Lemon* test).

30. *Moss*, 683 F.3d at 609.

31. *Id.* at 602–03, 610.

32. *Id.* at 603, 610.

33. *Id.* at 610; *see also* *Lanner v. Wimmer*, 662 F.2d 1349, 1360–61 (10th Cir. 1981) (stating that a school cannot utilize a “purely religious test” for determining whether a course is credit-worthy for a time release program; to consider criteria such as whether a class is “mainly denominational,” creates an excessive entanglement between public schools and religion).

schools with religion.³⁴ However, unlike the statutory scheme involved in *Moss*, the Virginia Department of Education has recommended that schools not award academic credit to students for religious instruction provided by these programs.³⁵

2. Student Speech

In *Hardwick v. Heyward*, the Fourth Circuit held that school officials can properly prohibit students from wearing Confederate flag apparel if the officials can demonstrate that there is a sufficient basis to believe that the apparel will cause a substantial disruption to the school environment.³⁶ During the 2002-2003 school year, middle school student Candice Hardwick frequently wore shirts displaying the Confederate flag to her school in Latta, South Carolina.³⁷ As Hardwick progressed through high school, she was disciplined on numerous occasions for wearing Confederate flag apparel on the basis that clothing depicting images of the Confederate flag was in violation of the school's policy against student dress that causes disruption or is "deemed to be offensive."³⁸ Hardwick filed an action pursuant to 42 U.S.C. § 1983 alleging, among other things, that the school's disciplinary actions violated her First Amendment right to free speech and expression.³⁹

Applying the foundational *Tinker* student-speech analysis,⁴⁰ the court held that Latta High School officials did not violate Hardwick's First Amendment rights when they censored her Confederate flag apparel because there was sufficient evidence to predict that the apparel would "materially and substantially disrupt the work and discipline of the school."⁴¹ Latta is a community that

34. See *Guidelines Concerning Religious Activity in the Public Schools*, VIRGINIA STATE BOARD OF EDUCATION 11 (adopted June 22, 1995), available at http://www.doe.virginia.gov/boe/guidance/support/religious_activity.pdf.

35. *Id.*

36. 711 F.3d 426, 444 (4th Cir. 2013).

37. *Id.* at 430-31.

38. *Id.*

39. *Id.* at 430.

40. For a school official to prohibit student speech, he or she must show that his or her actions were caused by a reasonable belief that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

41. *Hardwick*, 711 F.3d at 438 (quoting *Tinker*, 393 U.S. at 513).

struggles with racial tensions as a result of its racially segregated past.⁴² Within the high school, this tension has manifested itself through classroom disruptions and altercations at school dances and events.⁴³ Outside of the school, this tension motivated two high school students to set fire to a local African-American church.⁴⁴ The Fourth Circuit held that even assuming Hardwick's shirts never caused an actual disruption in the school, the clear evidence of racial tensions in Latta and the Latta school community provided school officials with sufficient reason to believe that Hardwick's apparel could cause a disruption to the learning environment.⁴⁵

The Fourth Circuit also found Latta's dress code policies to be sufficiently clear and not unconstitutionally vague.⁴⁶ Even if the policies were so vague that Hardwick would not have known how to conform her behavior, the school rectified these ambiguities by approaching Hardwick on several occasions to personally inform her that Confederate flag apparel was in violation of the school dress code.⁴⁷ Finally, the court held that the school had not violated Hardwick's equal protection rights because the school dress code policy was enforced on a viewpoint neutral basis.⁴⁸ For example, school officials had also disciplined students for wearing apparel displaying images of Malcolm X.⁴⁹ Although there were

42. *Id.* at 438.

43. *Id.* at 432–33.

For instance, in the mid-1980s, a white student and an African-American student attended the prom together, causing “small groups of whites and blacks . . . to stir up trouble,” which included white students wearing Confederate flag apparel and African-American students wearing Malcolm X apparel. Less than a decade later in the early 1990s, the Confederate flag again caused commotion when a student drove through the school parking lot with a Confederate flag on his truck.

More recent examples that occurred during or after Candice's time at the middle school and high school demonstrate continued racial tension in Latta schools. Heyward described an incident involving a Confederate flag that led to a disruption of a classroom in which the teacher had to calm the class down in response to the flag. Another incident involving the Confederate flag took place in 2009, when a student wore a Confederate flag belt buckle, prompting another student who saw the belt buckle to say, “If you don't take that belt off, we're going to take it off of you.”

Id.

44. *Id.* at 432.

45. *Id.* at 440.

46. *Id.* at 442.

47. *Id.*

48. *Id.* at 444.

49. *Id.*

some inconsistencies in the enforcement of the dress code, Hardwick benefited from these inconsistencies on several occasions when school officials failed to punish her for her inappropriate dress.⁵⁰

C. *Freedom of Information Act*

Under the Virginia Freedom of Information Act (“FOIA”), school board meetings are required to be open to the public with limited exceptions.⁵¹ In *Hill v. Fairfax County School Board*, the Supreme Court of Virginia considered the question of whether e-mail exchanges between school board members prior to a scheduled school board meeting can be defined as a meeting under FOIA.⁵² Hill filed a petition for a writ of mandamus against the Fairfax County School Board (“School Board”) alleging that the School Board conducted an unlawful closed meeting in violation of FOIA when its members exchanged emails discussing the potential closing of an elementary school prior to the public meeting in which the School Board voted to close the school.⁵³

Under FOIA, a “Meeting” is defined as “an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership . . . of any public body.”⁵⁴ Applying the principles that it first laid out in 2004 in *Beck v. Shelton*,⁵⁵ the court upheld the circuit court’s determination that the School Board had not conducted an improper closed meeting in violation of FOIA.⁵⁶ In *Beck*, the Supreme Court of Virginia held that email exchanges between public officers did not constitute a meeting under FOIA because the exchanges at issue did not involve a simultaneous interaction between members, which the Court found was required by the usage of the word “as-

50. *Id.*

51. VA. CODE ANN. §§ 2.2-3700, -3701 (Repl. Vol. 2011 & Cum. Supp. 2013).

52. 284 Va. 306, 309, 727 S.E.2d 75, 76 (2012).

53. *Id.* at 309, 727 S.E.2d at 77.

54. VA. CODE ANN. § 2.2-3701.

55. *See* 267 Va. 482, 489, 593 S.E.2d 195, 198 (2004) (holding that email exchanges between a mayor and members of the city council did not constitute a meeting under FOIA because “the e-mail communications did not involve virtually simultaneous interaction. Rather, the e-mail communications at issue in this case were more like traditional letters sent by ordinary mail, courier, or facsimile.”).

56. *Hill*, 284 Va. at 314, 727 S.E.2d at 79; *see Hill v. Fairfax Cnty. Sch. Bd.*, 83 Va. Cir. 172, 173, 176 (2011) (Fairfax County).

semblage” in the FOIA definition of “meeting.”⁵⁷ In *Hill*, the court stated that while the use of technology had advanced since *Beck* was decided, the principles set forth in *Beck* were still applicable.⁵⁸

The court in *Hill* found that the circuit court’s findings of fact that the email exchanges at issue were not sufficiently simultaneous to constitute a meeting, that the emails which did involve back-and-forth exchanges were between only two members at a time, and that emails sent or copied to more than two members “conveyed information unilaterally, in the manner of an office memorandum” were all supported by evidence in the record.⁵⁹ The court further held that the circuit court correctly applied the *Beck* standard when it concluded that the email exchanges at issue lacked the simultaneity required to constitute a meeting under FOIA.⁶⁰

D. *School Liability*

One of the most important school law decisions impacting school administrators this past year was the Supreme Court of Virginia’s decision in *Burns v. Gagnon*.⁶¹ In *Burns*, the court considered whether a school principal owed a duty to a student in his school and whether the principal was entitled to sovereign immunity.⁶² Gagnon, a high school student, was involved in a fight on school grounds with another student, Newsome.⁶³ Prior to the altercation, Burns, an assistant principal, was warned by Diaz, another student, about the possibility of a fight planned to occur sometime that day.⁶⁴ Burns told Diaz that he would “alert [his] security and we’ll make sure this problem gets taken care of.”⁶⁵ Burns, however, did not alert security, nor did he take other measures to prevent the altercation.⁶⁶ The fight took place as

57. 267 Va. at 490–92, 593 S.E.2d at 199–200.

58. 284 Va. at 311–12, 727 S.E.2d at 78.

59. *Id.* at 313–14, 727 S.E.2d at 79.

60. *Id.* at 314, 727 S.E.2d at 79.

61. 283 Va. 657, 727 S.E.2d 634 (2012).

62. *Id.* at 663, 727 S.E.2d at 639.

63. *Id.* at 664, 727 S.E.2d at 639.

64. *Id.*

65. *Id.* (alteration in original).

66. *Id.*

planned, and Gagnon sustained serious injuries.⁶⁷ Gagnon sued Burns, asserting claims for simple and gross negligence, and he was awarded \$1,250,000 in damages by a Virginia jury.⁶⁸

The court first considered whether Burns owed Gagnon a legal duty.⁶⁹ Gagnon asserted that Burns owed him three types of legal duties: “(1) an elevated duty of care to protect him from Newsome’s conduct; (2) a common-law duty of ordinary care; and (3) an assumed duty to investigate Diaz’ report and notify school security about the fight.”⁷⁰ Considering the first proposed duty, the court explained that a person does not have a duty to protect another from the conduct of a third party unless a special relationship exists.⁷¹ The court declined to expand its special relationship jurisprudence to the principal-student relationship stating, “we have repeatedly been hesitant to recognize a special relationship where a public official is being sued for acts committed in his official capacity.”⁷² Thus, Burns did not owe Gagnon an elevated duty of care by virtue of the relationship between a school principal and a student.

The court did, however, find that Burns owed a common-law duty to supervise and care for Gagnon.⁷³ The court, citing its recent decision in *Kellerman v. McDonough*, stated “when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care.”⁷⁴ The court reasoned that “[b]y law, Gagnon’s parents had to send Gagnon to school, where it was the responsibility of Burns and other school officials to supervise and ensure that ‘students could . . . have an

67. *Id.*

68. *Id.* at 664, 667, 727 S.E.2d at 639, 641. Gagnon also sued the aggressor student, Newsome, and Newsome’s sister who encouraged the fight. *Id.* at 664, 727 S.E.2d at 639. The jury awarded Gagnon \$3,250,000 on his claim against Newsome and \$500,000 on his claim against Newsome’s sister. *Id.* at 667, 727 S.E.2d at 641. Newsome and his sister did not appeal and the claims against them are not discussed by the court in *Burns*. *Id.* at 663 n.1, 727 S.E.2d at 639 n.1.

69. *Id.* at 668, 727 S.E.2d at 641.

70. *Id.*

71. *Id.* at 668–69, 727 S.E.2d at 641–42 (citing *Burdette v. Marks*, 244 Va. 309, 311–12, 421 S.E.2d 419, 420 (1992)).

72. *Id.* at 671, 727 S.E.2d at 643 (citing *Marshall v. Winston*, 239 Va. 315, 319, 389 S.E.2d 902, 904–05 (1990)).

73. *Id.* at 673, 727 S.E.2d at 644.

74. *Id.* at 671, 727 S.E.2d at 643 (quoting *Kellermann v. McDonough*, 278 Va. 478, 487, 684 S.E.2d 786, 790 (2009)).

education in an atmosphere conducive to learning, free of disruption, and threat to person.”⁷⁵ The court explained that while Burns owed a common-law duty to care for and supervise Gagnon, “[t]hat does not mean, however, that Burns was an insurer of Gagnon’s safety; instead, like the defendants in *Kellermann*, Burns can only be held liable if he failed to ‘discharge his . . . duties as a reasonably prudent person would under similar circumstances.’”⁷⁶

The court also considered whether Burns assumed a duty to investigate Diaz’s report and take action as a result of the report.⁷⁷ The court held that “when the issue is not whether the law recognizes a duty, but rather whether the defendant by his conduct assumed a duty, the existence of that duty is a question for the fact-finder.”⁷⁸ The court, citing the Restatement (Second) of Torts section 324A, stated that Burns could only be liable to Gagnon under a theory of assumption of duty

if Gagnon proves, first that Burns undertook to investigate Diaz’ report and notify school security about the fight, and then either: (1) that Burns’ failure to exercise reasonable care in performing his undertaking increased the risk of the harm; (2) that Burns undertook to perform a duty owed by Diaz to Gagnon; or (3) that the harm was a result of Diaz’ or Gagnon’s reliance upon Burns’ undertaking.⁷⁹

Thus, the court concluded that Burns owed Gagnon a common-law duty of care and that it was a fact question for a jury to determine whether Burns also owed Gagnon an assumed duty.⁸⁰ The court then turned to the issue of whether Burns was entitled to sovereign immunity from Gagnon’s claims.⁸¹ The court rejected Burns’ claim that he was entitled to immunity under Virginia Code section 8.01-220.1:2(A) because Burns was a principal and the statute only afforded immunity to teachers.⁸² The court found

75. *Id.* (alteration in original).

76. *Id.* (alteration in original) (quoting *Kellermann v. McDonough*, 278 Va. 478, 487, 684 S.E.2d 786, 790 (2009)).

77. *Id.* at 672, 727 S.E.2d at 643–44.

78. *Id.* (citing *Kellermann v. McDonough*, 278 Va. 478, 487, 684 S.E.2d 786, 790 (2009)).

79. *Id.* at 673, 727 S.E.2d at 644; see RESTATEMENT (SECOND) OF TORTS § 324A (1965).

80. *Burns*, 283 Va. at 673, 727 S.E.2d at 644.

81. *Id.*

82. *Id.* at 675, 727 S.E.2d at 645 (citing VA. CODE ANN. § 8.01-220.1:2(A) (Cum. Supp. 2013)). The court also rejected Burns’ argument that he was protected by Virginia Code section 8.01-220.1:2(B), which provides that “[n]o school employee or school volunteer shall be liable for any civil damages arising from the prompt good faith reporting of alleged acts

that Burns was, however, entitled to common-law immunity from Gagnon's claims for simple negligence.⁸³ In so finding, the court applied a four-factor test for determining whether an individual working for an immune governmental entity is entitled to immunity.⁸⁴ The four factors are: "(1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion."⁸⁵ The court explained that "Burns' response (or lack thereof) to Diaz' report involved the exercise of judgment and discretion" because Burns had to decide whether, when, and how to respond to Diaz' report.⁸⁶ The court concluded that "[i]n light of these decisions that Burns had to make upon receiving Diaz' report, we conclude that his response (or lack thereof) was not simply a ministerial act; instead, it was an act involving the exercise of judgment and discretion."⁸⁷ Accordingly, Burns was entitled to immunity from Gagnon's simple negligence claims.⁸⁸

Finally, the court explained that the common-law immunity to which Burns was entitled was not a complete immunity from suit, "[r]ather, the degree of negligence which must be shown to impose liability is elevated from simple to gross negligence."⁸⁹ The Court, therefore, held that the circuit court erred when it refused to instruct the jury on gross negligence.⁹⁰ The case was remanded

of bullying or crimes against others to the appropriate school official in compliance with . . . specified procedures." VA. CODE ANN. § 8.01-2201:2(B) (Cum. Supp. 2013). The court stated that "Burns was not sued because he reported an alleged act of bullying or crime against another to the appropriate school official; rather he was sued because he failed to respond to such a report." *Burns*, 283 Va. at 675, 727 S.E.2d at 645.

83. *Burns*, 283 Va. at 677, 727 S.E.2d at 646.

84. *Id.* at 676, 727 S.E.2d at 646 (citing *Friday-Spivey v. Collier*, 268 Va. 384, 387-88, 601 S.E.2d 591, 593 (2004)). In Virginia, a school board is considered "an arm of the state" and therefore enjoys the sovereign immunity of the state. *See Kellam v. Sch. Bd. of Norfolk*, 202 Va. 252, 254, 117 S.E.2d 96, 97 (1960).

85. *Burns*, 283 Va. at 676, 727 S.E.2d at 646 (quoting *Lentz v. Morris*, 236 Va. 78, 82, 372 S.E.2d 608, 610 (1988)).

86. *Id.* at 677, 727 S.E.2d at 646.

87. *Id.*

88. *Id.*

89. *Id.* (quoting *Colby v. Boyden*, 241 Va. 125, 128, 400 S.E.2d 184, 186 (1991)).

90. *Id.* at 678, 727 S.E.2d at 647.

for a new trial on Gagnon's gross negligence claim against Burns.⁹¹

E. *Special Education*

Special education statutes and regulations codified under the Individuals with Disabilities Education Act ("IDEA")⁹² and Section 504 of the Rehabilitation Act of 1973 ("Section 504")⁹³ are extremely complex and often do not provide administrators and teachers implementing these requirements with sufficient clarity or guidance. As a result, special education statutes and regulations are a significant source of litigation.⁹⁴ This year was no exception in Virginia and the Fourth Circuit. Recent cases dealt with issues such as evaluating students under the IDEA, private school tuition reimbursement, and the availability of a free and appropriate public education ("FAPE") for students in a private placement. These recent holdings are reviewed in the following sections.

1. Section 504 of the Rehabilitation Act of 1973

In *D.L. v. Baltimore City Board of School Commissioners*, the Fourth Circuit held that under Section 504, a public school division has no obligation to provide FAPE to a student who is voluntarily enrolled by his parents in a private religious school.⁹⁵ The parents of an eighth-grade student recently diagnosed with ADHD decided to continue their son's enrollment in a private religious school rather than transfer the student to a public school.⁹⁶ The Baltimore City Board of School Commissioners informed the student's parents that Section 504 services would not be provided unless the student enrolled in one of the division's schools.⁹⁷ The parents challenged the board's decision, arguing that Section

91. *Id.* at 683, 727 S.E.2d at 649–50.

92. 20 U.S.C. §§ 1400–1482 (2006 & Supp. 2011); 34 C.F.R. pt. 300 (2012).

93. 29 U.S.C. § 701 (2006 & Supp. 2012); 34 C.F.R. pt. 104 (2012).

94. See Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHNS'S J. LEGAL COMMENT. 675, 681–82 (2004); see also Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1, 1–7 (2011).

95. 706 F.3d 256, 258 (4th Cir. 2013).

96. *Id.*

97. *Id.*

504's requirement that public schools make FAPE available "to each qualified handicapped person who is in the recipient's jurisdiction" meant that a public school division is required to provide Section 504 services to a student who is enrolled in, and attends, a private school.⁹⁸ The parents also argued that the school division's requirement that a student must enroll in the public school in order to receive Section 504 services violated their constitutional right to make education decisions for their child.⁹⁹

The court held that a school division is not required to provide Section 504 services to a parentally-placed private school student if appropriate services are offered and made available to the student in a public school setting.¹⁰⁰ In reaching this decision, the court discussed the interplay between Section 504 and IDEA:

Under Appellants' interpretation of Section 504, however, school districts would have to provide and fully fund services that an eligible private school student requested under a Section 504 plan. Because all students who are eligible for services under IDEA are also covered for those services under Section 504, this scenario would entitle all IDEA-eligible students in a private school to full services using Section 504. In other words, Appellants' interpretation of Section 504 would create an individual right to special education and related services where none exists. This interpretation flies directly in the face of the limitations that Congress imposed on school districts' obligations under IDEA by reading an affirmative obligation into Section 504, an anti-discrimination statute.¹⁰¹

Accordingly, the court concluded that the school division satisfied its obligations under Section 504 by providing the student access to FAPE in the public school.¹⁰² In addition, the court found that because parents can choose whether to send their children to private school, the parents' constitutional rights were not violated by making public school enrollment a prerequisite to receiving Section 504 services.¹⁰³

98. *Id.* at 259 (quoting 34 C.F.R. § 104.33(a) (2012)) (internal quotation marks omitted).

99. *Id.* at 263.

100. *Id.* at 262 ("Overall, the administrative guidance, statutory purpose, case law, and policy considerations compel our holding that D.L. is not entitled to Section 504 services if he remains enrolled at a private institution.")

101. *Id.* at 260 (citations omitted).

102. *Id.* at 261.

103. *Id.* at 262–63.

2. Tuition Reimbursement

An additional challenge for school divisions working with special education students in private placements is navigating the obligations under the IDEA to reimburse parents for the tuition and expenses of a private placement. In the foundational case of *School Committee of Burlington, Massachusetts v. Department of Education of Massachusetts*, the Supreme Court of the United States held that parents who unilaterally place their children “during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.”¹⁰⁴ Parents will only be reimbursed for the private placement of their children if a court “determines that a private placement desired by the parents was proper under the Act and that an [individualized education program (“IEP”)] calling for placement in a public school was inappropriate.”¹⁰⁵

In *S.H. v. Fairfax County Board of Education*, the Eastern District of Virginia reaffirmed that an IEP must be individually tailored, provide some educational benefit in the least restrictive environment, and be developed by a properly composed IEP team.¹⁰⁶ Moreover, the court held that where the parents failed to provide notice of their intent to place the student in private placement, equity bars the parents’ subsequent request for reimbursement.¹⁰⁷ In *S.H.*, George and Barbara Hopkins, brought suit on behalf of their daughter under the IDEA for the alleged failure of the Fairfax County Public Schools (“FCPS”) to provide FAPE.¹⁰⁸ The parents argued that they were entitled to receive tuition reimbursement for their daughter’s private placement at the Lab School of Washington (“Lab”), an out-of-district private special education school, during her fifth through eighth-grade school years (2007-2011).¹⁰⁹ The parents contended that they unilaterally placed their child at Lab because the IEPs proposed by FCPS during this four year period, recommending a public education placement, were “inappropriate and not reasonably calculated to confer edu-

104. 471 U.S. 359, 373–74 (1985); *see also* 34 C.F.R. § 104.33(e)(4) (2012).

105. *Burlington*, 471 U.S. at 370.

106. 875 F. Supp. 2d 633, 647 (E.D. Va. 2012).

107. *Id.* at 658.

108. *Id.* at 639.

109. *Id.* at 639, 644.

ational benefits.”¹¹⁰ An administrative hearing officer found in favor of FCPS, and the court upheld the denial of the parents’ claim for reimbursement.¹¹¹

The court disagreed with the parents and held that each IEP proposed by FCPS during the four year period was sufficient to provide the student with FAPE in the public school environment.¹¹² For each year in question, the court found that the IEP was reasonably calculated to provide the student with some educational benefit.¹¹³ The court reasoned that each IEP was: (1) individually tailored to the student’s needs as they existed at the time; (2) provided for some educational benefit in the least restrictive environment; (3) was completed by the IEP team in a coordinated and collaborative manner; and (4) would benefit the student academically and non-academically, especially considering the student’s progress under her IEP during her fourth-grade year.¹¹⁴ The court concluded that even if it held that FCPS had failed to provide the student with FAPE in 2007, the student’s first year at Lab, equitable factors would still bar the parents’ request for reimbursement.¹¹⁵ FCPS had no notice of the parents’ intent to seek reimbursement for the private placement until over a year after the final IEP meeting held prior to the student’s removal from FCPS.¹¹⁶

In *C.C. v. Fairfax County Board of Education*, the Eastern District of Virginia further clarified that a parent is not entitled to reimbursement under the IDEA for unilateral private placements if the school division’s proposed IEP offered FAPE under the IDEA.¹¹⁷ In *C.C.*, the student was found eligible to receive special education services under three disability categories: Hearing Impairment, Specific Learning Disability, and Other Health Impairment.¹¹⁸ The parent alleged that FCPS failed to provide the student with FAPE when it presented a draft of an IEP proposing to place the student in a large public day school and provide the

110. *Id.* at 639.

111. *Id.* at 639, 657–58.

112. *Id.* at 667.

113. *Id.* at 648, 658, 662, 666.

114. *Id.* at 648–56, 658–66.

115. *Id.* at 657.

116. *Id.* at 658.

117. 879 F. Supp. 2d 512, 518 (E.D. Va. 2012).

118. *Id.* at 515.

student with services in both self-contained and general education classes.¹¹⁹ The parent rejected the proposed IEP and unilaterally placed the student in a private school, for which the parent sought and was denied tuition reimbursement by the school division.¹²⁰ The parent subsequently filed a special education due process request under the IDEA.¹²¹ The hearing officer determined that the IEP proposed by FCPS provided the student with FAPE because the IEP “provided [C.C.] the support to learn and progress academically in the least restrictive environment and was reasonably calculated to provide C.C. with the necessary quantum of educational benefit required by law.”¹²² The parent appealed the hearing officer’s decision, arguing that the decision was not “regularly made”¹²³ and not based upon proper standards of law.¹²⁴

The district court upheld the decision of the hearing officer denying the parent’s request for private school tuition reimbursement.¹²⁵ The court explained that once a hearing officer determines that a school division offered FAPE to a student, the hearing officer has no obligation to then examine the appropriateness of the plaintiff’s unilateral placement.¹²⁶ In this case, the hearing officer properly determined, through a consideration of all the evidence, that the school division had offered the student a public education that provided educational benefits and “a sufficient degree of educational accommodation in light of [the stu-

119. *Id.* at 516.

120. *Id.*

121. *Id.*

122. *Id.* at 517 (alteration in original) (internal quotation marks omitted).

123. *Id.* at 518–19 (internal quotation marks omitted). A hearing officer’s decision is regularly made, and thus entitled to deference, if the hearing officer “conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and . . . by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case. The focus of such inquiry is the ‘process through which the findings were made.’” *Id.* at 519 (alterations in original) (citations omitted). The parent alleged in her appeal that the hearing officer’s decision was not regularly made because it failed to acknowledge evidence presented by the parent’s expert witnesses and evidence presented during the hearing that C.C. had achieved progress in her time in private placement. *Id.*

124. *Id.* at 521–25. The parent alleged that the hearing officer: (1) improperly gave deference to FCPS educators who were not familiar with the student; and (2) erred in concluding that the parent was barred from seeking reimbursement because she had predetermined her student’s private placement. *Id.*

125. *Id.* at 525

126. *Id.* at 524.

dent's] disabilities."¹²⁷ Accordingly, the court affirmed the hearing officer's decision to deny the parent's request for reimbursement.¹²⁸

3. Evaluations

In an unpublished per curiam decision, the Fourth Circuit affirmed the Eastern District of Virginia's holding that, among other things, a parent's refusal to consent to a reevaluation barred the parent's subsequent claim under the IDEA that the school division improperly failed to evaluate the parent's child for Auditory Processing Disorder ("APD").¹²⁹ In *Torda v. Fairfax County School Board*, the parent claimed that the Fairfax County School Board ("FCSB") and Fairfax County Public Schools ("FCPS") failed to evaluate the student for APD when, according to the parent, FCSB and FCPS knew or should have known that the student had auditory processing deficits.¹³⁰ The student, a child with Down syndrome, significant cognitive deficits, communication difficulties, and motor skills problems, was found eligible in 2006 for special education services under the disability category of "mental retardation."¹³¹ At that time, the parent disagreed with the eligibility determination but did not appeal it.¹³² In 2007, as a result of concerns raised by the parent, FCPS told the parent that the student would need to be reevaluated before any changes could be made to his eligibility determination and offered to conduct the evaluations.¹³³ The parent refused to consent to the new evaluations.¹³⁴

127. *Id.* at 525.

128. *Id.* The court also noted that the issue before the court is not which placement, public or private, would provide the best or even the more helpful or appropriate setting for the student; it is simply whether the publically available education that the student has been offered has a sufficient degree of educational accommodation in light of the student's disabilities to provide some educational benefit, or whether it is so deficient in that regard as to entitle the student to an additional expenditure of public funds for a privately furnished alternative education. *Id.*

129. *Torda v. Fairfax Cnty. Sch. Bd.*, 517 F. App'x 162, 163 (4th Cir. 2013).

130. 2012 U.S. Dist. LEXIS 86514, at *24 (E.D. Va. June 21, 2012).

131. *Id.* at *2-3. This category is now designated "intellectual disability." *See id.* at *4.

132. *Id.* at *4-5.

133. *Id.* at *26.

134. *Id.* at *6-7.

The district court held, and the Fourth Circuit affirmed,¹³⁵ that the parent's IDEA claim that the school division improperly failed to reevaluate the student for APD was "foreclosed" by her refusal to consent to the reevaluations.¹³⁶ The district court stated that

the record suggests that [the parent] is now seeking relief from the failure of FCPS to do something [the parent] prevented FCPS from doing—conducting a reevaluation of [the student] to determine his educational needs during the 2007-08 school year. FCSB cannot be fairly held liable for such a failure, and Plaintiffs are not entitled to compensatory education on this basis.¹³⁷

The parent also claimed that the school division failed to provide FAPE to the student based on the allegation that FCBS and FCPS did not accommodate and remediate the student's auditory processing problems during the 2007–2008 school year.¹³⁸ The parent's claim was based in part on a report of an auditory processing assessment conducted in 2010 that recommended certain accommodations.¹³⁹ The district court stated that because the information and recommendations in the 2010 report were not available at the time the 2007–2008 IEP was developed, "it would be unreasonable to hold the school system liable for failing to consider it."¹⁴⁰ Rather, the court explained, "[t]he relevant inquiry is 'whether, at the time [the 2007–2008] IEP was created, it was reasonably calculated to enable the child to receive educational benefits.'"¹⁴¹ The district court found, and the Fourth Circuit affirmed, that the student's educational program for the 2007–2008 school year was "'reasonably calculated to confer some educational benefit' on [the student]"¹⁴² as demonstrated by substantial evidence that the student met or made sufficient progress towards several of his IEP goals and made some progress towards meeting other goals.¹⁴³ In addition, the district court noted that while the school division did not have the benefit of the information contained in the 2010 report, the school division staff actually implemented

135. *Torda v. Fairfax Cnty. Sch. Bd.*, 517 F. App'x 162, 163 (4th Cir. 2013).

136. *Torda*, 2012 U.S. Dist. LEXIS 86514, at *26.

137. *Id.* at *30.

138. *Id.* at *40.

139. *Id.* at *48.

140. *Id.* at *48–49.

141. *Id.* at *49 (alterations in original) (quoting *Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009)).

142. *Id.* at *44 (quoting *M.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002)); see *Torda v. Fairfax Cnty. Sch. Bd.*, 517 F. App'x 162, 163 (4th Cir. 2013).

143. *Torda*, 2012 U.S. Dist. LEXIS 86514, at *45–46.

many of the strategies and accommodations that were subsequently recommended in that report.¹⁴⁴

The district court also rejected the parent's argument that the student's educational program was defective because it failed to provide for intensive, one-on-one services on a daily basis.¹⁴⁵ The court found that the student did receive individualized instruction and that there was no indication in 2007–2008 that the student had an educational need for one-on-one services.¹⁴⁶ The court explained that “[the parent’s] demands for [the student’s] educational program do not amount to demonstrated educational needs in [the student] and do not create automatic duties on FCPS to provide services in any particular manner.”¹⁴⁷

II. STATUTORY AND REGULATORY CHANGES

A. *Federal*

In the last two legislative sessions of Congress, K–12 education policy has received little attention in either the House of Representatives or the Senate. Although No Child Left Behind (“NCLB”),¹⁴⁸ the most recent reauthorization of the Elementary and Secondary Education Act of 1965 (“ESEA”), was due for reauthorization in 2007, Congress failed again to produce any major legislative alternatives to take its place.¹⁴⁹ Congress’ failure to reauthorize the NCLB has created serious problems for state governments who are unable to fulfill the difficult requirements that remain in effect under the NCLB.¹⁵⁰ When the NCLB was passed in 2002, lawmakers set ambitious goals for student achievement, requiring that 100% of students be classified as “proficient” in

144. *Id.* at *49–53.

145. *Id.* at *54.

146. *Id.* at *54–55.

147. *Id.* at *55.

148. 20 U.S.C. § 6301 (2006).

149. Natalie Gomez-Velez, *Urban Public Education Reform: Governance, Accountability, Outsourcing*, 45 URB. LAW. 51, 64–65 (2013) (citing Sam Dillon, *New Challenges for Obama’s Education Agenda in the Fact of a G.O.P.-Led House*, N.Y. TIMES, Dec. 12, 2010, at A36).

150. See Regina R. Umpstead & Elizabeth Kirby, *Reauthorization Revisited: Framing the Recommendations for the Elementary and Secondary Education Act’s Reauthorization in Light of No Child Left Behind’s Implementation Challenges*, 276 EDUC. L. REP. 1, 1–2 (2012) (demonstrating the pressures faced by states in complying with current federal education requirements).

science and math by 2014.¹⁵¹ With the reality that no state is prepared to meet this goal by 2014, the Obama administration has allowed states to opt-out of some NCLB requirements.¹⁵² The Obama administration, however, is only willing to waive the requirements of the NCLB if the state agrees to set new goals in line with the administration's education agenda.¹⁵³ To date, thirty-nine states have received waivers from many of the difficult requirements of the NCLB.¹⁵⁴

In June of 2013, both Republicans and Democrats introduced legislative proposals for the reauthorization of the ESEA.¹⁵⁵ Although all three proposals are united in their recommendation to eliminate Adequate Yearly Progress ("AYP"),¹⁵⁶ they differ starkly in their visions of the federal government's future role in education.¹⁵⁷ While the Democratic bill, sponsored by Senator Tom Harkin, requires states to follow a comprehensive list of federal standards in areas such as teacher evaluations and accountability,¹⁵⁸ the two Republican bills call for state-created standards and accountability measures in deference to the value of having local control over education.¹⁵⁹ At this time, it is too early to judge

151. No Child Left Behind Act of 2001, Pub. L. No. 117-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6311 (b)(2)(F) (2006)).

152. See *ESEA Flexibility*, U.S. DEPT OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last visited Oct. 15, 2013); Patrick Welsh, *U.S. School Progress Reports Defy Common Sense*, USA TODAY (Mar. 21, 2004), http://usatoday30.usatoday.com/news/opinion/editorials/2004-03-21-welsh_x.htm.

153. *10 States Freed From Some 'No Child Left Behind' Requirements*, CNN (Feb. 10, 2012), <http://www.cnn.com/2012/02/09/politics/states-education>; Motoko Rich, *'No Child' Law Whittled Down by White House*, N.Y. TIMES (July 6, 2012), http://www.nytimes.com/2012/07/06/education/no-child-left-behind-whittled-down-under-obama.html?pagewanted=all&_r=0.

154. *ESEA Flexibility*, *supra* note 152.

155. H.R. 5, 113th Cong. § 102 (2013); S. 1094, 113th Cong. § 1001 (2013); S. 1101, 113th Cong. § 1001 (2013); see Jake Miller, *GOP Slams Dems' Education Proposal as Federal Power Grab*, CBS NEWS (June 15, 2013, 8:27 AM), http://www.cbsnews.com/8301-250_162-57589469/gop-slams-dems-education-proposal-as-federal-power-grab/.

156. 20 U.S.C. § 6311(b)(2)(B) (2006) ("Each State plan shall demonstrate, based on academic assessments described in paragraph (3), and in accordance with this paragraph, what constitutes adequate yearly progress of the State, and of all public elementary schools, secondary schools, and local educational agencies in the State, toward enabling all public elementary school and secondary school students to meet the State's student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools.")

157. H.R. 5 § 102; S.1094 § 1001; S. 1101 § 1001; see Alyson Klein, *Senate Democrats to Unveil NCLB Reauthorization Bill*, EDUC. WEEK (June 4, 2013, 10:30 AM), http://blogs.edweek.org/edweek/campaign-k-12/2013/06/embargoed_do_not_publish.html.

158. S. 1094, 113th Cong. §§ 1001(8), 2101(1), 2141(a)(1).

159. H.R. 5, 113th Cong. §§ 1001(4), 1111(b)(3)(A), 5522(d); S. 1101, 113th Cong. §§ 4,

whether any of these proposals will acquire enough bi-partisan support to even reach the floor of the House or Senate.¹⁶⁰ The renewed interest in the reauthorization of ESEA suggests that Congress may pass a new education policy package during the next year.

B. *State*

The 2013 session of the Virginia General Assembly produced legislation that creates significant implications for school boards and educators around the Commonwealth. In his 2013 State of the Commonwealth address, Governor Robert McDonnell announced his commitment to pursuing a bold education agenda and challenged the General Assembly to consider legislation impacting areas such as teacher evaluations and charter school authorizations.¹⁶¹ The General Assembly met this challenge by passing several major education bills.

1. Opportunity Educational Institution

The General Assembly considered several bills during its 2013 session dealing with the state takeover of schools that were experiencing difficulties meeting the Standards of Accreditation adopted by the Virginia Board of Education.¹⁶² Bills were introduced in both the Virginia House of Delegates and the Senate, proposing an amendment to the Virginia Constitution authorizing the state takeover of schools meeting certain conditions.¹⁶³ Both bills failed.¹⁶⁴ The General Assembly was more successful in en-

1111(a)(1), 1111(b)(3)(A).

160. See Alyson Klein, *New ESEA Proposals Introduced In Congress, But Unlikely To Be Reauthorized in 2013*, EDUC. WEEK (June 10, 2013), <http://legalclips.nsba.org/?p=21156>.

161. Robert McDonnell, Governor of Virginia, 2013 State of the Commonwealth Address (Jan. 9, 2013), available at <http://www.governor.virginia.gov/news/viewRelease.cfm?Id=1591>.

162. 8 VA. ADMIN. CODE §§ 20-131-5 to 20-131-360 (Cum. Supp. 2013).

163. H.J. Res. 693, Va. Gen. Assembly (Reg. Sess. 2013); S.J. Res. 327, Va. Gen. Assembly (Reg. Sess. 2013).

164. The Constitution of Virginia provides that before amendments may be placed before the voters, it must pass two sessions of the General Assembly, one before and one after the general election of members of the House of Delegates. VA. CONST. art. XII, § 1. Because the next general election of House of Delegates' members is 2013, this proposed amendment cannot be passed and submitted to the voters until after the 2016 session of the General Assembly.

acting legislation creating the Opportunity Educational Institution (“OEI”),¹⁶⁵ a “statewide school division” to be run by the Opportunity Educational Institution Board (“OEI Board”), to take over the supervision of public schools that are denied accreditation or accredited with warning for three consecutive years.¹⁶⁶ This legislation was widely opposed by virtually every statewide education-related organization on the basis that it allegedly violates the Virginia Constitution,¹⁶⁷ including the provision that requires that the “supervision of schools in each school division shall be vested in a school board.”¹⁶⁸

The OEI Board is “established as a policy board in the executive branch of state government”¹⁶⁹ and it is also deemed to be an “educational institution” pursuant to title 23 of the Code of Virginia.¹⁷⁰ The OEI Board will consist of nine members, plus an unspecified number of ex officio members.¹⁷¹ The nine voting members include two delegates appointed by the Speaker of the House of Delegates; two senators appointed by the Senate Committee on Rules; one non-legislative citizen member experienced with the turnaround of failing schools; one non-legislative citizen member who is a former teacher, principal, or superintendent; and three non-legislative citizen members appointed by the governor and subject to confirmation by the General Assembly.¹⁷² In addition to the nine voting members, the Secretary of Education or her designee, the Executive Director of the Institution, and the chairman (or designee) of any school board which has had a school

165. House Bill 2096 was defeated in the Senate, but the companion Senate Bill 1324 made it through the House and was signed by the governor. *See* H.B. 2096, Va. Gen. Assembly (Reg. Sess. 2013); S.B. 1324, Va. Gen. Assembly (Reg. Sess. 2013).

166. Perhaps showing some regrets over the passage of the Senate bill, the General Assembly amended the state budget by adopting a provision dealing with the OEI, which, among other things, changed the criteria for the state takeover of schools. Under the budget, only schools that have been denied accreditation for the previous two years are subject to a takeover. Act of May 3, 2013, ch. 806, item 134, 2013 Va. Acts ____. Further, the budget amendment directed the Joint Legislative Audit and Review Commission, the state’s equivalent to the federal General Accounting Office, “to study options for the restructuring of lowest performing schools or districts” and to issue its final report to the General Assembly by June 30, 2014. *Id.* at item 31.

167. *Coalition Calls on Governor McDonnell to Veto SB 1324*, VA. EDUC. ASS’N (Apr. 9, 2013), http://www.veanea.org/assets/document/Veto_SB_1324_release.pdf.

168. VA. CONST. art. VIII, § 7.

169. VA. CODE ANN. § 22.1-27.1(A) (Cum. Supp. 2013).

170. *Id.* § 23-14 (Cum. Supp. 2013). Interestingly, title 23 deals primarily with institutions of higher education, while Title 22.1 deals primarily with K–12 education.

171. *Id.* § 22.1-27.1(C) (Cum. Supp. 2013).

172. *Id.*

taken over by the OEI are nonvoting, ex officio members of the OEI Board.¹⁷³ The Governor will appoint the Executive Director of the Institution¹⁷⁴ and the Superintendent of Public Instruction must designate two members of the Department of Education staff to assist the OEI Board.¹⁷⁵

The legislation specifies that the initial take-over of schools by the OEI “shall occur after the 2013-2014 school year,”¹⁷⁶ although the OEI Board may require a school to disclose information and documentation pertaining to its operation in January of the third year that the school is accredited with warning.¹⁷⁷ The supervision of any school that is denied accreditation is automatically transferred to the OEI Board, while the supervision of any school that has been accredited with warning for three consecutive years may be transferred to the OEI Board upon a majority vote of the OEI Board.¹⁷⁸ No later than six months prior to the expiration of a school’s fifth year in the OEI, the OEI Board shall decide whether to retain the school in the OEI or turn it back over to the local school division.¹⁷⁹

The legislation does not specify how the OEI will improve student achievement or achieve full accreditation. Rather, it provides that the OEI Board “shall supervise and operate schools in the Opportunity Educational Institution in whatever manner that it determines to be most likely to achieve full accreditation for each school in the Institution, including the utilization of charter schools and college partnership laboratory schools.”¹⁸⁰ Accordingly, schools under the supervision of the OEI will not necessarily be subject to the same legal and regulatory requirements as other public schools. At the end of each school year, however, the OEI Board is required to make a report to the governor and the General Assembly regarding the status of each school in the OEI, the nature of its faculty and administration, the size of its

173. *Id.*

174. *Id.* § 22.1-27.1(E) (Cum. Supp. 2013).

175. *Id.* § 22.1-27.1(G) (Cum. Supp. 2013).

176. Act of May 3, 2013, ch. 805, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 23-14 (Cum. Supp. 2013)). This takeover date is immediately after the Joint Legislative Audit and Review Commission is required to present its final study report to the General Assembly pursuant to the budget provision.

177. VA. CODE ANN. § 22.1-27.2(A) (Cum. Supp. 2013).

178. *Id.* § 22.1-27.2(B) (Cum. Supp. 2013).

179. *Id.* § 22.1-27.2(F) (Cum. Supp. 2013).

180. *Id.* § 22.1-27.2(C) (Cum. Supp. 2013).

student body, its organizational and management structure, and the levels of improvement in student academic performance.¹⁸¹

The budget amendments adopted by the General Assembly during the 2013 General Assembly session allocated \$150,000 to the OEI for fiscal year 2014—far short of the \$600,926 the governor sought.¹⁸² In addition to any funds that might be appropriated by the General Assembly in future years, each locality that has a school taken over by the OEI must transfer to the OEI the per pupil funding for each student in the school “consist[ing] of the total operational expenditures for the most recent fiscal year available, as reported by the resident division in the Annual School Report Financial Section (ASRFIN), divided by actual March 31 Average Daily Membership for the corresponding fiscal year.”¹⁸³ Accordingly, the OEI will receive not only the state and federal per pupil funding for every student enrolled in an OEI-run school, but it will also receive the local funding which includes the standards of quality required minimum local funding plus any local aspirational funding provided by the local appropriating body.

Another interesting aspect of the OEI legislation is the way it treats property owned or used by the local school board. The legislation provides that the OEI

shall have the right to use any school building and all facilities and property otherwise part of the school and recognized as part of the facilities or assets of the school prior to its placement in the Institution and shall have access to such additional facilities as are typically available to the school, its students, and its faculty and staff prior to its placement in the Institution.¹⁸⁴

The legislation further states that “[s]uch use shall be unrestricted, except that the Institution shall be responsible for and obligated to provide for routine maintenance and repair such that the facilities and property are maintained in as good an order as when the right of use was acquired by the Institution,” but the school board or local governing body that owns the facility must

181. *Id.* § 22.1-27.2(E) (Cum. Supp. 2013).

182. Act of May 3, 2013, ch. 806, item 134, 2013 Va. Acts __; see H. APPROPRIATIONS COMM. & SEN. FIN. COMM., SUMMARY OF THE GOVERNOR’S PROPOSED AMENDMENTS TO THE 2012-2014 BUDGET 25 (2013), available at <http://lis.virginia.gov/131/bud/BudSum/fullreport.pdf>.

183. VA. CODE ANN. § 22.1-27.5(A) (Cum. Supp. 2013).

184. *Id.* § 22.1-27.6(A) (Cum. Supp. 2013).

pay for extensive repairs or capital expenses.¹⁸⁵ The legislation does not address how these two provisions are to be enforced. For example, there is no provision reconciling the use of a local government-owned stadium by multiple groups, including the school, or how the OEI can force a school board or local governing body to make extensive repairs or capital improvements that they disagree are necessary or desirable. Finally, neither the school board nor the governing body can sell property used by the OEI without the permission of the OEI.¹⁸⁶

If the OEI becomes fully operational, it will have a profound impact on K–12 education in Virginia. The Virginia Board of Education continues to raise the cutoff scores and the rigor of the standardized tests used as a basis for determining whether a school will receive full accreditation or whether it will be accredited with warning or denied accreditation.¹⁸⁷ It is reasonable to assume that there will always be schools that will come within the reach of the OEI.

2. The Educator Fairness Act

Another bill that made sweeping changes to the Virginia Education Code is the Educator Fairness Act, supported by Governor McDonnell.¹⁸⁸ This bill made significant changes to the grievance procedure applicable to teachers and other school employees. The most significant of these changes was the elimination of the fact finding panel, a three member panel composed of one member selected by the Division Superintendent of Schools, one member selected by the grievant, and one member selected by those two members to serve as chair of the panel.¹⁸⁹ Under the former law,

185. *Id.* § 22.1-27.6(A)–(B) (Cum. Supp. 2013).

186. *Id.* § 22.1-27.6(C) (Cum. Supp. 2013).

187. *See, e.g., Accountability & Virginia Public Schools 2012–2013*, VA. DEP'T OF EDUC., http://www.doe.virginia.gov/statistics_reports/school_report_card/accountability_guide.shtml (last visited Oct. 15, 2013); *Standards of Accreditation*, VA. DEP'T OF EDUC., <http://www.doe.gov/boe/accreditation> (last visited Oct. 15, 2013); *Standards of Learning (SOL) & Testing*, VA. DEP'T OF EDUC., <http://www.doe.virginia.gov/testing> (last visited Oct. 15, 2013).

188. Press Release, Gov. Robert F. McDonnell, Governor McDonnell's Educator Fairness Act Passes Senate, (Feb. 11, 2013), <http://www.governor.virginia.gov/news/viewRelease.cfm?id=1666>.

189. *See* Act of Mar. 20, 2013, ch. 588, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 22.1-312 (Cum. Supp. 2013)); Act of Mar. 20, 2013, ch. 650, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 22.1-312 (Cum. Supp. 2013)); *see also* VA.

the panel would conduct a hearing and make recommendations to the school board.¹⁹⁰ The panel has been replaced by a single, impartial hearing officer appointed by the school board, and, under the new law, the school board determines whether a grievance will be heard by the hearing officer or directly by the school board.¹⁹¹ This change was intended to provide both the teacher and the school system a more timely decision, and is estimated to reduce the time in which grievances are processed.¹⁹²

Another significant change brought about by the Educator Fairness Act is provisions relating to the probationary periods teachers must serve before they acquire continuing contract status. Under the old law, teachers who had not acquired continuing contract status were required to successfully complete a three-year probationary period before they were eligible to receive a continuing contract.¹⁹³ School boards were not permitted to extend the probationary period regardless of the reason.¹⁹⁴ The new law gives school boards the authority to extend the probationary period for new teachers from three years up to five years.¹⁹⁵ It also changes the probationary period for continuing contract teachers who transfer from one school division to another.¹⁹⁶ Under the previous law, a school board could require those teachers to serve a one-year probationary status in the new school division.¹⁹⁷ Under the Educator Fairness Act, the transferring teacher can be required to serve up to two years of probation before being entitled to a continuing contract in the new school division.¹⁹⁸ The

CODE ANN. § 22.1-312 (Repl. Vol. 2011 & Cum. Supp. 2013).

190. VA. CODE ANN. § 22.1-312 (Repl. Vol. 2011).

191. *Id.* § 22.1-311 (Cum. Supp. 2013).

192. See *Educator Fairness Act Passes Senate*, *supra* note 188.

193. VA. CODE ANN. § 22.1-303(A) (Repl. Vol. 2011). The Supreme Court of Virginia interpreted the old statute to require that the teacher serve three consecutive years of probation. See *Corns v. Sch. Bd. of Russell Cnty.*, 249 Va. 343, 350 (1995). Presumably, this interpretation will apply to the new statute since it merely authorizes the increase of the probationary period and not the other terms of probation.

194. See Dena Rosenkrantz, *Taking a Stand: VEA Preserves Continuing Contract Rights for Teachers*, VA. EDUC. ASS'N (June 2013), <http://www.veanea.org/home/2140.htm>.

195. Act of Mar. 20, 2013, ch. 588, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 22.1-303(A) (Cum. Supp. 2013)); Act of Mar. 20, 2013, ch. 650, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 22.1-303(A) (Cum. Supp. 2013)).

196. Act of Mar. 20, 2013, ch. 588, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 22.1-303(B) (Cum. Supp. 2013)); Act of Mar. 20, 2013, ch. 650, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 22.1-303(B) (Cum. Supp. 2013)).

197. VA. CODE ANN. § 22.1-303(B) (Repl. Vol. 2011).

198. Ch. 588, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN. § 22.1-303(B) (Cum. Supp. 2013)); Ch. 650, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN.

probationary period for assistant principals, principals, and certain supervisors did not change.¹⁹⁹ Under both the old and new laws, they must serve a three-year probationary period in the same position in the same school division before becoming eligible for a continuing contract.²⁰⁰

The Educator Fairness Act also requires that teachers and principals be evaluated regularly, and, for the first time, distinguishes between informal and formal evaluations.²⁰¹ Probationary teachers must be evaluated informally at least once during their first semester of teaching and formally at least once per year during their probationary period.²⁰² Continuing contract teachers must be evaluated formally at least once every three years, or more often as deemed necessary by the principal, and informally each year they are not formally evaluated.²⁰³ Any continuing contract teacher who receives an unsatisfactory formal evaluation and who continues to be employed, must be formally evaluated in the following year.²⁰⁴ Probationary principals and assistant principals must be evaluated each school year.²⁰⁵ Continuing contract principals and assistant principals must be evaluated formally at least once every three years and informally at least once each year that they are not formally evaluated.²⁰⁶ The legislation also requires that evaluations of teachers, principals, and superintendents “include student academic progress as a significant component and an overall summative rating.”²⁰⁷

Another significant change in the law brought about by the Educator Fairness Act is in the definition of “incompetence” for

§ 22.1-303(B) (Cum. Supp. 2013).

199. Compare VA. CODE ANN. § 22.1-294(A) (Repl. Vol. 2011), with *id.* § 22.1-294(A) (Cum. Supp. 2013).

200. Compare VA. CODE ANN. § 22.1-294(A) (Repl. Vol. 2011), with *id.* (Cum. Supp. 2013). Unlike teachers, principals, assistant principals and supervisors cannot transfer continuing contract status from one school division to another. See *Lee-Warren v. Sch. Bd. of Cumberland Cnty.*, 241 Va. 442, 446, 403 S.E.2d 691, 693 (1991).

201. See ch. 588, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN. §§ 22.1-294 to -95, -303 (Cum. Supp. 2013)); ch. 650, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN. §§ 22.1-294 to -95, -303 (Cum. Supp. 2013)).

202. Ch. 588, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN. § 22.1-303 (Cum. Supp. 2013)); ch. 650, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN. § 22.1-253.13:5 (Cum. Supp. 2013)).

203. VA. CODE ANN. § 22.1-295 (Cum. Supp. 2013).

204. *Id.*

205. *Id.* § 22.1-294. (Cum. Supp. 2013).

206. *Id.*

207. *Id.* § 22.1-253.13:5 (Cum. Supp. 2013).

purposes of dismissal under the grievance procedure. That term is now defined, among other things, as “one or more unsatisfactory performance evaluations.”²⁰⁸

3. A–F School Grading Scale

Another bill passed during the 2013 General Assembly session, over the objections of many education organizations, is the bill requiring the use of an A–F scale for grading the performance of individual schools.²⁰⁹ For many years prior to the passage of the grading scale bill, the levels of accreditation were used to denote the level of proficiency of a school.²¹⁰ Under the new law, the Virginia Board of Education must also report individual school performance using the A–F grading system that includes the Board’s Standards of Accreditation, state and federal accountability requirements, and student growth indicators in assigning grades to individual schools.²¹¹ “Student growth” means

(i) whether individual students on average fall below, meet, or exceed an expected amount of growth based on a statewide average or reference base year on state assessments or additional assessments approved by the Board; (ii) maintaining a proficient or advanced proficient performance level on state assessments; or (iii) making significant improvement within the below basic or basic level of performance on reading or mathematics assessments as determined by the Board.²¹²

The Board is required to develop the student growth indicators, which are critical to the grading scale.²¹³

208. *Id.* § 22.1-307 (Cum. Supp. 2013).

209. See Act of Mar. 21, 2013, ch. 672, 2013 Va. Acts ___; Act of Mar. 21, 2013, ch. 692, 2013 Va. Acts ___; see also Michael Alison Chandler, *Virginia Lawmakers Seek to Simplify School Ratings with A to F Grades*, WASH. POST (Feb. 23, 2013), http://articles.washingtonpost.com/2013-02-23/local/37256037_1_letter-grades-school-ratings-b-schools (discussing how educators and the Virginia Association of School Superintendents criticized the grade system).

210. Chandler, *supra* note 209.

211. Ch. 672, 2013 Va. Acts at ___; ch. 692, 2013 Va. Acts at ___. The growth indicators are also required to be used in teacher evaluations. See Ch. 672, 2013 Va. Acts at ___; ch. 692, 2013 Va. Acts at ___.

212. Ch. 672, 2013 Va. Acts at ___; ch. 692, 2013 Va. Acts at ___.

213. Act of Mar. 20, 2013, ch. 640, 2013 Va. Acts ___, ___; ch. 672, 2013 Va. Acts at ___; ch. 692, 2013 Va. Acts at ___. In an interesting twist, one version of the grading scale bill that was passed would have required the Board to develop the growth indicators by October 1, 2014, while the other two bills that passed required their development by July 31, 2013. Compare ch. 640, 2013 Va. Acts at ___, with ch. 672, 2013 Va. Acts at ___, and ch.

4. Kinship Care

Another bill that caused much debate among the K–12 education community is a bill that amends section 22.1-3 of the Virginia Code, which deals with persons who are entitled to attend public schools for free.²¹⁴ Prior to the enactment of this legislation, there were two schools of thought regarding the right of a student living in a school division with someone other than his or her legal parent or guardian to attend the public schools in that school division. This issue is important particularly for school divisions that experience a high volume of students attempting to enroll from other school divisions. These students are often in situations in which it is difficult to determine whether the student's residency is legitimate. The first school of thought, based on a strict reading of the statute, was that the list of persons in section 22.1-3 entitled to attend public schools was exclusive, and, therefore, a student living in the school division with a relative who did not have legal custody or guardianship over the child was not entitled to attend the public schools in that school division.²¹⁵ The other school of thought, based on long-standing opinions of the Attorney General,²¹⁶ was that the categories of persons listed in section 22.1-3 are not exclusive, and that any school aged child who is a bona fide resident of the school division not solely for school purposes is entitled to attend the public schools in that school division regardless of the person with whom the student is living.²¹⁷

The new legislation partially resolves the conflicts between these two schools of thought by adding to the list of persons entitled to attend the public schools for free children whose parents are unable to care for them and who are living, not solely for

692, 2013 Va. Acts at _____. Because the bills that used the 2013 date were signed after the bill that used the 2014 date, the 2013 date takes precedence. *Compare* ch. 640, 2013 Va. Acts at _____, *with* ch. 672, 2013 Va. Acts at _____, *and* ch. 692, 2013 Va. Acts at _____.

214. Act of Apr. 3, 2013, ch. 779, 2013 Va. Acts _____, ____ (codified as amended at VA. CODE ANN. § 22.1-3 (Cum. Supp. 2013)); *Preview of the 2013 Legislative Session*, VA. ASS'N OF SECONDARY SCH. PRINCIPALS, <http://www.vassp.org/VASSP/legislativeadvocacy/legislative-initiatives/> (last visited Oct. 15, 2013); Hannah Hess, *VA's Kinship Care Bill Could Open The Door To 'School Shopping,'* LEESBURG TODAY (Mar. 1, 2012, 3:17 PM), available at http://www.leesburgtoday.com/news/general_assembly/va-s-kinship-care-bill-could-open-the-door-to/article_87f69dc6-63db-11e1-b880-0019bb2963f4.html.

215. See VA. CODE ANN. § 22.1-3 (Cum. Supp. 2013); *see, e.g.*, 2007 Op. Va. Att'y Gen. 84, 85, 87 (discussing how a school division found the list exhaustive).

216. 2007 Op. Va. Att'y Gen. 84, 85; 1987 Op. Va. Att'y Gen. 374, 375.

217. 2007 Op. Va. Att'y Gen. 84, 85; 1987 Op. Va. Att'y Gen. 374, 375.

school purposes, with a person in the school division who is “an adult relative providing temporary kinship care as that term is defined in § 63.2-100.”²¹⁸ Under the new law, a school division

may require one or both parents and the relative providing kinship care to submit signed, notarized affidavits (a) explaining why the parents are unable to care for the person, (b) detailing the kinship care arrangement, and (c) agreeing that the kinship care provider or the parent will notify the school within 30 days of when the kinship care arrangement ends.²¹⁹

A school division may also require “a power of attorney authorizing the adult relative to make educational decisions regarding the person.”²²⁰

In addition, a school division may also require the parent or kinship care provider to procure written verification from the department of social services “that the kinship arrangement serves a legitimate purpose that is in the best interest of the person other than school enrollment.”²²¹ The school division may require “continued verification” from the department of social services if the kinship care arrangement lasts more than one year.²²²

Depending upon the school of thought to which the school division previously subscribed, these changes may result in an increase or decrease in the number of students eligible to attend the public schools. The benefit of these changes, however, is that they will provide school divisions with some certainty regarding the details and duration of a kinship care arrangement and certainty that the kinship care provider is authorized by the parent to make decisions regarding the student—assurances that were lacking under the prior law.

218. Ch. 779, 2013 Va. Acts at ___ (codified as amended at VA. CODE ANN. § 22.1-3 (Cum. Supp. 2013)). It is important to note that this legislation included a sunset provision and therefore, will expire on June 30, 2016. *Id.*

219. VA. CODE ANN. § 22.1-3 (Cum. Supp. 2013).

220. *Id.*

221. *Id.*

222. *Id.*