VIRGINIA BEACH BAR ASSOCIATION

2019 VBJDR ANNUAL CLE

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2019 VBBA VBJDR ANNUAL CLE

September 12, 2019 ~ Advanced Technology Theater- TCC VB

SPONSORED IN PART BY OUR FAMILY WIZARD AND VETERAN REPORTERS

8:30am — **Registration and Continental Breakfast**

9a-11a — **DHS/Foster Care- Major Changes Ahead: What this means for parents, CACs/Retained Attorneys, GALs, $$$, and the Agency *Plus* Recently Requested Information on DHS Record Requests and CPS Referrals**

Christianna Cunningham/Brad Hudgins, Associate City Attorneys
Kara Chappell, VBDHS-CQI- FOIA Coordinator
VBDHS Administration Representatives

11-11:15a — **Break**

11:15a-12:15p — **Drug Testing- Provider Panel and Judges Q & A**

The Hon, Deborah V. Bryan
Kerriel Bailey, Esq.
Paul Mungo, Drug Testing Solutions

12:15p-1:15p — **Lunch (provided)**

1:15p-2:15p — **HOT TOPICS in JDR Criminal Law:**

1. **School Threats: Discipline v. Delinquency and School Safety**
   Paul Powers, Deputy Commonwealth Attorney
   Kamala Lannetti, Deputy City Attorney- Schools
   Thomas DeMartini, Director of Safe Schools, VBCPS

2. **Juvenile Competency and Mental Health**
   Ashley Coleman, Assistant Commonwealth Attorney
   Lania Herman, Assistant Public Defender

2:00p-3:00p — **Social Media and Use of Co-Parenting Apps as Evidence in Juvenile and Adult Criminal and Civil Cases**

The Hon. Tanya J. Bullock
Jennifer Schupert, Esq.
Kevin Dorsey, Our Family Wizard

3:00p-3:15p — **Break**

3:15p-5:15p — **Ethics: Professionalism Minus the Zealousness In Civil and Criminal Cases**

The Hon. Cheshire I'Anson Eveleigh
Bretta Lewis, Esq.
Kathleen Edge, Esq.
Allison Anders, Esq.

SEGMENT 1

9a-11a

DHS/Foster Care- Major Changes Ahead:
What this means for parents, CACs/Retained Attorneys, GALs, $$$, and the Agency

PLUS

RECENTLY REQUESTED INFORMATION ON DHS-FOIA AND CPS REFERRALS

DHS/FOSTER CARE- MAJOR CHANGES AHEAD:

WHAT THIS MEANS FOR PARENTS, CACS/RETAINED ATTORNEYS, GALS, $$$, AND THE AGENCY

PLUS

RECENTLY REQUESTED INFORMATION ON RECORD REQUESTS AND CPS REFERRALS

*Prepared by C. Cunningham, VB Associate City Attorney
August 2019
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Major Changes Ahead for Child Welfare

Background

Anyone that has ever handled a DHS case has heard of "4-E." Everyone is always saying "no we can't do that because of "4-E," or "4-E doesn't allow continuances," etc. But- does anyone really know what is 4-E???

4-E or IV-E is Title IV-E of the Social Security Act, specifically 42 USCA §621 *et. seq.* It set forth the requirements the States must meet in order to receive federal funding for foster care services. There is no wiggle room in 4-E, no snow days, no hurricane days, no nunc pro tunc, no semi-compliance. If States want to receive the funding, they must comply.

IV-E has not had a major re-write since the 1980's...that is until now. In reviewing the trends and data around foster care, the Feds have made changes that are intended to get the states to avoid traditional foster care where possible. And- where foster care is necessary, to promote relative placement or like placements ("kinship") where available. In Virginia, previously, only 7% of all foster care placements were with kin compared to the national average of 22%. This was in large part due to the fact there was no state or local funding to support kinship care. Now, relatives who are willing and able to go through foster care training and pass the required background checks, can become foster parents. And-Federal funds can now be used to support placement with such relatives ("**kinship care**"). Federal funds can now also be utilized for many "prevention" services, which in the past, were solely funded by state and/or local dollars.

However- ***where the use of federal allowances for certain things have expanded- they have significantly contracted in other areas.*** For example, for years there have been studies indicating that the benefits of residential treatment centers ("RTC") and placements in congregate care are often outweighed by the harms that can result from long-term placement in such facilities. Placement in any congregate care setting should be used a last resort where at all possible, should be short-term in length of stay, should be trauma focused and/or therapeutically intensive, and should work toward a swift re-integration of the child back into a community-based setting. To ensure the states adhere to these principles, the new federal regulations severely restrict the types of congregate care/RTC placements that can be made. A child can only be placed in a qualified residential program that meets certain federal requirements and has specific license. Presently- THERE ARE NO VIRGINIA FACILITIES THAT MEET THE FEDERAL REQUIREMENTS.

The changes above are but two of the many changes to federal law affecting foster care. In fact, the changes to IV-E are numerous and have caused the states to go back to their respective legislatures for major state code re-writes in policy and regulation. **But in Virginia, the changes have been made even more substantive by two other reviews, 1) The Federal Child and Family Services Review ("CFSR") and 2) the Virginia Joint Legislative Audit and Review Commission ("JLARC") Study.** To truly understand the breadth and scope of the changes recently taking effect in Virginia – as well as those on the way – it is essential that

any one handling child welfare cases understand the reasons and intent behind the changes in the law.

VIRGINIA FOCUSED CHILD WELFARE REVIEWS/AUDITS:

1. **CFSR**- The Federal Agency known as the Children's Bureau assisted with a Virginia state case review using the Federal Onsite Review Instrument. ***Virginia was found to be in compliance with 0 out of 7 measurable outcomes.*** The results were compiled in the Child and Family Services Review ("CFSR,") which led to Virginia being required to implement a corrective action plan- the Performance Improvement Plan (***"PIP"***).

   The CFSR listed the following as the biggest areas in need of improvement in Virginia:

   i. **Permanency- There is a reluctance in VA to terminate parental rights in accordance with the federally mandated timeline (15 months) and the Virginia appellate system can be a barrier to permanency.**

   ii. **Relative Identification- In VA, Relatives are not timely identified or not identified at all; parents refuse to disclose and/or workers are not able to find relatives in an efficient manner.**

2. **JLARC**- The JLARC Study, completed in December of 2018, received a lot of media attention and promoted the start of the wave of new laws that have already taken effect as of July 1, 2019, as well as set the stage for the passing of additional legislation come the next session of the General Assembly.

   What JLARC Found:

   a. Expanded state level policies and investments are needed to place more children in family settings. **Placement with relatives and the use of kinship care should be expanded and funded**.

   b. Too many children "age out." Permanency needs to be achieved for a higher population of Virginia's foster care youth. **Barriers to permanency are not solely related to the high caseload carried by LDSS workers- barriers to permanency include many factors *beyond the control of the LDSS*, such as the Virginia court system, worker retention issues, and funding for service availability.**

   c. **Caseloads are too high in Virginia**; LDSS need funding for expanded departments and to mitigate retention issues.

d. **There is little to no oversight by VDSS with respect to Virginia's locality-based system of child welfare;** VDSS should be given the authority to take action where a LDSS is not incompliance with applicable law and regulations.

e. There is a statewide **shortage of foster homes.**

SO WHAT HAS CHANGED SO FAR?

*(*Some changes are not directly related to the PIP or JLARC.)*

A. 2019 Legislative Changes to Child Welfare Statutes

1. HB 1622 Amends Va Code Sec. 63.2-1522 & 63.2-1523: Increases the age to which a child's out of court statement in a sex abuse case can be used in lieu of the child's testimony; the statutes now apply to children 14 and younger

- In order for the child's out of court statement to be used, the child will still need to be deemed "unavailable" under the statute.
- This applies to statements obtained during FIs by DHS, CHKD, or VBPD, etc.

2. HB1659/SB1257 amends Va Code Sec. 63.2-1509: Adds religious practitioners to the list of mandated reporters (priests, ministers, pastors, rabbis, etc.)

- Does allow for an exemption where the express doctrine of the faith requires the information to be kept confidential or where the law allows for the same to be kept confidential under other statutes (?)

3. HB1671 amends Va Code Sec. 63.2-1505 and 63.2-1506: Requires FSS – in either investigation or assessment- to determine whether subject child and/or perp have resided in another state within the last preceding 5 years and if so, to request a search of such state(s)' child abuse registries

4. HB2597 enacts Va Code Sec. 63.2-1506.1: Requires all LDSS to conduct sex trafficking assessments upon receiving complaint for suspected child abuse that concerns information the child may be a victim of sex trafficking

- Allows the LDSS to assume custody of the child for 72 hours to complete such assessment and take other necessary action
- Sex Trafficking "Assessment" is defined in the statute; assessment tool must meet minimum statutory requirements

5. HB2743 amends Va Code Sec. 63.2-1506 & 63.2-1506: **Requires the subject of the investigation or assessment to notify the LDSS in the event they change residences during the pendency of the case**

6. SB1436 amends Va Code Sec. 63.2-1509: Requires Mandated Reporters/licensed medical centers/ hospitals to require the development of an appropriate discharge plan when releasing a substance exposed infant from the hospital, and such plan must include referrals to local providers/DHS, etc., and that such notice of a plan should be sent to the BHA/CSB of the locality where Mom and child are discharged

7. HB1953/SB1416 amends Va Code Sec. 63.2-1526: In the event an appeal is noted in a founded investigation by CPS that is concurrently being investigated by law enforcement, and no charges have been filed, the appeal is stayed until the criminal investigation is closed or in the case of a criminal investigation not completed within 180 days, the appeal will be stayed only for 180 days ***** This creates a conflict with Virginia Code §63.2-1516.1(B)*** **that will likely be addressed next session.**

8. Va. Code §63.2-900.1- searches for relatives as kinship foster care placements shall be conducted at the time the child enters foster care and at least annually thereafter, and prior to any subsequent changes in the child's placement setting

9. Va. Code §63.2-905.2- Security Freeze- all foster children shall have their credit frozen if they are less than 16 and have been in care more than 6 months. LDSS shall conduct annual credit checks on all children under 14 but less than 18 and resolve any found issues to the greatest extent possible.

10. Va. Code §63.2-904- *VDSS State Commissioner has ultimate authority over placements*; VDSS can remove a child from any placement without the consent of the LDSS and the LDSS shall make placement in accordance with the Commissioner's direction.

11. Va Code §63.-900.1- Kinship Foster Care Requirements – LDSS shall take reasonable steps to place wit relatives and explore kinship options; waivers of standards may be requested; kinship placements may receive full foster care funding; and where a child has been placed in a kinship care arrangement for 6 consecutive months or more- the child shall not be removed unless certain conditions are met.

12. Va Code §63.2-904.1- VDSS may create a corrective action plan where needed for LDSS and may assume control over the LDSS where necessary to make corrective adjustments

13. Va. Code §63.2-904.2- Establishes a compliant hotline related to child welfare; it is exempt from FOIA

14. Va. Code §63.2-906- Parents must be included in creation of foster care service plan and workers must meet with parents no less than once every 2 months and at all critical decision-making points in case. Children shall be included to the best of their ability.

15. Va. Code §63.2-913.1- Caseload Standard to be established by the state and reviewed annually

16. Va. Code §16.1-283.1- The LDSS may inform the parents regarding the option of a PACCA and must inform the adoptive parent regarding PACCA. The LDSS shall inform the child re: PACCA where child is 14 or older.

17. Va. Code §16.1-228- defines "fictive kin" as a nonrelative but a person with whom the child has an established relationship

18. Va. Code §16.1-228- an LDSS may only place a child in an RTC where the RTC meets federal requirements, adds required hearings to children placed in RTC, adds additional requirements to foster care service plans of children in RTC, and adds certain findings that must be had at each hearing.

19. Va. Code §63.2-910.2*** **went into effect in 2017**- LDSS *must file* TPR at 15 months-

§ 63.2-910.2. Petition to terminate parental rights

A. If a child has been in foster care under the responsibility of a local board for 15 of the most recent 22 months or if the parent of a child in foster care has been convicted of an offense under the laws of the Commonwealth or a substantially similar law of any other state, the United States, or any foreign jurisdiction that constitutes (i) murder or voluntary manslaughter, or a felony attempt, conspiracy, or solicitation to commit any such offense, if the victim of the offense was a child of the parent, a child with whom the parent resided at the time such offense occurred, or the other parent of the child; or (ii) felony assault resulting in serious bodily injury or felony bodily wounding resulting in serious bodily injury or felony sexual assault, if the victim of the offense was a child of the parent or a child with whom the parent resided at the time of such offense, the local board shall file a petition to terminate the parental rights of the child's parents and concurrently identify, recruit, process, and approve a qualified family for adoption of the child, unless:

1. At the option of the local board, the child is being cared for by a relative;

2. The local board has determined that the filing of such a petition would not be in the best interests of the child and has documented a compelling reason for such determination in the child's foster care plan; or

3. The local board has not provided to the family of the child, within the time period established in the child's foster care plan, services deemed necessary for the child's safe return home or has not otherwise made reasonable efforts to return the child home, if required under § 473(a)(15)(B)(ii) of Title IV-E of the Social Security Act (42 U.S.C. § 673).

B. As used in this section, "serious bodily injury" means bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

B. The Implementation of the Virginia Performance Improvement Plan ("PIP")

1. The PIP started in concept in August of 2018.
2. The PIP was approved by the Children's Bureau (Feds) June 2019.
3. Implementation is set to continue through February 2021.

"We are Building the Plane as We Fly It!!!"

Implementation must occur whether VA is ready or not- meaning implementation must weather staff changes, funding issues, etc.

4. The Following will be Audited and are Federally Mandated by the PIP; every 6 months- required audit:
    a. Documentation of "meaningful contacts" – FSS must address all safety factors including but not limited to, risk, on-going concerns, at each contact with involved caretaker
    b. Documentation of engagement- FSS must see family monthly at minimum, must adhere to FPM schedule, must document all contacts and lack of contact by family
    c. Documentation of Relative Identification Efforts- State Funded Mobile technology to document diligent search in real time in the field
    d. Documentation of TPR in accordance with time-line and if not- why/what are barriers?
    e. Documentation of use of "safe-measures" – data driven assessment as to whether benchmarks are being met as to safety, engagement, and permanency

C. LIKELY COMING CHANGES AFFECTING DHS CASES IN COURT THROUGH THE PIP:

1. Enhanced Relative Identification Tools
    a. Parents being ordered to disclose and certify that they have disclosed all possible relatives/kinship care placement options
    b. LDSS workers using enhanced relative identification tools in the field (mobile)
    c. See attachment 1- examples being looked at though the state
        i. As CAC/GAL you may be asked to assist in gathering information and/or having your client **certify that the answers are complete and truthful.**
    d. Broadening of "legitimate interest" to allow LDSS to communicate more freely with "kin"

2. Removal of Barriers to Termination- items "on the table" or already being utilized
    a. Long-shot- making JDR a court of record
    b. Passing legislation to the effect that if a court cannot in good conscience return the child at 15 months, mandating TPR (limiting judicial discretion)
    c. Passing legislation limiting extension of timeline past 15 months to certain specific exempt criteria where TPR is not necessary
    d. Limiting the extent of the de novo review**
    e. Local Efforts-
        i. *VBJDR-* ***See attachment 2 New Forms*** *being implemented in VBJDR to assist parents and counsel in understanding these issues*
        ii. VBCC- ***See attachment 3 New Local Rule:*** VBCC has already implemented a new rule that all TPR appeals ***must*** now follow the statute and be heard within 90 days. Any counsel that doesn't have the date must make a motion to have the timeline waived

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QUESTIONS?

THE "BECAUSE YOU ASKED" SECTION ☺

D. VBDHS Document Requests 101

All DHS FOIA/Record requests/SDTs/etc. should go to:

Continuous Quality Improvement Division
256 N. Witchduck Rd. Suite 2F
Virginia Beach, VA 23462
Office: 757-385-0642
Fax: 757-473-2104
DHSFOIA@VBGOV.COM

Frequently Asked Questions Re: DHS Record Requests in VB and Other Nuances

1. **What are reasons I may be denied the record?**
    a. Virginia Code §§ 63.2-102, 63.2-104, 63.2-105 and applicable state as well as other applicable state and federal regulations (42 CFR P.2)
2. **Where I receive the record, why is it redacted?**
    a. State and Federal Law require that even where the record can be disclosed, certain information must be redacted unless a specific court order is obtained. For example- reporter/complainant information, social security numbers, and substance abuse information not in the original referral.
3. **How long does it take to get my records?**
    a. If filed under FOIA- 5 business days unless an extension is requested, then up to 15. Only applies to VA residents.
    b. If SDT, within time prescribed by SDT.
4. **Is there a fee?**
    a. Yes, Virginia law allows local gov to charge a reasonable fee for copying and labor charges associated with the request
5. **I sent a request to the VB CSB and no one responded; why?**
    a. The City of Virginia Beach *does not* have an operating CSB- our CSB is an advisory board in name only. Often requests are sent to clinics (i.e.) Magic Hollow/P6/Beach House/etc.) operating in the

City where people incorrectly assume the CSB is housed, and unfortunately – the requests never get to the right location. In place and stead of a CSB, the City of Virginia Beach has a Behavioral Health Authority (under Virginia Code §37.2-601) located under the umbrella of DHS. All requests for records that would come under a traditional CSB should be sent to CQI as well.

6. **What is Gov QA and how does it work?**
   a. See attachment 4. – *not yet active for DHS Records*
   b. Use Request Forms- https://www.vbgov.com/government/departments/human-services/Pages/default.aspx

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E. FREQUENTLY ASKED AND/OR MISUNDERSTOOD CPS ISSUES

Validity

- Determination of Validity (22 VAC 40-705-50)(63.2-1508)
  - victim under 18
  - alleged perpetrator is in caretaker role
  - acts alleged fit definitions of abuse and/or neglect
    - jurisdiction is met
- Invalid *does not* mean child was not abused or neglected
- Invalid could also mean:
  - alleged perpetrator was not in a caretaker role
  - case was a duplicate referral
  - case already open to agency action

Reporters

- three types:
  - mandated (doctors, police, teachers, etc.)
  - non-mandated (everyone else)
  - anonymous

- reporters are confidential (63.2-1514)
- reporters are immune from liability unless bad faith (63.2-1514)
- it is a class 1 misdemeanor to reveal reporter information
- there is only 1 way for a court to reveal reporter information:
  Virginia Code Sec. 63.2-1514(D):
  - petition is filed with the Circuit Court
  - the Circuit Court reviews the petition and if sees merit, orders *in camera* review of records

- If, after review, agrees "malice" could be inferred- orders production of unreacted records for use in civil case, such as a defamation action

Other Things to Keep in Mind:

- Valid Reports can turn into Family Assessments or Investigations
- Family Assessments can turn into Investigations
- Only Investigations can lead to Administrative Findings
- Administrative findings are appealed via the administrative processes act
- Administrative appeals are stayed when concurrent criminal charges are pending
- Both Family Assessments and Investigations can lead to court action
- Findings on the administrative track are against the caretaker
- Findings (Adjudications) on the court track are in favor of the child; the agency need not identify "an abuser" to obtain or compel caretaker involvement in services
- Child Protective Orders trigger the "you may not carry/possess" a gun rule
- Child Protective Orders stay in effect until child's 18 b-day unless amended or dissolved sooner

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Your TURN TO ASK .....WHATEVER ☺

F. CONTACT INFORMATION:

CITY ATTORNEY ASSIGNMENTS:

LITIGATION DEPUTY	BOYNTON	385-8803
JDR1 CUNNINGHAM	385-8456	
JDR2 ILARDI	385-1930	
JDR3 EVANS	385-4539	
JDR4 HUDGINS	385-8067	
JDR5 ILARDI	385-1930	
JDR8 HUDGINS	385-8067	

APS/BHDS/ADULT SERVICES	CUNNINGHAM	385-8456
CQI/FOIA	CUNNINGHAM	385-8456
CQI/FOIA	SMITH	385-1009
VBDHS/CONTRACTS/HR	SMITH	385-1009
FAPT/CPMT	EVANS	385-4539
MH DOCKET-GDC	ILARDI	385-1930
ADULT CORRECTIONS/NGRI	CUNNINGHAM	385-8456

PARALEGALS:

JUNE AVERY:	385-1192
ANGIE DIEZEL	385-1806

ATTACHMENT 1

WORKER NAME:	VIRGINIA DEPARTMENT OF SOCIAL SERVICES	CHILD'S NAME:
AGENCY:	DILIGENT SEARCH CHECKLIST	CASE NUMBER:

RELATIVE NAME:	RELATIVE NAME:	RELATIVE NAME:	RELATIVE NAME:
MATERNAL ☐ PATERNAL ☐	MATERNAL ☐ PATERNAL ☐	MATERNAL ☐ PATERNAL ☐	MATERNAL ☐ PATERNAL ☐
☐ GRANDMOTHER ☐ GRANDFATHER ☐ AUNT ☐ UNCLE ☐ COUNSIN ☐ ADULT SIBLING ☐ OTHER	☐ GRANDMOTHER ☐ GRANDFATHER ☐ AUNT ☐ UNCLE ☐ COUNSIN ☐ ADULT SIBLING ☐ OTHER	☐ GRANDMOTHER ☐ GRANDFATHER ☐ AUNT ☐ UNCLE ☐ COUNSIN ☐ ADULT SIBLING ☐ OTHER	☐ GRANDMOTHER ☐ GRANDFATHER ☐ AUNT ☐ UNCLE ☐ COUNSIN ☐ ADULT SIBLING ☐ OTHER
ADDRESS	ADDRESS	ADDRESS	ADDRESS
TELEPHONE NUMBER	TELEPHONE NUMBER	TELEPHONE NUMBER	TELEPHONE NUMBER
SOCIAL SECURITY NO.	SOCIAL SECURITY NO.	SOCIAL SECURITY NO.	SOCIAL SECURITY NO.
DATE OF BIRTH / NATIVE AMERICAN? ☐ Y ☐ N	DATE OF BIRTH / NATIVE AMERICAN ☐ Y ☐ N	DATE OF BIRTH / NATIVE AMERICAN ☐ Y ☐ N	DATE OF BIRTH / NATIVE AMERICAN ☐ Y ☐ N
TRIBAL AFFILIATION? ☐ Y ☐ N / ENROLLMENT NO.	TRIBAL AFFILIATION? ☐ Y ☐ N / ENROLLMENT NO.	TRIBAL AFFILIATION? ☐ Y ☐ N / ENROLLMENT NO.	TRIBAL AFFILIATION? ☐ Y ☐ N / ENROLLMENT NO.
CONTACTED? ☐ Y ☐ N / IF YES, WHEN?	CONTACTED? ☐ Y ☐ N / IF YES, WHEN?	CONTACTED? ☐ Y ☐ N / IF YES, WHEN?	CONTACTED? ☐ Y ☐ N / IF YES, WHEN?
IF NOT, WHY NOT?	IF NOT, WHY NOT?	IF NOT, WHY NOT?	IF NOT, WHY NOT?
COMMENTS	COMMENTS	COMMENTS	COMMENTS
TYPE OF RESOURCE/SUPPORT ☐ PLACEMENT ☐ RESPITE ☐ VISITATION ☐ CORRESPONDENCE ☐ CONNECTING CHILD WITH ☐ CULTURAL/ETHNIC HERITAGE ☐ OTHER:	TYPE OF RESOURCE/SUPPORT ☐ PLACEMENT ☐ RESPITE ☐ VISITATION ☐ CORRESPONDENCE ☐ CONNECTING CHILD WITH ☐ CULTURAL/ETHNIC HERITAGE ☐ OTHER:	TYPE OF RESOURCE/SUPPORT ☐ PLACEMENT ☐ RESPITE ☐ VISITATION ☐ CORRESPONDENCE ☐ CONNECTING CHILD WITH ☐ CULTURAL/ETHNIC HERITAGE ☐ OTHER:	TYPE OF RESOURCE/SUPPORT ☐ PLACEMENT ☐ RESPITE ☐ VISITATION ☐ CORRESPONDENCE ☐ CONNECTING CHILD WITH ☐ CULTURAL/ETHNIC HERITAGE ☐ OTHER:

VIRGINIA DEPARTMENT OF SOCIAL SERVICES
VIRGINIA RELATIVE IDENTIFICATION FORM ("RIF")

Relative Name: _____
Relation to child: _____
Physical Address: _____
Relative Information provided by (Party name): _____
Relative Information provided on (Date): _____
All Known Phone Numbers of Relative: _____
Email address of relative: _____

1. Is relative aware of the children's placement in foster care? _____
   _____

2. Have the parents executed a release for LDSS to communicate with the relative in detail the reasons for foster care as well as the concerns the LDSS has for the family? _____
   _____

3. Is relative willing to be a placement option for the child/children? _____
   _____

4. Does the relative understand the placement could be permanent? _____
   _____

5. Does the relative have any physical health concerns that would prevent them from being a permanent placement? _____

6. Is there any prior substance abuse, mental health, or other issues that could hinder the relative's ability to care for the child/children on a permanent basis? _____

7. Will the relative submit to CPS and Criminal background checks? _____

8. Has the relative identified any barrier crimes that would prevent them from being a placement option? _____

9. What is the type of housing in which the relatives lives? _____

10. Would each child have his or her own room and/or what would the room arrangements be?

_____

11. Does the relative have any minor children? If yes, do any of the children have any special needs that would hinder the relative's care of the subject child/children? _____

12. Has the relative produced employment information and/or financial information? _____

13. Is the relative a Virginia resident? If not, are they willing to submit to ICPC? _____

14. Is the relative willing to complete foster parent training and/or any other specialized training that may be required to assist in the care of the subject child/children? _____

15. Is the relative willing and able to abide by any protective order regarding contact with the parents/prior custodian and the child/children? _____

16. Has the relative identified any concerns or barriers to being a placement option? _____

17. Is the relative willing to participate in the court process? _____

18. If necessary, is the relative willing to be an adoptive parent in lieu of merely a custodial placement?

_____

19. Has the relative identified any other possible relatives, fictive kin, etc. and/or assisted in CLEAR search efforts? _____

20. Does the relative know of any Native American heritage not previously disclosed by the parties?

_____

Virginia Department of Social Services

DILIGENT SEARCH CHECKLIST

Child's Name:		Case Number:
Name of Relative:	AKA/Alias:	
Relative D.O.B.:	Relationship to the Child:	
American Indian? ☐ YES ☐ NO	Tribe Name:	
Tribal Affiliation? ☐ YES ☐ NO	Enrollment Number:	
Tribe Contacted? ☐ YES ☐ NO	If no, why not?	
SEARCH CATEGORIES FOR IDENTIFYING AND LOCATING RELATIVES	**DATE:**	**RESULTS:**
INTERVIEW FAMILY		
☐ Ask biological parent(s)		
☐ Ask child		
☐ Ask other relatives		
☐ Ask Tribe if child/parent is enrolled or member		
☐ Ask court to order biological parent(s) to provide relative information, when necessary		
Previous Records		
☐ Review current and previous case records		
☐ Ask Previous workers/agencies who have worked with the family		
DSS Computer Applications		
SPIDeR		
☐ OASIS		
☐ DMV		
☐ SVES/SOLQ		
☐ ADAPTRO		
☐ APECS		
☐ VEC		
☐ VACMS		
☐ **CLEAR**		
☐ **Federal Parent Locator Service (FPLS)**		

School ☐ Child's School/Emergency Contact Listing		
Health Department / Vital Records ☐ Birth Record ☐ Marriage Record ☐ Death Record ☐ **Unites States Post Office (USPS)** ☐ **Voter Registration** ☐ **Military** ☐ **Newspaper Obituary**		
Miscellaneous ☐ Telephone Book/Directory Assistance ☐ Certified letter to last known address ☐ Facebook ☐ Instagram		
Criminal History Search* ☐ Federal Bureau of Prisons www.bop.gov ☐ VINELink www.vinelink.com ☐ Federal Bureau of Investigation National Sex Offender Registry https://www.nsopw.gov/ ☐ Hampton Roads Regional Jail Inmate Search https://www.inmateaid.com/inmate-locator/hampton-roads-regional-jail.amp ☐ Richmond City Jail Inmate Search https://www.inmateaid.com/prisons/richmond-city-jail-rcjc ☐ Inmate Plus https://inmatesplus.com/ ☐ Department of Corrects www.corrections.com		

OTHER TOOLS USED:	

TYPE OF RESOURCE/SUPPORT

- ☐ PLACEMENT:
- ☐ RESPITE:
- ☐ VISITATION:
- ☐ CORRESPONDENCE:
- ☐ CONNECTING CHILD with CULTURAL/ETHNIC HERITAGE:
- ☐ OTHER:

Family Services Worker: _____ Family Services Supervisor: _____

ATTACHMENT 2

Meeting Permanency Deadlines in Foster Care Cases

To ensure strict compliance with the Federal and State Law timelines for children in foster care, it is crucial that parents understand the deadlines involved and the inability for the Agency and the Court to deviate from the requirements. Therefore, in order to provide complete transparency with regard to where a family is on the timeline, the attached form ("Permanency Deadlines Form") shall be filled out and provided to the Court, parents, and all counsel including the Guardian *ad Litem*. The following process will be used to complete and disseminate this form:

1. The City Attorney assigned to the case will be responsible for completing the form while in Court.
2. At the end of the Dispositional Hearing, if a child remains in foster care, the Court shall determine the dates for **all subsequent hearings**, including but not limited to, a termination of parental rights trial date and the City Attorney will fill out the Permanency Deadlines Form setting forth each date.
3. At the end of the Dispositional Hearing, all Parties and Counsel will receive a copy of the completed Permanency Deadlines Form together with any court orders entered.
4. The City Attorney will maintain the master form and will update it following each hearing in conjunction with preparing any required orders and shall update whether the parents participated in the hearing.
5. The parents will get a copy of the updated Permanency Deadlines Form after each hearing along with a copy of the order for that particular hearing.
6. The hearings listed on the Permanency Deadlines Form are the *minimum* number of hearings that must occur; the Court may set additional reviews and/or interim hearings that will not necessarily be listed on the Permanency Deadlines Form.
7. Parents, Counsel, and the FSS should ensure that they calendar all hearing dates.
8. In the event of a court closure on a scheduled hearing date, the City Attorney will coordinate with counsel and the Court to ensure the hearing is rescheduled within the timelines, and/or that steps are taken to ensure that all statutory requirements are met.

PERMANENCY DEADLINES

Child(ren)'s Name(s): _____

Hearing	Date	Parental Participation
1. Emergency Removal Hearing		Mother: __ Father: __
2. Preliminary Removal Hearing: within 5 business days of the date the child was removed		Mother: __ Father: __
3. Adjudicatory Hearing: within 30 calendar days of #2		Mother: __ Father: __
4. Dispositional Hearing: within 60 calendar days of #2 Initial Foster Care Plan is due 15 days prior to the dispositional hearing on: _____		Mother: __ Father: __
5. Foster Care Review Hearing: within 4 months of #4 Foster Care Plan is due 30 days before the hearing on: _____		Mother: __ Father: __
6. 1st Permanency Planning Hearing: within 5 months of #5 Permanency Plan is due 30 days before the hearing on: _____		Mother: __ Father: __
7. 2nd Permanency Planning Hearing: within 6 months of #6 Permanency Plan is due 65 days before the hearing on: _____ Termination of Parental Rights petition is due 60 days before the hearing on: _____ If needed, publication on parties whose location is unknown must commence 55 days before the hearing on: _____		Mother: __ Father: __

** While state and federal law requires the department of human services to file termination of parental rights petitions for children who have been in foster care for 15 of the last 22 months, termination petitions may be filed earlier and the court may terminate parental rights as early as at the dispositional hearing stage.

ATTACHMENT 3

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

Per Chief Judge, the following policy is effective March 1, 2019:

To comply with Code § 16.1-296(D), the *initial* trial date in a termination of parental rights appeal case shall be set within 90 days of perfecting the appeal. The Clerk of Court shall contact the City Attorney for an available date. Preferably on a Thursday. It makes no difference if the Court's docket is "full". The Clerk of Court shall then send notice of the trial date to the all counsel of record and any pro se parties.

A continuance of the initial date may be approved by the Court. Boatright v. Wise Cty. Dep't of Soc. Servs., 64 Va. App. 71, 79–81 (2014).

Note: See Procedures for Civil Actions Manual for continuing a trial date. If continuing case outside of 90 days by an agreed continuance, it is recommended that the order state that the 90 day requirement is waived.

ATTACHMENT 4

CHILD PROTECTIVE SERVICES (CPS) RECORDS REQUEST FORM

Please write neatly & provide as much information below as possible, to the degree that you are comfortable and know the information, so that we can do the most comprehensive search for records on your behalf and respond to you in a timely manner. Thank you.

Name: _____ **FOIA #:** _____

Address: _____ **City:** _____ **State:** _____ **Zip:** _____

Phone #: _____ **Cell#:** _____ **Email:** _____

Maiden Name/
Other Names: _____

Social Security #: _____ **Date of Birth:** _____

Purpose of Request:

☐ Seeking an Appeal ☐ Court re: Custody/Visitation ☐ Other court-related purpose

☐ Personal Records ☐ Intend to file petition re: malicious referral (see attached)

☐ Other, please explain in detail: _____

Specific Information Needed:

☐ Summary Information ☐ Verification of no CPS history ☐ Verification of CPS purge date

☐ Other, please explain in detail: _____

☐ **Self-Request** ☐ **Request by a 3rd party regarding:** _____
NOTE: Will require a signed Release of Information be provided.

Names of Child(ren): _____ **DOB:** _____ **SSN:** _____

_____ **DOB:** _____ **SSN:** _____

_____ **DOB:** _____ **SSN:** _____

Names of Child(ren)'s Parents: _____ **DOB:** _____ **SSN:** _____

_____ **DOB:** _____ **SSN:** _____

Other Names: _____ **DOB:** _____ **SSN:** _____

_____ **DOB:** _____ **SSN:** _____

Preferred Way To Receive Records

☐ Personal Email (I have been advised of the risks of regular email and accept the risk.)

☐ Certified Mail ☐ Email via an encrypted email program ☐ Fax _____

***** I understand I must submit a picture ID to be attached to this request and that there are monetary charges in order for records to be released ($21.68/hour, $0.03/page, $1/disc, & $8.32 minimum mailing cost, if applicable). The record & fees will be given at the time the record is provided. I agree that any information I receive will only be used for the purpose I have noted above & agree that I will keep the information confidential, except to the extent disclosure is required by law. If I have any questions, I may call (757) 385-0642.**

_____ _____

Signature of Citizen Making Request **Date**

VIRGINIA BEACH HUMAN SERVICES
REQUEST FOR CHILD PROTECTIVE SERVICES RECORDS

In order to help you with your request, you will need to do the following:

1. Complete the CPS Request Form on the back of this letter
2. Make a copy of your picture ID
3. Return the completed CPS Request Form and copy of your picture ID to the CQI Office – Fax, email or regular mail – ATTN: FOIA Coordinator

Fax: (757) 473-2104 or **Mail:** Continuous Quality Improvement Division, VBHSD
256 N. Witchduck Road, Suite 2F
Virginia Beach, VA 23462

Email: DHSFOIA@vbgov.com

Confidentiality & What Gets Released:

The Freedom of Information Act, under Virginia Code § 2.2-3705.5(3), does not apply to the release of case records. Case Records may be released however, under the Government Data Collection and Dissemination Practices Act (VA Code § 2.2-3806). CPS records are released according to federal and state laws, including 22 VAC 40-705-160 (A) (6) and (C) and VA Code § 63.2-105. Questions can be directed to: (757) 385-0642.

What this means to you:

- You legally have the right to information about yourself or that you provided.
- By law, we will have to research whether we are able to release any information that exists about your child(ren).
- The identity of the complainant (person who contacted CPS to make a report about alleged abuse/neglect) or information involving other individuals in the CPS record is considered confidential or protected by law from release.
- Confidential information will be redacted or marked through so that it cannot be read.

Timeframe:

- We try to complete requests within 5 business / work days.
- Because of the number of requests we receive, and the staff time needed to review and redact records prior to release by marking through confidential information, we may require an additional 7 work days to complete your request, once we receive your completed CPS Request Form and copy of your picture ID (for a total of 12 work days).

Cost for Records to be Released:

Under state law, the Department is allowed to charge you for the reasonable costs related to responding to your request. The total cost will be included with the records and a bill will be sent to you by the City Treasurer's Office. You do not pay for the record until you receive the bill.

The charges will be based on the amount of time required to gather, review, and redact the records, using the following rates:

- $21.68 per hour (hourly rate of a Family Services Specialist I) - gather, review, copy & redact records
- $0.03 per page & $1.00 per disc
- $8.32 minimum for mailing costs, unless the record is picked up or sent via email

Risks of Utilizing E-mail to Communicate Confidential Information

The following are some of the risks of using email communication:

- Your agreement with your internet service provider (ISP) most likely requires you to agree to allow the internet service provider (and often their agent) to monitor and read your email. Most ISP's also require that you agree to let them use and disclose the content of your emails. You have to sign these agreements with your ISP in order to receive internet service. ISP's can also copy messages that pass through their networks and store those emails on their servers.
- Emails can be illegally intercepted, altered or used by a third party (e.g. hackers) without your detection or your knowledge.
- Think of email as being similar to a postcard. It is open were anyone listening can see what is contained within the email with no traces left behind.
- Others (e.g. family members or roommates) that have access to your computer or your email accounts will be able to access your emails. This is a significant risk if your computer and email are not password protected.
- Computer malware that has been introduced to your computer (this can be done via an attachment to an email or at a website you have visited) can allow others to have access to your email without your knowledge.
- While we check to ensure we have the correct email address, you need to be aware that there is no guarantee than an email will not be sent to the wrong address. We can easily misaddress email, resulting in it being sent to unintended and unknown recipients. Please note: it is important to enter your email address onto the request form legibly.
- Email delivery is not guaranteed.
- Email can be immediately broadcast worldwide and be received by many unintended recipients.
- Email is easier to falsify than handwritten or signed documents.
- It is impossible to identify the true identity of the sender.
- Backup copies of email may exist even after the sender or the recipient has deleted his or her copy.
- Email can be used as evidence in court.
- If you are using an employer's computer to access your email, your employer has the right to archive and inspect emails transmitted through their systems.
- Contact HSD at dhsfoia@vbgov.com to set up a secure messaging address if you want to use email as a means of sending your report.

Malicious Reporting

If you feel the report was made maliciously, please follow the instructions below.

VA Code § 63.2-1514(D):

Any person who is the subject of an unfounded report or complaint made pursuant to this chapter who believes that such report or complaint was made in bad faith or with malicious intent may petition the circuit court in the jurisdiction in which the report or complaint was made for the release to such person of the records of the investigation or family assessment. Such petition shall specifically set forth the reasons such person believes that such report or complaint was made in bad faith or with malicious intent. Upon the filing of such petition, the circuit court shall request and the local department shall provide to the circuit court its records of the investigation or family assessment for the circuit court's in camera review. The petitioner shall be entitled to present evidence to support his petition. If the circuit court determines that there is a reasonable question of fact as to whether the report or complaint was made in bad faith or with malicious intent and that disclosure of the identity of the complainant would not be likely to endanger the life or safety of the complainant, it shall provide to the petitioner a copy of the records of the investigation or family assessment. The original records shall be subject to discovery in any subsequent civil action regarding the making of a complaint or report in bad faith or with malicious intent.

FOSTER CARE RECORDS REQUEST FORM

Please write neatly & provide as much information below as possible, to the degree that you are comfortable and know the information, so that we can do the most comprehensive search for records on your behalf and respond to you in a timely manner. Thank you.

Name: _____ **FOIA #:** _____

Address: _____ **City:** _____ **State:** _____ **Zip:** _____

Phone #: _____ **Cell#:** _____ **Email:** _____

Maiden Name/
Other Names: _____

Social Security #: _____ **Date of Birth:** _____

Specific Information Needed:

☐ Verification of Foster Care Placement as needed to apply for College Financial Assistance (no cost)

☐ Documents from Foster Care Records (please specify): _____

☐ Other, please explain in detail: _____

☐ **Self-Request** ☐ **Request by a 3rd party regarding:** _____
NOTE: Will require a signed Release of Information be provided.

Preferred Way To Receive Records

☐ Pick up at Witchduck Annex (CQI) ☐ Certified Mail

☐ Email via an encrypted email program

☐ Email (I have been advised of the risks of regular email and accept the risk.)

☐ Fax _____ ATTN: _____

***** I understand I must submit a picture ID to be attached to this request in order for information to be released. I understand that there may be monetary charges for records to be released ($21.68/hour, $0.03/page, $1/disc, & $8.32 minimum mailing cost, if applicable), except as noted above, and the record and fees will be given at the time the record is provided. If I have any questions, I may call (757) 385-0642.**

_____ _____

Signature of Citizen Making Request **Date**

VIRGINIA BEACH HUMAN SERVICES
REQUEST FOR FOSTER CARE RECORDS

In order to help you with your request, you will need to do the following:

1. Complete the Foster Care (FC) Records Request Form attached to this letter
2. Make a copy of your picture ID
3. Return the completed FC Request Form and copy of your picture ID to the CQI Office – Fax, email (dhsfoia@vbgov.com) or mail– ATTN: FOIA Coordinator

Fax: (757) 473-2104 or **Mail:** Continuous Quality Improvement Division
256 N. Witchduck Road, Suite 2F
Virginia Beach, VA 23462

Confidentiality & What Gets Released:

Case Records may be released under the Government Data Collection and Dissemination Practices Act. Foster Care records are released according to federal and state laws.

What this means to you:

- You legally have the right to information about yourself or that you provided.
- Confidential information will be redacted or marked through so that it cannot be read.

Timeframe:

- We try to complete requests within 5 business / work days.
- Because of the number of requests we receive, and the staff time needed to review and redact records prior to release by marking through confidential information, we will require an additional 7 work days to complete your request, once we receive your completed FC Request Form and copy of your picture ID (for a total of 12 work days).

Cost for Records to be Released:

Under state law, the Department is allowed to charge you for the reasonable costs related to responding to your request. The total cost will be included with the records and a bill will be sent to you by the City Treasurer's Office. You do not pay for the record until you receive the bill.

The charges will be based on the amount of time required to gather, review, and redact the records, using the following rates:

- $21.68 per hour (hourly rate of a Family Services Specialist I) - gather, review, copy & redact records
- $0.03 per page & $1.00 per disc
- $8.32 minimum for mailing costs, unless the record is picked up or sent via email

Questions: Please call (757) 385-0642

Risks of Utilizing E-mail to Communicate Confidential Information

The following are some of the risks of using email communication:

- Your agreement with your internet service provider (ISP) most likely requires you to agree to allow the internet service provider (and often their agent) to monitor and read your email. Most ISP's also require that you agree to let them use and disclose the content of your emails. You have to sign these agreements with your ISP in order to receive internet service. ISP's can also copy messages that pass through their networks and store those emails on their servers.
- Emails can be illegally intercepted, altered or used by a third party (e.g. hackers) without your detection or your knowledge.
- Think of email as being similar to a postcard. It is open were anyone listening can see what is contained within the email with no traces left behind.
- Others (e.g. family members or roommates) that have access to your computer or your email accounts will be able to access your emails. This is a significant risk if your computer and email are not password protected.
- Computer malware that has been introduced to your computer (this can be done via an attachment to an email or at a website you have visited) can allow others to have access to your email without your knowledge.
- While we check to ensure we have the correct email address, you need to be aware that there is no guarantee than an email will not be sent to the wrong address. We can easily misaddress email, resulting in it being sent to unintended and unknown recipients. Please note: it is important to enter your email address onto the request form legibly.
- Email delivery is not guaranteed.
- Email can be immediately broadcast worldwide and be received by many unintended recipients.
- Email is easier to falsify than handwritten or signed documents.
- It is impossible to identify the true identity of the sender.
- Backup copies of email may exist even after the sender or the recipient has deleted his or her copy.
- Email can be used as evidence in court.
- If you are using an employer's computer to access your email, your employer has the right to archive and inspect emails transmitted through their systems.
- Contact HSD at dhsfoia@vbgov.com to set up a secure messaging address if you want to use email as a means of sending your report.

Virginia Freedom of Information Act

FOIA Rights & Responsibilities

The Rights of Requesters and the Responsibilities of the City of Virginia Beach

Under the Virginia Freedom of Information Act

The Virginia Freedom of Information Act (FOIA), located of the Code of Virginia § 2.2-3700 et seq., guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials, and public employees.

A public record is any writing or recording -- regardless of whether it is a paper record, an electronic file, an audio or video recording, or any other format -- that is prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. All public records are presumed to be open, and may only be withheld if a specific, statutory exemption applies.

The policy of FOIA states that the purpose of FOIA is to promote an increased awareness by all persons of governmental activities. In furthering this policy, FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld must be interpreted narrowly.

Your FOIA Rights

- You have the right to request to inspect or receive copies of public records, or both.
- You have the right to request that any charges for the requested records be estimated in advance.
- If you believe that your FOIA rights have been violated, you may file a petition in district or circuit court to compel compliance with FOIA. Alternatively, you may contact the FOIA Council for a nonbinding advisory opinion.

Making a Request for records from the City

- You may request records by U.S. Mail, fax, e-mail, in person, or over the phone. FOIA does not require that your request be in writing, nor do you need to specifically state that you are requesting records under FOIA.
  - From a practical perspective, it may be helpful to both you and the person receiving your request to put your request in writing. This allows you to create a record of your request. It also

gives us a clear statement of what records you are requesting, so that there is no misunderstanding over a verbal request. However, we cannot refuse to respond to your FOIA request if you elect to not put it in writing.

- Your request must identify the records you are seeking with "reasonable specificity." This is a common-sense standard. It does not refer to or limit the volume or number of records that you are requesting; instead, it requires that you be specific enough so that we can identify and locate the records that you are seeking.
- Your request must ask for existing records or documents. FOIA gives you a right to inspect or copy records; it does not apply to a situation where you are asking general questions about the work of the City nor does it require the City to create a record that does not exist.
- You may choose to receive electronic records in any format used by the City in the regular course of business.
  - For example, if you are requesting records maintained in an Excel database, you may elect to receive those records electronically, via e-mail or on a computer disk, or to receive a printed copy of those records.
- If we have questions about your request, please cooperate with staff's efforts to clarify the type of records that you are seeking, or to attempt to reach a reasonable agreement about a response to a large request. Making a FOIA request is not an adversarial process, but we may need to discuss your request with you to ensure that we understand what records you are seeking.

To request records from the City of Virginia Beach, you may direct your request to the City's Freedom of Information Center. You may also contact the City's Freedom of Information Specialist, Melena Johnson via email at foia@vbgov.com, by phone at (757) 385-4052, by fax at (757) 427-5931, or by writing to FOI Office, Office of the City Attorney, 2401 Courthouse Drive, Virginia Beach, VA 23456. You may also contact her with questions you have concerning requesting records from the City. In addition, the Freedom of Information Advisory Council is available to answer any questions you may have about FOIA. The Council may be contacted by e-mail at foiacouncil@dls.virginia.gov, or by phone at (804) 225-3056 or [toll free] 1-866-448-4100.

The City's Responsibilities in Responding to Your Request

- The City must respond to your request within five working days of receiving it. "Day One" is considered the day after your request is received. The five-day period does not include weekends or holidays.
- The reason behind your request for public records from the City is irrelevant, and you do not have to state why you want the records before we respond to your request. FOIA does, however, allow the City to require you to provide your name and legal address.
- FOIA requires that the City make one of the following responses to your request within the five-day time period:

1. We provide you with the records that you have requested in their entirety.
2. We withhold all of the records that you have requested, because all of the records are subject to a specific statutory exemption. If all of the records are being withheld, we must send you a response in writing. That writing must identify the volume and subject matter of the records being withheld, and state the specific section of the Code of Virginia that allows us to withhold the records.
3. We provide some of the records that you have requested, but withhold other records. We cannot withhold an entire record if only a portion of it is subject to an exemption. In that instance, we may redact the portion of the record that may be withheld, and must provide you with the remainder of the record. We must provide you with a written response stating the

specific section of the Code of Virginia that allows portions of the requested records to be withheld.

4. We inform you in writing that the requested records cannot be found or do not exist (we do not have the records you want). However, if we know that another public body has the requested records, we must include contact information for the other public body in our response to you.
5. If it is practically impossible for the City to respond to your request within the five-day period, we must state this in writing, explaining the conditions that make the response impossible. This will allow us seven additional working days to respond to your request, giving us a total of 12 working days to respond to your request.

- If you make a request for a very large number of records, and we feel that we cannot provide the records to you within 12 working days without disrupting our other organizational responsibilities, we may petition the court for additional time to respond to your request. However, FOIA requires that we make a reasonable effort to reach an agreement with you concerning the production or the records before we go to court to ask for more time.

Costs

- A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen as set forth in subsection F of § 2.2-3704 of the Code of Virginia.
- You may have to pay for the records that you request from the City. FOIA allows us to charge for the actual costs of responding to FOIA requests. This would include items like staff time spent searching for the requested records, copying costs, or any other costs directly related to supplying the requested records. It cannot include general overhead costs.
- If we estimate that it will cost more than $200 to respond to your request, we may require you to pay a deposit, not to exceed the amount of the estimate, before proceeding with your request. The five days that we have to respond to your request does not include the time between when we ask for a deposit and when you respond.
- You may request that we estimate in advance the charges for supplying the records that you have requested. This will allow you to know about any costs upfront, or give you the opportunity to modify your request in an attempt to lower the estimated costs.
- If you owe us money from a previous FOIA request that has remained unpaid for more than 30 days, the City may require payment of the past-due bill before it will respond to your new FOIA request.

Types of records

The following is a general description of the types of records held by the City:

- Personnel records concerning employees and officials of the City
- Records of contracts which the City has entered into
- Ordinances and resolutions adopted by the City Council
- Records of City projects and records regarding the operations of City departments

If you are unsure whether the City has the record(s) you seek, please contact Freedom of Information Specialist Melena Johnson directly via email at foia@vbgov.com, by phone at (757) 385-4052, by fax at (757) 427-5931, or by writing to FOI Office, Office of the City Attorney, 2401 Courthouse Drive, Virginia Beach, VA 23456.

Commonly used exemptions

The Code of Virginia allows any public body to withhold or redact certain records from public disclosure. The City commonly withholds or redacts records subject to the following exemptions:

- Personnel records (§ 2.2-3705.1 (1) of the Code of Virginia)
- Records subject to attorney-client privilege (§ 2.2-3705.1 (2)) or attorney work product (§ 2.2-3705.1 (3))
- Vendor proprietary information (§ 2.2-3705.1 (6))
- Records relating to the negotiation and award of a contract, prior to a contract being awarded (§ 2.2-3705.1 (12))
- Records from criminal investigative files (§ 2.2-3706)

Policy regarding the use of exemptions

- The general policy of the City is to invoke the personnel records exemption in those instances where it applies in order to protect the privacy of employees and officials of the City.
- The general policy of the City is to invoke the contract negotiations exemption whenever it applies in order to protect the City's bargaining position and negotiating strategy.
- Although the list above includes the most commonly used exemptions, the City reserves the right to use any exemption provided under the Freedom of Information Act.

The City also will withhold or redact records for which release is prohibited by any applicable provision of federal or state law, including, but not limited to, certain tax records, records that identify a victim of sexual assault, and records of persons receiving certain forms of federally funded public assistance.

MENU

FOIA Request Center

FAQs

My computer won't let me download the files when I click on them.

Can I still email or submit a paper FOIA request?

What are the FOIA procedures?

How do I obtain a police report?

Where can I find more information on the OpenVB Data Portal?

FOIA Records Request

Submit a FOIA records request to the City of Virginia Beach.

My Request Cent

Track request status, mana information, and download

FOIA Records Archive

Search previously released records.

Trending Topic

View information on trendi request topics.

Powered by GovQA

☰ MENU

FOIA Request Center

FAQs

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Where can I find more information on the OpenVB Data Portal?

Login

If you have used this service previously, please log in. If this is your first online request, please create an account and provide as much contact information as possible. By creating an account, you will have the ability to track and monitor your FOIA record requests. All communication from the City of Virginia Beach will be sent directly to your email account.

Email Address:*

Password:*

Login

If you don't know or have forgotten your password, click here.

New User? Click below to create a new account.

Create Account

MENU

FOIA Request Center

FAQs

My computer won't let me download the files when I click on them.

Can I still email or submit a paper FOIA request?

What are the FOIA procedures?

How do I obtain a police report?

Where can I find more information on the OpenVB Data Portal?

My Request Center
Login here to check the status of requests you have submitted or to update your customer account information.

Pop-up Blockers on your web browser will need to be disabled to download files from this site...

View My Requests
Click above to access requests submitted.

View My Invoices
Click above to view your invoice history.

Edit Customer Account Information
Click above to access and update your customer account information.

SEGMENT 2

11:15a-12:15p

Drug Testing- Provider Panel and Judges Q & A

URL of this page: https://medlineplus.gov/lab-tests/drug-testing/

Drug Testing

What is a drug test?

A drug test looks for the presence of one or more illegal or prescription drugs in your urine, blood, saliva, hair, or sweat. Urine testing is the most common type of drug screening. The drugs most often tested for include:

- Marijuana [https://medlineplus.gov/marijuana.html]
- Opioids [https://medlineplus.gov/opioidabuseandaddiction.html] , such as heroin [https://medlineplus.gov/heroin.html] , codeine, oxycodone, morphine, hydrocodone, and fentanyl
- Amphetamines, including methamphetamine [https://medlineplus.gov/methamphetamine.html]
- Cocaine [https://medlineplus.gov/cocaine.html]
- Steroids [https://medlineplus.gov/anabolicsteroids.html]
- Barbiturates, such as phenobarbital and secobarbital
- Phencyclidine (PCP)

Other names: drug screen, drug test, drugs of abuse testing, substance abuse testing, toxicology screen, tox screen, sports doping tests

What is it used for?

Drug screening is used to find out whether or not a person has taken a certain drug or drugs. It may be used for:

- **Employment.** Employers may test you before hiring and/or after hiring to check for on-the-job drug use.
- **Sports organizations.** Professional and collegiate athletes usually need to take a test for performance-enhancing drugs or other substances.
- **Legal or forensic purposes.** Testing may be part of a criminal or motor vehicle accident investigation. Drug screening may also be ordered as part of a court case.
- **Monitoring opioid use.** If you've been prescribed an opioid for chronic pain, your health care provider may order a drug test to make sure you are taking the right amount of your medicine.

Why do I need a drug test?

You may have to take a drug test as a condition of your employment, in order to participate in organized sports, or as part of a police investigation or court case. Your health care provider may order drug screening if you have symptoms of drug abuse [https://medlineplus.gov/drugabuse.html] . These symptoms include:

- Slowed or slurred speech
- Dilated or small pupils
- Agitation
- Panic
- Paranoia
- Delirium
- Difficulty breathing
- Nausea [https://medlineplus.gov/nauseaandvomiting.html]
- Changes in blood pressure or heart rhythm

What happens during a drug test?

A drug test generally requires that you give a urine sample in a lab. You will be given instructions to provide a "clean catch" sample. The clean catch method includes the following steps:

1. Wash your hands
2. Clean your genital area with a cleansing pad given to you by your provider. Men should wipe the tip of their penis. Women should open their labia and clean from front to back.
3. Start to urinate into the toilet.
4. Move the collection container under your urine stream.
5. Collect at least an ounce or two of urine into the container, which should have markings to indicate the amounts.
6. Finish urinating into the toilet.
7. Return the sample container to the lab technician or health care provider.

In certain instances, a medical technician or other staff member may need to be present while you provide your sample.

For a blood test for drugs, you will go to a lab to provide your sample. During the test, a health care professional will take a blood sample from a vein in your arm, using a small needle. After the needle is inserted, a small amount of blood will be collected into a test tube or vial. You may feel a little sting when the needle goes in or out. This usually takes less than five minutes.

Will I need to do anything to prepare for the test?

Be sure to tell the testing provider or your health care provider if you are taking any prescription drugs, over-the-counter medicines, or supplements because they may give you a positive result for certain illegal drugs. Also, you should avoid foods with poppy seeds, which can cause a positive result for opioids.

Are there any risks to the test?

There are no known physical risks to having a drug test, but a positive result may affect other aspects of your life, including your job, your eligibility to play sports, and the outcome of a court case.

What do the results mean?

If your results are negative, it means no drugs were found in your body, or the level of drugs was below an established level, which differs depending on the drug. If your results are positive, it means one or more drugs were found in your body above an established level. However, false positives can happen. So if your first test shows that you have drugs in your system, you will have further testing to figure out whether or not you are actually taking a certain drug or drugs.

Is there anything else I need to know about a drug test?

Before you take a drug test, you should be told what you are being tested for, why you are being tested, and how the results will be used. If you have questions or concerns about your test, talk to your health care provider or contact the individual or organization that ordered the test.

Show references

Related Health Topics

Drug Abuse [https://medlineplus.gov/drugabuse.html]

Opioid Abuse and Addiction [https://medlineplus.gov/opioidabuseandaddiction.html]

Prescription Drug Abuse [https://medlineplus.gov/prescriptiondrugabuse.html]

Not helpful Very helpful

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National Institutes of Health
Page last updated on 15 April 2019
Page last reviewed: 12 September 2017

Of Virginia

Price List- Good thru 2016

Hair Follicle Testing: *All hair prices include MRO(if needed) and over-night shipping.

Standard 5 Panel $135 (Opiate tests for Heroin, Morphine & Codeine)- Add $25 for Expanded Opiates (5 Panel only) Adds oxycodone, hydrocodone & Hydromorphone

Panels: 7 > $189 9 > $229 10 > $249 12 > $314 14 > $364 15 > $ 429 17> $449

(Add $100 for 7 thru 17 panels to include Alcohol) (5 Panel plus Alcohol $274)

Child Guard: 5 panel $175 7 panel $195 9 Panel $235 (Tests child's environment)

Go to www.HairTestingofVirginia.com for more details.

Legal Paternity Testing: $299 for 1 alleged father & 1 child. Additional participants are $89 each. We average 4 business days for electronic results plus 3 days for paper copy.

Go to www.PaternityTestingofVirginia.com for more details.

Alcohol Testing (EtG): *Over-night shipping included on all except urine testing

Urine $69 - 80 Hour Alcohol Test (Tests for mild to heavy alcohol consumption)

Nail $199 - Finger tests up to 3 months & Toe up to 1 year (for risky/binge drinking)

Hair $199 – Scalp tests up to 3 mo. & Body hair up to 1 year (for risky/binge drinking)

Blood Spot $199 – Tests risky alcohol drinking for past 2-3 weeks (5 drops from finger)

Instant Tests: (urine): * Add $25 total for lab confirmation and MRO (1st class mail)

5 Panel $44 10 Panel $54 THC panel $29

Lab Testing (urine): Includes MRO if needed: Non DOT 5 or 9 Panel $69 DOT $69

Parent Information: check out: www.TestingTeensforDrugs.com

Office Hours: **By Appointment Only** Mon-Fri 9-5:30 & some Saturdays.

Mobile Testing: $39 extra within 15 miles and $59 for 16 to 30 miles. .

MRO- Medical Review Officer (rules out positive results being caused by a valid prescription)

DrugTestingSolutionsofVirginia.com
Paul Mungo – Owner
Phone: 757-469-3921
Fax: 866-204-5732
info@DrugTestingSolutionsofVirginia.com

Drug Testing Detection Time-Frames

Head Hair

Adulteration: Moderate/Difficult

Detection: Around 3 months

Collection: Usually No Notice Needed

Urine

Adulteration: Easy

Detection: 2 to 4 Days (Most drugs)

Collection: May Require Notice

Fingernail

Adulteration: Very Difficult

Detection: 3 to 6 months

Collection: May Need Notice

Whole Blood & Oral Fluid

Adulteration: Very Difficult

Detection: 1 to 2 Days (Most drugs)

Collection: No Notice Required

As you can see, *detection times* vary. Toe Nail and Body Hair testing detects up to about 1 year. These should only be used as a *last resort* because the samples are not as consistent & less data is available.

It usually takes 30 to 60 minutes after a drug is used for it to be detected in Saliva, a few hours with urine and typically 7 to 14 days for Hair and Nails to be at maximal detectable levels. Unlike Urine testing, the drug type being tested does not affect the detection time frame for Saliva, Hair and Nail testing.

Urine drug detection times, or the amount of time the drug remains detectable in the body, vary from drug to drug. Drug levels can vary in the same individual depending on when the test is done. The first urination of the day will yield the highest concentrations of drug metabolites. Testing urine at other times of the day may yield differing results since the hydration of urine changes throughout the day.

Factors that could affect the urine drug result:
(1) Drinking large amounts of fluids to self-dilute the urine sample. (2) Certain over the counter medications may cause a preliminary positive. (3) Donor's age, weight, sex, metabolic rate, drug concentration/strength, overall health and the period of time the drug was consumed all affect how long the drug may be detectable. (4) Using someone else's urine. (5) Adulterating/contaminating the sample.

The chart below shows drug detection times for urine based testing. Remember: *Positive instant drug test results should be confirmed with lab testing and use a Medical Review Officer before a result is considered final.*

DRUG CATEGORY	*DETECTION*	*DRUG CATEGORY*	*DETECTION*
Amphetamines (AMP)	2-5 Days	Opiates (OPI & MOR)	2-4 Days
Barbiturates (BAR)	4-14 Days	Oxycodone (OXY)	2-3 Days
Benzodiazepines (BZO)	2-7 Days	Phencyclidine (PCP)	3-8 Days
Cocaine (COC)	2-4 Days	Tricyclics (TCA)	2-8 Days
Marijuana (THC) Casual use	2-6 Days	Propoxyphene (PPX)	2-3 Days
Marijuana (THC) Chronic use	10-21+ Days	Buprenorphine (BUP)	2-5 Days
Methadone (MTD)	2-5 Days	Ecstasy (MDMA)	2-4 Days

Note: All of the above urine detection times are estimates. If you researched 10 different sources on your own, you would probably find 10 slightly different answers. I consider the above times to be "middle of the road" or "average" using standard workplace cutoffs (standard tests).

Urine Test $ Range: $39 to $139+ mostly depending on where you go and the number of drugs tested.

Hair & Nail Testing: up to 17 Drug Panels

Most drug testing businesses only use one hair testing lab with limited testing options, many do not offer nail testing, so you may have to call around to get what you want. Below is the most extensive list for testing options. You cannot simply pick the drugs you want tested. The panels are set. (i.e. If you only need "Propoxyphene" tested you must order at least a 9 panel to have it included.)

(1) **Amphetamines**- MDA, MDEA, MDMA (ecstacy), methamphetamine

(2) **Cannabinoids**- carboxy-THC (Marijuana)

(3) **Cocaine**- benzoylecgonine, cocaethylene, cocaine, norcocaine

(4) **Opiates**- 6-MAM, codeine, hydrocodone, hydromorphone, morphine

(5) **Phencyclidine**- phencyclidine (PCP)

(6) **Benzodiazepines**- alprazolam, diazepam, midazolam, nordiazepam, oxazepam, temazepam

(7) **Barbiturates**- amobarbital, butalbital, pentobarbital, phenobarbital, secobarbital

(8) **Methadone**- EDDP, methadone

(9) **Propoxyphene**- norpropoxyphene

(10) **Oxycodone**- oxycodone, oxymorphone

(11) **Meperidine**- normeperidine

(12) **Tramadol**- tramadol

(13) **Fentanyl**- norfentanyl

(14) **Sufentanil**- norsufentanil

(15) **Ketamine**- ketamine, norketamine

(16) **Buprenorphine** – buprenorphine, norbuprenorphine

(17) **Zolpidem** – (Ambien)

*There is also a hair and nail test designed to help detect environmental exposure called "ChildGuard". This test places the investigative emphasis on the child's environment, and not on just drug consumption, by modifying conventional hair and nail testing procedures. See http://hairtestingofvirginia.com/hair-testing-choices/ for details.

*Most drug testing companies only offer the ***standard 5 panel test*** which is what the majority of child custody cases seem to require. The 5 drug categories are standard but the drugs tested within each category are not standard, especially for *opiates and amphetamines*. For example, one company may have hydrocodone and MDEA standard while another Lab's test may not include them at all. Asking questions about specific drug use will help you determine the right testing choice.

*The ***standard hair test*** uses the most recent 1 ½ inches of head hair growth which tests approximately 3 months. For a ***6 month test***, there is at least one lab that will do a "Segmented" test which means they will do two 3 month tests as long as the donor has at least 3 inches of hair to test. The segmented test is limited to a 5 panel test with no alcohol testing available. There will be two separate test results, one up to about 3 months and the second about 3 to 6 months (two test charges.) The ***finger nail drug test*** has a window of detection of up to 3 to 6 months but there is no accurate way of determining the exact timeline from test to test. The *Body Hair & Toe Nail test* detects up to about 1 year but there are some drawbacks to using these tests discussed on the "Choosing the Right Test" handout.

Hair and Nail test price range: *$120 -$220* for the standard 5 panel. The 7 to 17 panel tests could range from $179 to $699+ depending on where you go and how many drugs are being tested.

National Institute on Drug Abuse
Advancing Addiction Science

Frequently Asked Questions About Drug Testing in Schools

Revised May 2017

How do some schools conduct drug testing?

Following models established in the workplace, some schools conduct random drug testing and/or reasonable suspicion/cause testing. This usually involves collecting urine samples to test for drugs such as marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids (both heroin and prescription pain relievers).

In random testing, students are selected regardless of their drug use history and may include students required to do a drug test as a condition of participation in an extracurricular activity. In reasonable suspicion/cause testing, a student can be asked to provide a urine sample if the school suspects or has evidence that he or she is using drugs, such as:

- school officials making direct observations
- the student showing physical symptoms of being under the influence or patterns of abnormal or erratic behavior

Why do some schools conduct random drug tests?

Schools adopt random student drug testing to decrease drug misuse and illicit drug use among students. First, they hope random testing will serve as a deterrent and give students a reason to resist peer pressure to take drugs. Secondly, drug testing can identify teens who have started using illicit drugs and would benefit from early intervention, as well as identify those who already have drug problems and need referral to treatment. Using illicit drugs not

only interferes with a student's ability to learn, but it can also disrupt the teaching environment, affecting other students as well.

Is random drug testing of students legal?

In June 2002, the U.S. Supreme Court broadened the authority of public schools to test students for illegal drugs. The court ruled to allow random drug tests for all middle and high school students participating in competitive extracurricular activities. The ruling greatly-expanded the scope of school drug testing, which previously had been allowed only for student athletes.

Just because the U.S. Supreme Court said student drug testing for adolescents in competitive extracurricular activities is constitutional, does that mean it is legal in my city or state?

A school or school district that is interested in adopting a student drug-testing program should seek legal expertise so that it complies with all federal, state, and local laws. Individual state constitutions may dictate different legal thresholds for allowing student drug testing. Communities interested in starting student drug testing programs should become familiar with the law in their respective states to ensure proper compliance.

If a student tests positive for drugs, should that student face disciplinary consequences?

The primary purpose of drug testing is not to punish students who use illicit drugs but to prevent future illicit drug use and to help students already using become drug-free. If a student tests positive for drugs, schools can respond to the individual situation. If a student tests positive for drug use but has not yet progressed to addiction, the school can require counseling and follow-up testing. For students diagnosed with addiction, parents and a school administrator can refer them to effective drug treatment programs to begin the recovery process.

Why test teenagers at all?

Teens' brains and bodies are still developing, and this makes them especially vulnerable to the harmful effects of drug use. Most teens do not use illicit drugs, but for those who do, it can lead to a wide range of adverse effects on their behavior and health.

Short term: Even a single use of an intoxicating drug can affect a person's judgment and decision-making, resulting in accidents, poor performance in school or sports activities, unplanned risky behavior, and overdose.

Long term: Repeated drug use can lead to serious problems, such as poor academic outcomes, mood changes (depending on the drug: depression, anxiety, paranoia, psychosis), and social or family problems caused or worsened by drugs.

Repeated drug use can also lead to ***addiction***. Studies show that the earlier a teen begins using drugs, the more likely he or she will develop a substance use disorder (SUD). An SUD develops when continued drug use causes issues, such as health problems and failure to meet responsibilities at home, work, or school. An SUD can range from mild to severe, the most severe form being addiction. Conversely, if teens stay away from drugs while in high school, they are less likely to develop an SUD later in life.

For more information about health effects, see our Commonly Abused Drugs Charts.

How many students actually use drugs?

Findings from the 2016 Monitoring the Future (MTF) survey of 8th, 10th, and 12th graders showed that past-year use of illicit drugs other than marijuana is down from recent peaks in all three grades.

Twenty-one percent of 12th graders say that they've used any illicit drug other than marijuana at least once in their lifetime, and about 36 percent reported using marijuana in the last year. Misuse of prescription drugs is also a concern—for example, in 2016, more than 6 percent of high school seniors reported nonmedical use of the prescription stimulant Adderall® in the past year.[1] Read more about the MTF survey results in our *Monitoring the Future Survey: High School and Youth Trends DrugFacts*.

What testing methods are available?

There are several testing methods currently available that use urine, hair, oral fluids, and sweat. These methods vary in cost, reliability, drugs detected, and detection period. Schools can determine their needs and choose the method that best suits their requirements, as long as the testing kits are from a reliable source.

Which drugs can be tested for?

Various testing methods normally test for a "panel" of five to 10 different drugs. A typical drug panel tests for marijuana, cocaine, opioids (including the prescription pain relievers OxyContin® and Vicodin®), amphetamines, and PCP. If a school has a particular problem with other drugs, such as *3,4-methylenedioxy-methamphetamine* (MDMA), *gamma-hydroxybutyrate* (GHB), or appearance- and performance-enhancing drugs (steroids), they can include testing for these drugs as well. It is also possible to screen for synthetic cannabinoids, commonly known as Spice and K2.

What about alcohol?

Alcohol is a drug, and its use is a serious problem among young people. However, alcohol does not remain in the blood long enough for most tests to detect most recent use. Breathalyzers, oral fluid tests, and urine tests can only detect use within the past few hours. The cut-off is usually detection of the presence of alcohol for the equivalent of a blood alcohol content greater than 0.02 percent (20mg/1dL).[2] Teens with substance use problems often engage in polydrug use (they use more than one drug), so identifying a problem with an illicit or prescription drug may also suggest an alcohol problem.

How accurate are drug tests? Is there a possibility a test could give a false positive?

The accuracy of drug tests from a certified lab is very high, and confirmation tests can help to rule out any false positives. Usually, samples are divided so that if an initial test is positive, a confirmation test can be conducted. Federal guidelines are in place to ensure accuracy and fairness in drug-testing programs.

Can students "beat" the tests?

Many drug-using students are aware of techniques that supposedly detoxify their systems or mask their drug use. Internet sites give advice on how to dilute urine samples, and there are even companies that sell clean urine or products designed to distort test results. A number of techniques and products are focused on urine tests for marijuana, but masking products are becoming more available for tests on hair, oral fluids, and multiple drugs.

Most of these products do not work, are very costly, and are easily identified in the testing process. Moreover, even if the specific drug is successfully masked, the product itself can be detected, in which case the student using it would become an obvious candidate for additional screening and attention. In fact, some testing programs label a test positive if a masking product is detected.

What has research determined about the utility of random drug tests in schools?

Study findings in this area show mixed results, but researchers generally agree that student drug testing should not be a stand-alone strategy for reducing substance use in students and that school climate (the quality and character of school life) is an important factor for achieving success in drug prevention programs. Because there is not a clear benefit to drug testing in schools, the American Academy of Pediatrics "opposes widespread implementation of drug testing as a means of achieving substance abuse intervention.[3] Relevant studies include the following:

- A NIDA-funded study published in 2013 found evidence of lower marijuana use in the presence of school drug testing and evidence of higher use of illicit drugs other than marijuana. Otherwise, the study found no causal relationships between school drug testing and patterns of substance use.[4]
- A study published in 2013 found that positive school climate was associated with reduced likelihood of marijuana and cigarette initiation and cigarette escalation, and that student drug testing was not associated with changes in the initiation or escalation of substance use. The authors conclude that improving school climates is a promising strategy for preventing student substance use, while testing is a relatively ineffective drug prevention policy.[5]
- A study published in 2012 found that students subject to mandatory random student drug testing reported less substance use than comparable students in high school without such testing. The study found no impact of random drug testing reported by

students not participating in testing on the intention to use substances, the perceived consequences of substance use, participation in activities subject to drug testing, or school connectedness.[6]

- Results from a study published in 2012 indicate that drug testing is primarily effective at deterring substance use for female students in schools with positive climates. The authors conclude that drug testing should not be implemented as a stand-alone strategy for reducing substance use and that school climate should be considered before implementing drug testing.[7]
- A NIDA-funded study published in 2007 found that random drug and alcohol testing had no deterrent effects on student athletes for past-month use during any of four follow-up periods. However, in two of four follow-up self-reports, student athletes reduced past-year drug use, and two assessments showed a reduction of drug and alcohol use as well. Because the conflicting findings between past-month and past-year substance use, more research is needed.[8]

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National Institute on Drug Abuse
Advancing Addiction Science

Virginia Opioid Summary

Revised March 2019

Opioid-Involved Overdose Deaths

In 2017, there were 1,241 drug overdose deaths involving opioids in Virginia—a rate of 14.8 deaths per 100,000 persons, compared to the national rate of 14.6 deaths per 100,000 persons.The greatest increase was among deaths involving synthetic opioids other than methadone (mainly fentanyl) with a nearly tenfold increase from 89 reported deaths in 2012 to 829 deaths in 2017 (Figure 1). Opioid deaths involving heroin also increased during the same 5-year period, from 121 to 556 reported deaths. Overall, deaths involving prescription opioids have not changed since 2011 with 404 deaths reported in 2017.

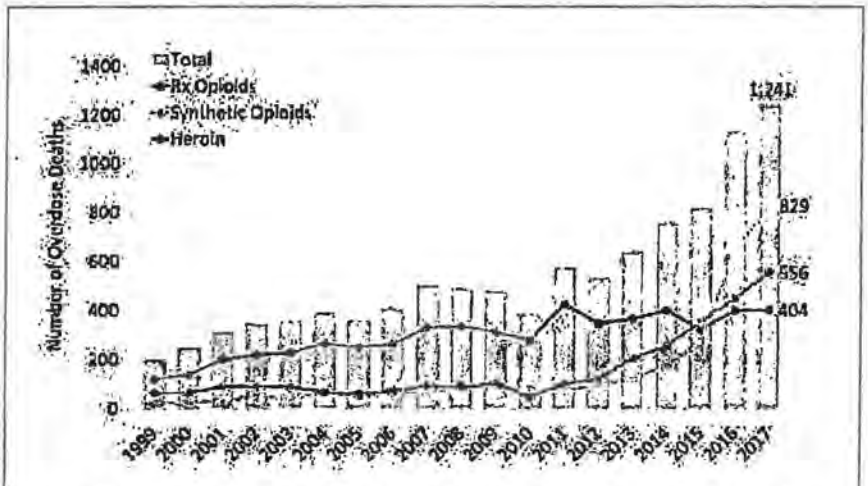

Figure 1. Number of overdose deaths involving opioids in Virginia, by opioid category. Drug categories presented are not mutually exclusive, and deaths might have involved more than one substance Source: CDC WONDER.

Opioid Pain Reliever Prescriptions

In 2017, Virginia providers wrote 52.9 opioid prescriptions for every 100 persons (Figure 2) compared to the average U.S. rate of 58.7 prescriptions (CDC). This represents a 34 percent decrease from a peak of 79.6 opioid prescriptions per 100 persons in 2012.

The rate of overdose deaths involving opioid prescriptions rose steadily from 1.7 deaths per 100,000 persons in 1999 to 4.7 deaths per 100,000 persons in 2017 (Figure 2).

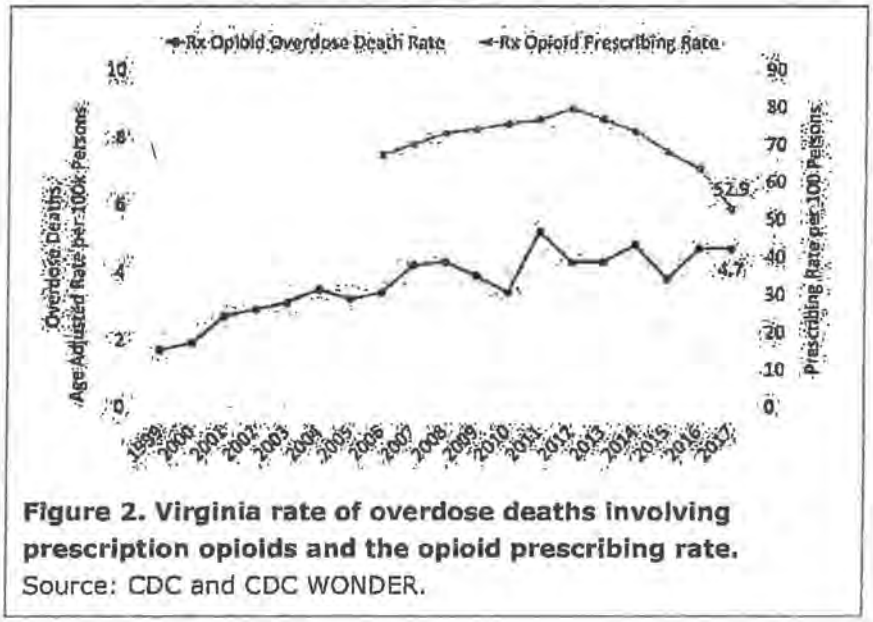

Figure 2. Virginia rate of overdose deaths involving prescription opioids and the opioid prescribing rate.
Source: CDC and CDC WONDER.

Neonatal Abstinence Syndrome (NAS)

NAS or neonatal opioid withdrawal syndrome (NOWS) may occur when a pregnant woman uses drugs such as opioids during pregnancy. A recent national study revealed a fivefold increase in the incidence of NAS/NOWS between 2004 and 2014, from 1.5 cases per 1,000 hospital births to 8.0 cases per 1,000 hospital births. This is the equivalent of one baby born with symptoms of NAS/NOWS every 15 minutes in the United States. During the same period, hospital costs for NAS/NOWS births increased from $91 million to $563 million, after adjusting for inflation (Figure 3).

To date, there is no standard in NAS/NOWS provider and hospital coding practices (CDC). As a result, the trends and rates reported by states varies. The number of NAS/NOWS cases in Virginia rose 11 percent in a 1-year period, from 741 in 2016 to 819 in 2017 (Virginia Hospital & Healthcare Association).

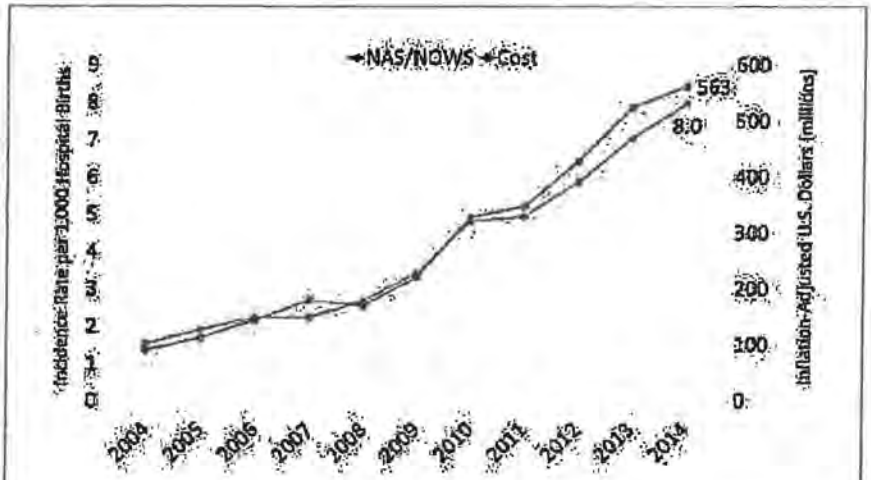

Figure 3. NAS/NOWS Incidence rate and hospital costs for treatment in the United States. Source: T.N.A. Winkelman, et al., 2018.

HIV Prevalence and HIV Diagnoses Attributed to Injection Drug Use (IDU)

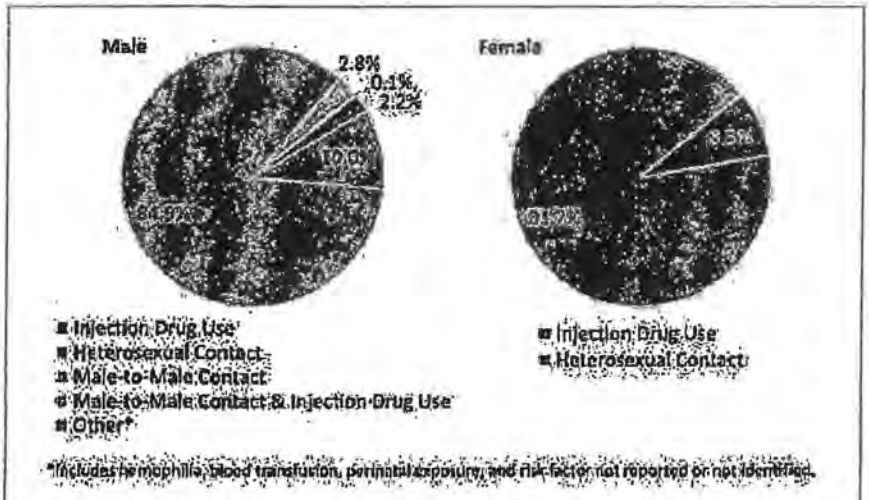

Figure 4. Virginia: Estimated percent of males and females with new HIV diagnoses, by transmission category, 2016. Source: CDC and www.AIDSVU.org.

- **U.S. Incidence:** In 2016, 9 percent (3,480) of the 39,589 new diagnoses of HIV in the United States were attributed to IDU. Among males, 6.3 percent (2,530) of new cases were transmitted via IDU or male-to-male contact and IDU. Among females, 2.3 percent (950) were transmitted via IDU (CDC).

- **U.S. Prevalence:** In 2016, 991,447 Americans were living with a diagnosed HIV infection—a rate of 306.6 cases per 100,000 persons. Among males, 19.9 percent (150,4661) contracted HIV from IDU or male-to-male contact and IDU while 21 percent (50,154) of females were living with HIV attributed to IDU (CDC).
- **State Incidence:** Of the new HIV cases in 2016, 893 occurred in Virginia. Among males, 5 percent of new HIV cases were attributed to IDU or male-to-male contact and IDU. Among females, 8.3 percent of new HIV cases were attributed to IDU (Figure 4) (AIDSVu).
- **State Prevalence:** In 2015, an estimated 21,607 persons were living with a diagnosed HIV infection in Virginia—a rate of 307 cases per 100,000 persons. Of those, 13.7 percent of male cases were attributed to IDU or male-to-male contact and IDU. Among females, 16.5 percent were living with HIV attributed to IDU (AIDSVu).

Hepatitis C (HCV) Prevalence and HCV Diagnoses Attributed to Injection Drug Use[1]

- **U.S. Incidence:** In 2016, there were an estimated 41,200 new cases of acute HCV[2] (CDC). Among case reports that contain information about IDU, 68.6 percent indicated use of injection drugs (CDC).
- **U.S. Prevalence**: An estimated 2.4 million Americans are living with HCV based on 2013-2016 annual averages (CDC).
- **State Incidence**: There were approximately 43 new cases of acute HCV (0.5 per 100,000 persons) reported in Virginia in 2016 (CDC).
- **State Prevalence**: In Virginia, there are an estimated 40,700 persons living with Hepatitis C (2013-2016 annual average), a rate of 630 cases per 100,000 persons (HepVu).

Additional Resources

- Virginia Department of Health, Opioid Addiction in Virginia
- Centers for Disease Control and Prevention, Opioid Overdose

FY2018 NIH-funded projects related to opioid use and use disorder in Virginia: 12

NIH RePORTER

View Results

Find treatment in Virginia (SAMHSA)

Notes

1. Not all states collect or report data on the incidence or prevalence of Hepatitis C or on how Hepatitis C is transmitted. When available, the data will be included.
2. Actual acute cases are estimated to be 13.9 times the number of reported cases in any year.

This page was last updated March 2019

National Institute on Drug Abuse
Advancing Addiction Science

Cocaine

Revised July 2018

What is cocaine?

Cocaine is a powerfully addictive stimulant drug made from the leaves of the coca plant native to South America. Although health care providers can use it for valid medical purposes, such as local anesthesia for some surgeries, recreational cocaine use is illegal. As a street drug, cocaine looks like a fine, white, crystal powder. Street dealers often mix it with things like cornstarch, talcum powder, or flour to increase profits. They may also mix it with other drugs such as the stimulant amphetamine, or synthetic opioids, including fentanyl. Adding synthetic opioids to cocaine is especially risky when people using cocaine don't realize it contains this dangerous additive. Increasing numbers of overdose deaths among cocaine users might be related to this tampered cocaine.

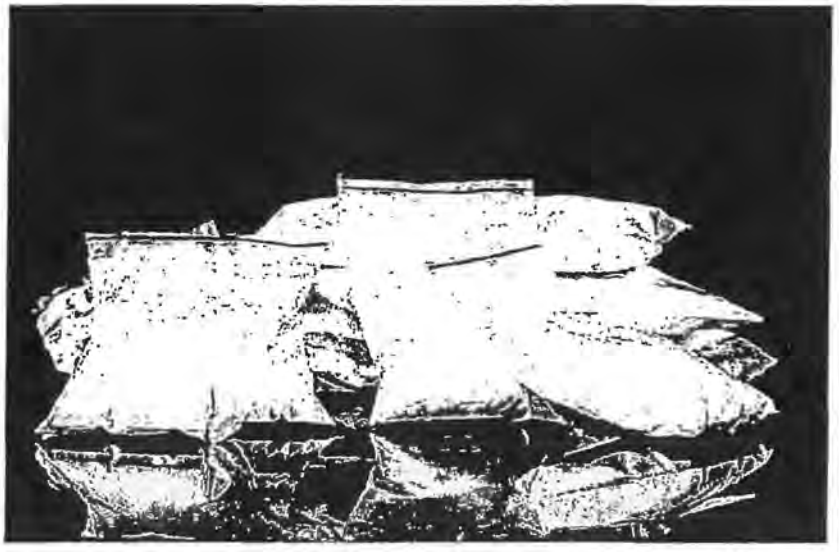

Photo ©Shutterstock/Africa Studio

Popular nicknames for cocaine include:

- Blow
- Coke
- Crack
- Rock
- Snow

How do people use cocaine?

People snort cocaine powder through the nose, or they rub it into their gums. Others dissolve the powder and inject it into the bloodstream. Some people inject a combination of cocaine and heroin, called a Speedball.

Another popular method of use is to smoke cocaine that has been processed to make a rock crystal (also called "freebase cocaine"). The crystal is heated to produce vapors that are inhaled into the lungs. This form of cocaine is called Crack, which refers to the crackling sound of the rock as it's heated. Some people also smoke Crack by sprinkling it on marijuana or tobacco, and smoke it like a cigarette.

People who use cocaine often take it in binges—taking the drug repeatedly within a short time, at increasingly higher doses—to maintain their high.

How does cocaine affect the brain?

Image by NIDA

The brain's reward circuit, which controls feelings of pleasure

Cocaine increases levels of the natural chemical messenger *dopamine* in brain circuits related to the control of movement and reward.

Normally, dopamine recycles back into the cell that released it, shutting off the signal between nerve cells. However, cocaine prevents dopamine from being recycled, causing large amounts to build up in the space between two nerve cells, stopping their normal communication. This flood of dopamine in the brain's reward circuit strongly reinforces drug-taking behaviors, because the reward circuit eventually adapts to the excess of dopamine caused by cocaine, and becomes less sensitive to it. As a result, people take stronger and more frequent doses in an attempt to feel the same high, and to obtain relief from withdrawal.

Short-Term Effects

Short-term health effects of cocaine include:

- extreme happiness and energy
- mental alertness
- hypersensitivity to sight, sound, and touch
- irritability
- *paranoia*—extreme and unreasonable distrust of others

Some people find that cocaine helps them perform simple physical and mental tasks more quickly, although others experience the opposite effect. Large amounts of cocaine can lead to bizarre, unpredictable, and violent behavior.

Cocaine's effects appear almost immediately and disappear within a few minutes to an hour. How long the effects last and how intense they are depend on the method of use. Injecting or smoking cocaine produces a quicker and stronger but shorter-lasting high than snorting. The high from snorting cocaine may last 15 to 30 minutes. The high from smoking may last 5 to 10 minutes.

What are the other health effects of cocaine use?

Other health effects of cocaine use include:

- constricted blood vessels
- dilated pupils
- nausea
- raised body temperature and blood pressure
- fast or irregular heartbeat
- tremors and muscle twitches
- restlessness

Long-Term Effects

Some long-term health effects of cocaine depend on the method of use and include the following:

- *snorting:* loss of smell, nosebleeds, frequent runny nose, and problems with swallowing
- *smoking:* cough, asthma, respiratory distress, and higher risk of infections like pneumonia
- *consuming by mouth:* severe bowel decay from reduced blood flow
- *needle injection:* higher risk for contracting HIV, hepatitis C, and other bloodborne diseases, skin or soft tissue infections, as well as scarring or collapsed veins

However, even people involved with non-needle cocaine use place themselves at a risk for HIV because cocaine impairs judgment, which can lead to risky sexual behavior with infected partners (see "Cocaine, HIV, and Hepatitis" textbox).

Cocaine, HIV, and Hepatitis

Studies have shown that cocaine use speeds up HIV infection. According to research, cocaine impairs immune cell function and promotes reproduction of the HIV virus. Research also suggests that people who use cocaine and are infected with HIV may be more susceptible to contracting other viruses, such as hepatitis C, a virus that affects the liver. Read more about the connection between cocaine and these diseases in NIDA's *Cocaine Research Report*.

Other long-term effects of cocaine use include being malnourished, because cocaine decreases appetite, and movement disorders, including Parkinson's disease, which may occur after many years of use. In addition, people report irritability and restlessness from cocaine binges, and some also experience severe paranoia, in which they lose touch with reality and have *auditory hallucinations*—hearing noises that aren't real.

Can a person overdose on cocaine?

Yes, a person can overdose on cocaine. An overdose occurs when a person uses enough of a drug to produce serious adverse effects, life-threatening symptoms, or death. An overdose can be intentional or unintentional.

Death from overdose can occur on the first use of cocaine or unexpectedly thereafter. Many people who use cocaine also drink alcohol at the same time, which is particularly risky and can lead to overdose. Others mix cocaine with heroin, another dangerous—and deadly—combination.

Some of the most frequent and severe health consequences of overdose are irregular heart rhythm, heart attacks, seizures, and strokes. Other symptoms of cocaine overdose include difficulty breathing, high blood pressure, high body temperature, hallucinations, and extreme agitation or anxiety.

How can a cocaine overdose be treated?

There is no specific medication that can reverse a cocaine overdose. Management involves supportive care and depends on the symptoms present. For instance, because cocaine overdose often leads to a heart attack, stroke, or seizure, first responders and emergency room doctors try to treat the overdose by treating these conditions, with the intent of:

- restoring blood flow to the heart (heart attack)
- restoring oxygen-rich blood supply to the affected part of the brain (stroke)
- stopping the seizure

How does cocaine use lead to addiction?

As with other drugs, repeated use of cocaine can cause long-term changes in the brain's reward circuit and other brain systems, which may lead to addiction. The reward circuit eventually adapts to the extra dopamine caused by the drug, becoming steadily less

sensitive to it. As a result, people take stronger and more frequent doses to feel the same high they did initially and to obtain relief from withdrawal.

Withdrawal symptoms include:

- depression
- fatigue
- increased appetite
- unpleasant dreams and insomnia
- slowed thinking

How can people get treatment for cocaine addiction?

Behavioral therapy may be used to treat cocaine addiction. Examples include:

- cognitive-behavioral therapy
- contingency management or motivational incentives—providing rewards to patients who remain substance free
- therapeutic communities—drug-free residences in which people in recovery from substance use disorders help each other to understand and change their behaviors
- community based recovery groups, such as 12-step programs

While no government-approved medicines are currently available to treat cocaine addiction, researchers are testing some treatments that have been used to treat other disorders, including:

- disulfiram (used to treat alcoholism)
- modanifil (used to treat *narcolepsy*—a disorder characterized by uncontrollable episodes of deep sleep)
- lorcaserin (used to treat obesity)
- buprenorphine (used to treat opioid addiction)

Points to Remember

- Cocaine is a powerfully addictive stimulant drug made from the leaves of the coca plant native to South America.
- Street dealers often mix it with things like cornstarch, talcum powder, or flour to increase profits.
- They may also mix it with other drugs such as the stimulant amphetamine or the synthetic opioid fentanyl.
- People snort cocaine powder through the nose, or rub it into their gums. Others dissolve the powder and inject it into the bloodstream, or inject a combination of cocaine and heroin, called a Speedball. Another popular method of use is to smoke Crack cocaine.
- Cocaine increases levels of the natural chemical messenger dopamine in brain circuits related to the control of movement and reward.
- A person can overdose on cocaine, which can lead to death.
- Behavioral therapy may be used to treat cocaine addiction.
- While no government-approved medicines are currently available to treat cocaine addiction, researchers are testing some treatments that have been used to treat other disorders.

Learn More

For more information about cocaine, visit our:

- Cocaine webpage
- Commonly Abused Drug Charts webpage

For more information about drug use and HIV/AIDS, visit our webpage, Drug Use and Viral Infections (HIV, Hepatitis).

language: Source: National Institute on Drug Abuse; National Institutes of Health; U.S. Department of Health and Human Services.

This page was last updated July 2018

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National Institute on Drug Abuse
Advancing Addiction Science

Treatment Approaches for Drug Addiction

Revised January 2019

NOTE: This fact sheet discusses research findings on effective treatment approaches for drug abuse and addiction. If you're seeking treatment, you can call the Substance Abuse and Mental Health Services Administration's (SAMHSA's) National Helpline at 1-800-662-HELP (1-800-662-4357) or go to www.findtreatment.samhsa.gov for information on hotlines, counseling services, or treatment options in your state.

What is drug addiction?

Drug addiction is a chronic disease characterized by compulsive, or uncontrollable, drug seeking and use despite harmful consequences and changes in the brain, which can be long lasting. These changes in the brain can lead to the harmful behaviors seen in people who use drugs. Drug addiction is also a relapsing disease. Relapse is the return to drug use after an attempt to stop.

The path to drug addiction begins with the voluntary act of taking drugs. But over time, a person's ability to choose not to do so becomes compromised. Seeking and taking the drug becomes compulsive. This is mostly due to the effects of long-term drug exposure on brain function. Addiction affects parts of the brain involved in reward and motivation, learning and memory, and control over behavior.

Addiction is a disease that affects both the brain and behavior.

Can drug addiction be treated?

Yes, but it's not simple. Because addiction is a chronic disease, people can't simply stop using drugs for a few days and be cured. Most patients need long-term or repeated care to stop using completely and recover their lives.

Addiction treatment must help the person do the following:

- stop using drugs
- stay drug-free
- be productive in the family, at work, and in society

Principles of Effective Treatment

Based on scientific research since the mid-1970s, the following key principles should form the basis of any effective treatment program:

- Addiction is a complex but treatable disease that affects brain function and behavior.
- No single treatment is right for everyone.
- People need to have quick access to treatment.
- Effective treatment addresses all of the patient's needs, not just his or her drug use.
- Staying in treatment long enough is critical.
- Counseling and other behavioral therapies are the most commonly used forms of treatment.
- Medications are often an important part of treatment, especially when combined with behavioral therapies.
- Treatment plans must be reviewed often and modified to fit the patient's changing needs.
- Treatment should address other possible mental disorders.
- Medically assisted detoxification is only the first stage of treatment.
- Treatment doesn't need to be voluntary to be effective.
- Drug use during treatment must be monitored continuously.

- Treatment programs should test patients for HIV/AIDS, hepatitis B and C, tuberculosis, and other infectious diseases as well as teach them about steps they can take to reduce their risk of these illnesses.

What are treatments for drug addiction?

There are many options that have been successful in treating drug addiction, including:

- behavioral counseling
- medication
- medical devices and applications used to treat withdrawal symptoms or deliver skills training
- evaluation and treatment for co-occurring mental health issues such as depression and anxiety
- long-term follow-up to prevent relapse

A range of care with a tailored treatment program and follow-up options can be crucial to success. Treatment should include both medical and mental health services as needed. Follow-up care may include community- or family-based recovery support systems.

How are medications and devices used in drug addiction treatment?

Medications and devices can be used to manage withdrawal symptoms, prevent relapse, and treat co-occurring conditions.

Withdrawal. Medications and devices can help suppress withdrawal symptoms during detoxification. Detoxification is not in itself "treatment," but only the first step in the process. Patients who do not receive any further treatment after detoxification usually resume their drug use. One study of treatment facilities found that medications were used in almost 80 percent of detoxifications (SAMHSA, 2014). In November 2017, the Food and Drug Administration (FDA) granted a new indication to an electronic stimulation device, NSS-2 Bridge, for use in helping reduce opioid withdrawal symptoms. This device is placed behind the ear and sends electrical pulses to stimulate certain brain nerves. Also, in May

2018, the FDA approved lofexidine, a non-opioid medicine designed to reduce opioid withdrawal symptoms.

Relapse prevention. Patients can use medications to help re-establish normal brain function and decrease cravings. Medications are available for treatment of opioid (heroin, prescription pain relievers), tobacco (nicotine), and alcohol addiction. Scientists are developing other medications to treat stimulant (cocaine, methamphetamine) and cannabis (marijuana) addiction. People who use more than one drug, which is very common, need treatment for all of the substances they use.

- ***Opioids:*** Methadone (Dolophine®, Methadose®), buprenorphine (Suboxone®, Subutex®, Probuphine® , Sublocade™), and naltrexone (Vivitrol®) are used to treat opioid addiction. Acting on the same targets in the brain as heroin and morphine, methadone and buprenorphine suppress withdrawal symptoms and relieve cravings. Naltrexone blocks the effects of opioids at their receptor sites in the brain and should be used only in patients who have already been detoxified. All medications help patients reduce drug seeking and related criminal behavior and help them become more open to behavioral treatments. A NIDA study found that once treatment is initiated, both a buprenorphine/naloxone combination and an extended release naltrexone formulation are similarly effective in treating opioid addiction. Because full detoxification is necessary for treatment with naloxone, initiating treatment among active users was difficult, but once detoxification was complete, both medications had similar effectiveness.
- ***Tobacco:*** Nicotine replacement therapies have several forms, including the patch, spray, gum, and lozenges. These products are available over the counter. The U.S. Food and Drug Administration (FDA) has approved two prescription medications for nicotine addiction: bupropion (Zyban®) and varenicline (Chantix®). They work differently in the brain, but both help prevent relapse in people trying to quit. The medications are more effective when combined with behavioral treatments, such as group and individual therapy as well as telephone quitlines.
- ***Alcohol:*** Three medications have been FDA-approved for treating alcohol addiction and a fourth, topiramate, has shown promise in clinical trials (large-scale studies with people). The three approved medications are as follows:
  - **Naltrexone** blocks opioid receptors that are involved in the rewarding effects of drinking and in the craving for alcohol. It reduces relapse to heavy drinking and is highly effective in some patients. Genetic differences may affect how well the drug works in certain patients.

- **Acamprosate (Campral®)** may reduce symptoms of long-lasting withdrawal, such as insomnia, anxiety, restlessness, and dysphoria (generally feeling unwell or unhappy). It may be more effective in patients with severe addiction.
- **Disulfiram (Antabuse®)** interferes with the breakdown of alcohol. Acetaldehyde builds up in the body, leading to unpleasant reactions that include flushing (warmth and redness in the face), nausea, and irregular heartbeat if the patient drinks alcohol. Compliance (taking the drug as prescribed) can be a problem, but it may help patients who are highly motivated to quit drinking.

- ***Co-occuring conditions:*** Other medications are available to treat possible mental health conditions, such as depression or anxiety, that may be contributing to the person's addiction.

How are behavioral therapies used to treat drug addiction?

Behavioral therapies help patients:

- modify their attitudes and behaviors related to drug use

- increase healthy life skills
- persist with other forms of treatment, such as medication

Patients can receive treatment in many different settings with various approaches.

Outpatient behavioral treatment includes a wide variety of programs for patients who visit a behavioral health counselor on a regular schedule. Most of the programs involve individual or group drug counseling, or both. These programs typically offer forms of behavioral therapy such as:

- *cognitive-behavioral therapy,* which helps patients recognize, avoid, and cope with the situations in which they are most likely to use drugs
- *multidimensional family therapy*—developed for adolescents with drug abuse problems as well as their families—which addresses a range of influences on their drug abuse patterns and is designed to improve overall family functioning
- *motivational interviewing,* which makes the most of people's readiness to change their behavior and enter treatment
- *motivational incentives* (contingency management), which uses positive reinforcement to encourage abstinence from drugs

Treatment is sometimes intensive at first, where patients attend multiple outpatient sessions each week. After completing intensive treatment, patients transition to regular outpatient treatment, which meets less often and for fewer hours per week to help sustain their recovery. In September 2017, the FDA permitted marketing of the first mobile application, reSET®, to help treat substance use disorders. This application is intended to be used with outpatient treatment to treat alcohol, cocaine, marijuana, and stimulant substance use disorders. In December 2018, the FDA cleared a mobile medical application, reSET®, to help treat opioid use disorders. This application is a prescription cognitive behavioral therapy and should be used in conjunction with treatment that includes buprenorphine and contingency management. Read more about reSET® in this FDA News Release.

Inpatient or residential treatment can also be very effective, especially for those with more severe problems (including co-occurring disorders). Licensed residential treatment facilities offer 24-hour structured and intensive care, including safe housing and medical attention. Residential treatment facilities may use a variety of therapeutic approaches, and they are generally aimed at helping the patient live a drug-free, crime-free lifestyle after treatment. Examples of residential treatment settings include:

- *Therapeutic communities*, which are highly structured programs in which patients remain at a residence, typically for 6 to 12 months. The entire community, including treatment staff and those in recovery, act as key agents of change, influencing the patient's attitudes, understanding, and behaviors associated with drug use. Read more about therapeutic communities in the *Therapeutic Communities Research Report* at https://www.drugabuse.gov/publications/research-reports/therapeutic-communities.
- *Shorter-term residential treatment*, which typically focuses on detoxification as well as providing initial intensive counseling and preparation for treatment in a community-based setting.
- *Recovery housing,* which provides supervised, short-term housing for patients, often following other types of inpatient or residential treatment. Recovery housing can help people make the transition to an independent life—for example, helping them learn how to manage finances or seek employment, as well as connecting them to support services in the community.

Is treatment different for criminal justice populations?

Scientific research since the mid-1970s shows that drug abuse treatment can help many drug-using offenders change their attitudes, beliefs, and behaviors towards drug abuse; avoid relapse; and successfully remove themselves from a life of substance abuse and crime. Many of the principles of treating drug addiction are similar for people within the criminal justice system as for those in the general population. However, many offenders don't have access to the types of services they need. Treatment that is of poor quality or is not well suited to the needs of offenders may not be effective at reducing drug use and criminal behavior.

In addition to the general principles of treatment, some considerations specific to offenders include the following:

- Treatment should include development of specific cognitive skills to help the offender adjust attitudes and beliefs that lead to drug abuse and crime, such as feeling entitled to have things one's own way or not understanding the consequences of one's behavior. This includes skills related to thinking, understanding, learning, and remembering.
- Treatment planning should include tailored services within the correctional facility as well as transition to community-based treatment after release.
- Ongoing coordination between treatment providers and courts or parole and probation officers is important in addressing the complex needs of offenders re-entering society.

Challenges of Re-entry

Drug abuse changes the function of the brain, and many things can "trigger" drug cravings within the brain. It's critical for those in treatment, especially those treated at an inpatient facility or prison, to learn how to recognize, avoid, and cope with triggers they are likely to be exposed to after treatment.

How many people get treatment for drug addiction?

According to SAMHSA's National Survey on Drug Use and Health, 22.5 million people (8.5 percent of the U.S. population) aged 12 or older needed treatment for an illicit* drug or alcohol use problem in 2014. Only 4.2 million (18.5 percent of those who needed treatment) received any substance use treatment in the same year. Of these, about 2.6 million people received treatment at specialty treatment programs (CBHSQ, 2015).

*The term "illicit" refers to the use of illegal drugs, including marijuana according to federal law, and misuse of prescription medications.

Points to Remember

- Drug addiction can be treated, but it's not simple. Addiction treatment must help the person do the following:
  - stop using drugs
  - stay drug-free
  - be productive in the family, at work, and in society
- Successful treatment has several steps:
  - detoxification
  - behavioral counseling
  - medication (for opioid, tobacco, or alcohol addiction)
  - evaluation and treatment for co-occurring mental health issues such as depression and anxiety
  - long-term follow-up to prevent relapse

- Medications and devices can be used to manage withdrawal symptoms, prevent relapse, and treat co-occurring conditions.
- Behavioral therapies help patients:
  - modify their attitudes and behaviors related to drug use
  - increase healthy life skills
  - persist with other forms of treatment, such as medication
- People within the criminal justice system may need additional treatment services to treat drug use disorders effectively. However, many offenders don't have access to the types of services they need.

Learn More

For more information about drug addiction treatment, visit: www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/acknowledgments

For information about drug addiction treatment in the criminal justice system, visit: www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations/principles

For step-by-step guides for people who think they or a loved one may need treatment, visit: www.drugabuse.gov/related-topics/treatment

References

Center for Behavioral Health Statistics and Quality (CBSHQ). *2014 National Survey on Drug Use and Health: Detailed Tables.* Rockville, MD: Substance Abuse and Mental Health Services Administration; 2015.

Substance Abuse and Mental Health Services Administration (SAMHSA). *National Survey of Substance Abuse Treatment Services (N-SSATS): 2013. Data on Substance Abuse Treatment Facilities.* Rockville, MD: Substance Abuse and Mental Health Services Administration; 2014. HHS Publication No. (SMA) 14-489. BHSIS Series S-73.

This page was last updated January 2019

Resource Guide: Screening for Drug Use in General Medical Settings

Biological Specimen Testing

Introduction to Biological Testing

Urine drug testing is the most common toxicological test of body fluid samples in general medical settings, but you do **not** need to have a biological testing program to implement a drug screening program. The purpose of a biological testing program is to:

- Confirm the presence of a drug or the use of multiple drugs.
- Augment screening and followup conversations (i.e., biological testing should not preclude screening).

Users of biological tests should be aware that:

- Biological tests have different windows of detection. For example:
  - A positive urine or saliva screen for cocaine and/or heroin likely indicates very recent use (past few days/past week), whereas one for marijuana could detect marijuana use anywhere from a few days to up to one month or more in the past, depending on the frequency of use..
  - It is almost impossible to determine the time of use from hair samples.
- Not all biological screens test for all commonly abused drugs (e.g., MDMA, methadone, fentanyl, and other synthetic opioids are not included in many drug screens, and these tests must be ordered separately).
- Biological tests examine a sample with a drug concentration at a specific cutoff level (see SAMHSA Drug Cutoff Concentrations [PDF, 49KB]). Therefore, a negative result

does not mean drugs have not been used, and a positive result may at times reflect consumption of other substances (such as hemp or poppy products).

- If tampering is a concern, specimens should be monitored for temperature or adulterants; and programs should implement and follow accurate chain-of-custody procedures.

Feedback for biological screening results:

- Present results in a matter-of-fact way in conjunction with NIDA-Modified ASSIST feedback.
- Re-administer the test if the patient believes the result showed a false positive.
- If the second biological test results are positive, categorize the patient as high risk and offer a brief intervention and referral for additional assessment and possible treatment.

Prev Next

This page was last updated March 2012

Analytes and Their Cutoffs

Effective Date: October 1, 2010

Reference: Federal Register, November 25, 2008 (73 FR 71858), Section 3.4

Initial test analyte	Initial test cutoff concentration	Confirmatory test analyte	Confirmatory test cutoff concentration
Marijuana metabolites	50 ng/mL	THCA[1]	15 ng/mL
Cocaine metabolites	150 ng/mL	Benzoylecgonine	100 ng/mL
Opiate metabolites Codeine/Morphine[2]	2000 ng/mL	Codeine Morphine	2000 ng/mL 2000ng/mL
6-Acetylmorphine	10 ng/mL	6-Acetylmorphine	10 ng/mL
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL
Amphetamines[3] AMP/MAMP[4]	500 ng/mL	Amphetamine Methamphetamine[5]	250 ng/mL 250 ng/mL
MDMA[6]	500 ng/mL	MDMA MDA[7] MDEA[8]	250 ng/mL 250 ng/mL 250 ng/mL

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA).
[2] Morphine is the target analyte for codeine/morphine testing.
[3] Either a single initial test kit or multiple initial test kits may be used provided the single test kit detects each target analyte independently at the specified cutoff.
[4] Methamphetamine is the target analyte for amphetamine/methamphetamine testing.
[5] To be reported as positive for methamphetamine, a specimen must also contain amphetamine at a concentration equal to or greater than 100 ng/mL.
[6] Methylenedioxymethamphetamine (MDMA).
[7] Methylenedioxyamphetamine (MDA).
[8] Methylenedioxyethylamphetamine (MDEA).

COMMONLY ABUSED DRUGS AND WITHDRAWAL SYMPTOMS

DRUG NAME	WITHDRAWAL SYMPTOMS
Marijuana	*Irritability* *Trouble sleeping* *Decreased appetite* *Anxiety*
Prescription Opioids	*Restlessness* *Muscle and bone pain* *Insomnia* *Diarrhea* *Vomiting* *Cold flashes with goose bumps* *Leg movements*
Prescription Sedatives & Tranquilizers	*Seizures* *Shakiness* *Anxiety* *Agitation* *Insomnia* *Overactive reflexes* *Increased heart rate, blood pressure, and temperature with sweating* *Hallucinations* *Severe cravings*
Prescription Stimulants	*Depression* *Tiredness* *Sleep Problems*
Steroids	*Mood swings* *Tiredness* *Restlessness* *Loss of appetite* *Insomnia* *Lowered sex drive* *Depression*
Tobacco	*Irritability* *Attention problems* *Sleep problems* *Increased appetite*

Withdrawal symptoms can be severe. Patients experiencing withdrawal from these substances, especially prescription and illicit opioids, should seek immediate medical attention.

National Institute on Drug Abuse
Advancing Addiction Science

Trends & Statistics

Brief Description

There are a variety of sources of information NIDA uses to monitor the prevalence and trends regarding drug abuse in the United States. The resources below cover a variety of drug related issues, including information on drug usage, emergency room data, prevention and treatment programs, and other research findings.

Costs of Substance Abuse

Abuse of tobacco, alcohol, and illicit drugs is costly to our Nation, exacting more than $740 billion annually in costs related to crime, lost work productivity and health care.**

Tobacco[1,2]	**Health Care**	**Overall**	**Year Estimate Based On**
Alcohol[3]	$27 billion	$249 billion	2010
Illicit Drugs[4,5]	$11 billion	$193 billion	2007
Prescription Opioids[6]	$26 billion	$78.5 billion	2013

Supplemental/References for Economic Costs

Monitoring the Future Survey (MTF)

Results from a yearly survey of teenagers conducted by the University of Michigan's Institute for Social Research and funded by NIDA. (Survey results, updated each autumn.) View survey results and MTF publications.

- Monitoring the Future Study: Trends in Prevalence of Various Drugs Table

National Survey on Drug Use and Health (NSDUH)

The Substance Abuse and Mental Health Services Administration's (SAMHSA) NSDUH (formerly called the National Household Survey on Drug Abuse) is the primary source of information on the prevalence, patterns, and consequences of alcohol, tobacco, and illegal drug use and abuse in the general U.S. civilian noninstitutionalized population, ages 12 and older. Survey information can be found at: www.samhsa.gov/data/population-data-nsduh.

SAMHSA sometimes releases specialized reports using the NSDUH data, including a July 2016 report exploring rates of marijuana use and perceptions of risks of harm associated with marijuana use by state and substate regions.

- National Survey of Drug Use and Health, Trends in Prevalence of Various Drugs Table

National Drug Early Warning System (NDEWS)

NDEWS monitors drug use trends in 12 sentinel communities across the United States. Sentinel Site profiles describing drug abuse trends and emerging issues will be available on the University of Maryland NDEWS website

- NDEWS Sentinel Community Site Reports

Overdose Deaths (CDC Wonder)

CDC WONDER (Wide-ranging Online Data for Epidemiologic Research) makes the information resources of the Centers for Disease Control and Prevention (CDC) available to public health professionals and the public at large. NIDA has compiled data on drug overdose deaths from this resource, please note that not all drug types are reported.

- Overdose Death Rates - 2002 to 2017 for various drugs

Related Publications

Monitoring the Future Survey: High School and Youth Trends

Describes high school and youth trends for drug use and addiction, as presented in the annual Monitoring the Future survey. Includes emphasis on marijuana, cigarettes, alcohol, and prescription drugs. (December 2018) En Español

Nationwide Trends

Describes nationwide trends in drug abuse and addiction, focusing on past-month use for illicit drugs (including marijuana and prescription drugs), alcohol, and tobacco. (June 2015) En Español

Drug-Related Hospital Emergency Room Visits

Provides national estimates on drug-related visits to hospital emergency departments and makes comparisons with previous years' data. Discusses illicit drugs, alcohol and other drugs, and prescription drugs. (May 2011) En Español

Treatment Statistics

List of resources to help find treatment data. (January 2019)

Criminal Justice

Looks at the challenges with substance use disorders (SUDs) among people in the criminal justice system, and why treatment and follow up is important for inmates. ()

Community Monitoring Systems: Tracking and Improving the Well-Being of America's Children and Adolescents

Describes community systems that monitor the well-being of children and adolescents and lists recommendations that define the next steps for creating and mentoring effective community monitoring systems. ()

View all related publications

Infographics

Dramatic Increases in Maternal Opioid Use and Neonatal Abstinence Syndrome (January 2019)

Use of opioids during pregnancy can result in a drug withdrawal syndrome in newborns called neonatal abstinence syndrome or neonatal opioid withdrawal syndrome (NAS/NOWS). Every ~15 minutes, 1 baby is born suffering from opioid withdrawal.

Monitoring the Future 2018 Survey Results (December 2018)

This infographic of the NIH's 2018 Monitoring the Future survey highlights drug use trends among the Nation's youth for vaping, marijuana, alcohol, cigarettes, and prescription/OTC drugs.

Drugged Driving (October 2018)

Driving while under the influence of legal or illegal substances puts the driver, passengers, and others who share the road in danger.

View more Infographics

Related Infographics

Monitoring the Future 2018 Survey Results (December 2018)

This infographic of the NIH's 2018 Monitoring the Future survey highlights drug use trends among the Nation's youth for vaping, marijuana, alcohol, cigarettes, and prescription/OTC drugs.

Drugged Driving (October 2018)

Driving while under the influence of legal or illegal substances puts the driver, passengers, and others who share the road in danger.

Comorbidity: Substance Use and Other Mental Disorders (August 2018)

This infographic summarizes data on the comorbidity between substance use and mental disorders and the rates at which people get treatment for these conditions.

View more Infographics

Related NIDA Notes Articles

- Drug Use and Its Consequences Increase Among Middle-Aged and Older Adults (July 2019)
- Long-Term Marijuana Use Is Associated With Health Problems Later in Life (February 2018)
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- Economic Costs of Drug Abuse in the United States, 1992-2002 (PDF, 2.4MB) - Detailed description by the Office of National Drug Control Policy of the societal costs of drug abuse
- Monitoring the Future Survey - Study funded by NIDA and performed by the University of Michigan
- Youth Risk Behavior Survey - Study conducted by the Centers for Disease Control and Prevention
- National Survey on Drug Use and Health - Study conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA)

Other Resources

- MEDLINEplus Health Information on Drug Abuse - National Library of Medicine, NIH
- www.abovetheinfluence.com - Office of National Drug Control Policy
- healthfinder.gov - U.S. Department of Health and Human Services

Past information on many drugs of abuse is available on our Archives site.

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Clinical trials are research studies in human volunteers conducted to answer specific health questions. Learn about the NIH-sponsored clinical trials available to you.

- **NIDA Clinical Trial Locator** - answer a few simple questions and get contact information for Clinical Trials near you.

Other Clinical Trials information sources:

- NIH Clinical Trials and You - NIH site that helps explain about clinical trials and why people participate.
- NIDA Trials at ClinicalTrials.gov - a resource of federally and privately supported clinical trials.

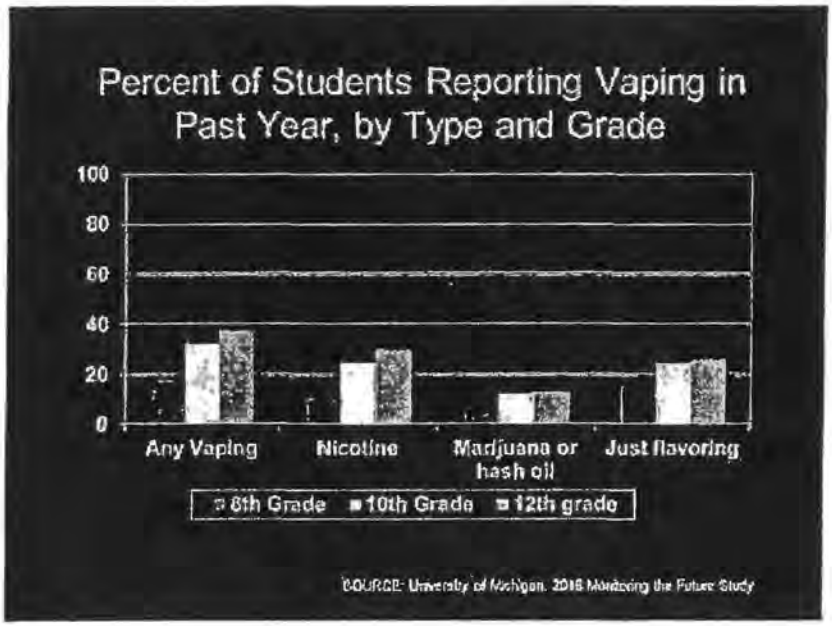
- Clinical Research Studies from the National Drug Abuse Treatment Clinical Trials Network (CTN) - a NIDA coordinated network of research institutions conducting human trials on drug abuse solutions.
- Research Studies at NIDA Intramural Research Program - located in Baltimore, Maryland.

This page was last updated April 2017

Monitoring the Future Survey: High School and Youth Trends

Revised December 2018

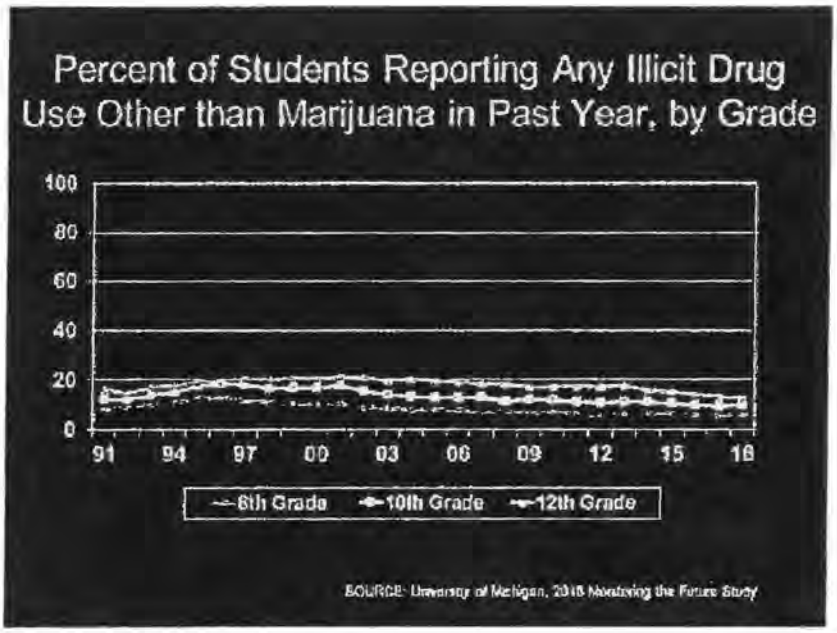
The most striking finding of this year's Monitoring the Future (MTF) survey of drug use and attitudes among 8th, 10th, and 12th graders in hundreds of schools across the country is a **substantial and significant increase in vaping.** Overall, rates of vaping are second only to alcohol among substances surveyed, with 17.6 percent of 8th graders, 32.3 percent of 10th graders, and 37.3 percent of 12th graders reporting past-year vaping.



Still, the 2018 MTF results also contain promising trends, with **past-year use of illicit drugs other than marijuana holding steady at the lowest levels in over two decades**—6.1 percent of 8th graders, 9.6 percent of 10th graders, and 12.4 percent of 12th

graders. Among 12th graders, the rate of past-year use of illicit drugs other than marijuana has declined by 30.0 percent in the past five years.

For the past three years, many substances have held steady at the lowest levels of use since the survey's inception (or since the survey began asking about them). In some cases, use has dropped to lower levels than ever before. Substances at historic low levels of use in 2018 include alcohol, cigarettes, heroin, prescription opioids, MDMA (Ecstasy or Molly), methamphetamine, amphetamines, sedatives, and ketamine.

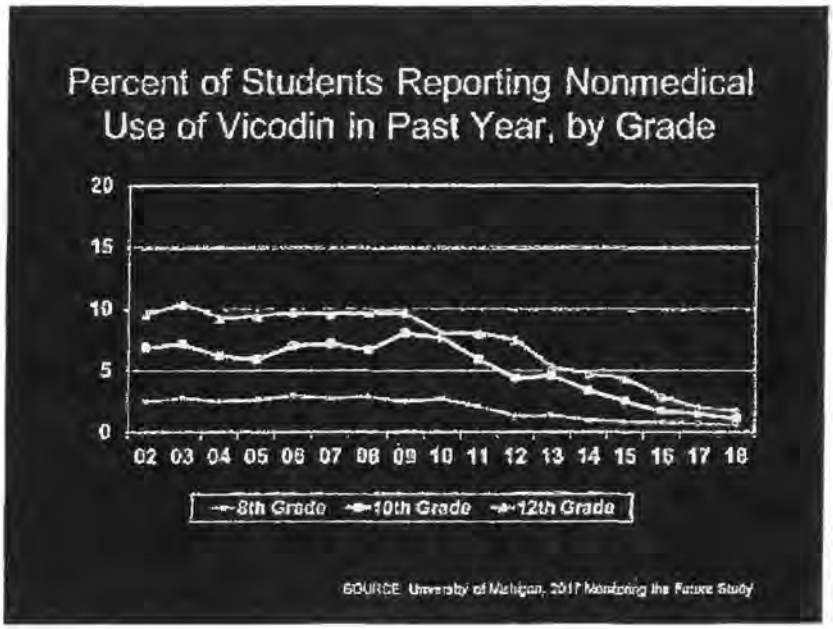


Survey findings were mixed in terms of changes in the perceived risk of harm from using various substances and disapproval of people who use them. For example, the percentage of 8th graders who think that occasional use of inhalants is risky is less than it was last year and in prior years. However, among 10th graders, there was an increase in the proportion of students who perceive a risk of harm when trying Vicodin® or Adderall® occasionally. High school seniors also reported increased disapproval of daily drinking, binge drinking, and smoking one or more packs of cigarettes per day.

Opioids

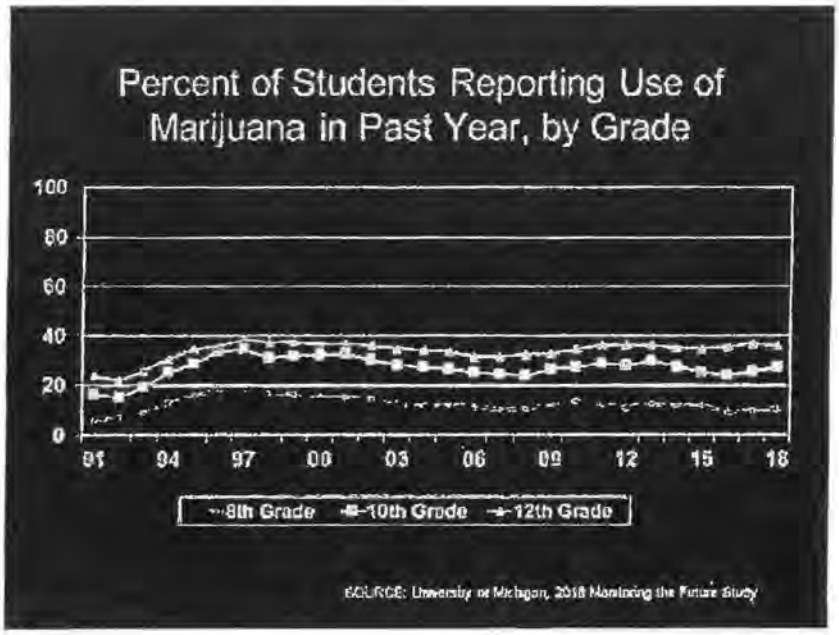
Despite the continued rise in opioid overdose and overall overdose deaths and high levels of opioid misuse among adults, lifetime, past-year, and past-month **misuse of prescription opioids (narcotics other than heroin) dropped significantly over the last five years in 12th graders**. In the past five years, Vicodin® use notably dropped by 58.4 percent in

8th graders, 75.4 percent in 10th graders and 67.2 percent in 12th graders. Interestingly, teens also think these drugs are not as easy to get as they used to be. One in three 12th graders (32.5 percent) said that prescription opioids were easily available in the 2018 survey, compared to more than 54.2 percent in 2010.



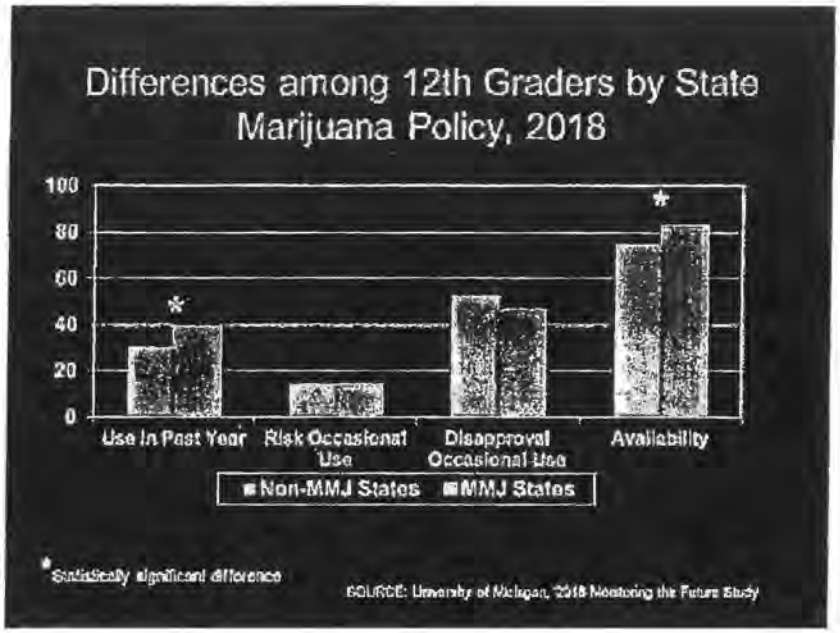
Marijuana

Daily, past-month, past-year, and lifetime marijuana use declined among 8th graders and remains unchanged among 10th and 12th graders compared to five years ago, despite the changing state marijuana laws during this time period. Past-year use of marijuana reached its lowest levels in more than two decades among 8th and 10th graders in 2016 and has since remained stable.



Among 12th graders, around six (5.8) percent continue to report daily use of marijuana, which corresponds to about one in 16 high school seniors. Among all grades, perceptions of harm and disapproval of marijuana use have trended downward in recent years. One in four 12th graders report that regular marijuana use poses a great risk (26.7 percent, which is less than half of what it was 20 years ago), and disapproval among 12th graders remains somewhat high, with 66.7 percent reporting they disapprove of adults smoking marijuana regularly.

As with other vaping measures, marijuana vaping increased significantly from when it was first measured in 2017 to 2018. While past month marijuana vaping is fairly low—reported by 2.6 percent of 8th graders, 7.0 percent of 10th graders, and 7.5 percent of 12th graders—these numbers represent respective increases of 59.7 percent, 62.7 percent, and 50.6 percent over 2017 rates. Daily marijuana use continues to outpace daily cigarette use across grades, reflecting a steep decline in daily cigarette use and fairly stable daily marijuana use.



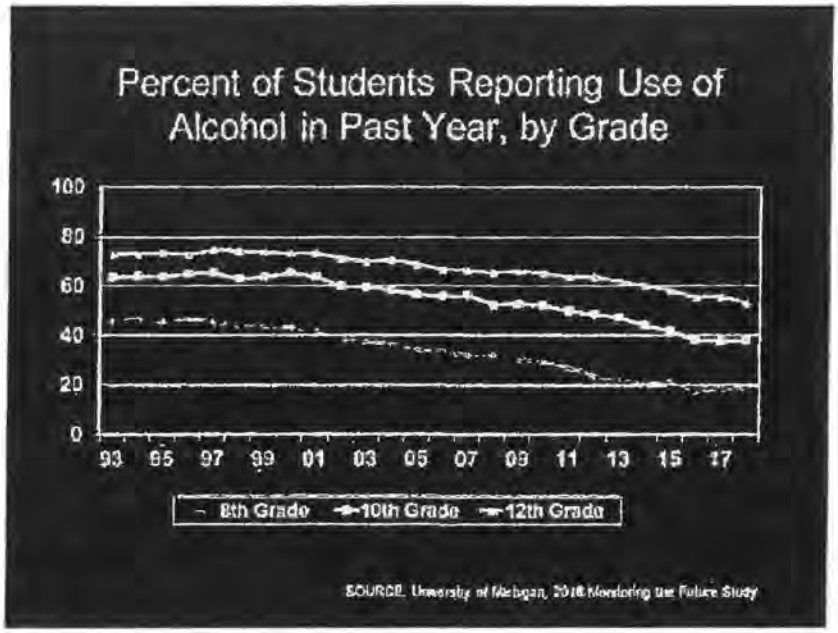
Alcohol

Alcohol use and binge drinking continued to show a significant five-year decline among all grades. Past-month use of alcohol was reported by 8.2 percent, 18.6 percent, and 30.2 percent of 8th, 10th, and 12th graders, respectively, compared to 10.2 percent, 25.7 percent, and 39.2 percent in 2013. Daily alcohol use and binge drinking (defined as consuming five or more drinks sometime in the past two weeks) also decreased significantly among all grades between 2013 and 2018.

Among 12th graders, there were significant declines in lifetime, past month, and daily binge alcohol use between 2017 and 2018. Also, the perception of risk of binge drinking significantly increased among 12th graders in 2018.

The percentage of high school teens who reported ever using alcohol dropped by as much as 58 percent compared to peak years. This year's survey found that 23.5 percent of 8th graders reported ever trying alcohol, which is a 57.9 percent drop from the peak of 55.8 percent in 1994.

Among 10th graders, lifetime use fell by 40.3 percent from 72.0 percent in 1997 to 43.0 percent in 2018. Among 12th graders, there was a significant 28.4 percent drop in lifetime alcohol use from 81.7 percent in 1997 to 58.5 percent in 2018.



Nicotine and Tobacco

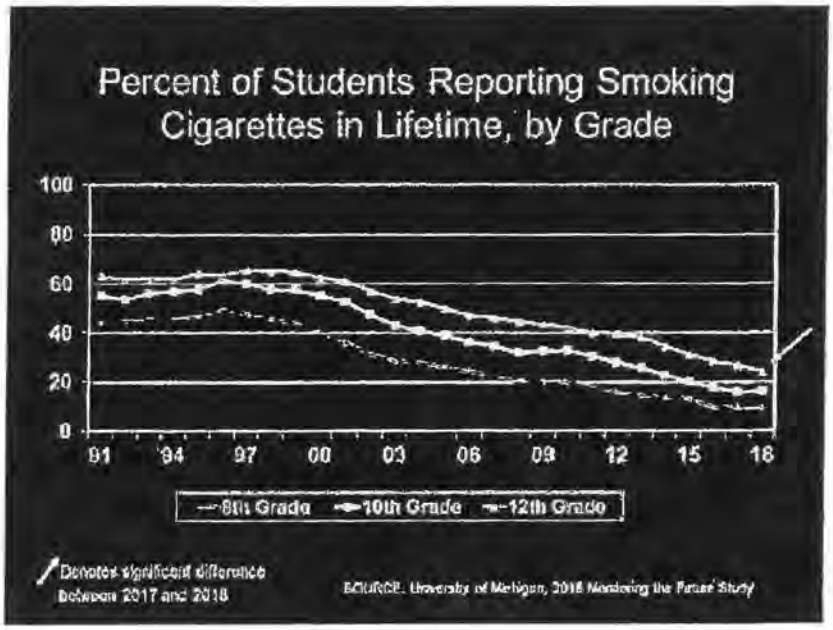
2018 is the second year in which the MTF survey asked high school students about vaping specific substances ever, in the past year, and in the past month. In just one year, rates of past-year vaping increased by about one-third in all grades, to 17.6 percent of 8th graders, 32.3 percent of 10th graders, and 37.3 percent of 12th graders. After alcohol, vaping is the second most common form of substance use in all three grades.

Students were also asked what substances they had consumed via vaping—nicotine, marijuana, or "just flavoring." "Just flavoring" was most commonly noted by 8th graders (reported by 15.1 percent), followed by nicotine (10.9 percent) and marijuana (4.4 percent). Tenth graders reported identical rates of "just flavoring" and nicotine vaping (24.7 percent), and 12.4 percent of 10th graders reported vaping marijuana. A higher percentage of 12th graders reported vaping nicotine (29.7 percent) than flavoring alone (25.7 percent), and 13.1 percent reported vaping marijuana. It is important to note that students do not always know what is in the device they are using; labeling is inconsistent, and they often use devices bought by other people. The most popular vaping devices on the market do not offer options that are nicotine-free.

These one-year jumps in vaping are mirrored by changes in the perception of availability; more 8th and 10th graders reported that vaping devices and e-liquids containing nicotine are easy or very easy to obtain in 2018 than in 2017.

The survey data regarding vaping also reveal an increase in the perception of the harm of vaping when nicotine is specifically mentioned. While 22.1 percent of 8th graders reported thinking that it is harmful to regularly use e-cigarettes, 32.4 percent reported thinking that it is harmful to regularly vape an e-liquid containing nicotine. Similar differences were also seen among 10th graders (22.8 percent reported thinking it is harmful to use e-cigarettes regularly versus 31.3 percent who reported perceiving harm in regularly vaping a liquid that contains nicotine) and 12th graders (18.0 percent versus 27.7 percent).

Use of traditional cigarettes remains at the lowest levels in the survey's history. Significant five-year declines—by more than half for daily use and for use of one half pack or more per day—were reported by all grades. Daily cigarette use was reported by 0.8 percent of 8th graders, 1.8 percent of 10th graders, and 3.6 percent of 12th graders in 2018. Lifetime cigarette use among 12th graders decreased from 26.6 percent in 2017 to 23.8 percent in 2018, and past-month use declined from 9.7 percent to 7.6 percent.



Use of other tobacco products, including hookah, smokeless tobacco, and little cigars or cigarillos remained low and declined among high school seniors. Among 12th graders, tobacco use with a hookah fell from a high of 22.9 percent in 2014 to 7.8 percent in 2018. Past-year use of little cigars or cigarillos declined in 12th graders from 2017 to 2018, and lifetime smokeless tobacco use shows a five-year decline in 10th and 12th graders.

Synthetic Drugs

Past-year use of synthetic cannabinoids (K2/Spice, sometimes called "fake weed" or "synthetic marijuana") has dropped significantly in the past five years in all three grades. Since first assessed in 2011, past-year use among 12th graders has dropped from 11.4 percent to 3.5 percent. Past-year use has also fallen from 4.4 percent to 1.6 percent among 8th graders, and from 8.8 percent to 2.9 percent among 10th graders since first assessed in 2012. The MTF survey began tracking past-year synthetic cathinone use in 2012, and since then, there has been a decrease among 12th graders from 1.3 percent to 0.6 percent in 2018 (synthetic cathinones are commonly known as "bath salts"). Use among 8th and 10th graders has remained fairly low and flat.

Learn More

For more information about the Monitoring the Future survey and results, please visit:

- the Monitoring the Future website
- the NIDA's Monitoring the Future webpage

This page was last updated December 2018

Laboratory Evaluation: Testing for Alcohol and Substance Use

Introduction

This resource provides information about laboratory testing for alcohol and substance use, including the appropriate role and uses for this testing as part of substance use monitoring and treatment. Limitations of substance use testing results and important considerations when conducting testing are also included.

Laboratory Evaluation: Testing for Alcohol and Substance Use

Testing to monitor drug use is an important component of every treatment regimen. However, when making a substance use disorder diagnosis or evaluating the associated physical harm from alcohol or substance use, the usefulness of laboratory testing results is limited. Alcohol and drug testing do not measure severity of the disease. Some important considerations for conducting laboratory testing are the following:

- No laboratory test establishes an unequivocal diagnosis of a substance use disorder; however, blood alcohol levels may confirm tolerance, and detection of a drug may confirm the origin of coma or confusion.

- Routine laboratory screening, including liver function tests, complete blood count (e.g., to detect anemia from chronic gastritis, to detect a slightly high Mean Corpuscular Volume [MCV], which can be caused by excessive alcohol consumption), and vitamin B12 and folate levels occasionally are the "red flags" that stimulate further diagnostic inquiry.

- Blood alcohol levels, breathalyzer test results, urine drug screens, and, less commonly, hair and saliva analysis can be used to assess patients for possible alcohol and other drug use. A drug screen may be useful in evaluating an adolescent with school problems, or in accidents, domestic violence, or other trauma situations.

- Performing urine and blood screens in some settings (e.g., school, employment) may be controversial, so it is advisable to obtain the patient's (and/or parents') permission before initiating such screens. Failure to do so can damage the physician–patient relationship and cause legal consequences for the physician.

- Blood, urine, and saliva studies add a crucially important dimension to the effectiveness of treatment programs. Testing adds structure and establishes limits that are critical aspects of helping patients regain self-control and self-respect.

For additional information about conducting a clinical evaluation to screen for alcohol or substance use, see the Clinical Assessment of Substance Use Disorders resource and browse the topics under Clinical Evaluation.

Urine Drug Testing for Chronic Pain Management

Introduction

This resource includes three tables of information that can be used by clinicians to inform conduct of urine drug testing for opioids and other drugs. The first table provides information about two drug testing techniques, immunoassay and gas chromatography mass spectrometry, and includes a brief description of each technique and their advantages and disadvantages. A second table lists three classes of opioids: natural, semi-synthetic, and synthetic, and notes that standard immunoassays can detect only natural opioids. The third table lists five common classes of drugs and information related to their detection in a urine drug test (i.e., primary metabolites, typical detection cut-off, potential sources of false positives, and length of time they can be detected in urine).

Urine drug testing in the management of chronic pain

Adapted from:
Urine Drug Testing in Clinical Practice (2010) Gourlay DL Heit HA. Caplan, YH
http://www.familydocs.org/files/UDTMonograph_for_web.pdf
Manchikanti I et. Al. Pain Physician 2008 Opioids Special Issue 11:S155-S180

Table: Drug Testing Techniques

Drug Testing Techniques	**Characteristics**	**Advantages**	**Disadvantages**
Immunoassays	• Engineered antibodies bind to drug metabolites • Most commonly used technique in all settings, including hospital labs	• Easy to use in many settings including office-based testing • Less expensive • Available for specific drugs, or a panel of drugs	• Qualitative testing positive or negative only • Often have high cut-off levels, giving **false negative** results • Risk of cross reactivity with other agents, giving **false positive** results
GCMS (Gas Chromatography, Mass Spectrometry)	• Directly measures drugs and drug metabolites	• Very specific, less cross-reactivity, minimizes **false positives** • Very sensitive, detects low levels of drug, minimizes **false negatives** • Quantitative testing	• Requires advanced laboratory services • Very expensive

Table: Natural and Synthetic Opioids

Natural Opiates *from opium*	Semi Sythetic Opioids *Derived from opium*	Synthetic Opioids *Manufactured, not from natural opium*
Morphine Codeine Thebaine	Hydrocodone Oxycodone Hydromorphone Oxymorphone Buprenorphine Diacetylmorphine (heroin)*	Methadone Propoxyphene Fentanyl Meperidine

Typical opiate immunoassays detect only natural opiates that are metabolized to morphine, and do not detect semi-synthetic or synthetic opioids
* Heroin is metabolized to morphine, and therefore can be detected using a standard opiate immunoassay

Table: Drug metabolites, typical cut-off levels and time of detection in urine

Drug	Primary Metabolite	Typical cutoff mg/ml	Potential source of false positive	Time of detection in urine
Opiates	Morphine	300-2,000	Poppy seeds Rifampin Chloropromazine Dextromethorphan	2-4 days
Cocaine	Benzoylecgonine	300	Very specific metabolite	1-3 days
Amphetamine Methamphetamine	Amphetamine	1,000	Ephedrine Phenylpropanolamine Methylphenidate Trazadone Bupropion Ranitidine	2-4 days
Marijuana	Tetrahydrocannabinol (THC)	50	NSAIDS Marinol Pantoprazole	1-3 days for intermittent use, up to 50 days in chronic use
Benzodiazopines	Standard assays measures oxazepam, diazepam *Poor detection of newer agents*	200	Oxaprozin	Varies with half-life agent

Appendix C
Drug Identification and Testing in The Juvenile Justice System

This appendix on laboratory testing is an excerpt from *Drug Identification and Testing in the Juvenile Justice System*, by Ann H. Crowe, American Probation and Parole Association, and Shay Bilchik, Administrator, Office of Juvenile Justice and Delinquency Prevention. Published by the Office of Justice Programs, U.S. Department of Justice in May 1998.

Drug Recognition Techniques

Drug recognition techniques were developed originally by the Los Angeles Police Department to help law enforcement officers identify drug-impaired motorists in a traffic arrest situation. The Orange County, California, Probation Department later applied and adapted the techniques for use in community corrections settings, using their findings to expand the period for detecting illicit drug use.

Drug recognition techniques are systematic and standardized evaluation techniques for detecting signs and symptoms of substance abuse. All the areas evaluated are observable physical reactions to specific types of drugs. Three key elements in the process are

- Verifying that the person's physical responses deviate from normal
- Ruling out a cause that is not drug related
- Using diagnostic procedures to determine the category or combination of substances that are likely to cause the impairment

A skilled practitioner can determine, with a high degree of accuracy, whether a youth has used some substances recently. Drug recognition techniques include the identification of the category of chemical substances ingested, although it is not possible to identify specific drugs within a classification. These techniques can determine whether a youth currently is under the influence of substances or has used a particular drug or combination of drugs within 72 hours of ingestion. However, it is not possible to determine the amount of the substance consumed.

Using drug recognition techniques is cost efficient because they often can eliminate the need for costly urinalysis by screening out those youth who do not show symptoms of current or recent substance use. This does not mean these youth have not used illicit drugs; however, if the symptoms are not apparent through drug recognition techniques, it is unlikely there is a sufficient quantity of most drugs, or their metabolites, left in the body for urinalysis to produce a positive test result. (Marijuana and PCP may be exceptions, as low levels sometimes can be detected through urinalysis for as long as 3 to 4 weeks.) Initial training for staff to become proficient in using these techniques can be costly, but once the staff are trained, ongoing expenses are minimal.

Use of drug recognition techniques provides immediate results with which to confront youth. These techniques are minimally intrusive in detecting illicit drug use, compared with the collection of body fluids required for urinalysis. The process is systematic and standardized, reducing the possibility of bias or error by trained staff.

Not all categories of drugs are equally detectable using drug recognition techniques, and the specific drugs ingested cannot be determined. Thus, the techniques used alone may not be conclusive in determining the exact substance used or in detecting the effects of illicit drugs that have minimal influence on the physical responses measured by the techniques. There are 12 steps in the drug recognition process:

- Drug history
- Breath alcohol test
- Divided-attention psychophysical tests
- Medical questions and initial observations
- Examination for muscle rigidity
- Examination for injection sites
- Examination of vital signs
- Darkroom examination
- Examination of the eyes
- Youth's statements and additional observations by staff
- Opinions of the evaluator
- Toxicological examination

It is imperative that practitioners be well trained in using these techniques and that each step be followed precisely to preserve the credibility and integrity of the drug recognition process.

Chemical Testing

Chemical testing is the most physically intrusive and the most expensive of the three methods of identifying illicit drug use; however, it is also the most accurate. Several scientific methods are available for detecting illicit drug use in individuals, including urinalysis, blood analysis, hair analysis, and saliva tests. However, saliva and breath analysis for alcohol and urinalysis for drugs other than alcohol are the methods currently recommended because they are reliable and relatively inexpensive compared with other methods of chemical testing.

Immunoassay tests generally are used for initial tests, and they are considered reliable for detecting the presence of illicit drugs in a person's system. These tests depend on naturally occurring reactions between antibodies and antigens. A specific antibody can be produced to react with a particular antigen, such as a drug. A "tag" is chemically attached to a sample of the illicit drug to be detected.

Immunoassay procedures vary primarily in the tag used to produce the reaction. The following immunoassay methods of urinalysis have been developed. Often, the type of tag used to produce the chemical reaction is reflected in the name of the test:

- Radioimmunoassay (RIA)
- Latex agglutination immunoassay (LAIA)
- Enzyme immunoassay (EIA)
- Fluorescence polarization immunoassay (FPIA)
- Kinetic interaction of microparticles in solution (KIMS)
- Ascent multi-immunoassay (AMIA)

During an immunoassay process, the reagent (the tagged drug), the urine, and the antibody are combined. The tagged drug and the untagged drug (if present in the urine) compete for binding sites with the antibody. If a sufficient concentration of drug is in the urine, little of the tagged drug can bind with the antibody. The results will indicate the amount of tagged drug that either was or was not bound with the antibody. These results are compared with a sample containing a known amount of a drug to determine whether the urine contained a measurable amount of the substance.

Immunoassay tests provide qualitative results that indicate the presence or absence of a chemical relative to a certain cutoff level. However, except for the RIA method used primarily by the military, which provides quantitative results, they cannot indicate the actual amount of the illicit drug in the system or when it was ingested.

Chromatography methods of urinalysis extract the drug from the urine in a concentrated form. This is then processed by laboratory instruments using heat or liquids, causing the drug metabolites to separate. These methodologies include gas chromatography/mass spectrometry (GC/MS), gas chromatography (GC), and high-performance liquid chromatography (HPLC). They are the only other procedures providing a quantitative reading of the level of drugs in one's system. GC/MS is considered the "gold standard" of urinalysis testing, and although it is the most expensive, it is often used to confirm positive results of initial tests. Thin-layer chromatography (TLC) was one of the earliest methods developed, but it has been found to be extremely unreliable and is not recommended for use in the criminal or juvenile justice system (Bureau of Justice Assistance, 1990).

Breath analysis is the most commonly used and most cost-effective method of detecting

levels of alcohol intoxication. Because alcohol evaporates quickly from urine, urinalysis generally is not used to test for alcohol.

The cutoff level is the amount of drug or metabolite that must be in the specimen for a test to show a positive result. A positive test indicates the amount of drug present is above the cutoff level; negative results show there is no drug or the amount is below the cutoff level. The cutoff level is usually measured in nanograms per milliliter (ng/ml), and recommended cutoff levels for illicit drug categories have been developed by the Division of Workplace Programs, Center for Substance Abuse Prevention (CSAP) (see table below). Cutoff levels for confirmation tests are generally set lower than those for initial tests (see table on the following page). Agencies are encouraged to establish cutoff levels consistent with those recommended by the U.S. Department of Health and Human Services (HHS) guidelines (Substance Abuse and Mental Health Services Administration, 1994), as they are more likely to be accepted by courts if the results of drug tests are challenged.

It is important that agencies conducting urinalysis have well-defined policies and procedures for doing so. Following are some issues that should be considered in developing policies. The documents listed in the references and suggested readings section of this Summary are sources of additional information on these topics.

Frequency of testing

Staff and monetary resources can be wasted if tests are conducted more often than necessary. However, testing should occur with sufficient frequency to ensure there is a reasonable opportunity to detect youth who are using illicit drugs. Policies should establish minimum frequencies for testing (e.g., once per week, three times per month). These should be flexible enough that personnel could test any youth if circumstances so dictated. For example, a youth whose behavior seems erratic might be tested

Recommended Cutoff Levels for Initial Tests	
Cannabinoids*	50 ng/ml
Cocaine*	300 ng/ml
Opiates*	300 ng/ml
Amphetamines/Methamphetamines*	1,000 ng/ml
PCP*	25 ng/ml
Benzodiazepines**	100 ng/ml
Barbiturates**	300 ng/ml
Methadone**	300 ng/ml

*U.S. Department of Health and Human Services Mandatory Guidelines for Testing Levels.
**Cutoff levels for these drugs are not included in the HHS. guidelines because they may be legally prescribed. The cutoff levels cited are those recommended by the scientific community.
Sources: Federal Register 59(11):29922.
American Probation and Parole Association. *Drug Testing Guidelines and Practices for Juvenile Probation and Parole Agencies*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 1992.

Recommended Cutoff Levels for Confirmation Tests	
Cannabinoids*	15 ng/ml
Cocaine*	150 ng/ml
Opiates*	300 ng/ml
Amphetamines/ Methamphetamines*	500 ng/ml
PCP*	25 ng/ml
Benzodiazepines**	250 ng/ml
Barbiturates**	250 ng/ml
Methadone**	250 ng/ml

*U.S. Department of Health and Human Services Mandatory Guidelines for Testing Levels.
**Cutoff levels for these drugs are not included in the HHS guidelines because they may be legally prescribed. The cutoff levels cited are those recommended by the scientific community.
Sources: Federal Register 59(11):29922.
American Probation and Parole Association. *Drug Testing Guidelines and Practices for Juvenile Probation and Parole Agencies.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 1992.

before the next random test time occurs. Because different drugs of abuse stay in the body for varying lengths of time, ranging from a few hours to several days (see table on following page), it is helpful to know the youth's drug(s) of choice to decide how often he or she should be tested. Many programs test youth initially and periodically during their time in the program for a broad range of illicit drugs, but most of the time they test only for those substances the youth has been known to use. Another factor to consider is the youth's progress in the program. Initially, testing may be performed much more often, with testing frequency being reduced for youth whose results are consistently negative. A response to the youth should always be made following testing, whether the results are positive or negative. A realistic appraisal of staff tasks also is important. Thus, caseloads and other responsibilities of staff must be considered when deciding how often to test.

Some agencies conduct testing at set times, while others advise youth that they are subject to testing at any time. Scheduling tests can help staff members organize their tasks and time efficiently. However, when juveniles know they will be tested at certain times, they may learn to schedule their substance abuse accordingly to avoid detection. Therefore, random testing is generally recommended.

Observed specimen collection

To avoid the possibility of specimens being adulterated or otherwise tampered with, urination should be observed by a staff member who is the same sex as the youth. There are two ways youth may attempt to taint a urine sample: by ingesting something before giving the sample or by adding something to the specimen after it leaves the body. Examples of substances youth might try to ingest before a drug test include large quantities of water, acidic liquids (such as lime or lemon juice or vinegar), diuretics, pectin, and oriental tea. Water, bleach, toilet bowl cleaner, and soap are examples of substances youth might try to add to a specimen during or after urination. Most of these substances will

Approximate Duration of Detectability of Selected Drugs*	
Drug	**Duration of Drug Detectability**
Alcohol	Very short**
Amphetamine	2–4 days
Methamphetamine	2–4 days
Barbiturates	
• Most types	2–4 days
• Phenobarbital	Up to 30 days
Benzodiazepines	Up to 30 days
Cocaine metabolites	12–72 hours
Methadone	2–4 days
Opiates (heroin, codeine, morphine)	2–4 days
Cannabinoids (marijuana)	
• Casual use	2-7 days
• Chronic use	Up to 30 days
Phencyclidine (PCP)	
• Casual use	2-7 days
• Chronic use	Up to 30 days

*These provide only general guidelines. Many variables should be considered in interpreting duration of detectability. These include drug metabolism and half-life, the youth's physical condition, the youth's fluid balance and state of hydration, and the route and frequency of ingestion.
**The period of detection depends on the amount consumed. Approximately 1 ounce of alcohol is excreted per hour.

Source: Division of Workplace Programs, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services.

not affect the accuracy of most drug tests unless the amount of drug remaining in the youth's system is already very close to the cutoff level. Test manufacturers also have taken steps to design tests that detect adulterants or ensure specimens are brought to the proper pH level before they are analyzed. Another ploy some youth might use if not supervised is to substitute a specimen they have taken earlier or one from another individual. A substitution should be easily detectable by the temperature of the sample; some collection cups now have temperature strips to ensure the sample is consistent with body temperature. Youth also might make a sample useless by punching a hole in the collection cup. Because of all these possibilities, it is recommended that collection of specimens be observed to rule out any potential for adulteration, switching of samples, or tampering with collection cups.

Chain of custody

There must be a record of the whereabouts and persons handling the urine specimen and test results at all times. This includes documentation of the specimen collection; handling, storage, transportation, and testing; and dissemination of results. All drug-testing specimens, supplies, and equipment should be kept in a locked storage area.

Onsite testing or contracting for services

There are both instruments and field kits that can be used by agency personnel to conduct initial immunoassay tests. If used according to manufacturer's directions, these provide accurate qualitative results. However, it is also possible to contract with a laboratory to analyze the specimens collected from youth. Volume of testing, staff time, training level for processing tests, the time required to obtain results, and the availability of laboratories will be factors to consider in selecting either onsite or laboratory services. Some programs use a combination of onsite and laboratory testing. For example, they may conduct initial tests onsite and, if necessary, send positive tests to a laboratory for confirmation. Using commercial laboratories, health departments, and forensics laboratories might be explored.

Safety measures

One aspect of safety includes procedures for handling and testing urine specimens. There are no known cases of transmission of HIV through laboratory contact with urine. However, it is wise for personnel to take standard precautions when handling urine to protect themselves from any potential disease transmission. Safety procedures should include wearing rubber gloves, lab coats, and goggles.

Safety measures also should be employed to protect the specimens. Therefore, rules should include no smoking, eating, or drinking in the area where specimens are stored or handled. No food should be in the same refrigerator with specimens.

Safety concerns also should be related to the youth in the program. Staff should be trained to identify the possible withdrawal symptoms or side effects of chemical use that might endanger a youth's health and safety. Some substances may lead to erratic behavior that could endanger the youth or others. Staff should know how to intervene appropriately if these are noticed. If youth have injected drugs, it may be important for them to receive counseling and testing for HIV/AIDS and other blood-borne infections.

Finally, safety also refers to the development of guidelines for staff and youth when revealing positive results to juveniles. When working with potentially violent youth, staff should be trained to use designated procedures in case of an emergency.

Quality assurance and quality control

Steps should be taken by agency personnel or laboratories to document the accuracy and reliability of the testing program regularly. Without such measures, the program may be subject to legal liability issues.

Report of results

Onsite noninstrument tests will yield virtually instant results. However, onsite instrument and laboratory testing procedures will take longer. For youth, timely responses to their behavior are important. The type of agency and the way results will be used also will affect how soon results may be needed. For detention programs, results may be needed before the youth goes to court. Thus, the ACA/IBH project recommends "[s]pecimen collection should take place during the intake process, and testing should occur before the pre-hearing or within 48 hours of detention" (American Correctional Association/Institute for Behavior and Health, 1995, p. 4). Initial information also is needed for case planning. The American Probation and Parole Association Guidelines state the turnaround time for receiving a report of results "should be 72 hours or less from the time the specimen reaches the laboratory until the results are received by agency personnel" (APPA, 1992, p. 49).

Confirmation

A positive result may be confirmed in three ways: a statement of admission by the youth, a second test using the same methodology, or a

second test using a different methodology. For legal proceedings, especially if a youth's freedom may be limited, a second test using a different methodology may be necessary. Confirmation by GC/MS is required in some jurisdictions because it is the most accurate test. If results are going to be used for treatment planning or for internal program procedures, the other methods of confirmation may be acceptable.

Responding to results

Unless a response follows every test administered, youth may receive an unintended message that drug testing is simply procedural and does not have much impact. Chemical testing, assessments, and drug recognition techniques are tools available to juvenile justice agencies and practitioners to identify and monitor substance abuse among youth. The most critical element of any program is how the results are used to intervene with the youth.

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Substance Abuse and Mental Health Services Administration
First Printed 1998
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Screening and Assessing Adolescents For Substance Use Disorders

Treatment Improvement Protocol (TIP) Series

31

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Substance Abuse and Mental Health Services Administration

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Disclaimer

The opinions expressed herein are the views of the consensus panel members and do not necessarily reflect the official position of SAMHSA or HHS. No official support of or endorsement by SAMHSA or HHS for these opinions or for the instruments or resources described are intended or should be inferred. The guidelines presented should not be considered substitutes for individualized client care and treatment decisions.

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Urine Drug Testing

Recommendation #10 from the CDC *Guideline for Prescribing Opioids for Chronic Pain* states, "When prescribing opioids for chronic pain, clinicians should use urine drug testing before starting opioid therapy and consider urine drug testing at least annually to assess for prescribed medications as well as other controlled prescription drugs and illicit drugs."

When to conduct urine drug testing:

All patients on long-term opioid therapy should have periodic urine drug tests (UDT). Medical experts agree that an annual UDT for all patients should be standard practice[1]. Subsequent UDTs should be determined on an individual patient basis, at the discretion of the clinician. Before ordering a UDT, have a plan for responding to unexpected results.

tips WHAT TO DISCUSS WITH PATIENTS BEFORE ORDERING AND CONDUCTING A URINE TEST:

Establish provider/patient trust

Requiring a UDT does not imply a lack of trust on the part of the provider; it is part of a standardized set of safety measures offered to all patients taking opioids.

Discuss the purpose of UDTs

What drugs the test will cover, and the expected results (e.g., presence of prescribed medication and absence of other drugs, including illicit drugs, not reported by the patient).

Go over the potential cost

If the UDT is not covered by insurance.

Review dosage

Review the time and dose of the opioids most recently consumed by the patient.

Discuss any prescribed or unprescribed drugs

Discuss any other prescribed or unprescribed drugs the patient has taken; unprescribed drugs may include marijuana or other illicit drugs.

Ask the patient what UDT results he/she expects

To aid in eliciting information on other drugs taken as well as to assess his/her understanding of test result interpretation.

Establish the expectation of random repeat testing

Establish the expectation of random repeat testing depending on treatment agreement and monitoring approach.

Review

Review actions that may be taken based on the results of the test.

[1] *Dowell D, Haegerich TM, Chou R. CDC Guideline for Prescribing Opioids for Chronic Pain — United States, 2016. MMWR 2016.*

If unexpected results occur when ordering a UDT, remember that the focus is to improve patient safety. Have a plan in place for communicating results and practice the difficult conversations you may have with your patients.

tips TALKING WITH PATIENTS ABOUT URINE DRUG TESTING RESULTS:

- Always keep the focus on the patient's well-being and safety.
- Do not jump to conclusions about unexpected results; have a candid conversation with the patient about possible explanations.
- Do not dismiss patients from care based on UDT results.
- Consider using the CDC mobile app to practice the types of conversations you may encounter with patients.

Actions to take post-urine drug testing:

- Discuss unexpected results with the local laboratory or toxicologist if assistance is needed with interpretation.
- Inform the patient of the test results.
- Take time to discuss unexpected results with the patient and refer to pre-UDT information the patient may have shared with you.
- Review the treatment agreement and focus conversations around patient safety.
- Determine if frequency and intensity of monitoring should be increased and keep the patient informed.

Types of urine drug tests:

There are two main types of UDTs— immunoassay drug testing conducted at a laboratory or at the point of care in a provider's office, and laboratory-based gas or liquid chromatography/mass spectrometry. See the chart below for a description of the main differences in these two types of tests.

IMMUNOASSAY	GAS CHROMATOGRAPHY, MASS SPECTROMETRY
Less expensive, fast, easy to use	More expensive, labor intensive
Most frequently used technique in all settings, including hospital labs	Requires advanced laboratory services.
Used commonly as screening test.	Used primarily to confirm positive immunoassay result.
Engineered antibodies bind to drug metabolites	Measures drugs and drug metabolites directly.
Qualitative testing– positive or negative	Quantitative testing
Screens for presence of drugs or a panel of drugs: amphetamine, marijuana, PCP, cocaine, natural opiates (morphine/ codeine/thebaine but without differentiation). Heroin is metabolized to morphine and can therefore be detected; a separate screening assay specific to heroin is also available.	Identifies specific drugs and their metabolites
Does not differentiate various natural opiates	Differentiates all opioids
Typically misses semisynthetic (e.g. hydrocodone and oxycodone) and synthetic opioids (e.g. fentanyl and tramadol). Assays specific for these drugs must be requested.	More accurate for semisynthetic and synthetic opioids–methadone, propoxyphene, fentanyl, meperidine, hydrocodone, oxycodone, hydromorphone, oxymorphone, buprenorphine, heroin
Often has high cut- off levels, giving false negative results	Very sensitive, detects low levels of drug, minimizes false negatives
Will show false positives: poppy seeds, quinolone antibiotics, over-the-counter medications	Very specific, less cross-reactivity, minimizes false positives

Source: Adapted from "Urine Drug Testing in the Management of Chronic Pain," at https://www.drugabuse.gov/sites/default/files/files/UrineDrugTesting.pdf

▶ **To learn more, visit: www.cdc.gov/drugoverdose/prescribing/qi-cc.html**

Bio for Paul Mungo- I've been the owner/operator of Drug Testing Solutions of Virginia since 2009. I specialize in forensic drug and alcohol testing for child custody & criminal cases. I created a 2 hour live CLE called "Court Related Drug and Alcohol Testing". This training was created because I've seen too many court related testing mistakes (wrong test chosen, misrepresentation of the test results etc.) repeated over and over and I knew I could help prevent those costly mistakes. Attorneys learn nothing about drug and alcohol testing while earning a Law Degree or studying to pass the Bar exam. Learning on the job, from others with no training, seems like a scary proposition to me. There simply hasn't been enough educational coordination between the testing labs, drug testers and the judicial system.

Additional Trainer Information:

- Certified DOT Drug Test Collector for 5 years- US DOT 49 CFR Part 40 Training Guidelines
- Hair Testing Certification from 3 Accredited National Labs
- Teaches Court Related Drug and Alcohol classes to the Virginia Beach Department of Human Services and Virginia Beach Child Protective Services personnel.
- Educates local judges and attorneys about forensic drug and alcohol testing.
- Has testified or provided litigation support as an expert witness for forensic drug & alcohol testing in the Virginia Beach, Chesapeake and Norfolk Court System for the prosecution and defense.

My direct number is 757-469-3921 and the best email is Paul@DTSofVA.com .

CLE website is www.DrugAndAlcoholCLE.com and the Drug Testing Solutions of Virginia site is www.DTSofVA.com which has links to their other sites: www.HairTestingofVirginia.com and www.PaternityTestingofVirginia.com and www.TestingTeensforDrugs.com .

Thank you,

Paul Mungo

Drug & Alcohol Testing Cheat Sheet

Head Hair

Adulteration: Moderate/Difficult

Detection: Drugs & Alcohol About 3 months

Collection: Usually No Notice Needed

Fingernail

Adulteration: Very Difficult

Detection: Drugs 3 to 6 mo. & Alcohol about 3 mo.

Collection: May Need Notice

Urine

Adulteration: Easy

Detection: Drugs- see below & Alcohol 2-3 days

Collection: May Require Notice

Whole Blood & Oral Fluid

Adulteration: Very Difficult

Detection: Drugs 1 to 3 Days & Alcohol- hours

Collection: No Notice Required

Blood Spot Alcohol testing detects moderate to heavy drinking for the past 3 weeks (5 drops from finger).

Detection times vary. *Toe Nail* and Body Hair testing detects drugs up to about 1 year. These should be used as a *last resort* because the quality of sample is not as consistent & less data is available.

It usually takes 15 to 30 minutes after a drug is used for it to be detectable in Saliva, one or two hours with urine and typically 7 to 14 days for Hair and Nails to be at maximal detectable levels.

Urine drug detection times vary from drug to drug. Drug levels can vary in the same individual depending on when the test is done. The first urination of the day will yield the highest concentrations of drug metabolites. Testing urine at other times of the day may yield differing results since the hydration of urine changes throughout the day. *Saliva testing* can be a good alternative depending on the situation.

The chart below shows drug detection times for urine based testing. *Positive instant drug test results should be confirmed with lab testing and use a Medical Review Officer before a result is considered final.*

DRUG CATEGORY	*DETECTION*	*DRUG CATEGORY*	*DETECTION*
Amphetamines (AMP)	2-5 Days	Opiates (OPI & MOR)	2-4 Days
Barbiturates (BAR)	4-14 Days	Oxycodone (OXY)	2-3 Days
Benzodiazepines (BZO)	2-7 Days	Phencyclidine (PCP)	3-8 Days
Cocaine (COC)	2-4 Days	Tricyclics (TCA)	2-8 Days
Marijuana (THC) **Casual use**	2-6 Days	Propoxyphene (PPX)	2-3 Days
Marijuana (THC) **Chronic use**	10-21+ Days	Buprenorphine (BUP)	2-5 Days
Methadone (MTD)	2-5 Days	Ecstasy (MDMA)	2-4 Days

Note: All of the above urine detection times are estimates. If you researched 10 different sources on your own, you would probably find 10 slightly different answers. I consider the above times to be "middle of the road" or "average". About 2 to 3 days for moderate use applies to most drug types.

Note: The information above represents a small taste of the type of information taught in the "*Court Related Drug and Alcohol Testing*" 2 hour live CLE we offer. More information, including a Course Outline, can be found at: www.DrugAndAlcoholCLE.com .

Compliments of ***Drug Testing Solutions of Virginia*** *(757) 469-392* *www.DTSofVA.com*

SEGMENT 3

1:15p-2:15p
HOT TOPICS in JDR
Criminal Law

Part 1-

School Threats: Discipline v. Delinquency and School Safety

Part 2- Juvenile Competency and Mental Health

SCHOOL THREATS

Paul J. Powers
Deputy Commonwealth's Attorney
385-1263

School Threats

- Every threat taken seriously
  - Investigated fully
  - SW's
    - Second graders example
  - Potential for charges

Possible Charges

- **Sec. 23-10. - Disturbing the Peace (City Code)**
  - It shall be unlawful and a Class 1 misdemeanor for any person to **disturb the peace of others by violent, tumultuous or obstreperous conduct or by threatening**, challenging to fight, assaulting, fighting or striking another.
  - Used for most oral threats to a person

- **18.2-60 Electronic Threats**
  - Written or electronic threats
  - School grounds under (A)(2) - felony
    - Includes actual grounds, events, and bus
  - (B) Oral threats to school employee - misdemeanor

Possible Charges

- **18.2-83 Threats to Burn or Bomb**
  - Threat to burn, bomb, or destroy any structure communicated to another by any means
  - Or False threats
  - Class 5 Felony unless D under 15 then M1

- **18.2-46.5 Acts of Terrorism**
  - Phillip Bay - Landstown H.S. case 2009
  - Commits or conspires, or aids and abets
  - Very serious - Class 2 Felony 20y-Life
  - Complicated Definitions
    - 18.2-46.4 Act of Terrorism - act of violence under 19.2-297.1 with intent to intimidate a civilian population

Common Defenses

- "Only a joke", No intent to actually do it
- No ability to carry it out

- *Summerlin v. Commonwealth*, 37 Va. App. 288, 297 (2002)

18.2-83 does not require the Commonwealth to prove the intent to actually carry out threat to bomb, but only that the Def intended to make and communicate the threat and that the threat was made and communicated

- *Holcomb v. Commonwealth*, 58 Va. App. 339 (2011)

Adopts Summerlin's legal analysis regarding communicating threats in a 18.2-60 written threat case

Possible Outcomes

- Deferred Findings
- Supervised Probation
- Frequent Court Reviews
- Psychological Evaluations and Treatment
- Research Papers
  - Internet Safety
- Transfer to Circuit Court

Virginia Beach City Public Schools

Response to Threats made by Students

Virginia Beach City Public Schools (VBCPS) takes all threats in or to students, staff or the educational environment seriously. Outside agencies such as the Police Department or the Fire Department may have separate investigations, responses and punishments than VBCPS. Students and families should be aware that there may be multiple investigations and processes happening and that they will have to address each process in a different matter.

I. What is a threat?

School Board Policy 5-36 defines what constitutes a threat

A communication or behavior may be determined by school administrators to be a threat if a reasonable person would believe that the communication or behavior could result in violence, fear, apprehension for safety, or substantial and material disruption to the educational and work environment. School administrators may consider, but are not limited to, the following factors in determining whether a communication constitutes a threat:

1. Nature of the communication or behavior- including timing and method;
2. Recent or past history of similar threats including national or international events;
3. Past educational, medical, psychological, and criminal history of student making communication;
4. Reaction of School Division personnel, students, students' families, and community members;
5. Media coverage;
6. Information provided by outside agencies concerning the maker of the threat and matters outside of the School Division's jurisdiction;
7. School Division resources required to investigate and/or respond to the threat;
8. other good and just cause.

Intent or ability to carry out the threat is not a determining factor. Criminal charges or a pending criminal investigation are not determining factors for disciplining a student for threats.

2. VBCPS's jurisdiction over threats

School Board Policy 5-36 defines when the School Division has jurisdiction over threats

Students may be disciplined for making or contributing to the making of threats against school personnel, students, volunteers or agents, school visitors, school vehicles, school communication

devices, school property or property where a school is sponsoring an activity when such threat is communicated under any of the following circumstances:

9. coming to and from school;
10. on School Board provided transportation;
11. on School Board property or at property used for School Board sponsored or approved activities;
12. through School Board communication devices or School Board provided communication access or networks;
13. outside of school hours or school days;
14. from personal communication devices and networks; and
15. off of school property.

3. Investigations and student's status pending investigation

Investigations of student discipline matters typically take 3-5 days to complete if the matter is timely reported and witnesses and evidence are readily available. However, the time period can be longer if the information provided is vague or the matter is being investigated by outside agencies and the School Division has limited access to the information. Investigations can be further complicated by weekends, school holidays and closings, and the time necessary to review recorded data.

In most cases of a serious threat or other serious disciplinary matter, the student will be placed on out of school suspension pending the results of the investigation. The out of school suspension during the investigation is not the final discipline but instead is a safety precaution to minimize further misconduct and to allow investigations to proceed with limited to no interference. During an out of school suspension, the student should be allowed to access school work through online resources and packages sent home through the School office. Students will not be allowed to return to the School or School activities- including extracurricular activities (sports, band, clubs, etc.) or social events (dances, football games, prom, etc.) while on out of school suspension. Under limited circumstances, arrangements may be made for students to take certain testing at the School or another facility.

If the student is recommended by a VBCPS Office of Student Leadership Student Discipline Hearing Officer to be placed in an alternative education setting (Renaissance Academy, homebased services, etc.) the student must attend the new alternative education setting or be subject to compulsory attendance (truancy) law and regulations. Once assigned to an alternative education setting, the student's home school will discontinue access to all classwork and assignments.

4. Student discipline procedures and appeals

Student discipline is an administrative law procedure. Therefore it follows both the Virginia Code section provisions concerning student discipline as well as the Virginia Department of Education administrative regulations and VBCPS policies and regulations. If the student is eligible for Special

Education or Section 504 services, there may be additional administrative procedures that must be followed.

A. VBCPS ranges of discipline.

VBCPS discipline options have a range from 1-8. Principals are provided with guidelines for each offense in the Code of Student Conduct and the appropriate range of discipline for the violation. Recommended ranges of discipline can be different based on the grade level of the student(s) involved. Discipline ranges are:

Level 1	Verbal warning/reprimand
Level 2	Conference with student/parent
Level 3	Intervention- referral, behavior contract
Level 4	In School Suspension 1- 4 days/CHOICES
Level 5	Out of School Suspension 1-5 days
Level 6	Out of School Suspension 6-10 days
Level 7	Long term suspension- out of school up to 365 days
Level 8	Expulsion- out of school permanently but can petition to reenter after 365 days- no automatic right to renter. Still subject to compulsory attendance

In addition to the disciplinary options, all VBCPS schools implement some form of positive behavior intervention systems as a whole school philosophy on student behavior and conduct. Counseling, evaluation and other educational accommodations are also implemented to address student conduct before discipline is imposed.

B. How are student and families informed of student conduct and behavior expectations?

Students and families are informed of student behavior expectations at the beginning of each school year when the Code of Student Conduct is sent home with each student. Parents/legal guardians of minor students or adult students must return a signed Parent Acknowledgement Form agreeing that they have reviewed the Code of Student Conduct with their students and agree to assist the School in enforcing student conduct expectations. Students participate in assemblies or in class presentations on student conduct and behavior at the beginning of each school year. The grade appropriate Parent/Student Handbook also covers these topics and the Code of Student Conduct is available on all student issued Chromebooks or through the VBschools.com websites.

C. Out of School discipline.

When a student is subject to discipline that may place the student out of school, the discipline will fall under one of three categories: 1) short term suspension defined as 1-9 school days; 2) long term suspension defined as 10-365 days out of school; 3) expulsion from the School Division. The General Assembly made significant changes to the student discipline laws (See Virginia Code §22.1-277.05) in 2018 that limited most out of school discipline to 45 school days but allowed for longer terms of suspension or for expulsion if exceptional conditions exist to warrant longer discipline.

VBCPS's Code of Student Conduct and supporting policies and regulations allow for the Superintendent or designee (Director of Office of Student Leadership) to reduce an expulsion recommendation to a long term suspension recommendation. VBCPS reduces most expulsion recommendations to long term suspension; however, certain offenses such as handguns, selling of illegal narcotics, serious bodily injury or death, and serious threats generally are not reduced to long term suspension. Threats made to students, staff or the educational environment will generally result in an expulsion recommendation.

D. Long term suspension hearings.

Long term suspension recommendations are first heard by a VBCPS Office of Student Leadership Student Discipline Hearing Officer. To comply with Virginia Code §22.1-277.05, long term suspension hearings before a hearing officer are scheduled for no more than ten (10) school days after the principal makes a discipline recommendation.

1) The Hearing Officer hearing. Student discipline hearing officers are seasoned school administrators who are trained to handle student discipline matters. Most hearing officers have served as assistant principals, principals, Office or Department heads or other senior school administrators. The hearings will take place at the Laskin Road Annex located at 1413 Laskin Road, Virginia Beach. Hearing officers are scheduled to hear 5- 7 hearings per day in roughly forty five minute segments. Due to the large number of hearings that must be conducted in a day, hearing officers will not make rulings during a hearing. They will make their decisions at the end of the hearing or within five working days after the hearing. During a typical school year, Hearing Officer's hear between 1,000-2,000 long term suspension cases. About 60-80 Hearing Officer decisions are appealed each year.

The hearings are administrative in nature so students and parents should not expect trial like procedures. All recommendations for long term suspension or expulsion require that a School Principal prepare an extensive student discipline package. These student discipline package are lengthy and generally are available for the student and family to pick up on the afternoon before or the morning of the hearing. The hearing office will have read the package before the hearing. Unlike a trial, the principal or designee will not bring witnesses to the hearing and students and families will not have the opportunity to cross examine the principal/designee or any witnesses.

The principal/designee will present the administrative statement and relevant information and then the student or family will be allowed to present evidence and argument. The hearing officer will expect the student to testify and will focus the most amount of attention on student and the student's academic achievement. The hearing officers take great interest in the student and determining whether the student understands how his/her conduct is impeding the student's or other students' opportunity to be educated. Great emphasis is placed on the student's recognition of the importance of education and planning for higher education or career training. This approach often takes students and families by surprise as they expect the hearing to be adversarial in nature.

Once the Hearing Officer's decision has been prepared, the decision will be emailed or mailed to the student and family. The student or family will have five (5) calendar days from the date of receipt to file an appeal of the Hearing Officer's decision with the Office of Student Leadership.

The Office of Student Leadership will then schedule the appeal for a School Board Student Discipline Committee hearing.

2) School Board Student Discipline Committee hearings. The School Board has three Student Discipline Committees. The School Board Discipline Committees are authorized by Virginia Code §22.1-277.05 to act on behalf of the entire School Board. Each Discipline Committee has two set starting at 3 pm. The other Discipline Committee holds morning hearings starting at 8:30 am. All Discipline Committee Hearings are held at the School Administration Building located at 2512 George Mason Drive, Municipal Center, Building 6, Virginia Beach, Virginia. If required, a Discipline Committee hearing can be held at the Juvenile Detention Center or by electronic means if the student is placed at the Juvenile Detention Center for an extended period of time. Generally, three to four student discipline hearings are scheduled for one Discipline Committee hearing day. Hearings average 30-60 minutes.

Discipline Committee hearings are more formal than Hearing Officer hearings and are conducted in School Board Chambers. Three School Board Members and a nonvoting School Counselor will make up the Discipline Committee. Discipline Committee hearings do constitute official School Board meetings subject to the Virginia Freedom of Information Act meeting requirements. Because student discipline information is confidential in nature, the student will be identified by a unique student number and the hearing will be conducted in closed session. When the Discipline Committee completes all hearings scheduled for the day, it will deliberate in closed session but will render a decision in open session.

The School Board Student Discipline Committees are the only entities that can hear an expulsion recommendation. Long term suspension recommendations are first sent to an Office of Student Leadership Student Discipline Hearing Officer for a hearing and discipline determination. Students may appeal the Hearing Officer's determination to a School Board Student Discipline Committee. Decision of the School Board Discipline Committee are final if the Discipline Committee's decision is unanimous. If the decision is not unanimous, the student may appeal the Discipline Committee's decision to the entire School Board for a hearing. Unanimous decisions of the Discipline Committee or a decision of the School Board and final decision and can only be appealed to a Circuit Court in accordance with Virginia Code §22.1-87.

E. Effect of criminal charges on student discipline procedures

To comply with statutory and case law requirements, student discipline procedures move very quickly. As determined by the United States Supreme Court in *Goss v. Lopez*, students have a property interest in public school services after being removed from school for ten days. Once a student has been out of school for ten school days, the due process procedures kick in and students must have certain due process rights in place. Therefore, student discipline procedures cannot be stayed pending the resolution of criminal charges which can take many months to resolve. VBCPS strives to have all long term suspensions and expulsion hearings conducted by the tenth day that a student is placed out of school. Scheduled hearings will proceed whether the student of family are present or not.

The School Board recognizes that students with pending criminal charges may be instructed by attorneys or family members not to make comments regarding the student discipline matter. Under those circumstances, the student will not be required to testify about the facts but may be asked to explain issues such as academic progress, future goals and evaluation status. All School Board Student Discipline Hearings are audio recorded and the recording remains as part of the student's academic record. The audio recording will not be released to the public but it can be subpoenaed.

Students and families should also be aware that the Virginia Court System is required to inform the Superintendent when a student has been charged with certain offenses set forth in Virginia Code §16.1-305.1 school divisions are allowed to make educational decisions regarding students based on this information and are not required to wait until a final decision is made regarding the criminal charges. This falls under Rule 30 of the VBCPS Code of Student Conduct and students will be scheduled for hearing on whether to place the student in an alternative educational placement based on these charges or subsequent convictions or dismissals.

F. Special Education/Section 504 considerations

Students determined eligible for special education services (IDEA) or Section 504 of the Rehabilitation Act accommodations at the time of the conduct that led to the student discipline, will go through a Manifestation Determination Review (MDR) hearing by their IEP or Section 504 Team. An MDR hearing seeks to determine if the student's conduct and the school division's failure to deliver services constituted to the basis for the disciplinary action. If the student's action is determined to be a manifestation of his/her disability, then the IEP or Section 504 will find "cause" and the student cannot be disciplined more than ten days out of school for the incident. The IEP or Section 504 Team should then reevaluate the student and determine if more services or accommodations are necessary for the student.

If the Student's Team determines that the student's conduct was not a manifestation of the student's disability, then no "cause" is found and the student can be disciplined the same as all other students. The student's team should still determine whether the student requires any additional evaluations or services to address new issues. But the student discipline process can continue.

The MDR must be completed before the student can proceed to the Hearing Officer hearing or the School Board. Therefore, schools must move quickly to schedule the MDR so that, if no cause is found, the student has a hearing before a Hearing Officer within ten days of the discipline being recommended.

Students who have IEPs or Section 504 plans will continue to receive agreed upon services while in their new disciplinary educational settings.

G. Alternative educational placement options

VBCPS provides many educational options for students. A student who is suspended or expelled from public school is not entitled to receive educational services. However, VBCPS provides multiple levels of alternative disciplinary options to allow suspended to continue to progress in their academic studies.

Many parents and students request a "second chance" when being suspended or expelled. Parents and students should be aware that having an expulsion recommendation reduced to a long term suspension or being suspended but allowed to receive educational services through The Renaissance Academy, SECEP TRAEP (Tidewater Regional Alternative Education Program), home based, home bound or online courses, is the School Board's offer of a second chance.

The alternative educational placement options for students who are suspended include:

1) The Renaissance Academy middle or high school program
2) The Renaissance Academy 4x4 program
3) Home based services for 2-5 hours per week
4) Home bound services for students with medical issues
5) SECEP TRAEP
6) Certain online course offerings

Students eligible for special education services may be placed by their IEP team in private alternative educational placements.

H. Educational services for services for students incarcerated or placed in alternative educational settings.

Students of school age who are placed at the Virginia Beach Juvenile Detention Center (JDC) or the Virginia Beach Correctional Center (VBCC) will be provided with educational services by VBCPS unless the student has been expelled by VBCPS. VBCPS contracts with the JDC to provide educational services to all school age inmates at the both JDC and VBCC. A principal and staff are on site at the JDC to provide educational services. VBCPS's Adult Learning Center offers high school level programs for inmates of the VBCC. VBCPS students placed in these facilities will generally have their home school course materials available within twenty four hours. Students from outside of the City may have their educational services delayed until such time as their home school division provides VBCPS with their course schedule and curriculum. Students and families should note that specialized courses or courses which require a student to be onsite at their home school may not be able to be duplicated at JDC or VBCC. Students will be provided with access to courses toward a standard diploma to the extent reasonably available to the VBCPS JDC or VBCC programs. Students assigned to these institutions may lose credits or the opportunity to progress in certain curriculum or courses due to their incarceration. Special Education and Section 504 services and accommodations can be provided at the JDC or VBCC.

VIRGINIA BEACH CITY PUBLIC SCHOOLS

SCHOOL BOARD POLICIES AND REGULATIONS
RELATED TO
STUDENT DISCIPLINE FOR THREATENING BEHAVIOR

Materials current as of 8/27/19

Policies and Regulations are subject to amendment by the School Board each month. Updates to Policies and Regulations can be found on the School Board website at VBschools.com under the Our Leadership/School Board Tab

Extent of School Authority 5-1

STUDENTS

Extent of School Authority

A. Generally

The School Board is authorized to make reasonable rules for the governance of the schools and to regulate the conduct of students.

B. School Board and Parental/Guardian Responsibility

The School Board will be responsible for maintaining good order and discipline of students while traveling to and from or attending school or school sponsored events. The Superintendent is authorized to take appropriate action against students who are not in compliance with compulsory attendance laws and regulations. The School Board may exercise jurisdiction over students for activities that happen off of school property, outside of school hours or days, and/or through online or social media when such activity disrupts or has the potential to disrupt the educational environment and the operation of school services.

1. The following guidelines shall apply:

    a. Students shall be under the jurisdiction of the rules and regulations governing school activities while:

    1) in transit to and from school as a pedestrian;

1. 2) in transit to, from, or at the bus stop

2. 3) while riding on a school bus, in a School Division vehicle, or a vehicle being used for school activities;

3. 4) while using School Division equipment, computers, School Division provided online resources or networks;

4. 5) while outside of school hours or school days if school administrators determine that the student's conduct causes or has the potential to cause substantial and material disruption to the educational environment or the operation of the school or School Division;

5. 6) when a student is the subject of investigation, arrest, petition for review, probation and sentencing for criminal conduct unrelated to school matters;

6. 7) when public attention or scrutiny of the student causes or has the potential to cause substantial and material disruption to the educational environment; and

7. 8) when school authorities determine that there are unique circumstances that justify the need to take action against the student.

Legal Reference

Code of Virginia § 22.1-78, as amended. Bylaws and regulations.

1960-1961 Opinions of the Attorney General 274.

Adopted by School Board: October 21, 1969
Amended by School Board: August 21, 1990
Amended by School Board: July 16, 1991
Amended by School Board: July 13, 1993 (Effective August 14, 1993)
Amended by School Board: May 22, 2018
Amended by School Board: October 23, 2018

Student Rights and Responsibilities 5-2

School Board of the City of Virginia Beach
Policy 5-2

STUDENTS

Student Rights and Responsibilities

A. Students' Right to an Education

1. The Commonwealth of Virginia, as provided for in Article VIII of the Constitution of Virginia, has established and must maintain a public school system. Except as specifically provided for in relevant chapters of the Code of Virginia, all residents of the division, between the ages of five and twenty are entitled to attend the public schools without charge.

2. All students, irrespective of color, religion, national origin, sex, sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, age, marital status, disability, genetic information or veteran status are entitled to the same courses of education and use of facilities in the schools.

B. General Responsibility of Students When Asserting a Right to an Education

1. Along with the right to equality of educational opportunity, students have two responsibilities:

   a. To apply themselves to the best of their ability to gain maximum benefit from the educational opportunities guaranteed to citizens, and

   b. To act in such a way as not to interfere with the rights of others to the same opportunity.

2. Reasonable and necessary order in the educational institution itself is essential to the fostering and maintaining of educational opportunity. Students may forfeit their right to educational opportunities when their conduct is such that it substantially disrupts the educational process and deprives others of their rights.

Adopted by School Board: June 15, 1993 (Effective August 14, 1993)
Amended by School Board: May 28, 2019

Student Conduct 5-34

STUDENTS

Student Conduct

A. Generally

The School Division is committed to providing an educational environment that is safe, conducive to teaching and learning, and free from unnecessary disruption. All students will benefit from an educational experience that fosters their social and emotional development. Accordingly, the School Division will develop a plan to systematically integrate developmentally appropriate social-emotional learning strategies into the curriculum to promote the development of interpersonal skills, responsible decision making and resilience.

It is the policy of the School Board that the discipline and control of students shall be the responsibility of the teachers, staff, and principals of the respective schools. The supervision and control of students should be maintained during the entire period of time that they are in school, during school or school sponsored activities, on the school grounds before and after school, and on the way to and from school, including school bus stops, and while on school buses. Students may be disciplined for conduct outside of the educational environment when such conduct substantially and materially disrupts or has the potential to disrupt the educational or work environment.

B. Code of Student Conduct

To ensure an optimum learning environment the Superintendent, or designee, will develop a Code of Student Conduct that is consistent with School Board Policies and Regulations that serves as a guideline for parents, families, students, and staff. The Code of Student Conduct will outline major categories of behavior and list disciplinary actions that may occur as a result of student misconduct. Regulations for passengers riding school buses will be included in the Code of Student Conduct. Each student will receive a copy of the Code of Student Conduct during the first week of the school year. Each student and a parent or legal guardian shall date and sign an acknowledgement of receipt of the Code of Student Conduct.

C. Discipline Guidelines

The Superintendent, or designee, will develop Discipline Guidelines to be used by teachers and administrators in enforcing the Code of Student Conduct. The Discipline Guidelines will be based on limits established by Federal and/or State laws and regulations and consistent with School Board policies, and school division regulations related to student discipline. The Discipline Guidelines will provide school administrators with a comprehensive description of discipline offenses, clear definitions of the criteria for discipline offense categories, specific levels of disciplinary action based on objective criteria, and a range of disciplinary actions for specific offenses.

The levels of disciplinary action will provide teachers and administrators with a range of options that will provide consistency across the School Division in dealing with individual students who exhibit inappropriate behavior. The guidelines will be progressive in nature; that is, the level of disciplinary action increases as the number of similar incidents increases.

Principals may deviate from the established levels of disciplinary action only if there is appropriate justification. The reasons justifying the action must be specified in writing to the Director, Office of Student Leadership.

D. Conduct on School Buses, School Vehicles or Vehicles used for School Purposes

Students are under the authority of the bus driver while on the school bus or other school vehicle. Students are under the authority of the school staff member or assigned adults when travelling on other vehicles used for school purposes The driver is to control student conduct and report behavior problems to the principal or designee. The principal or designee shall be responsible for all disciplinary action.

Failure on the part of any student to follow the rules and regulations dealing with school bus/vehicle operation may result in termination of privilege to ride the school bus/vehicle in addition to other appropriate disciplinary measures.

Editor's Note

See Also: School Board Policy 5-35 Discipline and Corporal/Academic/Group Punishment/Detention.
School Board Policy 5-36 Conduct Invoking Punitive Action.
School Board Policy 5-37 Reporting Data About School Violence and Crime.

Legal Reference

Code of Virginia § 22.1-253.13:7, as amended. Standard 7. School board policies.

Code of Virginia § 22.1-78, as amended. Bylaws and regulations.

Code of Virginia §22.1-79.4, as amended. Threat assessment teams and oversight committees.

Virginia Board of Education Regulations, Establishing Standards for Accrediting Schools in Virginia, 8VAC 20-131-210 B, as amended.

Related Links

School Board Policy 5-35
School Board Policy 5-36
School Board Policy 5-37

Adopted by School Board: October 21, 1969
Amended by School Board: February 16, 1971
Amended by School Board: August 21, 1990
Amended by School Board: July 16, 1991
Amended by School Board: June 15, 1993 (Effective August 14, 1993)
Amended by School Board: May 19, 1998
Amended by School Board: July 17, 2001
Amended by School Board: August 5, 2003
Amended by School Board: April 4, 2006
Amended by School Board: August 20, 2013
Amended by School Board: November 27, 2018

Conduct Invoking Punitive Action 5-36

STUDENTS

Conduct Invoking Punitive Action

A. Generally

Regulations governing punitive actions for student conduct must be approved by the School Board prior to implementation.

Students may be suspended or expelled from attendance at school for sufficient cause. Punitive actions resulting in Out-of-School Suspension shall be governed by the procedures set forth in Regulation 5-6.1, Policy 5-21 and Regulation 5-21.1 and Regulation 5-21.3. The assignment of a student to In-School Suspension shall be governed by the procedures set forth in Regulation 5-21.2.

B. Due Process

With the requirements of fair and equitable treatment of all students and within the guidelines of applicable caselaw, and federal and state law and regulation, the following shall constitute the minimum due process procedures to be followed in the detention, suspension and expulsion of students.

1. The student, and parent(s)/legal guardian(s) of minor students shall be given written notice of the charges.

2. If the student denies them, the student will be provided with an explanation of the facts as known to school personnel and an opportunity to present his/her version of what occurred.

3. The student and parent(s)/legal guardian(s) of minor students shall be informed of the conditions of the disciplinary action.

4. In the case of a suspension of more than ten (10) school days or in the case of an expulsion, the hearing officer, the discipline committee members, or the School Board members should not be persons with the direct involvement in the incident or the recommended discipline, and should not have a personal or professional relationship with the student, the student's family, or the student's attorney. The hearing officer, discipline committee members, or the School Board members reserve the right to recuse themselves from a student disciplinary hearing for these reasons or other good and just cause.

   If the student and parent(s)/legal guardian(s) of a minor student fail to appear, the hearing may be held in their absence and a decision may be rendered based upon the evidence that is presented.

5. The adult student or the parent/guardian of a minor student may appeal the decision as provided in School Board Policy 5-21 or 5-6 and the associated regulations, as appropriate.

Legal Reference

Code of Virginia § 22.1-78, as amended. Bylaws and regulations.

Code of Virginia § 22.1-277.04, as amended. Short-term suspension; procedures; readmission.

Related Links

School Board **5-6**
School Board **Regulation 5-6.1**
School Board **Policy 5-21**
School Board **Regulation 5-21.1**
School Board **Regulation 5-21.2**
School Board **Regulation 5-21.3**

Adopted by School Board: August 21, 1990
Amended by School Board: July 16, 1991
Amended by School Board: June 15, 1993 (Effective August 14, 1993)
Amended by School Board: August 2, 2000
Amended by School Board: August 21, 2001
Amended by School Board: April 4, 2006
Amended by School Board: November 27, 2018

Code of Student Conduct/Expulsion for First Time Offenses 5-36.1

School Board of the City of Virginia Beach
Regulation 5-36.1

STUDENTS

Code of Student Conduct/Expulsion for First Time Offenses

A. A Code of Student Conduct shall be distributed to all students at the beginning of each school year.

B. Each Code of Student Conduct shall have regulatory status and set forth the discipline practices of the school division, as well as the responsibilities of students and parents/guardians in the provision of safe school environments.

C. Students may be disciplined as set forth in the appropriate Code of Student Conduct, the Discipline Guidelines and the regulations provided herein for any disturbance to the learning environment. However, any student committing any of the following offenses while on school property, during extra-curricular activities, or at school sponsored or related activities, or while coming to or from school, shall, except for a first time simple drug possession offense as provided in Division Regulation 5-45.1 (I)(A), be automatically recommended by the principal to the Superintendent for expulsion of at least one calendar year and, when appropriate, referred for criminal prosecution.

1. Arson or attempted arson;
2. Assault and Battery of an employee or student;
3. Possession, use or sale of a firearm, pneumatic weapon, or dangerous weapon;
4. Use, possession, being under the influence of, selling, bringing, giving, distributing or passing to another individual or possessing with intent to sell, give, or distribute alcohol, marijuana, controlled substances or imitation controlled substances;
5. Extortion, attempted extortion, robbery, and/or larceny, burglary, motor theft;
6. Sex offenses, obscene phone calls, sexual assault, sexual battery, and inappropriate sexual behavior;
7. Hazing; Initiation of another student through abuse and humiliation so as to cause bodily injury;
8. Kidnapping or other serious criminal violations.
9. Possession, use, distribution, sale, lighting or discharge of explosive devices, except poppers;
10. Homicide;
11. And other good and just cause as determined by the Superintendent.

D. The School Board shall expel for at least one (1) year (365 days) any student who is determined to have possessed a firearm on school property, including a school bus, at extra-curricular activities or any school-sponsored or related activity, or coming to and from school. The School Board may, on a case-by-case basis, determine that other disciplinary action is appropriate.

E. The School Board may suspend or expel any student for whom the Superintendent has received a report pursuant to Virginia Code § 16.1-305.1, as amended, of an adjudication of delinquency or a conviction.

F. The School Board may require any student who has been: (1) charged with an offense relating to the Commonwealth's laws, or with a violation of School Board policies on weapons, alcohol or drugs or intentional injury to another person; (2) found guilty or not innocent of an offense relating to the laws on weapons, alcohol, or drugs, or of a crime which resulted in or could have resulted in injury to others, or of a crime for which the disposition ordered by a court is required to be disclosed to the Superintendent pursuant to Virginia Code § 16.1-260, 16.1-305.1; (3) found to have committed a serious offense or repeated offenses in violation of school board policies; (4) suspended pursuant to Virginia Code § 22.1-277.05; or (5) expelled pursuant to Virginia Code § 22.1-277.06 or § 22.1-277.07, or § 22.1-277.08, or subsection B of § 22.1-277, to attend an alternative education program, including, but not limited to, night school, adult education or any other educational program designed to offer instruction to students for whom the regular program of instruction may be inappropriate. The School Board may require such student to attend such programs regardless of where the crime occurred. As used in this regulation, "charged" means that a petition or warrant has been filed or is pending against a pupil.

G. The School Board may require any student who has been found, in accordance with procedures set forth in this regulation to have been in possession of, or under the influence of, drugs or alcohol on a school bus, on school property, or during extra-curricular activities or at a school sponsored activity, or coming from or going to school in violation of School Board policies, to undergo evaluation for drug or alcohol abuse, or both, and if recommended by the evaluator and with the consent of the student's parent, to participate in a treatment program.

Editor's Note

For Substance Abuse Intervention Program see Division Regulation 5-45.1.
For disciplinary hearing procedures see School Board Policy 5-21.
For Weapons/Explosives/Fireworks see Division Regulation 5-36.4.
Code of Student Conduct Disciplinary Guidelines

Legal Reference

Code of Va., § 22.1-277.04, as amended, *et seq*. Short-term and long-term suspension, and expulsion of pupils; generally.

Related Links

School Division **Regulation 5-45.1**
School Board **Policy 5-21**
School Division **Regulation 5-36.4**

Approved by Superintendent: July 16, 1991
Revised by Superintendent: August 18, 1992
Revised by Superintendent: September 21, 1993 (Effective August 14, 1993)
Revised by Superintendent: October 17, 1995
Adopted by School Board: December 15, 1998
Amended by School Board: August 21, 2001
Amended by School Board: April 4, 2006
Amended by School Board: August 22, 2006

False Fire Alarms/Bomb Threats/911 Calls/ Hoaxes-Imitation Infectious Biological, Toxic, or Radioactive Substances 5-36.2

STUDENTS

False Fire Alarms/Bomb Threats/911 Calls/ Hoaxes-Imitation Infectious Biological, Toxic, or Radioactive Substances

A. False Fire Alarms/Bomb Threats/911 Calls

Activating a fire alarm without cause, making a false 911 emergency call, making a bomb threat, including false threats, against School Division personnel or School Board property, or encouraging, inciting, enticing, or soliciting any person to commit such a threat is unlawful and forbidden. Students guilty of this offense will be disciplined in accordance with the Code of Student Conduct

B. Hoaxes - Imitation Infectious Biological, Toxic, or Radioactive Substance

Students are forbidden from: threatening injury to the person or property of another by the use of an imitation infectious biological, toxic, or radioactive substance; use of an imitation infectious biological, toxic or radioactive substance in such a manner as to place any person in reasonable apprehension of death or bodily harm, or with the intent to disrupt or interfere with the operations of any school, school bus or school-sponsored extra-curricular event or activity; to possess, manufacture, sell, give or distribute an imitation infectious biological, toxic or radioactive substance with the intent to place a person in reasonable apprehension of death or bodily harm; or to knowingly release or place, or cause or procure to be released or placed in, on or around any school, school bus, school event or school activity any imitation infectious biological, toxic, or radioactive substance with the intent to place any person in reasonable apprehension of death or bodily harm. Students violating this rule shall be disciplined in accordance with the Code of Student Conduct and the Discipline Guidelines and reported to Police.

Definitions

1. "Imitation infectious biological substance" means a substance, in any form whatsoever, which is not an infectious biological substance and which:

    a. by overall appearance, including color, shape, size, marking, packing or by representations made, would cause a reasonable likelihood that such substance in any form whatsoever would be mistaken for an infectious biological substance; or

    b. by express or implied representation purports to act like an infectious biological substance.

2. "Infectious biological substance" means any bacteria, virus, fungi, protozoa, or rickettsia capable of causing death or serious injury.

3. "Imitation toxic substance" means a substance, in any form whatsoever, which is not a toxic substance and which:

a. by overall appearance, including color, shape, size, marking, packaging or by representations made, would cause a reasonable likelihood that such substance in any form whatsoever would be mistaken for a toxic substance; or

b. by expressed or implied representation purports to act like a toxic substance.

4. "Toxic substance" means any substance, including any raw materials, intermediate products, catalysts, final products, or by-products of any manufacturing operation conducted in a commercial establishment, that has the capacity, through its physical, chemical or biological properties, to pose a substantial risk of death or impairment either immediately or over time, to the normal functions of humans, aquatic organisms, or any other animal.

5. "Imitation radioactive substance" means a substance, in any form whatsoever, which is not a radioactive substance and which:

   a. by overall appearance, including color, shape, size, marking, packaging or by representations made, would cause a reasonable likelihood that such substance in any form whatsoever would be mistaken for a radioactive substance.

   b. by expressed or implied representation purports to act like a radioactive substance.

6. "Radioactive substance" means any substance that emits ionizing radiation spontaneously.

C. Discipline and threat assessment

The Superintendent or designee is authorized to develop regulations and procedures to discipline students for violations of this Policy and, as appropriate, refer students for a threat assessment. Students may be disciplined for violations of this Policy up to long term suspension or expulsion. Appropriate limitations may be placed on the student's ability to access School Board transportation, property, communication devices and networks, and to use personal devices and communication systems at school or school sponsored events. The student may be reassigned to another school, home based or homebound placement, online educational services or private placement if the Superintendent or designee determines that the student's return to the school setting would or could constitute a safety issue or would cause substantial disruption to the educational or work environment. At the principal's or equivalent administrator's determination that the conduct that constituted a violation of this Policy has caused the student to no longer have the privilege of participating in special opportunities, a student may be removed from sports or extracurricular teams or clubs, specialized programs, academies and/or may be denied the opportunity to represent the school in other manners.

Legal References

Code of Virginia § 18.2-60, as amended. Threats of death or bodily injury to a person or member of his family; threats to commit serious bodily harm to persons on school property; penalty.

Code of Virginia § 18.2-83, as amended. Threats to bomb or damage buildings or means of transportation; false information as to danger to such buildings, etc.; punishment; venue.

Code of Virginia § 18.2-84, as amended. Causing, inciting, etc., commission of act proscribed by § 18.2-83.

City of Virginia Beach Ordinance #2674 adopted November 6, 2001 adding City Code Section 23.8.2 prohibiting certain uses of imitation infectious biological, toxic, or radioactive substances.

Approved by Superintendent: July 16, 1991
Adopted by School Board: August 2, 2000
Amended by School Board: March 5, 2002
Amended by School Board: October 7, 2003
Amended by School Board: April 4, 2006
Revised by Superintendent: August 16, 2013
Amended by School Board: October 23, 2018

Hazing/Assault and Battery or Fighting/Profane, Obscene or Abusive Language or Conduct/Bullying 5-36.3

School Board of the City of Virginia Beach
Regulation 5-36.3

STUDENTS

Hazing/Assault and Battery or Fighting/Profane, Obscene or Abusive Language or Conduct/Bullying

A. Hazing

Students who haze or otherwise mistreat another student so as to cause bodily injury shall immediately be suspended from school under the provisions set forth in Policy 5-21 and Regulations 5-21.1 and 5-21.3.

B. Assault and Battery or Fighting

Assault and battery or fighting is prohibited. Violators may also be subject to prosecution as provided by state law.

Any student grabbing, striking, hitting, kicking, or otherwise physically abusing a teacher or any other school personnel shall immediately be disciplined in accordance with the Code of Student Conduct and the Discipline Guidelines and recommended for appropriate disciplinary action, up to and including expulsion. Criminal action may be taken against such student.

C. Profane or Abusive Language or Conduct

Students who use language, a gesture, or engage in conduct that is vulgar, profane, obscene, or abusive, or which substantially and materially disrupts the educational or work environment shall automatically receive a discipline referral to the principal or assistant principal for appropriate disciplinary action including suspension and/or a recommendation for long-term suspension or expulsion.

D. Bullying

Bullying is defined as: any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma. "Bullying" includes cyber bullying. Bullying does not include ordinary teasing, horseplay, argument, or peer conflict. Bullying may include, but is not limited to, verbal or written threats, or physical harm. Bullying will not be tolerated and students shall be referred to the principal or assistant principal for appropriate disciplinary action which may include suspension and/or recommendation for long-term suspension or expulsion. Within five school days of receiving a complaint of alleged bullying, parents/legal guardians of minor students or the adult student alleged to be involved with the complaint, will be notified of the status of any investigation regarding the complaint.

Legal Reference

Code of Virginia §18.2-56, as amended. Hazing unlawful; civil and criminal liability; duty of school, etc., officials.

Code of Virginia §18.2-57, as amended. Assault and battery.

Code of Virginia §22.1-276.01, as amended. Definitions.

Code of Virginia §22.1-279.8, as amended. School safety audits and school crisis and emergency management plans required.

Code of Virginia §22.1-279.6, as amended. Board of Education guidelines and model policies for codes of student conduct; school board regulations.

Code of Virginia §22.1-291.4, as amended. Bullying prohibited.

Related Links

School Board **Policy 5-21**
School Board **Regulation 5-21.1**
School Board **Regulation 5-21.3**

Approved by Superintendent: September 21, 1993 (Effective August 14, 1993)
Adopted by School Board: May 19, 1998
Amended by School Board: August 2, 2000
Amended by School Board: April 4, 2006
Amended by Superintendent: September 5, 2017
Amended by School Board: May 14, 2018
Amended by School Board: November 27, 2018

Threats

STUDENTS

Threats

A. Threats

Students may be disciplined for making or contributing to the making of threats against school personnel, students, volunteers or agents, school visitors, school vehicles, school communication devices, school property or property where a school is sponsoring an activity when such threat is communicated under any of the following circumstances:

1. coming to and from school;
2. on School Board provided transportation;
3. on School Board property or at property used for School Board sponsored or approved activities;
4. through School Board communication devices or School Board provided communication access or networks;
5. outside of school hours or school days;
6. from personal communication devices and networks; and
7. off of school property.

B. What constitutes a threat

A communication or behavior may be determined by school administrators to be a threat if a reasonable person would believe that the communication or behavior could result in violence, fear, apprehension for safety, or substantial and material disruption to the educational and work environment. School administrators may consider, but are not limited to, the following factors in determining whether a communication constitutes a threat:

1. Nature of the communication or behavior- including timing and method;
2. Recent or past history of similar threats including national or international events;
3. Past educational, medical, psychological, and criminal history of student making communication;
4. Reaction of School Division personnel, students, students' families, and community members;
5. Media coverage;

6. Information provided by outside agencies concerning the maker of the threat and matters outside of the School Division's jurisdiction;

7. School Division resources required to investigate and/or respond to the threat;

8. other good and just cause.

Intent or ability to carry out the threat is not a determining factor. Criminal charges or a pending criminal investigation are not determining factors for disciplining a student for threats.

C. Discipline and threat assessment

The Superintendent or designee is authorized to develop regulations and procedures to discipline students for violations of this Policy and, as appropriate, refer students for a threat assessment. Students may be disciplined for violations of this Policy up to long term suspension or expulsion. Appropriate limitations may be placed on the student's ability to access School Board transportation, property, communication devices and networks, and to use personal devices and communication systems at school or school sponsored events. The student may be reassigned to another school, home based or homebound placement, online educational services or private placement if the Superintendent or designee determines that the student's return to the school setting would or could constitute a safety issue or would cause substantial disruption to the educational or work environment. At the principal's or equivalent administrator's determination that the conduct that constituted a violation of this Policy has caused the student to no longer have the privilege of participating in special opportunities, a student may be removed from sports or extracurricular teams or clubs, specialized programs, academies and/or may be denied the opportunity to represent the school in other manners.

Legal References

Code of Virginia § 18.2-60, as amended. Threats of death or bodily injury to a person or member of his family; threats to commit serious bodily harm to persons on school property; penalty.

Code of Virginia § 18.2-83, as amended. Threats to bomb or damage buildings or means of transportation; false information as to danger to such buildings, etc.; punishment; venue.

Code of Virginia § 18.2-84, as amended. Causing, inciting, etc., commission of act proscribed by § 18.2-83.

Adopted by School Board: October 23, 2018

Threat Assessment Procedure 5-43.1

School Board of the City of Virginia Beach
Regulation 5-43.1

STUDENTS

Threat Assessment Procedure

When a threat is reported, the principal or assistant principal or designee, as the leader of the school-based threat assessment team (i.e., principal or assistant principal, school resource officer, school psychologist, school counselor) should follow this procedure to assess the seriousness of the student's threat based on "Guidelines for Responding to Student Threats of Violence" by Dewey Cornell and Peter Sheras (2006, Sopris West Educational Services)

A. Evaluate the threat

The principal or designee investigates a reported threat by interviewing the student who made the threat and any witnesses to the threat and writing down the exact contents of the threat and statements made by each party. The principal or designee should consider the circumstances in which the threat was made and the student's intentions.

B. Decide whether the threat is transient or substantive

Transient threats are defined as statements that do not express a lasting intent to harm someone and the student has no substantive intention of carrying out the threat. *Substantive* threats are defined as statements that express a continuing intent to harm someone that extends beyond the immediate incident or argument when the threat was made. Also consider the student's age, credibility, and previous discipline history.

C. Respond to the transient threat

Typical responses may include a reprimand, parent notification, or another disciplinary action based on the Code of Student Conduct and Discipline Guidelines. The student may be required to make amends, apologize, or provide an explanation that makes it clear that the threat is over. Transient threats, by definition, do not require protective action because there is no sustained intent to carry out the threat. If the threat is substantive or the meaning of the threat is not clear, continue to the next step.

D. Decide whether the substantive threat is serious or very serious

A *serious* threat involves a threat to assault someone. A *very serious* threat involves the use of a weapon or is a threat to kill, rape, or inflict severe injury on someone.

E. Respond to a serious substantive threat.

Take immediate precautions to protect potential victims, including notifying the intended victim and the victim's parents/legal guardians. Typical immediate protective actions may include: cautioning the student who made the threat about the consequences of carrying it out; providing direct supervision so that the student cannot carry out the threat while at school. Notify the student's parents/legal guardians to assume responsibility for supervising the student after he or she is returned to parental control. Consider involving the school resource officer or other law enforcement. Refer the student for counseling, dispute mediation, or another appropriate

intervention. A mental health assessment by the school psychologist or other mental health professional may be considered (refer to 6 of this subsection for a brief description). The student making the threat will be disciplined in accordance with the Code of Student Conduct and the Discipline Guidelines.

F. **Respond to a very serious substantive threat (conduct a safety evaluation)**

The full threat assessment team should be involved in a very serious substantive threat. The term "very serious substantive threat" is reserved for only the most serious and dangerous threat situations. The team's investigation of the threat is termed a "safety evaluation" that should identify and carry out any actions necessary to reduce the risk of violence and to gather information relevant to whether the student can return to school. Take immediate precautions to protect potential victims, including notifying the victim and the victim's parents. Notify the student's parents/legal guardians. Consult with the school resource officer or other law enforcement. A mental health assessment should be conducted by the school psychologist or other mental health professional to assess the student's present mental state and determine whether there are urgent mental health needs that require immediate attention or if there are other treatment, referral, or support needs. Another purpose of the mental health assessment is to gather information on the student's motives and intentions in making the threat, to understand why the threat was made and to identify relevant strategies and interventions that have the potential to reduce the risk of violence. Permission from the parent/legal guardian is not needed to begin this assessment because of the immediate need to determine the safety of the student or others, but the parent/legal guardian should be notified promptly. Permission from the parent/legal guardian should be obtained if further assessment is needed. The student should also be disciplined as appropriate according to the **Code of Student Conduct** and the Discipline Guidelines.

Legal Reference:

Code of Virginia § 22.1-79.4, as amended. Threat assessment teams and oversight committees.

Code of Virginia § 54-1-2400.1, as amended. Mental health service providers; duty to protect third parties; immunity.

City of Virginia Beach Ordinance #2674 adopted November 6, 2001 adding City Code Section 23.8.2 prohibiting certain uses of imitation infectious biological, toxic, or radioactive substances.

Adopted by School Board: October 23, 2018

Sexual Harassment, sexual violence, and inappropriate sexual conduct prohibited - students 5-44

STUDENTS

Sexual Harassment, sexual violence, and inappropriate sexual conduct prohibited - students

A. Policy

The School Board does not condone or tolerate any form of sexual harassment, sexual violence, inappropriate sexual conduct or retaliation for reporting such conduct. Each employees, including non-employee volunteers who work subject to the control of school authorities (hereinafter collectively referred to as employees) and students shall promote an atmosphere of mutual respect among students and staff that provides an environment free from discrimination of any kind including sexual harassment, sexual violence and inappropriate sexual conduct.

B. Responsibility for compliance with policy

1. Sexual harassment, sexual violence and inappropriate sexual conduct are serious offenses. As a consequence, complaints of such conduct will be thoroughly investigated, and any employee, student, School Division agent, volunteer or invitee who engages in such conduct or encourages such behavior by others shall be subject to corrective action. Depending on the circumstances involved, such disciplinary action may include: discipline action as set for in the Code of Student Conduct including suspension or expulsion from school; disciplinary action up to and including termination; ban from School Board property, busses, communication systems and school sponsored events; referral for criminal prosecution; and other actions deemed appropriate to address the specific circumstances. Reprisals against students or employees who file complaints of such conduct shall be prohibited; however, such protection will not condone unrestricted engagement in unfounded or vindictive accusations of others. To the extent permitted by law, the School Board will protect the legitimate interest of all parties concerned in a dispute involving allegations of sexual harassment, sexual violence, and inappropriate sexual conduct. All inquiries will be treated as confidentially as possible.

2. School Division administrative and supervisory employees have a duty to report and investigate allegations of sexual harassment, sexual violence and inappropriate sexual conduct and take immediate and appropriate corrective action. Administrative and supervisory employees who allow sexual harassment, sexual violence and inappropriate sexual conduct to continue or fail to take appropriate corrective action shall be considered a party to the act of behavior, even though they may not behave in such a manner. Such personnel shall also be subject to corrective action. Depending on the circumstances, such corrective action measures may include demotion from a supervisory position and/or dismissal from School Division service.

3. Each principal, assistant principal, teacher and other employee or agents of the School Division has an affirmative duty to maintain a school environment free of sexual harassment.

C. The Superintendent is authorized to develop appropriate regulations and procedures for the reporting, investigating and resolving of complaints of sexual harassment. The Superintendent is authorized to develop appropriate training and notifications regarding the School Board's commitment to providing an environment free of sexual harassment.

Legal Reference

Title IX of the Education Amendments of 1972, as amended.

United States Department of Education Dear Colleague Letter Title IX requirements pertaining to sexual harassment, April 4, 2011, as amended.

United States Department of Education Office for Civil Rights Revise Sexual Harassment Guidance 2001, as amended.

Virginia Board of Education Guidelines for Prevention of Sexual Misconduct and Abuse in Virginia Public Schools, approved March 24, 2011, as amended.

Adopted by School Board: July 16, 1991
Amended by School Board: August 18, 1992
Amended by School Board: June 15, 1993 (Effective August 14, 1993)
Amended by School Board: August 18, 2015

Questioning of Students: Non-Law Enforcement or Child Abuse/Neglect Purposes 5-64.2

STUDENTS

Questioning of Students: Non-Law Enforcement or Child Abuse/Neglect Purposes

A. Generally

Any school visitors from outside agencies are considered invitees to School Board property and are expected to adhere to the requirements of School Board Policy 7-17 and School Board Regulation 7-17.1. School visitors from outside agencies who are acting in a capacity to investigate a law enforcement, health, safety or child abuse/neglect matter shall act in accordance with School Board Regulation 5-64.1. All other investigations or interviews of students by school visitors from outside agencies shall be governed by this Regulation.

The School Board authorizes the Superintendent to take all necessary actions regarding the safety, order and preservation of the educational environment on School Board property or at School Board sponsored activities. To protect students and faculty, to preserve instructional time, and to maintain the confidentiality of students and their records, outside visitors must report to the school office or security desk to sign in and present proper identification in order to receive permission to visit.

B. Probation/Parole or Court Service Unit (CSU)

In order to visit a student during school hours, the Probation/Parole Officer (PO) must schedule an appointment with the school. The appointment will only be scheduled for non-instructional time, i.e., the student's lunch hour or study block. The PO must show a proper photo identification indicating that he/she is employed by the Virginia Department of Probation/Parole, the City of Virginia Beach, Court Service Unit or the applicable City/County unit. The PO must provide documentation, in the form of an order from a court of competent jurisdiction or a letter on the applicable agency's official letterhead, which indicates that there is an open court case for the student and that the PO is authorized to access the student and education records. Upon arrival to the school, the PO must report to the Guidance Office in order to request to meet with the student. The PO will be permitted to meet the student within the school in a private place designated by the principal.

C. Guardian ad Litem (GAL)

In order to visit a student during school hours, the appointed Guardian ad Litem (GAL) must schedule an appointment with the school. The appointment will only be scheduled for non-instructional time, i.e., the student's lunch hour or study block. The GAL must show proper photo identification and his/her Virginia State Bar card. In order to visit a student during school hours, the GAL must provide a copy of the court order appointing him/her as GAL for the student. Upon arrival to the school, the GAL must report to the Guidance Office in order to request to meet with the student. The GAL will be permitted to meet the student within the school in a private place designated by the principal.

D. Private Agencies

In order to protect student's instructional time and to avoid disruption to the educational environment, private agencies are not permitted to conduct their business at school, which includes interviewing or observing students. The private agency should make alternative arrangements to observe or interview students outside of School Board property or grounds. If the parent, guardian or eligible student (eighteen years of age or older) has provided written permission for the release of the student to such private agency, then the school may release the student to such private agency.

This provision shall not apply to registered nurses providing services to students throughout the school day for legitimate health care purposes. Any request for a student to have a private registered nurse present in the school during instructional hours should be made in writing to the principal. The request shall be approved by the principal after consultation with the Coordinator for Student Health Services/School Nurses.

E. Access to Student Records

Requests for access to student records is governed by School Board Policy 5-31.

Related Links

School Board **Policy 5-31**
School Board **Regulation 5-64.1**
School Board **Policy 7-17**
School Board **Regulation 7-17.1**

Approved by Superintendent: May 23, 2014

Safe Schools

Virginia Beach City Public Schools is committed to providing a ***safe environment*** for students, staff and visitors. We work closely with national, state, and local safety officials – *police, fire, emergency medical services, and public health* – in order to ensure our schools are well prepared for an emergency. Together, we have developed a comprehensive *Emergency Response Plan* covering a wide variety of emergencies that serves as a guide to help staff and our public safety partners respond swiftly should a crisis occur in our schools.

The information included on this page provides an overview of the many safety measures Virginia Beach City Public Schools has implemented. Please report any safety concerns you may have to your school principal.

What security measures are provided in our schools both during the day and after hours?
We strive to be proactive rather than reactive where safety and security are concerned. The following safety measures are in place for the safety of every student.

- Each school has a *Crisis Response Team* with selected members that have participated in training to ensure appropriate response on a variety of potential school emergencies.
- All exterior school doors are either locked or under surveillance.
- Interior and exterior Closed Circuit Television (CCTV) is installed in all schools.
- As a condition of entry, visitors must sign-in and wear a visitors I.D. badge.
- All principals and key administrators have cell phones with text messaging capability.
- Each school has a minimum supply of 15 two-way radios to assist in emergency communications.
- Intrusion alarms are installed in every school.
- After-hours security staff monitor all schools.
- The school division's parent notification system *AlertNow* will be used to call and email parents during an emergency situation in order to provide the most current information about the emergency situation.
- Each school has an *Emergency Response Plan* that serves as a guide for a variety of school emergencies.
- Students are constantly reminded to share any information with their School Resource Officers (SRO) or school staff that could be potentially harmful to a school.
- *Code of Student Conduct* and supporting School Board policies and regulations.

How can parents be assured that our schools remain safe?
One of the top priorities in the school division is to create a learning environment free from disruption. Testimony to this, are the security measures we have. This is also echoed in the *Code of Student Conduct* and supporting School Board policies and regulations.

The Office of Safety and Loss Control is continually reviewing and updating security measures to include new technologies and procedures in order to provide the safest environment possible for our students and staff. We consult with national, state and local safety officials to gain knowledge of best practices on the subject of school safety and learn lessons from other school divisions.

Most importantly, parents should know that safe school audits are conducted on a routine basis in every school. The audit process provides a comprehensive overview of Virginia Beach City Public Schools' overall security and emergency preparedness. The information gathered from the audit is used to improve security and emergency preparedness throughout the school division.

Unfortunately, we live in a day and time when guarantees are no longer feasible. What we can guarantee is this: **An absolute commitment to staying continually vigilant and aware and to working with law enforcement on an ongoing basis because, as has already been proved, effective communication is the key to proactive success.**

What is the role of a School Resource Officer (SRO)?
School Resource Officers (SRO) are uniformed Virginia Beach police offices assigned to schools to help create a safe and positive learning environment by building and maintaining successful working relationships between

police, school administrators, students, parents, and staff. All middle and high schools have a SRO on-site; however, they are also available to respond to the feeder elementary schools when needed.

What is the procedure if a student or community member reports a suspected threat or reports seeing a weapon on school property?
All threats are taken seriously by school administration. Police are notified, and officers and school personnel work together to thoroughly investigate any threat, whether it is made verbally, in writing, via email, text message, online or social media. Most importantly, if a student, parent or community member has knowledge of a threat, we encourage them to immediately report it to police or school officials instead of spreading rumors. The sooner we know about a potential threat – the sooner the investigation can begin.

Is school safety training ongoing for staff?
Yes, new security assistants are required to receive state mandated certification training and Mandt System crisis de-escalation training. Security assistants must complete Mandt System recertification training, and Basic First Aid, CPR and AED training every 2 years.

Each summer OSSRM coordinates training for administrators choosing topics based on challenges faced during the previous school year.

Prior to the start of the 2010-2011 school year, threat assessment training was conducted by the U.S. Department of Education's Office of Safe and Drug-Free Schools and U.S. Secret Service. Administrators, guidance counselors, school psychologists, school social workers and SROs attended the training. This training focused on the prevention of school violence and provided:

- Strategies for educators, law enforcement officials, and others to identify, intervene, and prevent targeted acts of school violence.
- Information on the threat assessment process and how to identify students who are potentially dangerous and may pose a risk of targeted violence.

What kind of safe schools/emergency training have you provided school staff?
The Office of Safety and Loss Control offers training on an annual basis for principals, assistant principals, school security assistants, guidance counselors, social workers and psychological staff.

Do teachers know what signs to watch for with regards to suicide or potential violence?
Each school has a *Crisis Intervention Team Manual*, which provides several lists of warning signs for suicide or potential violence that students might display. Staff is encouraged to talk to these students, notify their parents about their concerns and refer them to the school counselor, to psychological services, or to outside mental health providers if necessary. Schools are encouraged to review these procedures and warning signs on a regular basis. Staff training is available on request to the Offices of Safe Schools and Psychological Services.

What disciplinary action does the school take if a student makes a threat – credible or otherwise?
First and foremost, anyone who makes a threat against a school could face criminal charges. A threat could be made verbally, in writing, via email, text message, online or social media. As appropriate to the situation he/she will be recommended for expulsion or other disciplinary action such as an alternative placement as outlined in the *Code of Student Conduct*.

How does the school division communicate with parents should there be a credible threat against a student or school?
Should there be a threat to cause harm against a student or school, the first call to action will be to investigate this threat in partnership with the local police. Depending on the specifics of the threat, an individual parent could be contacted. The school division also has access to a rapid notification system *AlertNow*. This communication system allows the principal or school administration to quickly send information out via phone and/or email. Letters are often sent home to parents and announcements can be posted on individual school websites or the division website *vbschools.com*.

With a large number of students using social networking sites such as *Facebook*, *Twitter*, or any other online source, does anyone from the school division monitor these outlets for threats that could potentially cause harm to a school, students or staff?
The school division is not in the position to monitor social media accounts for the more than 67,000 students in our schools. When we are made aware of a potential threat, school administration works in tandem with police to review the source and nature of the threat.

Often cases of student violence can be linked to reports of bullying against a fellow student. How is the school division approaching anti-bullying in its schools?
First of all, bullying is classified as prohibited conduct in any school or school activity. Students identified as being the source of bullying and or making threats against a student could be recommended for expulsion in accordance with the *Code of Student Conduct*. To discourage this type of behavior, the school division has implemented the following:

- A bullying prevention program is coordinated through the Office of Student Support Services.
- All schools in the division are required to have a character education program. In support of this, the subject of bullying is discussed with all students at the beginning of each school year, during a review of the *Code of Student Conduct*.
- As a point of interest, a division-wide character education program was originally implemented 13 years ago. Many of the schools still use this program and/or expanded on it philosophy of character education which discourages bullying.
- Many schools have implemented a positive behavioral support system as a school-wide initiative that emphasizes respect for others.
- Teachers are trained to reinforce character and leadership skills to decrease discipline referrals associated with bullying.
- Some schools have additional research-based strategies and programs in place to diminish bullying behaviors such as the *Olweus Bullying Prevention Program*, which is designed to improve peer relations and make schools safer, more positive places for students to learn and develop.
- Another program, *The Leader In Me*, is designed to be integrated into a school's core curriculum and everyday language so that it isn't "one more thing" teachers and administrators have to do. It becomes part of the culture, gaining momentum and producing improved results year after year.

What is the referral/examination process if a staff member has concerns about the emotional state or behavior of a student?
The process is to have the staff member make a verbal or written referral to a school administrator. The school administrator will then investigate the referral to determine the appropriate course of action. If deemed necessary, a threat assessment is conducted by a school psychologist.

What services does the school division offer for students who may have/or be suspected of having emotional problems or who may pose a danger/threat to others?
The school division does offer direct mental health services for students who may have emotional problems or who may pose a danger/threat to others when these issues affect the students' educational performance or relationships with others in school through our psychological services staff. The staff consists of licensed clinical and school psychologists who provide individual and group counseling to students and consultation to school staff and parents. They work with parents to discuss strategies that can be implemented during school hours or options to seek outside assistance when those issues have no educational impact or are beyond the limitations of school personnel.

As a parent or student how can we help keep our schools safe?
School safety is everyone's responsibility – staff, students, parents, and the entire community. Please report any safety concerns you may have to your school principal. Students and parents can be crime stoppers. If you have information about criminal activity in school, on school grounds, or in our community call: **1-888-562-5887.**

Students and parents can be crime stoppers. If you have information about criminal activity in school, on school grounds, or in our community call:
1-888-562-5887

Bullying

Virginia Beach City Public Schools is committed to providing an educational environment

free from harassment, intimidation or bullying.

What is bullying?
Bullying is any negative behavior intended to frighten or cause harm, which may include, but are not limited to verbal or written threats, or physical harm.

What is the difference between teasing vs. bullying?
Teasing allows the teaser and person to swap roles. It is not intended to hurt another person and is done in a light-hearted manner. Bullying is one-sided and is intended to harm another person. It involves cruel and demeaning or bigoted comments thinly disguised as a joke.

What is Virginia Beach City Public Schools' stand on bullying?
Bullying is classified as prohibited conduct and will not be tolerated in any school or school-sponsored activity, program, or event. *School Board Regulation 5-36.3.* Students who threaten to cause harm or harass others will be referred to the principal or assistant principal for appropriate disciplinary action which may include suspension and/or recommendation for long-term suspension or expulsion in accordance with the Code of Student Conduct..

What can students do about bullying?
Should a student be aware of any act of bullying committed by another student that takes place in school, on school property, at a bus stop, on a school bus, or at any school activity, he or she should immediately report this incident to a staff member. Should there be a threat to cause harm against any student, the first call to action will be to investigate this threat in partnership with the local police.

What are we doing to prevent bullying?

- A bullying prevention program is coordinated through the Office of Guidance Services and Student Records.
- All schools in the division are required to have a character education program. In support of this, the subject of bullying is discussed with all students at the beginning of each school year, during a review of the *Code of Student Conduct*.
- As a point of interest, a division-wide character education program was originally implemented in 1997. Many of the schools still use this program and/or expanded on it philosophy of character education which discourages bullying.

- Many schools have implemented a positive behavioral support system as a school-wide initiative that emphasizes respect for others.
- Teachers are trained to reinforce character and leadership skills to decrease discipline referrals associated with bullying.
- Some schools have additional research-based strategies and programs in place to diminish bullying behaviors such as the *Olweus Bullying Prevention Program* which is designed to improve peer relations and make schools safer, more positive places for students to learn and develop.
- Another program, *The Leader In Me*, is designed to be integrated into a school's core curriculum and everyday language so that it isn't "one more thing" teachers and administrators have to do. It becomes part of the culture, gaining momentum and producing improved results year after year.
- In all middle and high schools, staff members are positioned outside classroom doors while student change between classes.
- School psychologists, social workers, and school counselors routinely consult with teachers, parents and school administrators around issues of bullying and work with students identified as requiring behavioral intervention or counseling support.
- School psychologists conduct threat assessments to determine the type of social/emotional support that needs to be provided to the student who bullies another student in addition to a discipline consequence since the goal is to change the behavior of the bully.
- School social workers provide resources to support the parents of the victim and bully.
- During the January 2011 Parent Connection Workshop, a session was held on bullying prevention for the benefit of parents attending this special program.
- In January 2011 anti-bullying signs were posted on all school property.

Security of Buildings and Grounds: Cellular Phones and other Telecommunications Devices 3-65

School Board of the City of Virginia Beach
Policy 3-65

BUSINESS AND NONINSTRUCTIONAL OPERATIONS

Security of Buildings and Grounds: Cellular Phones and other Portable Telecommunications Devices

The use of portable communications devices, such as cellular telephones, or other hand-held computing devices (when such device is being used as a communications device), by any person on property (including vehicles) controlled by the School Board to engage in unlawful or unauthorized activity is prohibited.

All possession or use of portable communications devices such as cellular telephones, or other hand-held computing devices (when such device is being used as a communications device) shall be regulated and/or prohibited at each school or school event as deemed necessary to prevent disruption of the educational environment and to maintain order on school property and at school activities.

Elementary, middle and high school students may use portable communications devices before or after the instructional day as long as such communications devices are not activated or used inside School Board buildings unless use inside School Board buildings is specifically permitted by school administration.

Editor's Note
For additional information see Bring Your Own Device (BYOD), Student/Parent Guidelines for use of a Privately Owned Electronic Device.

Legal Reference

Code of Virginia § 22.1-279.6 (E), as amended. Board of Education Guidelines and Model Policies for Codes of Student Conduct; School Board Regulations

Related Links

Bring Your Own Device (BYOD) Information

Adopted by School Board: February 16, 1993
Amended by School Board: February 6, 2001
Amended by School Board: June 11, 2002
Amended by School Board: June 8, 2004
Amended by School Board: September 5, 2007
Amended by School Board: June 2, 2009
Amended by School Board: June 5, 2012
Amended by School Board: June 30, 2015

VIRGINIA BEACH CITY PUBLIC SCHOOLS
CHARTING THE COURSE

Threat Assessment Response Summary Sheet

RESPONSES TO TRANSIENT THREAT	RESPONSES TO SERIOUS THREAT	RESPONSES VERY SERIOUS THREAT
☐ Contact subject student's parents and/or guardians, if necessary ☐ Notify intended victim(s)'s parents and/or guardians, if necessary ☐ See that threat is resolved through explanation, apology, or making amends ☐ Consult with SRO, if necessary ☐ Refer subject student for conflict mediation or counseling to resolve problem, if appropriate ☐ Follow discipline procedures ☐ Develop behavior intervention plan and/or contract, as appropriate ☐ Designate a clinical case manager, as appropriate ☐ Maintain Threat Assessment Summary in the cumulative file, if completed	☐ Mobilize threat assessment team ☐ Notify subject student's parents and/or guardians ☐ Protect and notify intended victim(s) and parents and/or guardians of victim(s) ☐ Provide direct supervision of subject student until parents and/or guardians assume control ☐ Caution the subject student about the consequences of carrying out the threat ☐ Notify law enforcement and/or consult with SRO, as needed ☐ Follow discipline procedures ☐ Refer to Psychological Services for mental health assessment, as appropriate ☐ Designate a clinical case manager, as appropriate ☐ Maintain Threat Assessment Summary in the cumulative file	☐ Mobilize threat assessment team ☐ Notify subject student's parents and/or guardians ☐ Protect and notify intended victim(s) and parents and/or guardians of victim(s) ☐ Provide direct supervision of subject student until parents and/or guardians assume control ☐ Caution the subject student about the consequences of carrying out the threat ☐ Notify the Director of the Office of Student Leadership ☐ Notify law enforcement and consult with SRO ☐ Follow discipline procedures ☐ Refer to Psychological Services for mental health assessment, as appropriate ☐ Designate a clinical case manager, as appropriate ☐ If warranted by findings of mental health assessment, develop/monitor safety plan. ☐ Maintain Threat Assessment Summary in the cumulative file

Name of Student _____ Date _____

Print name of administrator: _____ Date:

Signature of administrator: _____
(Signature indicates agreement with identified level of threat and the above actions have been taken.)

Threat Assessment Team Members: (name and position)

_____ _____

_____ _____

_____

_____

_____

_____

_____

Commonwealth of Virginia
Virginia Department of Criminal Justice Services

THREAT ASSESSMENT TRIAGE AND ASSESSMENT FORM

PART I. THREAT REPORTED

Date Reported:		Time: _____ ❑ AM ❑ PM
Taken by:	School:	Position:

REPORTING PARTY:

Name:		❑Unknown	ID #:	
Affiliation:	❑Administrator ❑Teacher ❑Staff ❑Student ❑Parent/Guardian ❑Contractor ❑Other:_____ ❑ None/Unknown		Status:	❑Current ❑Former ❑Prospective Grade:_____(if student)
School:		Building/Program:		
Home Address:		Phone:		

INCIDENT:

Date Occurred:		Time: _____ ❑ AM ❑ PM
Location:	❑School Property [O In School Building O School Grounds] ❑School Bus ❑School Sponsored Activity ❑Other:	
Threat Type:	❑Assault [O Physical O Sexual) ❑Threat ❑Suspicious ❑Stalking ❑Suicidal/Self-Harm ❑Bomb threat ❑Unusual Communication ❑Vandalism ❑Disruptive ❑Harassment ❑Involuntary MH hold ❑Other:	
Mode:	❑In Person ❑Phone ❑Text ❑Email ❑Letter ❑Social Media ❑Internet ❑Other :	❑ Multiple Modes
Target(s) injured: ❑Yes ❑No ❑Unknown	Target(s) require medical attention? ❑Yes ❑No ❑Unknown	
Weapon involved: ❑Yes ❑No ❑Unknown	Type of Weapon: ❑Firearm [O Rifle/Shotgun O Pistol] ❑Edged ❑Bomb ❑Other:	

Details of the incident or threat. Where threats were communicated, quote where possible, use quotation marks to indicated direct quotes. Attach original communications if available.

PART II. PERSONS INVOLVED

SUBJECT (1) Engaging in threatening, aberrant or concerning behavior:

Name:		☐Unknown	**ID #:**	
Affiliation:	☐Administrator ☐Teacher ☐Staff ☐Student ☐Parent/Guardian ☐Contractor ☐Other:_____ ☐ None/Unknown		**Status:**	☐Current ☐Former ☐Prospective Grade:_____(if student)
School:				
Emergency Contact:			**Relationship:**	
Home Address:			**Phone:**	

SUBJECT (2) Engaging in threatening, aberrant or concerning behavior:

Name:		☐Unknown	**ID #:**	
Affiliation:	☐Administrator ☐Teacher ☐Staff ☐Student ☐Parent/Guardian ☐Contractor ☐Other:_____ ☐ None/Unknown		**Status:**	☐Current ☐Former ☐Prospective Grade:_____(if student)
School:				
Emergency Contact:			**Relationship:**	
Home Address:			**Phone:**	

Note: If more than two subjects of concern in this incident, attach additional copies of this page with subject's information.

TARGET (1):

Name:		☐Unknown	**ID #:**	
Affiliation:	☐Administrator ☐Teacher ☐Staff ☐Student ☐Parent/Guardian ☐Contractor ☐Other:_____ ☐ None/Unknown		**Status:**	☐Current ☐Former ☐Prospective Grade:_____(if student)
School:				
Emergency Contact:			**Relationship:**	
Home Address:			**Phone:**	

TARGET (2):

Name:		☐Unknown	**ID #:**	
Affiliation:	☐Administrator ☐Teacher ☐Staff ☐Student ☐Parent/Guardian ☐Contractor ☐Other:_____ ☐ None/Unknown		**Status:**	☐Current ☐Former ☐Prospective Grade:_____(if student)
School:				
Emergency Contact:			**Relationship:**	
Home Address:			**Phone:**	

WITNESS (1)

Name:		☐Unknown	**ID #:**	
Affiliation:	☐Administrator ☐Teacher ☐Staff ☐Student ☐Parent/Guardian ☐Contractor ☐Other:_____ ☐ None/Unknown		**Status:**	☐Current ☐Former ☐Prospective Grade:_____(if student)
School:				
Emergency Contact:			**Relationship:**	
Home Address:			**Phone:**	
Witness Interview				

WITNESS (2)

Name:		☐Unknown	**ID #:**	
Affiliation:	☐Administrator ☐Teacher ☐Staff ☐Student ☐Parent/Guardian ☐Contractor ☐Other:_____ ☐ None/Unknown		**Status:**	☐Current ☐Former ☐Prospective Grade:_____(if student)
School:				
Emergency Contact:			**Relationship:**	
Home Address:			**Phone:**	
Witness Interview				

PART III. RECORDS CHECKS (NS=Not Significant; NA=Not Applicable)

RECORDS CHECKS (ALL):	Subject	Target	Notes about Significant findings:
Affiliation	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Photo	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Threat Assessment Team history	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Criminal history (VA)	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Driver license information	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Vehicle / Parking information	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
SRO/SSO contacts	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Local Law Enforcement contacts	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Protective / No Contact Orders	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Concealed weapons permit	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Weapons purchase permit	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Social media	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Online Search	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Other:	☐Checked ☐NS/NA	☐Checked ☐NS/NA	

RECORDS CHECKs: School Staff

Disciplinary actions	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Grievances filed	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Application	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Other:	☐Checked ☐NS/NA	☐Checked ☐NS/NA	

RECORDS CHECKS: Students

Class schedule	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Academic standing / progress	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Transfer records	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Conduct / Disciplinary actions	☐Checked ☐NS/NA	☐Checked ☐NS/NA	
Other:	☐Checked ☐NS/NA	☐Checked ☐NS/NA	

Other Sources/Checks/Comments:

PART IV. KEY TRIAGE QUESTIONS SUMMARY SHEET

SUBJECT		Notes:
Identified grievances / motives for violence	❑Yes ❑No ❑Unknown	
Identification with other perpetrators, grievances, or violent acts	❑Yes ❑No ❑Unknown	
Communicated violent ideation or intent	❑Yes ❑No ❑Unknown	
Planning taken to support violence intent	❑Yes ❑No ❑Unknown	
Acquiring means, methods, opportunity or proximity toward violence	❑Yes ❑No ❑Unknown	
Prior violence / disruptive behaviors	❑Yes ❑No ❑Unknown	
Significant behavioral changes: e.g., paranoia, substance abuse, isolation	❑Yes ❑No ❑Unknown	
Despondency and/or suicidality	❑Yes ❑No ❑Unknown	
Diminished alternatives or ability to manage stressors	❑Yes ❑No ❑Unknown	
Recurrent pattern(s) of disruptive/concerning behavior(s)	❑Yes ❑No ❑Unknown	
Stalking / unwanted contact, communication or pursuit	❑Yes ❑No ❑Unknown	
Lack of inhibitors / stabilizers to prevent violence	❑Yes ❑No ❑Unknown	
Other:	❑Yes ❑No ❑Unknown	
TARGET / OTHERS		Notes
Identified targets (person/proxy, place, program, process, philosophy)	❑Yes ❑No ❑Unknown	
Fearful of harm	❑Yes ❑No ❑Unknown	
Responding as if subject poses a safety concern	❑Yes ❑No ❑Unknown	
Engaging in protective actions	❑Yes ❑No ❑Unknown	
Responding in a provocational or defensive manner	❑Yes ❑No ❑Unknown	
Low / inconsistent situational awareness	❑Yes ❑No ❑Unknown	
Other:	❑Yes ❑No ❑Unknown	
ENVIRONMENT		Notes
Organizational climate concerns: e.g., bullying, bias, poor conflict mgmt..	❑Yes ❑No ❑Unknown	
Chaotic or inconsistent structure	❑Yes ❑No ❑Unknown	
Lack of support, guidance or resources	❑Yes ❑No ❑Unknown	
High rates of violence, harassment, disruption, injury or harm	❑Yes ❑No ❑Unknown	
High perceived stress	❑Yes ❑No ❑Unknown	
Disproportionate rate/severity of concerns	❑Yes ❑No ❑Unknown	
Other:	❑Yes ❑No ❑Unknown	
PRECIPITATING EVENTS		Notes
Have occurred	❑Yes ❑No ❑Unknown	
Impending	❑Yes ❑No ❑Unknown	

TRIAGE COMPLETED BY:

Name	Position	Signature	Date
Name	Position	Signature	Date

PART V. KEY QUESTIONS FOR THREAT ASSESSMENT INQUIRY

1. What are the subject's motives, grievances, goals and intent in their behavior?

2. Have there been any communications suggesting ideas, intent, planning or preparation for violence?

3. Has the subject shown inappropriate interest in/identification with:	If yes, describe:
☐ Incidents or perpetrators of targeted/mass violence ☐ Grievances of perpetrators ☐ Weapons/tactics of perpetrators ☐ Notoriety or fame of perpetrators	
4. Does the subject have (or are they developing) the capacity and will to carry out an act of targeted violence? ☐ Expressed ideas to engage in violence ☐ Made plans for violence ☐ Preparing for violence (means, method, opportunity, access) ☐ Surveillance, stalking or rehearsal	If yes, describe:

5. Is the subject experiencing or expressing hopelessness, desperation, and/or despair?

6. Does the subject have a positive, trusting, sustained relationship with at least one responsible person?

7. Does the subject see violence as an acceptable, desirable – or the only – way to solve a problem?

8. Are the subject's conversation and "story" consistent with his or her actions?
9. Are other people concerned about the subject's potential for violence?
10. What circumstances might affect the likelihood of escalation to violence?
Other Relevant Information:

PART VI. PRELIMINARY DETERMINATION OF THREAT LEVEL

Check one:

☐ Very Serious threat ☐ Serious Threat threat ☐ Transient threat

Juvenile Competency and Mental Health

Va. Code Ann. 16.1-356 addresses Raising the Question of a Juvenile's Competency to Stand Trial

A. "If, at any time after the attorney for the juvenile has been retained or appointed pursuant to a delinquency proceeding and before the end of a trial, the court finds, sua sponte or upon hearing evidence or representations of counsel for the juvenile or the attorney for the Commonwealth, that there is probable cause to believe that the juvenile lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist, clinical psychologist, licensed professional counselor, licensed clinical social worker, or licensed marriage and family therapist, who is qualified by training and experience in the forensic evaluation of juveniles."

The Initial Request- a little guidance

- WHEN: The code indicates probable cause is the standard when requesting an evaluation
  - There is no clear cut means of determining this
  - Things to consider:
    - The juvenile's age
    - The juvenile's education level (i.e. are they in special education classes, are they at an age appropriate grade in school, does the child have an Individualized Education Plan "IEP")
    - The nature of the charges and their severity
    - Mental Health Treatment or Services – past and/or current
  - Guardians are a good resource for background, but the best resource is often the juvenile - Juveniles tend to be great oral historians when it comes to any past treatments or commitments
  - If you have any doubts or the slightest concern – have the juvenile evaluated. These are kids, after all.
- WHO: The Court has a list of providers
  - BUT not every trained and approved forensic provider is on that list
  - Where can you find a list of forensic evaluators?
    - The University of Virginia's Institute of Law, Psychiatry, and Public Policy "ILPP" Forensic Clinic is a great resource https://www.ilppp.virginia.edu/ExpertDirectory
    - Search by area – ILPP created a very clear table indicating each Evaluators qualifications
  - If you plan on requesting someone from the listserv who is not on the Court's list contact the evaluator first.
- WHERE: Inpatient v. Outpatient
  - All Competency Evaluations are on an outpatient basis, this includes detained juveniles re: Va. Code Ann. 16.1-356(B)
  - There are rare exceptions when the evaluation is done in an Inpatient Setting
    - After an outpatient evaluation is done and its results indicate hospitalization is needed for evaluation of competency OR

        - The juvenile is already in a psychiatric hospital
- THE COURT ORDER:
    - DC-522 ORDER FOR EVALUATION TO DETERMINE COMPETENCY TO STAND TRIAL – JUVENILE (see attached)
    - The Court will enter a DC-522 Form – attorneys are not required to provide a separate written order
    - Who is responsible for sending the designated evaluator Va. Code Ann. 16.1-356(C). (this is a problem that has been coming up often – both with the initial evaluation and, if needed, restoration services)
        - Commonwealth:
            - copy of warrant or petition,
            - names and addresses of the attorney for the Commonwealth, attorney for the juvenile, and the judge ordering the evaluation, and
            - information about the alleged offense
        - Attorney for the Juvenile
            - Psychiatric records and
            - Other information deemed relevant to the evaluation of competency
        - The Court is to provide the actual DC-522 Order to the designated evaluator
        - NOTE: It is always wise, as the juvenile's attorney, to send the necessary documents and paperwork yourself. You are not required by statute, but things fall through the cracks. At the very least, follow-up with the evaluator and confirm they have received all the necessary documents and paperwork.
- TIMELINE:
    - 96 hours after issuance of the court order- the evaluator is to receive all required documents
    - 14 days of receipt of the required documents- completion of the evaluation and report submitted to the court by the evaluator. Va. Code Ann. 16.1-356(E)
    - See Va. Code Ann. 16.1-356(E) for what the evaluator is required to include in the report submitted to the court.

After the Initial Evaluation

- An Evaluator generally makes 2 conclusions
    - The juvenile is competent to stand trial
    - The juvenile is not competent and requires restoration services
- Competent to stand Trial- the court will find the juvenile competent to stand trial and set a date for trial
- Juvenile found Incompetent stand trial Va. Code Ann 16.1-357
    - The court will order the juvenile be restored to competency in either a non-secure setting or a secure facility (this is usually the detention center or a secure treatment facility).
    - Juvenile is deemed to be restorable to competency
        - DC 523 ORDER FOR PROVISION OF RESTORATION SERVICES TO INCOMPETENT JUVENILE (see attached)
        - The court will order restoration services for up to 3 months

- The order is forwarded to the Commissioner of Behavioral Health and Developmental Services who arranges restoration services through the local agency

  Benjamin Skowysz, LCSW, CSOTP
  DBHDS Juvenile Justice Program Supervisor
  Cell 804-840-0280
  Fax 804-786-0197
  Email: Ben.Skowysz@dbhds.virginia.gov
- The court will review the juvenile's restoration within 3 months of the issuance of the order
- The juvenile will be re-evaluated for competency prior to the review date – this is arranged through DBHD

- If juvenile is deemed unrestorable
  - 16.1-358 outlines remedies
    - Commitment
      - If under 18 at time deemed unrestorable then must meet all the standards of 16.1-335 et. Seq.
      - If over 18 at time deemed unrestorable then must meet all the standards of 37.2-814 et. Seq.
    - Certified (NGRI like, but juveniles do not have an NGRI remedy)
      - 37.2-806
      - This is only to be used if the juvenile has a learning disability.
    - CHINS
      - 16.1-260(D)
      - The parties must have exhausted all other non-judicial remedies before tuning to this.
    - Release
  - Dismissal
    - There are time limits
    - Juveniles can only be committed for the statutory time limits.
      - Misdemeanor = 1 year from date of arrest (Four, three months at a time, attempts at restoration)
      - Felony = 3 years from date of arrest (Twelve, three months at a time, attempts at restoration)
      - There can be annual reviews as agreed by the parties
        - This is typically done with felonies.
      - Once the case has reached the statutory time limits upon motion the court will dismiss without prejudice.
        - If the Juvenile becomes competent the Commonwealth may bring charges back through traditional routes as long as that Statute of Limitations has not run
      - The Commonwealth can agree to, or a Judge can dismiss before the time periods upon a motion before the Court (usually from the defense attorney)

- Inpatient Evaluation of a Juvenile – I have only had this happen on two cases in the last three years.
    - A juvenile can be ordered to be evaluated for competency in an inpatient setting, but only after the initial outpatient evaluation concludes it is necessary to determine treatment. See Va. Code Ann. 16.1-275 Physical and mental examinations; nursing and medical care.
      "[…] Upon the written recommendation of the person examining the juvenile that an adequate evaluation of the juvenile's treatment needs can only be performed in an inpatient hospital setting, the court shall have the power to send any such juvenile to a state mental hospital for not more than 10 days for the purpose of obtaining a recommendation for the treatment of the juvenile."
        - The Court cannot order to send a juvenile to the state mental hospital without an initial evaluation and that evaluation must conclude that it is necessary to send the juvenile to an inpatient state mental hospital
        - The Court cannot order the juvenile to be held more than the statutory allowed 10 day period
    - **The Commonwealth has just ONE inpatient state mental hospital for juveniles:**

      Commonwealth Center for Children and Adolescents "CCCA"
      1335 Richmond Ave
      Staunton, VA 24401
      Phone: 540-332-2100
    - ORDER FOR PHYSICAL AND MENTAL EXAMINATIONS AND TREATMENT; NURSING AND MEDICAL CARE (See attached template- there is not a DC Form)
        - This will require a transportation order to send the juvenile to inpatient
        - A separate transportation order will need to be entered for the juvenile to return upon completion
        - Prior to entering the order and arranging transportation- confirm bed availability and that CCCA has all the documents they require

ARTICLE 18 OF THE VIRGINIA CODE

JUVENILE COMPETENCY

LexisNexis®

Va. Code Ann. § 16.1-356

Current through the 2019 Regular Session of the General Assembly.

VA - Code of Virginia (Annotated) > TITLE 16.1. COURTS NOT OF RECORD > CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS > ARTICLE 18. JUVENILE COMPETENCY

§ 16.1-356. Raising question of competency to stand trial; evaluation and determination of competency

A. If, at any time after the attorney for the juvenile has been retained or appointed pursuant to a delinquency proceeding and before the end of trial, the court finds, sua sponte or upon hearing evidence or representations of counsel for the juvenile or the attorney for the Commonwealth, that there is probable cause to believe that the juvenile lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist, clinical psychologist, licensed professional counselor, licensed clinical social worker, or licensed marriage and family therapist, who is qualified by training and experience in the forensic evaluation of juveniles.

The Commissioner of Behavioral Health and Developmental Services shall approve the training and qualifications for individuals authorized to conduct juvenile competency evaluations and provide restoration services to juveniles pursuant to this article. The Commissioner shall also provide all juvenile courts with a list of guidelines for the court to use in the determination of qualifying individuals as experts in matters relating to juvenile competency and restoration.

B. The evaluation shall be performed on an outpatient basis at a community services board or behavioral health authority, juvenile detention home or juvenile justice facility unless the court specifically finds that (i) the results of the outpatient competency evaluation indicate that hospitalization of the juvenile for evaluation of competency is necessary or (ii) the juvenile is currently hospitalized in a psychiatric hospital. If one of these findings is made, the court, under authority of this subsection, may order the juvenile sent to a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for the evaluation of juveniles against whom a delinquency petition has been filed.

C. The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or petition, (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the juvenile, and the judge ordering the evaluation; and (iii) information about the alleged offense. The court shall require the attorney for the juvenile to provide to the evaluator only the psychiatric records and other information that is deemed relevant to the evaluation of competency. The moving party shall provide the evaluator a summary of the reasons for the evaluation request. All information required by this subsection shall be provided to the evaluator within 96 hours of the issuance of the court order requiring the evaluation and when applicable, shall be submitted prior to admission to the facility providing the inpatient evaluation. If the 96-hour period expires on a

Saturday, Sunday or other legal holiday, the 96 hours shall be extended to the next day which is not a Saturday, Sunday or legal holiday.

D.If the juvenile is hospitalized under the provisions of subsection B, the juvenile shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the juvenile's competency, but not to exceed 10 days from the date of admission to the hospital. All evaluations shall be completed and the report filed with the court within 14 days of receipt by the evaluator of all information required under subsection C.

E.Upon completion of the evaluation, the evaluator shall promptly and in no event exceeding 14 days after receipt of all required information submit the report in writing to the court and the attorneys of record concerning (i) the juvenile's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for services in the event he is found incompetent, including a description of the suggested necessary services and least restrictive setting to assist the juvenile in restoration to competency. No statements of the juvenile relating to the alleged offense shall be included in the report.

F.After receiving the report described in subsection E, the court shall promptly determine whether the juvenile is competent to stand trial for adjudication or disposition. A hearing on the juvenile's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the juvenile or when required under *§ 16.1-357* B. If a hearing is held, the party alleging that the juvenile is incompetent shall bear the burden of proving by a preponderance of the evidence the juvenile's incompetency. The juvenile shall have the right to notice of the hearing and the right to personally participate in and introduce evidence at the hearing.

If the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be made based solely on any or all of the following: (i) the juvenile's age or developmental factors, (ii) the juvenile's claim to be unable to remember the time period surrounding the alleged offense, or (iii) the fact that the juvenile is under the influence of medication.

History

1999, cc. 958, *997*; *2000, c. 337*; *2005, c. 110*; *2009, cc. 813*, *840*.

Annotations

Notes

THE 2000 AMENDMENTS. --

The 2000 amendment by c. 337 inserted "licensed professional counselor" near the end of subsection A.

THE 2005 AMENDMENTS. --The 2005 amendment by c. 110, in the first paragraph of subsection A, deleted "or" following "counselor" and inserted "or licensed marriage and family therapist"; in subsection C, substituted "96 hours" for "ninety-six hours" in the fourth and fifth sentences and substituted "96-hour" for "ninety-six hour" in the fifth sentence; substituted "14 days" for "fourteen days" in subsections D and E; substituted "10 days" for "ten days" in the first sentence of subsection D; and made a minor punctuation change.

THE 2009 AMENDMENTS. --The 2009 amendments by cc. 813 and 840 are identical, and substituted "Behavioral Health and Developmental Services" for "Mental Health, Mental Retardation and Substance Abuse Services" in the second paragraph of subsection A and in subsection B.

Case Notes

LICENSED PROFESSIONAL COUNSELOR QUALIFIED TO TESTIFY AS TO POST-TRAUMATIC STRESS DISORDER. --Appellate court's judgment that affirmed defendant's convictions for sex offenses was affirmed; the trial court did not err, and the appellate court did not err in affirming, the decision that permitted the licensed professional counselor to testify about the alleged victim's post-traumatic stress disorder, as Virginia law authorized licensed professional counselors to diagnose that disorder and the record showed that the licensed professional counselor possessed the requisite skill, knowledge, and experience to testify about it. *Fitzgerald v. Commonwealth, 273 Va. 596, 643 S.E.2d 162, 2007 Va. LEXIS 63 (2007)*.

Research References & Practice Aids

LAW REVIEW. --

For a review of Virginia legal issues involving children, see *33 U. Rich. L. Rev. 1001 (1999)*. For 2000 survey of Virginia law regarding children, see *34 U. Rich. L. Rev. 939 (2000)*.

RESEARCH REFERENCES. --

Virginia Forms (Matthew Bender). No. 9-2029. Order for Evaluation to Determine Competency to Stand Trial--Juvenile.

End of Document

LexisNexis®

Va. Code Ann. § 16.1-357

Current through the 2019 Regular Session of the General Assembly.

VA - Code of Virginia (Annotated) > TITLE 16.1. COURTS NOT OF RECORD > CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS > ARTICLE 18. JUVENILE COMPETENCY

§ 16.1-357. Disposition when juvenile found incompetent

A. Upon finding pursuant to subsection F of § 16.1-356 that the juvenile is incompetent, the court shall order that the juvenile receive services to restore his competency in either a nonsecure community setting or a secure facility as defined in *§ 16.1-228*. A copy of the order shall be forwarded to the Commissioner of Behavioral Health and Developmental Services, who shall arrange for the provision of restoration services in a manner consistent with the order. Any report submitted pursuant to subsection E of § 16.1-356 shall be made available to the agent providing restoration.

B. If the court finds the juvenile incompetent but restorable to competency in the foreseeable future, it shall order restoration services for up to three months. At the end of three months from the date restoration is ordered under subsection A of this section, if the juvenile remains incompetent in the opinion of the agent providing restoration, the agent shall so notify the court and make recommendations concerning disposition of the juvenile. The court shall hold a hearing according to the procedures specified in subsection F of § 16.1-356 and, if it finds the juvenile unrestorably incompetent, shall order one of the dispositions pursuant to § 16.1-358. If the court finds the juvenile incompetent but restorable to competency, it may order continued restoration services for additional three-month periods, provided a hearing pursuant to subsection F of § 16.1-356 is held at the completion of each such period and the juvenile continues to be incompetent but restorable to competency in the foreseeable future.

C. If, at any time after the juvenile is ordered to undergo services under subsection A of this section, the agent providing restoration believes the juvenile's competency is restored, the agent shall immediately send a report to the court as prescribed in subsection E of § 16.1-356. The court shall make a ruling on the juvenile's competency according to the procedures specified in subsection F of § 16.1-356.

History

1999, cc. 958, 997; 2009, cc. 813, 840.

Annotations

Notes

THE 2009 AMENDMENTS. --

The 2009 amendments by cc. 813 and 840 are identical, and substituted "Behavioral Health and Developmental Services" for "Mental Health, Mental Retardation and Substance Abuse Services" in the second sentence of subsection A.

End of Document

LexisNexis

Va. Code Ann. § 16.1-358

Current through the 2019 Regular Session of the General Assembly.

VA - Code of Virginia (Annotated) > TITLE 16.1. COURTS NOT OF RECORD > CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS > ARTICLE 18. JUVENILE COMPETENCY

§ 16.1-358. Disposition of the unrestorably incompetent juvenile

If, at any time after the juvenile is ordered to undergo services pursuant to subsection A of § 16.1-357, the agent providing restoration concludes that the juvenile is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the agent's opinion, the juvenile should be (i) committed pursuant to Article 16 (§ 16.1-335 et seq.) of this chapter or, if the juvenile has reached the age of eighteen years at the time of the competency determination, pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, (ii) certified pursuant to § 37.2-806, (iii) provided other services by the court, or (iv) released. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection F of § 16.1-356. If the court finds that the juvenile is incompetent and is likely to remain so for the foreseeable future, it shall order that the juvenile (i) be committed pursuant to Article 16 (§ 16.1-335 et seq.) of this chapter or, if the juvenile has reached the age of eighteen years at the time of the competency determination, pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, (ii) be certified pursuant to § 37.2-806, (iii) have a child in need of services petition filed on his behalf pursuant to § 16.1-260 D, or (iv) be released. If the court finds the juvenile incompetent but restorable to competency in the foreseeable future, it may order restoration services continued until three months have elapsed from the date of the provision of restoration ordered under subsection A of § 16.1-357.

If not dismissed without prejudice at an earlier time, charges against an unrestorably incompetent juvenile shall be dismissed in compliance with the time frames as follows: in the case of a charge which would be a misdemeanor, one year from the date of the juvenile's arrest for such charge; and in the case of a charge which would be a felony, three years from the date of the juvenile's arrest for such charges.

History

1999, cc. 958, 997; 2000, c. 216.

Annotations

Notes

EDITOR'S NOTE. --

At the direction of the Virginia Code Commission, "Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2" was substituted for "§ 37.1-67.01 or § 37.1-67.1" twice in the first paragraph.

THE 2000 AMENDMENTS. --The 2000 amendment by c. 216 substituted the language beginning "should be (i) committed pursuant" and ending "by the court, or (iv) released" for "should be committed pursuant to Article 16 (§ 16.1-335 et seq.) of this chapter, certified pursuant to § 37.1-65.1, provided other services by the court, or released" in the second sentence of the first paragraph, and inserted the language beginning "or if the juvenile" and ending "through 37.1-70" in the fourth sentence of the first paragraph.

End of Document

LexisNexis

Va. Code Ann. § 16.1-359

Current through the 2019 Regular Session of the General Assembly.

VA - Code of Virginia (Annotated) > TITLE 16.1. COURTS NOT OF RECORD > CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS > ARTICLE 18. JUVENILE COMPETENCY

§ 16.1-359. Litigating certain issues when the juvenile is incompetent

A finding of incompetency does not preclude the adjudication, at any time before trial, of a motion objecting to the sufficiency of the petition, nor does it preclude the adjudication of similar legal objections which, in the court's opinion, may be undertaken without the personal participation of the juvenile.

History

1999, cc. 958, *997*.

End of Document

LexisNexis

Va. Code Ann. § 16.1-360

Current through the 2019 Regular Session of the General Assembly.

VA - Code of Virginia (Annotated) > TITLE 16.1. COURTS NOT OF RECORD > CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS > ARTICLE 18. JUVENILE COMPETENCY

§ 16.1-360. Disclosure by juvenile during evaluation or restoration; use at guilt phase of trial adjudication or disposition hearing

No statement or disclosure by the juvenile concerning the alleged offense made during a competency evaluation ordered pursuant to § 16.1-356, or services ordered pursuant to § 16.1-357 may be used against the juvenile at the adjudication or disposition hearings as evidence or as a basis for such evidence.

History

1999, cc. 958, 997.

End of Document

LexisNexis

Va. Code Ann. § 16.1-361

Current through the 2019 Regular Session of the General Assembly.

VA - Code of Virginia (Annotated) > TITLE 16.1. COURTS NOT OF RECORD > CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS > ARTICLE 18. JUVENILE COMPETENCY

§ 16.1-361. Compensation of experts

Each psychiatrist, clinical psychologist, licensed clinical social worker, licensed professional counselor, licensed marriage and family therapist, or other expert appointed by the court to render professional service pursuant to § 16.1-356, shall receive a reasonable fee for such service. With the exception of services provided by state hospitals or training centers, the fee shall be determined in each instance by the court that appointed the expert, in accordance with guidelines established by the Supreme Court after consultation with the Department of Behavioral Health and Developmental Services. If any such expert is required to appear as a witness in any hearing held pursuant to § 16.1-356, he shall receive mileage and a fee of $ 100 for each day during which he is required to serve. An itemized account of expenses, duly sworn to, must be presented to the court, and when allowed shall be certified to the Supreme Court for payment out of the state treasury, and be charged against the appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized shall also be made by order of the court, duly certified to the Supreme Court for payment out of the appropriation to pay criminal charges.

History

1999, cc. 958, 997; 2000, c. 337; 2005, c. 110; 2009, cc. 813, 840; 2012, cc. 476, 507.

Annotations

Notes

THE 2000 AMENDMENTS. --

The 2000 amendment by c. 337 inserted "licensed professional counselor" in the first sentence.

THE 2005 AMENDMENTS. --The 2005 amendment by c. 110 inserted "licensed marriage and family therapist" in the first sentence.

THE 2009 AMENDMENTS. --The 2009 amendments by cc. 813 and 840 are identical, and substituted "Behavioral Health and Developmental Services" for "Mental Health, Mental Retardation and Substance Abuse Services" at the end of the second sentence.

THE 2012 AMENDMENTS. --The 2012 amendments by cc. 476 and 507 are identical, and substituted "state hospitals or training centers" for "state mental health or mental retardation facilities" in the second sentence.

End of Document

Virginia JDR Clerk's Manual Guidance

http://www.courts.state.va.us/courts/jdr/resources/manuals/jdrman/chapter03.pdf

At any time between appointment or retention of an attorney and the end of trial, on motion of either the Commonwealth's Attorney or the attorney for the juvenile or on the court's own motion, the judge may hear evidence to determine whether there is probable cause to believe that the juvenile lacks substantial capacity to understand the proceedings against him or to assist in his own defense. If that probable cause is found:

- The court orders a competency evaluation to be performed by at least one psychiatrist, clinical psychologist, licensed professional counselor, licensed clinical social worker or licensed marriage and family therapist who is qualified by training and experience in the forensic evaluation of juveniles.
- This evaluation should be performed on a local outpatient basis, unless the court specifically finds:
    - The results of the outpatient competency evaluation indicate that hospitalization of the juvenile for evaluation of competency is necessary; or –
    - The juvenile is currently hospitalized in a psychiatric hospital.
- Inpatient evaluation should be ordered only if one of the above situations exists.
- If inpatient evaluation is to be used, the evaluating facility is selected by the Commissioner of the Department of Behavioral Health and Developmental Services (whose designee at the Office of Forensic Services may be contacted at (804) 786-4837 to ascertain to which hospital the juvenile should be transported).

- The length of stay is determined by the director of the hospital based on the director's determination of the time necessary to perform an adequate evaluation, but it is not to exceed ten days from the date of admission to the hospital.

- The court shall require the Commonwealth's Attorney, the juvenile's attorney and the moving party to provide the evaluator with specified information within ninety-six hours of issuance of the order requiring the evaluation, or if the ninety-six hours ends on a Saturday, Sunday or holiday, on the next business day.

- The Commonwealth's attorney must provide any information relevant to the evaluation, including but not limited to: a copy of the warrant or petition, the names and addresses of the attorney for the Commonwealth, the attorney for the juvenile and the judge ordering the evaluation, and information about the alleged offense.

- The defendant's attorney must provide the evaluator with any available psychiatric records or other information that is deemed relevant. The moving party must provide the evaluator with a summary of the reasons for the evaluation request.

FORMS USED- DC-522, ORDER FOR EVALUATION TO DETERMINE COMPETENCY TO STAND TRIAL - JUVENILE, and, if needed, a district court form DC-354, Custodial Transportation Order after which the sheriff will be notified of the need for transporting the juvenile.

EVALUATION PROCESS-

The evaluator must submit a report in writing to the court and the attorneys of record within fourteen days after receipt of all the required information.

The report must address:

The juvenile's capacity to understand the proceedings against him;

The juvenile's ability to assist his attorney;

The juvenile's need for services in the event he is found incompetent, including a description of the suggested necessary services and the least restrictive setting to assist the juvenile in restoration to competency.

After receiving the evaluation report, the court must promptly determine whether the juvenile is competent to stand trial. A hearing is not required unless the Commonwealth or the attorney for the defendant requests it. If a hearing is held, the juvenile has a right to notice of the hearing and the right to personally participate and introduce evidence. The party alleging that the juvenile is incompetent bears the burden of proving the juvenile's incompetency by a preponderance of the evidence.

If the judge finds that the juvenile is incompetent to stand trial and that treatment is required to restore the juvenile to competency, then the judge shall enter district court form DC-523, ORDER FOR PROVISION OF RESTORATION SERVICES TO INCOMPETENT JUVENILE.

A finding of incompetency should not be made based solely on any or all of the following:

The juvenile's age or developmental factors,

The juvenile's claim to be unable to remember the time period surrounding the alleged offense,

The fact that the juvenile is under the influence of medication.

If the court finds that the juvenile is restorable to competency in the foreseeable future, it shall order restoration services for up to three months.

If the agent providing restoration services believes the juvenile's competency has been restored, the agent shall immediately send a report to that effect to the court and the court shall make a ruling on the juvenile's competency in accordance with the procedures above.

NOTE: No statements of the juvenile relating to the alleged offense shall be included in the evaluation report. In addition, no statement or disclosure by the juvenile concerning the alleged offense made during a competency evaluation or provision of services may be used against the juvenile at the adjudication or disposition hearings as evidence or as a basis for such evidence.

At the end of the three months, if the juvenile remains incompetent, the agent providing restoration services shall notify the court and make recommendations concerning disposition of the juvenile.

The court shall hold a hearing and if the court finds that:

- that the juvenile is restorable, it may order continued restoration services for additional three month periods, provided a hearing is held at the completion of each such period;
- that the juvenile is unrestorably incompetent, it shall order one of the dispositions pursuant to Va. Code § 16.1-358.

If the initial evaluator or the agent providing restoration services concludes that the juvenile is likely to remain incompetent for the foreseeable future, a report stating so should be sent to the court. The report shall also provide recommendations for the disposition of the juvenile.

The court may order that:

-the juvenile be committed pursuant to Article 16 of Chapter 11 of Title 16.1, or,

- if the juvenile has reached the age of eighteen at the time of the competency determination, pursuant to Va. Code §§ 37.2-814 to 37.2-820,

- the juvenile be certified pursuant to Va. Code § 37.2-806,

-a child in need of services petition be filed on the juvenile's behalf pursuant to Va. Code § 16.1-260 (D) or

- the juvenile be released. If the charges are not dismissed without prejudice at an earlier time, charges against an unrestorably incompetent juvenile shall be dismissed as follows:

- In the case of a charge which would be a misdemeanor if committed by an adult, one year from the date of the juvenile's arrest for the charge.

- In the case of a charge which would be a felony if committed by an adult, three years from the date of the juvenile's arrest for such charge.

Compensation of Experts: Each psychiatrist, clinical psychologist, licensed professional counselor, licensed clinical social worker, licensed marriage and family therapist or other expert appointed by the court, except services provide by state mental health, hospitals or training centers, shall receive a reasonable fee determined by the court that appointed the expert. The fee should be determined in accordance with the guidelines established by the Supreme Court. If the expert is required to appear as a witness, the expert shall receive mileage and a fee of $100 for each day during which he is required to serve. Va. Code § 16.1-361.

ORDER FOR PROVISION OF RESTORATION SERVICES TO INCOMPETENT JUVENILE

Case No.: _____

Commonwealth of Virginia VA. CODE §§ 16.1-357; 16.1-358

_____ Juvenile and Domestic Relations District Court

_____

COURT ADDRESS

In re: _____

The Court having found, pursuant to § 16.1-356(F) of the Code of Virginia, that the juvenile is incompetent to stand trial, and having found further, based on the attached report or other evidence, that the juvenile can be provided services to restore his or her competency in

☐ ____ a non-secure community setting

☐ _____ a secure facility as defined in Virginia Code § 16.1-228

The Court therefore ORDERS that the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services or his or her designee shall arrange for the provision of restoration services to the juvenile in an effort to restore him or her to competency.

If, at any time after the provision of restoration services commences, the agent providing restoration believes the juvenile's competency is restored, the agent shall immediately send a report to the Court concerning (1) the juvenile's capacity to understand the proceedings against him or her and (2) his or her ability to assist his or her attorney.

If, at any time after the provision of restoration services commences, the agent providing restoration concludes that the juvenile is likely to remain incompetent for the foreseeable future, the agent shall send a report to the Court so stating and indicating whether, in the agent's opinion, the juvenile should be (1) released; (2) provided other services by the Court; (3) committed in accordance with the applicable provisions of Article 16 of Title 16.1; or (4) certified pursuant to § 37.1-65.1 of the Code of Virginia.

If the juvenile has not been restored to competency by three months from the date of the commencement of the provision of restoration services, the agent providing restoration shall send a report to the Court so stating and indicating whether, in the agent's opinion, the juvenile remains restorable to competency or whether the juvenile should be (1) released; (2) provided other services by the Court; (3) committed pursuant to Article 16 of Title 16.1; or (4) certified pursuant to § 37.1-65.1 or the Code of Virginia.

A review hearing is set for _____.

_____ _____

DATE JUDGE

NOTICE: No statement or disclosure by the juvenile relating to the alleged offense made during the provision of services to restore competency may be used against the juvenile at the adjudication or disposition as evidence or as a basis for such evidence. Virginia Code § 16.1-360.

ORDER FOR EVALUATION TO DETERMINE COMPETENCY TO STAND TRIAL – JUVENILE

Commonwealth of Virginia VA. CODE § 16.1-356

Case No. .....

..... Juvenile and Domestic Relations District Court

.....
COURT ADDRESS

In re: ....., a juvenile

It appearing to the Court, on motion of [ ] Commonwealth's attorney [ ] juvenile's attorney [ ] the Court and upon hearing evidence or representations of counsel, that there is probable cause to believe that the juvenile lacks substantial capacity to understand the proceedings against him or her or to assist in his or her own defense, the Court therefore appoints the evaluator(s) listed below, who is qualified by training and experience in the forensic evaluation of juveniles, to evaluate the juvenile and to submit a report,

and to submit a report, on or before .....
DATE AND TIME
, to this Court, the Commonwealth's Attorney and the juvenile's attorney, concerning:

(1) the juvenile's capacity to understand the proceedings against him or her;
(2) his or her ability to assist his or her attorney; and
(3) his or her need for services in the event that he or she is found to be incompetent including a description of the suggested necessary services and least restrictive setting to assist the juvenile in restoration to competency.

No statements of the juvenile relating to the alleged offense shall be included in the report.

DESIGNATION OF EVALUATOR(S)

[ ] The Court finds that the evaluation must be conducted on an outpatient basis at a community services board or behavioral health authority, juvenile detention home or juvenile justice facility.
The Court therefore ORDERS the following evaluator(s) to conduct the evaluation:

.....
OUTPATIENT EVALUATOR(S): NAME(S) AND TITLE(S) OR NAME OF FACILITY

.....

[ ] The Court finds that the evaluation must be conducted on an inpatient basis because:

[ ] the juvenile is currently hospitalized in a psychiatric hospital.
The court therefore ORDERS that qualified staff, trained and experienced in the forensic evaluation of juveniles, in that psychiatric hospital conduct the evaluation.

[ ] the results of the outpatient competency evaluation (copy attached) indicate that hospitalization for evaluation of competency is necessary.
The Court therefore ORDERS that qualified staff, trained and experienced in the forensic evaluation of juveniles, at a hospital to be designated by the Commissioner of the Department of Behavioral Health and Developmental Services or his or her designee conduct the evaluation. The Commissioner shall arrange for admission to such hospital only after the required information is received from the attorneys. Hospitalization for evaluation shall not extend beyond 10 days from the date of admission.

The Court further orders the Commonwealth's Attorney and the attorney for the juvenile to forward information relevant to the evaluation, as required by statute (see reverse) and orders the moving party to provide a summary of the reasons for the

evaluation request, to the evaluator(s) by ..... at ..... m.
DATE TIME

TO EVALUATORS AND ATTORNEYS: See reverse for additional instructions.

..... at ..... m.
DATE TIME

_____
JUDGE

ADDITIONAL INSTRUCTIONS TO EVALUATOR(S) AND ATTORNEYS

Providing Background Information

Prior to an evaluation of competency to stand trial, the Commonwealth's Attorney shall provide the evaluator(s):

a. a copy of the warrant or petition
b. the names and address of the Commonwealth's Attorney, the juvenile's attorney, and the judge ordering the evaluation
c. Information about the alleged offense
d. any other relevant information

The attorney for the juvenile shall provide to the evaluator only those psychiatric records of the juvenile and other information that are deemed relevant to the evaluation of competency.

Use of Information Obtained During Evaluation

No statement or disclosure by the juvenile relating to the alleged offense made during the competency evaluation may be used against a juvenile at the adjudication or disposition as evidence or as a basis for such evidence. Virginia Code §§ 16.1-356, 16.1-360.

ORDER FOR PHYSICAL AND MENTAL EXAMINATIONS AND TREATMENT; NURSING AND MEDICAL CARE
Commonwealth of Virginia VA. CODE §16.1-275

Case No.:. . . . . .

. . . . . .Juvenile and Domestic Relations District Court

. . . . . .
COURT ADDRESS

In re: . . . . . **DOB:** . . . . . .

Upon the written recommendation of the person examining the juvenile that an adequate evaluation of the juvenile's treatment needs can only be performed in an inpatient hospital setting, the Court shall have the power to send any such juvenile to a state mental hospital for not more than ten (10) days for the purpose of obtaining a recommendation for the treatment of the juvenile. The juvenile can be treated

☐ at a local mental health center

or

☐ at a state mental hospital. The Court therefore ORDERS, pursuant to § 16.1-275 of the Code of Virginia, that this child be committed to . . . . . .
FACILITY
for a period up to ten (10) days for evaluation and report.

A review hearing is set for . . . . . .
DATE AND TIME

. . . . . .
DATE

_____
JUDGE

Name of parent/legal guardian: _____

Address: _____

_____

Phone: _____

SEGMENT 4

2:00p-3:00p

Social Media and Use of Co-Parenting Apps as Evidence in Juvenile and Adult Criminal and Civil Cases

MUST READ cases for social media evidence and electronically stored information

Lorraine v. Markel American Insurance Co., 241 F.R.D. 534, (D. Md. 2007)

Dalton v. Commonwealth, 64 Va. App 512 (2015) – authentication of text messages

Griffin v. State, 419 Md. 343 (2011) – authentication of social media post

Tienda v. State, 358 S.W. 3d 633 (2012)

Ellis v. Commonwealth, 2016 WL 308594 - Unpublished

Riley v. California, 134 S.Ct 2473 (2014) – search and seizure

United States v. Wurie, 134 S.Ct 999 (2014) – search and seizure

Midkiff v. Commonwealth, 280 Va. 216 (2010)

State of Connecticut v. Robert Eleck, 130 Conn. App. 632 (2011)

United States v. Browne, 834 F.3d 403 (2016) – use of social media chats

Carpenter v. United States, 138 S.Ct. 2206 (2017) – search & seizure

United States v. Recio, 884 D.3d 230 (2018) – admissibility & authenticity of social media posts

Melick v. Commonwealth, 69 Va. App 396 (2018)

Hillman v. Commonwealth, 68 Va. App. 58 (2018) – admissibility of snapchat photographs

Atkins v. Commonwealth, 68 Va. App. 1 (2017) – admissibility of cell phone evidence

United States v. Larry Recio, 884 F.3d. 230 (2018) – authentication of social media

Social Media and The Use of Co-Parenting Apps

The Practitioner's Perspective

WHY do I need this evidence?

1. Impeach the Witness

"You testified earlier that you did not know Mr. Smith's mother was coming into town, correct?"

["Yyyyyyessss...."]

"Isn't this a text from you to Mr. Smith calling him a 'mama's boy' because he asked to switch weekends with you due to his mother coming into town?"

WHY do I need this evidence?

2. Rebuttal Evidence

"Mr. Smith testified that you arrived at 8pm?" ["Yes"]

"But you testified that you arrived at 6pm?" ["Yes"]

"Did you post a picture of you and your son on Facebook when you arrived?" ["Yes"]

"And is this a copy of that post?" ["Yes!"]

WHY do I need this evidence?

3. Examples (for direct evidence)

"Has Ms. Smith ever cursed in her communication with you?"

["Yes"]

"Are these examples of some of the times Ms. Smith cursed in her communication with you?

["Yes!"]

HOW should I present the evidence?

1. It starts with the client

Text Message Instructions

Dear Client,

Please find below some instructions regarding the best way to prepare your text messages for me to use in the trial of this case. Our goal is to be able to present the text message(s) clearly and concisely to the Court. Keep in mind that in order to present the text messages to the Court, the following must be included:

1. Date: The date of the texts must be visible, at least at the beginning of the text conversation
2. Identity: The phone number or identity of the other person must be visible
3. Completeness: No messages in the conversation should be missing
4. Clean Copies: do not write on, underline or highlight any of the messages. If you want to add notes or point out something specific, make two copies and provide me one clean copy and one copy with your notes.

If you are able to use a phone application that easily prints out text conversations, as long as the print out conforms to the above elements, it should be sufficient. I recommend sending me a sample, so that I can confirm it is sufficient, before printing it all out.

If you intend to use screen shots of the text messages, please do the following:

1. Make sure the first screen shot contains the date that the conversation began
2. Each subsequent screen shot should show ONLY the last line of the last screen shot (this proves that nothing is missing, and prevents us from having to read duplicate language)
3. Provide me with the whole conversation
4. Organize the screen shots in a Word document:
    a. Use narrow margins
    b. Try to fit at least three, if not four, text messages on each page
    c. Color copies are best, but not required
    d. Save each *topic* in a new Word document (for example, "Convo about school pick up"; "Notice of vacation days"; "Questions about Dr appointment")

HOW should I present the evidence?

INFORMATION CONSIDERED IN CHILD CUSTODY/VISITATION PROCEEDINGS
Commonwealth of Virginia VA. CODE §§ 16.1-278.15, 20-124.3

At a hearing to determine the custody or visitation of a child, information on the following factors is considered by the judge, if presented by the parties.

1. The child's age and physical and mental condition, with due consideration to the child's changing developmental needs. .....

2. The age and physical and mental condition of each parent. .....

3. The relationship existing between each parent and the child, with due consideration given to the positive involvement with the child's life and the ability to accurately assess and meet the emotional, intellectual and physical needs of the child.

4. The needs of the child, with due consideration given to other important relationships of the child, including but not limited to siblings, peers and extended family members. .....

5. The role which each parent has played and will play in the future, in the upbringing and care of the child. .....

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has reasonably denied the other parent access to or visitation with the child. .....

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child. .....

8. The reasonable preference of the child, if the child is deemed by this court to be of reasonable intelligence, understanding, age and experience to express such a preference. .....

9. Any history of "family abuse" as that term is defined in § 16.1-228, specifically any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member, or any history of sexual abuse. If the court finds a history of family abuse or sexual abuse, the court may disregard information pertaining to factor 6.

10. Other: .....

FORM DC-574 MASTER 07/09

HOW should I present the evidence?

2. It ends with YOU!

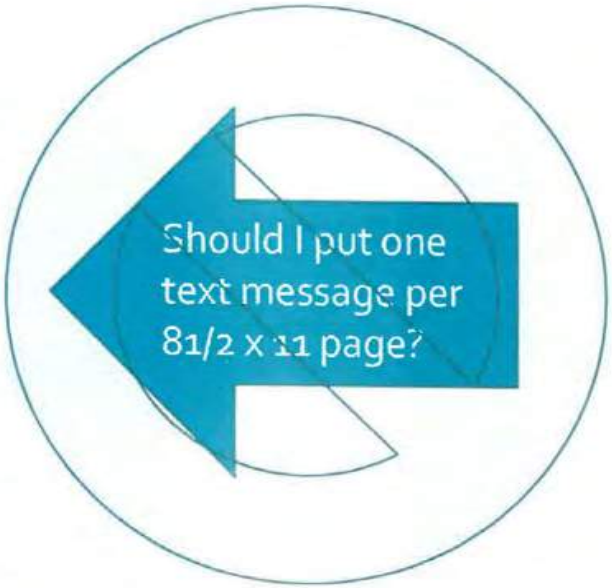
- Keeping it concise, which is always desirable, requires three things:
- 1. Year examination
  - How OLD is the evidence?

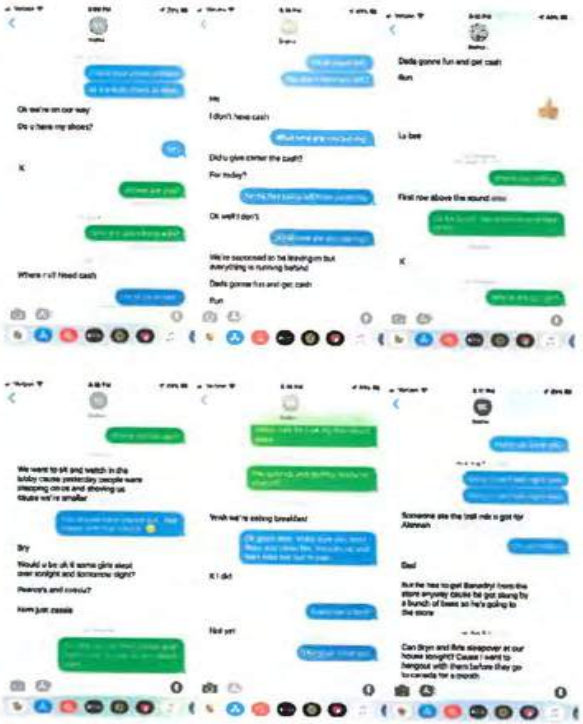
- 2. Organization by issue
  - Is there a theme?

- 3. Ultimate issues only!
  - Is there a point? (Which Best Interest Factor is implicated?)

YOU are the one who guides which evidence is presented, so choose wisely!

HOW should I present the evidence?





HOW should I present the evidence?

Create a demonstrative exhibit

Highlight the best examples

Following these helpful hints will make you a winner.*

*Maybe. No guarantees, sorry.

**But check out these cases to help you prepare:

- ~ United States v. Browne, 834 F.3d 403 (3rd Cir., 2016)
- ~ Atkins v. Commonwealth, 800 S.E.2d 827 (Va. App., 2017)
- ~ Ellis v. Commonwealth (Va. App., 2016)

Text Message Instructions

Dear Client,

Please find below some instructions regarding the best way to prepare your text messages for me to use in the trial of this case. Our goal is to be able to present the text message(s) clearly and concisely to the Court. Keep in mind that in order to present the text messages to the Court, the following must be included:

1. Date: The date of the texts must be visible, at least at the beginning of the text conversation
2. Identity: The phone number or identity of the other person must be visible
3. Completeness: No messages in the conversation should be missing
4. Clean Copies: do not write on, underline or highlight any of the messages. If you want to add notes or point out something specific, make two copies and provide me one clean copy and one copy with your notes.

If you are able to use a phone application that easily prints out text conversations, as long as the print out conforms to the above elements, it should be sufficient. I recommend sending me a sample, so that I can confirm it is sufficient, before printing it all out.

If you intend to use screen shots of the text messages, please do the following:

1. Make sure the first screen shot contains the date that the conversation began
2. Each subsequent screen shot should show ONLY the last line of the last screen shot (this proves that nothing is missing, and prevents us from having to read duplicate language)
3. Provide me with the whole conversation
4. Organize the screen shots in a Word document:
    a. Use narrow margins
    b. Try to fit at least three, if not four, text messages on each page
    c. Color copies are best, but not required
    d. Save each *topic* in a new Word document (for example, "Convo about school pick up"; "Notice of vacation days"; "Questions about Dr appointment")

INFORMATION CONSIDERED IN CHILD CUSTODY/VISITATION PROCEEDINGS

Commonwealth of Virginia VA. CODE §§ 16.1-278.15, 20-124.3

At a hearing to determine the custody or visitation of a child, information on the following factors is considered by the judge, if presented by the parties.

1. The child's age and physical and mental condition, with due consideration to the child's changing developmental needs. .....

2. The age and physical and mental condition of each parent. .....

3. The relationship existing between each parent and the child, with due consideration given to the positive involvement with the child's life and the ability to accurately assess and meet the emotional, intellectual and physical needs of the child.

4. The needs of the child, with due consideration given to other important relationships of the child, including but not limited to siblings, peers and extended family members. .....

5. The role which each parent has played and will play in the future, in the upbringing and care of the child. .....

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has reasonably denied the other parent access to or visitation with the child. .....

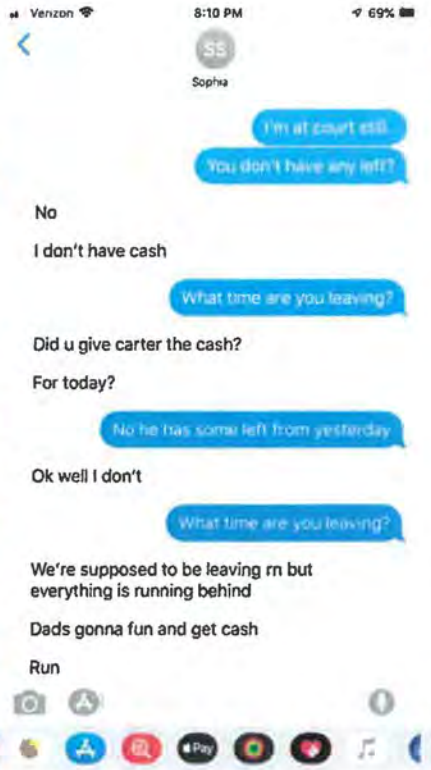
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child. .....

8. The reasonable preference of the child, if the child is deemed by this court to be of reasonable intelligence, understanding, age and experience to express such a preference. .....

9. Any history of "family abuse" as that term is defined in § 16.1-228, specifically any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member, or any history of sexual abuse. If the court finds a history of family abuse or sexual abuse, the court may disregard information pertaining to factor 6.

10. Other: .....


Verizon
8:09 PM
70%
SS
Sophia
I have your cheer uniform
At the kids check in desk
Ok we're on our way
Do u have my shoes?
Yes
K
Where are you?
Who are you sitting with?
Where r u? Need cash
I'm at court still.


Verizon
8:10 PM
69%
SS
Sophia
I'm at court still.
You don't have any left?
No
I don't have cash
What time are you leaving?
Did u give carter the cash?
For today?
No he has some left from yesterday
Ok well I don't
What time are you leaving?
We're supposed to be leaving rn but everything is running behind
Dads gonna fun and get cash
Run


Verizon
8:10 PM
69%
SS
Sophia
Dads gonna fun and get cash
Run
Ly bye
Where you sitting?
First row above the sound area
Ok be good. Pay attention and take notes
K
Where did you go?!


Verizon
8:10 PM
69%
SS
Sophia
Where did you go?!
We went to sit and watch in the lobby cause yesterday people were stepping on us and shoving us cause we're smaller
You should have stayed put. Not happy with that choice.
Sry
Would u be ok if some girls slept over tonight and tomorrow night?
Pearce's and cassia?
Nvm just cassia
Go find your brother please and make sure he saw my text about papa


Verizon
8:10 PM
69%
SS
Sophia
make sure he saw my text about papa
You girls up and getting ready for church?
Yeah we're eating breakfast
Ok good deal. Make sure you feed Roxy and clean her messes up and then take her out to pee
K I did
Everyone in bed?
Not yet
Hurry up. Love you


Verizon
8:11 PM
69%
SS
Sophia
Hurry up. Love you
Sorry, I can't talk right now.
Sorry, I can't talk right now.
Someone ate the trail mix u got for Alannah
Oh no!! Who!?
Dad
But he has to get Benadryl from the store anyway cause he got stung by a bunch of bees so he's going to the store
Can Bryn and Bria sleepover at our house tonight? Cause I want to hangout with them before they go to canada for a month

Ellis v. Commonwealth

Court of Appeals of Virginia

January 26, 2016, Decided

Record No. 1530-14-1

Reporter
2016 Va. App. LEXIS 18 *; 2016 WL 308594

EMANUEL DALE ELLIS v. COMMONWEALTH OF VIRGINIA

Notice: PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

Prior History: [*1] FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON. Bonnie L. Jones, Judge.

Disposition: Affirmed.

Core Terms

shoes, photograph, timestamp, robbery, wearing, harmless error, non-constitutional, harmless, authenticate, arrested, trial court, harmless error analysis, in limine, sentenced

Case Summary

Overview
HOLDINGS: [1]-Any constitutional error in the exclusion of the time stamp on a photograph was harmless, as the court was unable to say how similar the sneakers on the photograph were to those taken from the victim and the Commonwealth's evidence was overwhelming, making it so that the error did not contribute to the verdict; [2]-Because the error passed the more stringent constitutional harmless error analysis, it also satisfied the requirements of nonconstitutional harmless error.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Evidence > Authentication

HN1[] **Authentication**

When authentication is required prior to the admission of evidence, evidence sufficient to support a finding that the thing in question is what its proponent claims will satisfy such requirement. *Va. Sup. Ct. R. 2:901*.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN2[] **Harmless Error**

The Constitution entitles a criminal defendant to a fair trial, not a perfect one. Assessing error for harmlessness promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually

inevitable presence of immaterial error.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Compulsory Process

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Compulsory Process

HN3[] Compulsory Process

The right to call forth evidence in one's favor is guaranteed by the "compulsory process" clause of the *Sixth Amendment to the Constitution of the United States*, which mandates that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Compulsory Process

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Compulsory Process

HN4[] Compulsory Process

See *Va. Const. art. I, § 8*.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

HN5[] De Novo Review

On appeal, issues of constitutional interpretation are reviewed de novo.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN6[] Harmless Error

Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt; otherwise the conviction under review must be set aside. A federal constitutional error is harmless, and thus excusable, only if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN7[] Harmless Error

For purposes of harmless error review, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN8[] Evidence

In a non-constitutional context, an appellate court reviews a trial court's rulings on whether to admit or exclude evidence under an abuse of discretion standard.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN9[] **Harmless Error**

The standard for determining whether non-constitutional error was harmless is set out in both the case law of Virginia and the Code. If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. If so, or if one is left in grave doubt, the conviction cannot stand.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN10[] **Harmless Error**

See Va. Code Ann. § 8.01-678.

Counsel: Charles E. Haden for appellant.

John W. Blanton, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Judges: Present: Chief Judge Huff, Judges Decker and AtLee.

Opinion

MEMORANDUM OPINION* BY JUDGE RICHARD Y. ATLEE, JR.

A Hampton jury convicted Emanuel Dale Ellis of robbery and use of a firearm in the commission of that robbery. Ellis wished to introduce into evidence at trial a photograph from his Facebook page with an accompanying timestamp. The trial judge, however, granted the Commonwealth's motion *in limine*, admitting the photograph but redacting the timestamp. The sole issue on appeal is the propriety of that redaction. Assuming without deciding that the timestamp was erroneously excluded, we find such error harmless and affirm.

I. BACKGROUND

A. The Crime

In August of 2013, Miles Conley ("the victim") was walking home after completing some freelance tattoo work. Ellis, seventeen years old at the time, approached the victim, and asked about the price of a tattoo. (The victim and Ellis knew each other, though not well.) They walked **[*2]** together and discussed a price. As they entered a breezeway, however, Ellis produced a revolver and robbed the victim of a book bag and suitcase, both of which contained tattooing equipment. These items were worth more than $200. Ellis also demanded the victim's Air Jordan "Concord 11" shoes. When the victim balked at giving his shoes to Ellis, Ellis pulled the hammer back on the revolver and said: "I'm not playing." The victim relinquished his shoes and ran home, where he arrived "in a state of panic, shocked and terrified," according to his foster father. The next day, based on information provided by the victim, police arrested Ellis. At the time of his arrest, Ellis was wearing Air Jordan "Concord 11" shoes, though the victim's bag and suitcase were never recovered. The grand jury indicted Ellis for two felonies: robbery and use of a firearm in the commission of that robbery.

B. The Motion in Limine

Prior to trial, the Commonwealth moved, *in limine*, to exclude the timestamp from a Facebook[1]

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

[1] Facebook is a social networking Web site. "Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook 'friends' who are notified when new content is posted." Elonis v. United States,

photograph that the Commonwealth anticipated Ellis would introduce at trial.[2] The timestamp attached to the photograph showed a date over a year prior to the robbery. In its motion *in limine*, the **[*3]** Commonwealth argued that the timestamp was ***hearsay*** and that its "probative value is substantially outweighed by the likelihood of misleading the trier of fact." The Commonwealth also argued that, because Facebook timestamps were unreliable and subject to modification, it would be foundationally inadequate for the person who posted the photograph to authenticate it. Ellis argued that the timestamp was not ***hearsay*** and that he could properly authenticate the timestamp. He asserted that the timestamp on the photograph would corroborate his testimony that he did not rob the victim, but in fact owned his own pair of Air Jordan "Concord 11" shoes, and had uploaded a photograph of himself wearing such shoes over a year before the robbery.[3] The trial judge agreed with the Commonwealth and granted the motion *in limine*, finding that Ellis had laid inadequate foundation to authenticate the timestamp.

C. The Trial

At trial, the victim testified in detail about the shoes taken from him. Although the shoes retailed for $180, due to high demand, the victim had paid a premium and purchased them for $240.[4] Normally, the victim wore size 9 shoes, but when he purchased these shoes, all of the shoes in his size had been sold. As a solution, the victim purchased size 8 1/2 shoes but removed the insoles so the shoes would fit properly. The victim also testified that one of his shoes had a minor defect. He examined the shoes recovered from Ellis and pointed out this defect to the jury, stating "I can recognize **[*6]** my shoes when I see them."

In addition to having the same minor defect described by the victim, the shoes recovered from Ellis were size 8 1/2, with the insoles removed. At trial, the shoes were in substantially worse condition than they were on the evening of the robbery. Ellis stressed this at trial, since police recovered the shoes from Ellis just one day after the robbery. The victim testified that the degradation in the condition and appearance of the shoes was likely a result of the shoes' storage in an evidence bag for months between seizure and trial, without having been cleaned beforehand.

Ellis's foster mother testified that Ellis left home the day before the robbery, returning home late on the night of the robbery wearing different clothes and different shoes. Ellis testified in his own behalf. He claimed the shoes he was wearing when he was arrested were his own and that he had purchased them in "March **[*7]** or February of 2012," more

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135 S. Ct. 2001, 2004, 192 L. Ed. 2d 1 (2015).

[2] The trial at issue in this appeal was actually Ellis's second trial on these charges. **[*4]** The first trial, in which Ellis introduced the photograph showing the timestamp, resulted in a deadlocked jury and a mistrial.

[3] The photograph at issue shows Ellis wearing some sort of athletic-style shoes, or at least one such shoe, since only the right shoe is visible. (We will refer to the shoes as being black and white, although the photograph is a black and white computer printout, so it is possible that the dark color could be some hue other than black.) The visible shoe has a black strip up the left side, and a black area above the toe. There is also a black strip near the top of the laces. At trial, the shoes Ellis was wearing when he was arrested were offered into evidence. At the conclusion of the trial, however, these shoes were returned to the Hampton Police Department. *See* App. at 200. (This is the second page of a document labeled "Sentencing Order." Based on its contents and the presence of a later sentencing order, this document actually appears to be a conviction order.) The last sentence of this document reads: "*The Court returned Commonwealth's exhibit # 1, Sneakers, to the Officer of the Hampton Police Department.*" Presumably, the trial court returned the exhibit pursuant to **[*5]** Code § 19.2-270.4(B). That code section permits return of exhibits "to the owners thereof, notwithstanding the pendency of any appeal . . . ." The return of exhibits under this subsection "may be upon such conditions as the court deems appropriate for future identification and inclusion in the record . . . ." In this case, the record ideally would have contained a photograph of the shoes in place of the actual shoes. Neither the joint appendix nor the record contains any such photograph. As such, we are unable to compare, visually, the shoes worn by Ellis when he was arrested and the shoe in Ellis's photograph.

[4] The secondary market for basketball shoes, particularly Nike's Air Jordan brand shoes, can be lucrative, as many models increase dramatically in value following their release. *See* Grant Glickson, *At 'Sneakerhead' Fairs, Air Jordans Are Golden*, N.Y. Times, Apr. 17, 2014, at A1.

than a year before the robbery. He introduced a photograph of himself and two friends, which he claimed showed him wearing the same shoes he was wearing when he was arrested. He testified that he uploaded the photograph to his Facebook page in June of 2012. In compliance with the trial court's ruling on the Commonwealth's motion *in limine*, the date on the photograph was redacted before the photograph was introduced into evidence.

Ultimately, the jury found Ellis guilty of robbery and use of a firearm in the commission of the robbery. The trial judge sentenced Ellis to ten years in the penitentiary with six years suspended for the robbery, and three years in the penitentiary for the firearm charge.[5]

II. ANALYSIS

A. Introduction

Along with a profusion of hashtags and cat videos, the rise of ***social media*** has brought about a reexamination, among Virginia's judges and lawyers, of the use of electronic information in criminal investigations and proceedings. *See, e.g.*, *Stith v. Commonwealth*, 65 Va. App. 27, 773 S.E.2d 165 (2015); *Dalton v. Commonwealth*, 64 Va. App. 512, 769 S.E.2d 698 (2015); *Moter v. Commonwealth*, 61 Va. App. 471, 737 S.E.2d 538 (2013); *Holcomb v. Commonwealth*, 58 Va. App. 339, 709 S.E.2d 711 (2011). Academic writers have also begun to grapple with the challenges of ***social*** **[*8]** ***media*** evidence, in particular its authentication. *See, e.g.*, Michael J. Hannon, *An Increasingly Important Requirement: Authentication of Digital Evidence*, 70 J. Mo. B. 314 (2014); Justin P. Murphy & Adrian Fontecilla, ***Social Media*** *Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, 19 Rich. J.L. & Tech. 11 (2013); Ira P. Robbins, *Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13 Minn. J.L. Sci. & Tech. 1 (2012).

HN1[↑] When authentication is required prior to the admission of evidence, "evidence sufficient to support a finding that the thing in question is what its proponent claims" will satisfy such requirement. Va. R. Evid. 2:901. Ellis compares the process and requirements for authenticating a timestamp with the procedure for authenticating a photograph. *See Bynum v. Commonwealth*, 57 Va. App. 487, 492 n.3, 704 S.E.2d 131, 133 n.3 (2011). For purposes of addressing Ellis's assignment of error, we assume, without deciding, that the trial court wrongly excluded the timestamp.[6] Even operating under such an assumption, we affirm his convictions, because we find that any error was harmless.

B. Harmless Error

We undertake a harmless error analysis because ***HN2***[↑] "the Constitution entitles a criminal defendant to a fair trial, not a perfect **[*9]** one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Assessing error for harmlessness "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* Ellis's assignment of error has two parts, one constitutional and one non-constitutional. Our analysis for harmless error changes depending on the nature of the error alleged. *See Lavinder v. Commonwealth*, 12 Va. App. 1003, 1006 n.1, 407 S.E.2d 910, 911 n.1, 8 Va. Law Rep. 384 (1991) (holding that the test for constitutional harmless error is different from the test for non-constitutional harmless error). We thus analyze the two types of alleged error under two different standards.[7]

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[5] Because Ellis was a juvenile when he committed the crime, the trial judge, rather than the jury, sentenced Ellis. *See* Code § 16.1-272(A).

[6] *See Luginbyhl v. Commonwealth*, 48 Va. App. 58, 64, 628 S.E.2d 74, 77 (2006) (*en banc*) (noting that "an appellate court may structure a decision upon an 'assuming but not deciding' basis").

[7] The admission, or exclusion, of one piece of evidence can be the subject of both constitutional harmless error analysis and non-constitutional harmless error analysis. *See Fitzgerald v. Commonwealth*, 61 Va. App. 279, 292 n.4, 734 S.E.2d 708,

1. Constitutional Harmless Error

Ellis first alleges that by requiring redaction of the timestamp, the trial court "deprive[d] Ellis of his constitutional right to call forth evidence in his favor.HN3[] " The right to call forth evidence in one's **[*10]** favor is guaranteed by the "compulsory process" clause of the Sixth Amendment to the Constitution of the United States, which mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Similarly, Article I, Section 8 of the Constitution of Virginia reads in part that HN4[] "in criminal prosecutions a man hath a right . . . to call for evidence in his favor . . . ." Because this portion of Ellis's assignment of error alleges a constitutional error, we analyze it within a constitutional harmless error framework.

HN5[] "On appeal, issues of constitutional interpretation are reviewed *de novo*." Huguely v. Commonwealth, 63 Va. App. 92, 106, 754 S.E.2d 557, 564 (2014). HN6[] "'[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt;' otherwise the conviction under review must be set aside." Lilly v. Commonwealth, 258 Va. 548, 551, 523 S.E.2d 208, 209 (1999) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). "A federal constitutional error is harmless, and thus excusable, only if it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Quinn v. Commonwealth, 25 Va. App. 702, 719, 492 S.E.2d 470, 479 (1997) (quoting Chapman, 386 U.S. at 24).

In *Van Arsdall*, the trial court erroneously limited the defendant's cross-examination of a prosecution witness. The Supreme Court explained its harmless error review this way:

> HN7[] The correct inquiry is whether, assuming **[*11]** that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684. In conducting such an analysis of the facts and incidents of Ellis's trial, we conclude that any constitutional error was harmless.

The victim knew Ellis and identified him as the culprit. Ellis was arrested the day after the crimes wearing shoes matching those taken from the victim. The victim testified in detail about his shoes, explaining the deterioration in their condition, and pointing out the distinctive defect in the shoes Ellis was wearing. The shoes, besides being the same brand and size, had the insoles removed as well. Following **[*12]** the crimes, the victim arrived home "in a state of panic, shocked and terrified." Ellis's foster mother testified that he returned home late on the night of the robbery, wearing different shoes than he had been wearing the last time she saw him. As to the timestamp on the photograph, it would have been cumulative of other evidence of the date of the photograph, since Ellis himself testified to the date he uploaded the photograph. The photograph to which the timestamp was attached showed Ellis wearing a pair of shoes, as described above in footnote 2. Ellis asserts on appeal that the photograph showed him "wearing a pair of Air Jordan sneakers identical to the model of Air Jordan sneakers that were taken from the robbery victim . . . but in [Ellis]'s possession more than a year prior to the robbery." However, this Court is unable to say how similar the shoe in the

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714 n.4 (2012) ("Fitzgerald alleged both constitutional and non-constitutional errors in the admission of the [evidence]. We believe that any error in admitting the [evidence] was harmless under either standard.").

photograph is to the shoes admitted into evidence, since we have neither the shoes admitted into evidence, nor a photograph of such shoes with which to conduct such a comparison.[8] The strength of the Commonwealth's case is overwhelming. For all of these reasons, we hold "beyond a reasonable doubt that the error complained of **[*13]** did not contribute to the verdict obtained." Quinn, 25 Va. App. at 719, 492 S.E.2d at 479 (quoting Chapman, 386 U.S. at 24).

2. *Non-Constitutional Harmless Error*

Ellis also alleges that the trial court erroneously excluded the timestamp, because "the Facebook posting by Emanuel Ellis could [have been] properly authenticated by Ellis and the weight to be placed upon the date of the posting was a matter for the jury to decide, not the judge." Because this portion of his assignment of error alleges a non-constitutional error, we analyze it within the non-constitutional harmless error context. HN8[↑] "In a non-constitutional context, we review a trial court's rulings on whether to admit or exclude evidence under an abuse of discretion standard." Commonwealth v. Swann, 290 Va. 194, 197, 776 S.E.2d 265, 267 (2015).

HN9[↑] The standard for determining whether non-constitutional **[*14]** error was harmless is set out in both the case law of Virginia and the Code.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. . . . If so, or if one is left in grave doubt, the conviction cannot stand.

Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731-32 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). Code § 8.01-678 codified the doctrine of harmless error in Virginia, and states:

> HN10[↑] When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed . . . [f]or any other defect, imperfection, or omission in the record, or for any error committed on [sic] the trial.

This code section "puts a *limitation on the powers* of this court to reverse the judgment of the trial court—a limitation which we must consider on every application for an appeal and on the hearing of *every case* ***[*15]*** submitted to our judgment." Kirby v. Commonwealth, 50 Va. App. 691, 699, 653 S.E.2d 600, 604 (2007) (quoting Walker v. Commonwealth, 144 Va. 648, 652, 131 S.E. 230, 231 (1926)). "We will not reverse a trial court for evidentiary errors that were harmless to the ultimate result." Shifflett v. Commonwealth, 289 Va. 10, 12, 766 S.E.2d 906, 908 (2015). Non-constitutional harmless error analysis subjects an error to a more lenient standard of review. *See* Grant v. Commonwealth, 54 Va. App. 714, 729, 682 S.E.2d 84, 91 (2009) (discussing "the lesser standard of non-constitutional harmless error"). Because we are assessing the same error under different standards, and the error passed muster when subjected to the more stringent constitutional harmless error analysis, we find that it also satisfies the requirements of non-constitutional harmless error.

III. CONCLUSION

Assuming without deciding that the trial court erred when it excluded the timestamp from evidence, we find such exclusion constitutes harmless error.

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[8] To the extent our harmless error analysis calls upon us to make such a comparison, we are unable to do so. (*See supra* note 2). Appellants are responsible for ensuring that this Court has an adequate record. *See* Rule 5A:25; Via v. Commonwealth, 42 Va. App. 164, 185 n.4, 590 S.E.2d 583, 593 n.4 (2004) (observing that "it is the appellant's responsibility on appeal to provide this Court with an appropriate appendix and record"). And we note that there is no indication in the record that Ellis objected to the return of the shoes to the Hampton Police Department.

Affirmed.

End of Document

Atkins v. Commonwealth

Court of Appeals of Virginia

July 5, 2017, Decided

Record No. 1542-16-2

Reporter
68 Va. App. 1 *; 800 S.E.2d 827 **; 2017 Va. App. LEXIS 160 ***; 2017 WL 2853486

HASSAN CHRISTOPHER ATKINS v. COMMONWEALTH OF VIRGINIA

Prior History: [*1]** FROM THE CIRCUIT COURT OF POWHATAN COUNTY. Paul W. Cella, Judge.

Disposition: Affirmed and remanded.

Core Terms

phone, tweet, text message, ***hearsay***, messages, admissibility, counter, stolen, door, convictions, trial court, authentication, preponderance, party admission, telephone

Case Summary

Overview

HOLDINGS: [1]-In a case in which defendant was convicted of three counts of breaking and entering and three counts of grand larceny, under Va. Sup. Ct. R. 2:901, the evidence of the 20 text messages and the written message portion of a single ***social media*** post found on his cellular telephone regarding the sale of the stolen goods was properly admitted as the Commonwealth proved by a preponderance of the evidence that defendant was the person who sent them because he admitted that the passcode-protected phone from which they were sent was his phone; he knew the passcode for the phone and provided it to law enforcement; a ***social media*** application installed on the phone had been created with an email address using defendant's name; and the unobjected-to-photograph of the stolen money counter contained in the ***social media*** post was the same money counter found in his bedroom.

Outcome

Convictions affirmed; case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Relevance > Relevant Evidence

HN1[] **Evidence**

The determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion. That bell-shaped curve of reasonability governing appellate review rests on the venerable belief that the judge closest to the contest is the judge best able to discern where the equities lie. A reviewing court can conclude that an abuse of discretion has occurred only in cases in which reasonable jurists could not differ about the correct result. By definition, however, a trial court abuses its

discretion when it makes an error of law.

Evidence > ... > ***Hearsay*** > Rule Components > Declarants

Evidence > ... > ***Hearsay*** > Rule Components > Truth of Matter Asserted

Evidence > ... > ***Hearsay*** > Rule Components > Statements

Evidence > ... > ***Hearsay*** > Exemptions > State ments by Party Opponents

Evidence > ... > Statements as Evidence > ***Hearsay*** > Exceptions

HN2[] Declarants

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Va. Sup. Ct. R. 2:801(c). If evidence is ***hearsay***, it is inadmissible unless it falls within one of the recognized exceptions to the rule against ***hearsay***. An out-of-court statement by a criminal defendant, if relevant, is admissible as a party admission, under an exception to the rule against ***hearsay***.

Evidence > Authentication

Evidence > ... > ***Hearsay*** > Exemptions > State ments by Party Opponents

Evidence > ... > Statements as Evidence > ***Hearsay*** > Exceptions

Evidence > ... > ***Hearsay*** > Rule Components > Declarants

HN3[] Authentication

To meet the party admission exception to the rule against ***hearsay***, the Commonwealth must first establish that the ***hearsay*** statement was in fact made by the party. Va. Sup. Ct. R. 2:901. That principle holds true universally and applies equally to statements made over the telephone, through text messages, by emails, or using ***social media***.

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Evidence > ... > ***Hearsay*** > Rule Components > Declarants

HN4[] Circumstantial Evidence

The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance of the evidence. Although the type of evidence used to prove the identity of the person making the out-of-court statement may vary based in part upon the medium used to convey the message, the governing legal standard is the same - proof by a preponderance of direct evidence, circumstantial evidence, or a combination of both. The completeness of the identification goes to the weight afforded the evidence rather than its admissibility, with the responsibility of determining the threshold question of admissibility resting with the trial court.

Counsel: B. Thomas Bledsoe (The Law Office of B. Thomas Bledsoe, P.C., on briefs), for appellant.

Virginia B. Theisen, Senior Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Judges: Present: Judges Humphreys, Decker and O'Brien. OPINION BY JUDGE MARLA GRAFF DECKER.

Opinion by: MARLA GRAFF DECKER

Opinion

[828] [*3]** OPINION BY JUDGE MARLA GRAFF DECKER

Hassan Christopher Atkins appeals his convictions for three counts of breaking and entering and three counts of grand larceny, in violation of Code §§ 18.2-89 and 18.2-95.[1] The appellant argues that the evidence of the **[**829]** text messages and tweet recovered from his cellular telephone were inadmissible because the Commonwealth failed to prove that he was the person who sent those messages. We conclude that the Commonwealth sufficiently established that the appellant was the person who authored the challenged messages and therefore adequately authenticated the evidence. Consequently, the convictions are affirmed.

I. BACKGROUND

This case involves a short string of burglaries and thefts from three businesses. On August 23, 2015, Deputy Michael **[*4]** Fiedler, with the Powhatan County Sheriff's Office, responded **[***2]** to Quality Data Systems, which sells and services banking equipment, after a break-in was reported. When Fiedler arrived, the glass in the side entry door was completely shattered. On the ground among the glass he found a "ceramic portion" and conducting rod that appeared to be pieces of a spark plug.[2] Cash in the amount of $1,100 had been stolen. As a result of the damage to the property, the owner secured the door with plywood and pressboard before leaving for the night.

Later that night, or in the early morning hours, the door was broken again. More items were stolen, including three money counter machines and a digital camera.

On August 23 or 24, 2015, another burglary was discovered, this time at SMG Imports, a car dealership. The glass front door was shattered, and the office doors were broken. A laptop computer was missing. Additionally, keys to a "BMW coupe" were taken from inside the office, and the car was stolen.

Around "the 23[r]d or 25th" of that same month, a burglary also was discovered at a third location, Arborscapes, a tree care company.[3] The door was "kicked in," and two laptop computers were missing. One of the stolen computers was an "Apple MacBook" with the serial number **[***3]** C02P1HBXG3QH. A cellular phone and checks made payable to Arborscapes also were taken.

Approximately a week later, Lieutenant Danny Smith, with the Powhatan County Sheriff's Office, was on routine patrol. Near the burglarized businesses, he saw a car being driven erratically, so he stopped the vehicle. The appellant was the front seat passenger. Smith saw a ski mask and rubber gloves **[*5]** in the car on the floor of the rear passenger compartment. Additionally, Lieutenant Smith found a drill and two other masks.

A backpack found at the appellant's feet contained school papers bearing his name, checks payable to Arborscapes, cameras, and three spark plugs.[4] One of the cameras was the one stolen from Quality Data Systems.

During the traffic stop, Detective Mike Wentworth noticed that the appellant wore "Nike flip-flops" that looked like the shoes of one of the individuals who appeared in the surveillance footage of the break-in at Arborscapes.[5] Wentworth also found a cellular telephone. The appellant identified the phone as his and provided law enforcement with the passcode.

In connection with the investigation, law enforcement officers searched the appellant's home. They found one of the stolen **[***4]** money counters in the appellant's bedroom.

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[1] The appellant also was convicted of possession of burglarious tools and failure to appear, in violation of Code §§ 18.2-94 and 19.2-128, but those convictions are not subjects of this appeal.

[2] Another deputy sheriff explained that spark plugs can be used to break windows.

[3] The three businesses were in very close proximity to each other. Arborscapes and SMG Imports shared the same front door, but had separate locked office doors.

[4] The checks were specifically identified as the ones stolen from the company.

[5] The DVD with the surveillance recording was admitted into evidence.

At trial, Detective Wentworth identified the cell phone that the appellant had acknowledged as belonging to him. Robert Brown, a special agent with the High Technology Crimes Division of the Virginia Department of State Police, analyzed the appellant's phone. He testified that a ***social media*** application ("app") installed on the phone had been created with an email address containing the appellant's name. The phone contained stored photos of an Apple laptop computer. Also stored on the phone was a "screen shot" of a single Twitter message, or tweet.[6] The tweet included a photograph of **[**830]** the money counter that was found in the appellant's room and text **[*6]** advertising a money counter for sale. Agent Brown verified that the tweet was sent from the appellant's phone.

Additionally, Agent Brown testified that he recovered some text messages that were sent from the phone. The text messages admitted into evidence included messages sent from the appellant's phone between August 24 and 27, 2015. The messages communicated that the sender was selling money counters and a "mack book . . . pro" with the serial number "c02p1hbxg3qh." The sender also **[***5]** noted that he "got a new bmw" the previous night that he "shoulda kept."

The appellant objected to the admission of the tweet and the text messages, arguing that the identity of the sender was not proved. The Commonwealth countered that the appellant had sent the messages from his own phone and that they were admissible because they were not ***hearsay*** or, alternatively, they were party admissions, a recognized exception to the rule against ***hearsay***. The trial court overruled the objection, noting that the tweet and text messages were sent from "his phone, the phone he used."

The jury found the appellant guilty of three counts of breaking and entering and three counts of grand larceny. On these convictions, the court sentenced the appellant to a total of ninety years of incarceration, with seventy-five of those years suspended. The fifteen years remaining consisted of three sets of five years each to be served concurrently, leaving the appellant with five years of active incarceration.

II. ANALYSIS

The appellant challenges his convictions for breaking and entering and grand larceny. He argues that the trial court erred by admitting the evidence of the twenty text messages and the written message **[***6]** portion of the single tweet found on his cellular telephone. He contends that the evidence lacked an adequate foundation because the Commonwealth did not prove that he was the person who sent the tweet or the text **[*7]** messages.[7] For the reasons that follow, we conclude that the Commonwealth proved by a preponderance of the evidence that the appellant was the person who sent the challenged tweet and text messages from his phone.

The standard of review on appeal is well settled. *HN1*[] "[T]he determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion." *Adjei v. Commonwealth, 63 Va. App. 727, 737, 763 S.E.2d 225, 230 (2014)* (alteration in original) (quoting *Beck v. Commonwealth, 253 Va. 373, 384-85, 484 S.E.2d 898, 905 (1997)*). "This bell-shaped curve of reasonability governing our appellate review rests on the venerable belief that the judge closest to the contest is the judge best

[6] Twitter is a "***social media*** forum[]." *Hunter v. State Bar, ex rel. Third Dist. Comm., 285 Va. 485, 496, 744 S.E.2d 611, 616 (2013)*. "A [t]weet is any message posted to Twitter which may contain photos, videos, links . . . and text." *Sublet v. State, 442 Md. 632, 113 A.3d 695, 698 n.9 (Md. 2015)* (quoting *New User FAQs*, Twitter, *https://support.twitter.com/articles/13920-new-user-faqs* (last visited Apr. 20, 2015)).

[7] Consistent with his brief, the appellant confirmed at oral argument that the sole issues on appeal are the adequacy of the foundation for admission of the tweet and text messages and whether this purported authentication error was harmless. He references ***hearsay*** and the party admission exception to the rule against ***hearsay*** solely in the context of his challenge to the foundation for the admission of the evidence. *See, e.g., Walters v. Littleton, 223 Va. 446, 451, 290 S.E.2d 839, 842 (1982)* (recognizing that although issues of authentication and ***hearsay*** sometimes overlap, they are separate issues). Consequently, we address ***hearsay*** and the party admission exception only to the extent required by this overlap.

able to discern where the equities lie." Thomas v. Commonwealth, 62 Va. App. 104, 111-12, 742 S.E.2d 403, 407 (2013) (quoting Hamad v. Hamad, 61 Va. App. 593, 607, 739 S.E.2d 232, 239 (2013)). A reviewing court can conclude that "an abuse of discretion has occurred" only in cases in which "reasonable jurists could not differ" about the correct result. Commonwealth v. Swann, 290 Va. 194, 197, 776 S.E.2d 265, 268 (2015) (quoting Grattan v. Commonwealth, 278 Va. 602, 620, 685 S.E.2d 634, 644 (2009)). "[B]y definition," however, a trial court "abuses its discretion when it makes an error of law." Coffman v. Commonwealth, 67 Va. App. 163, 166, 795 S.E.2d 178, 179 (2017) **[**831]** (quoting Commonwealth v. Greer, 63 Va. App. 561, 568, 760 S.E.2d 132, 135 (2014)).

HN2[↑] ***Hearsay*** is "a statement, other ***[***7]*** than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Va. R. Evid. 2:801(c). If evidence is ***hearsay***, "[it] is inadmissible ***[*8]*** unless it falls within one of the recognized exceptions" to the rule against ***hearsay***. Robinson v. Commonwealth, 258 Va. 3, 6, 516 S.E.2d 475, 476 (1999); *see also* Va. R. Evid. 2:802. "[A]n out-of-court statement by a criminal defendant, if relevant, is admissible as a party admission, under an exception to the rule against ***hearsay***." Bloom v. Commonwealth, 262 Va. 814, 820, 554 S.E.2d 84, 87 (2001).

HN3[↑] To meet the party admission exception to the rule against ***hearsay***, the Commonwealth must first establish that the ***hearsay*** statement was in fact made by the party, in this case, the appellant. *See* Va. R. Evid. 2:901 ("The requirement of authentication or identification is a condition precedent to admissibility that is satisfied by evidence sufficient to support a finding that the thing in question is what the proponent claims."). This principle holds true universally and applies equally to statements made over the telephone, through text messages, by emails, or using ***social media*** such as Twitter.[8] *See* Bloom v. Commonwealth, 34 Va. App. 364, 369-70, 542 S.E.2d 18, 20 (2001) (holding that internet conversations conducted through instant messaging are in some respects "analogous to telephone conversations"), aff'd, 262 Va. 814, 554 S.E.2d 81 (2001); cf. Walters v. Littleton, 223 Va. 446, 451, 290 S.E.2d 839, 842 (1982) ("All writings are subject to **[***8]** the requirement of authentication, which is the providing of an evidentiary basis sufficient for the trier of fact to conclude that the writing came from the source claimed.").

The appellant contends that the evidence in the record did not meet minimum standards to support the admissibility of the texts and tweet. He argues that the Commonwealth **[*9]** failed to establish that he was the author of these messages. HN4[↑] "The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance of the evidence." Bloom, 262 Va. at 821, 554 S.E.2d at 87 (quoting Witt v. Commonwealth, 215 Va. 670, 674, 212 S.E.2d 293, 296 (1975)). Although the type of evidence used to prove the identity of the person making the statement may vary based in part upon the medium used to convey the message, the governing legal standard is the same—proof by a preponderance of direct evidence, circumstantial evidence, or a combination of both. See *id.* at 820-21, 554 S.E.2d at 87; *see also* Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 17-1, at 1164 (7th ed. 2012) ("[A]uthentication does not set a high barrier to admissibility, and is generally satisfied by any form of proof that supports a finding that it is what it purports to be."). Further, it is well established that **[***9]** "[t]he completeness of the identification goes to the weight" afforded

[8] Other jurisdictions considering the issue have reached the same conclusion. *See, e.g.*, United States v. Browne, 834 F.3d 403, 411-13, 65 V.I. 425 (3d Cir. 2016), *cert. denied*, ***137 S. Ct. 695, 196 L. Ed. 2d 572 (2017)***; United States v. Brinson, 772 F.3d 1314, 1320-21 (10th Cir. 2014); Smith v. State, 136 So. 3d 424, 432-34 (Miss. 2014); ***Commonwealth v. Koch, 2011 PA Super 201, 39 A.3d 996, 1002-05 (Pa. Super. Ct. 2011)***; Butler v. State, 459 S.W.3d 595, 600-01 (Tex. Crim. App. 2015); State v. Francis, 455 S.W.3d 56, 69-73 (Mo. Ct. App. 2014); ***Symonette v. State, 100 So. 3d 180, 183 (Fla. Dist. Ct. App. 2012)***; State v. Roseberry, 197 Ohio App. 3d 256, 2011 Ohio 5921, 967 N.E.2d 233, 243-44 (Ohio Ct. App. 2011).

"the evidence rather than its admissibility," with the responsibility of determining the threshold question of admissibility resting with the trial court. *Armes v. Commonwealth, 3 Va. App. 189, 193, 349 S.E.2d 150, 153, 3 Va. Law Rep. 753 (1986)* (quoting *State v. Williamson, 210 Kan. 501, 502 P.2d 777, 780 (Kan. 1972)*).

Under the applicable preponderance of the evidence standard, the record supports the trial court's finding that the appellant was the person who made the written statements contained in the tweet and text messages sent from his own phone from August 25 through 27, 2015. The appellant admitted that the passcode-protected phone from which the tweet and text messages were sent was his phone. He knew the passcode for the phone and provided it to law enforcement. In addition, a ***social media*** app installed on the phone had been created with an email address using the appellant's name. Further, **[**832]** the unobjected-to-photograph of the stolen money counter contained in the tweet was the same money counter **[*10]** found in the appellant's bedroom.[9] This evidence clearly met the baseline foundational requirement of proving by a preponderance that the appellant was the person who sent the text messages and the tweet from his cell phone. Thus, the trial court did not abuse its discretion **[***10]** in concluding that the Commonwealth sufficiently authenticated the challenged text messages and tweet to render them admissible for the jury's consideration.

III. CONCLUSION

The Commonwealth proved by a preponderance of the evidence that the appellant was the person who sent the challenged tweet and text messages from his phone. Consequently, the trial court's admission of the evidence was not an abuse of discretion, and we affirm the convictions. We remand the case solely for the correction of a clerical error in the sentencing order, which incorrectly lists one of the case numbers as CR150001240-03 instead of CR15000124-03. *See Code § 8.01-428(B)*; *Howell v. Commonwealth, 274 Va. 737, 739, 652 S.E.2d 107, 108, 109 n.* (2007)*.

Affirmed and remanded.

End of Document

[9] Although the appellant objected to the admission of the text in his tweet, he agreed that the photograph contained in the tweet was not ***hearsay***. See *Bynum v. Commonwealth, 57 Va. App. 487, 493, 704 S.E.2d 131, 134 (2011)* (holding that a photograph is not a statement and thus does not constitute ***hearsay***).

Common order language

The Parties shall communicate regarding their children via www.Ourfamilywizard.com. The parties are ordered to visit the website and each enroll in the program for at least a one-year subscription not later than 10 calendar days from today. The parties shall thereafter conduct all communications regarding shared parenting matters using the website's features.

The parties shall utilize the Messaging feature only when information cannot be conveyed in the Calendar, Expense, and Info Bank features.

The parties shall not communicate by telephone or text messaging except regarding matters of an emergency nature regarding a child that must be acted upon in less than 48 hours. In the case of such an emergency the subject and general content of any such communication shall be memorialized by a Journal entry in the Calendar feature.

The Court orders the parties to utilize the OFWpay expense feature to record and formalize all potentially reimbursable expenses in order to mitigate the necessity to litigate in the future over such matters. An electronic file of the receipt for payment must be attached to each request or record. Each parent shall preserve the original of any scanned or photographed document posted

All parents entries shall be viewable via a Professional Account to both parties' attorney(s) of record and the (Judge / Commissioner / Minor'sCounsel/ Parent Coordinator/ Special Masters /GAL) assigned.

Neither party shall fail to renew the annual subscription to the website without a signed and filed stipulation by both parties or a court order.

Additional order suggestions

The parties are ordered to each establish a parent account at www.OurFamilyWizard.com. Each shall enroll in the program for a one-year subscription not later than June 30, 2012 by completing the online sign up process or calling the toll free number provided on the contact us page.

The parties shall thereafter not e-mail, text, or telephone, but shall post all communication exclusively on the website. They shall communicate by telephone only in matters of emergency regarding the child that must be acted upon in less than 24 hours.

The parties shall use the Calendar, Info Bank, and Expense features and reserve the Message feature for information the others do not accommodate. If an entry requires a response the receiving parent shall respond within 48 hours unless the entry itself indicates a longer time frame is acceptable.

All parties shall elect to receive text or email alerts about new activity using the Daily Digest or On Action option.

Both parties shall authorize Professional Access to the Guardian Ad-Litem using the "Permission for Professional Access" document.

The utilization of the "OurFamilyWizard" website shall not be deemed as a per se violation of the existing Protection from Abuse Order filed at No. ---- of ----dated November, 2010 and in effect until November, 2011.

Although no issues regarding health reimbursements are presently before the court, **the court orders the parties to** take advantage of the Expense tools, utilizing OFWpay, on the website to have a future record of all potentially reimbursable expenses in order to mitigate the necessity to litigate in the future over such matters.

This Order of Court shall remain in full force and effect until further Order of Court.

SEGMENT 5

3:15p-5:15p Ethics:

Professionalism Minus the Zealousness in Civil and Criminal Cases

The Ethics of Professionalism:
How Counsel for Parents and GALs in Family Law Cases Can Best Represent their Clients Without the Aggression that Used to be Called "Zealousness"

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Introduction: This course focuses on a method of harkening back to more traditional practices and interpretations of ethical rules with the goal of assisting family lawyers to become leaders, helpers, and healers. We will discuss how attorneys can, even when they are in adversarial roles, remain friends and colleagues in the true sense of the word, while in the process, helping their clients through the toughest times of their lives by working side by side to achieve a fair and appropriate result.

In Part I of this two hour ethics seminar, we will look at the pros and cons of beginning a case with examining the possibility of shared custody, and whether using shared custody as a starting point can assist the entire family and the Court in achieving a result that is more child-focused, less likely to result in an appeal or repeat litigations throughout the child's life, or whether beginning the case in this way might limit the ability of the judiciary to exercise its discretion, or hamstring counsel for the parties. The ethical implications of this approach will be examined with respect to the practitioner's duty of Competence, Scope of Representation and other applicable rules.

In Part II of this seminar, we will discuss ways in which attorneys may be able to reduce confrontational episodes, reduce frustration when one of the attorneys or the GAL is disengaged from the litigation, and ways to bolster each other rather than attack each other, especially when the subject of the litigation is a child who, absent abuse or neglect, could benefit from the parents coming together to work to serve his or her best interests.

The over-reaching theme of this seminar is that we as professionals are trusted by the public to assist them with the hardest times they encounter. Whether it is a situation where a marriage has broken down, a situation where a non-traditional family is involved, a situation of mental health or substance abuse hindering parenting, or a situation where communication between parents has made the co-parenting almost impossible, we lawyers are supposed t be here to help, not to inflame the problems that the parties already have. This program examines how ethics rules can assist the practitioners in keeping the conversation positive and professional to achieve the best outcome.

The Richard S. Glasser Method: Turning Aspirational Goals Into Habits

"Always do the right thing, the right way, for the right reasons."

"There is no right way to do the wrong thing."

- *Richard S. Glasser*

On March 14, 2019, the legal community and the Commonwealth of Virginia lost a true leader, gentleman and consummate professional. The void left by Richard S. Glasser, who was not only the father of my best childhood friend, but was also a mentor and friend, will be almost impossible to fill, as he possessed a unique combination of tenacity, intellect, graciousness, civility and kindness. Although few are likely to replicate Mr. Glasser's courageous and rewarding path securing justice in the face of egregious wrongs by asbestos companies, we still have much to learn from his example. In a time of increasing concern about the apparent waning of professionalism and a surge in concerns about lawyer wellness, examining and adopting the habits of the best in the business provides a path to a better future.

This course hopefully can be a starting point for attorneys looking for some inspiration as we try to elevate our own practices as well as the profession in general. The Family Law bar faces unique challenges as its members navigate the extremely complex emotions of clients as well as the sometimes challenging behaviors of colleagues. While we all understand that the clients who darken our doorsteps are going through some of the most difficult and volatile days of their lives, and we want them to be satisfied with the result, we must commit to remaining faithful to the principals and ethical standards of our profession, as well as the aspirational goals of professionalism to which we aspire. We have all seen the harmful results to clients whose lawyers do not hold themselves to appropriate standards.

For the family law practitioner who truly wants to assist the client to achieve a long term satisfactory outcome while being mindful of the client's emotional well-being, including emotional ramifications when children are involved, the words of Richard Glasser could not be more applicable. Attorneys in the family bar do not have to be Ghandi. We do not have to be perfect, and we do not have to know the future. To serve our clients in the best possible way, however, we must identify what we believe is the "right" action, and we must identify that action in the context of the "right reasons," particularly in a custody case. Finally, we have to accomplish it the "right way," which includes keeping our clients informed, communicating respectfully and professionally with opposing counsel, and behaving fairly and ethically in all of our dealings with the Court and the community.

Performing in keeping with these goals may seem like a daunting task, however, the tools lie within us. Knowing and listening to your conscience and applying your instincts along with refreshing your familiarity with the Model Rules of Professional Conduct in times of doubt will almost always allow you and your client to do the right thing the right way.

As a starting point for this program, research and ideas have been generated using questions submitted by members of the Young Lawyers Section of the Virginia Bar Association. This program contains what is hopefully a helpful analysis of responses to these questions in keeping with the Model Rules as well as the aspirational goals and highest standards of ethical conduct.

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The goal of this course is to teach new practitioners and remind seasoned professionals how we can all elevate the practice and hopefully the profession as a whole.

PART I: USING CO-PARENTING AS A STARTING POINT – PROs and CONs – How are Ethical Rules Implicated here?

A. INDEX A – *Please see* Materials Prepared by The National Parents Organization
B. INDEX B - *Please see 2018 HB 1351and proposed 2019 HB 2127*
Virginia Code 20-124.2

C. ETHICAL RULES IMPLICATED

1. Competence - RULE 1.1 Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Commentary – How many of us even knew this Bill became a Law in 2018? In order to be competent, we need to stay abreast of the newest laws and the changes in the existing laws so that we may advise our clients with the best, most up to date information and how the changes in the law may impact the court's ruling.

Although we all are familiar with Virginia Code Section 20-124.3 and apply the factors to each case, how does this change to Virginia Code 20-124.2 impact the analysis of the client's case, if at all?

2. **RULE 1.2 Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Commentary – Regarding shared parenting, how does the lawyer handle a case where the client's objective is to minimize the other parent's contact with the child? How does it impact the attorney's ability to act ethically if the client has an unreasonable goal at the outset? How can a lawyer behave ethically while also representing a client who does not want to see that the best interests of his or her child are not being served by his or her objectives?

How does an attorney serve the client who will not be counseled? Does the attorney have an obligation to withdraw if the client states an unwavering desire to take a course of action that ignores the law and/or the instructions of the court? Where does client control intersect with ethical obligations? What if HB 2127 had passed? How would this change the situation? What

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about the client who does not want to talk about shared parenting at all, whether for financial reasons or because he or she has concerns about the other's parenting? Is it de facto unethical for an attorney to argue against shared parenting purely for financial reasons, if he or she thinks the client is overstating concerns or manufacturing false concerns to thwart a push for shared custody?

Are these issues the same or different in mediation? Does the attorney have more leeway in mediation than in Court?

D. DISCUSSION

1. Pros of Assuming Some form of Shared Custody will be the Outcome – Presentation by National Parents Organization Personnel

   a. Exceptions for Abuse
   b. Exceptions for Unavailable Parents
   c. Exceptions for Substance Abuse
   d. Exceptions for Mental Health issues

2. Cons of Assuming Some form of Shared Custody will be the Outcome – Commentary by Attorneys - Family Law Coalition

   a. Limiting options for Lawyers
   b. Limits on Discretion of Judge
   c. Financial Implications for Parties

Commentary: Whether shared custody is a starting point, the ending point, or is not an appropriate outcome, each attorney and the Guardian Ad Litem will have to put in his or her best efforts before the case is adjudicated, mediated, or settled. Without preparation, none of these outcomes will arise smoothly. Many family law attorneys and judges have expressed frustration with the lack of preparation of some attorneys, the lack of responsiveness, or the lack of participation in efforts to share information or negotiate.

The following segment will focus on ways to adhere to the rules of professional conduct in a fashion that encourages professionalism, and encourages a collegial yet appropriate approach to the adversarial system. If the goal of custody litigation is to bring out the truth, and find a solution that is best for the child, there should be no reason why it cannot be accomplished with all involved putting forward their best effort in a cooperative, professional manner.

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PART II – REPRESENTING FAMILY LAW CLIENTS IN CONTESTED CASES, WITH OR WITHOUT A GUARDIAN AD LITEM WITHOUT SACRIFICING PROFESSIONALISM

QUESTIONS AND HYPOTHETICALS SUBMITTED BY YOUNG LAWYERS

QUESTION 1. What are some ways to address a Guardian *Ad Litem* who do not meet the basic expectations of the court in our child custody cases? How can we do this without prejudicing our clients?

RESOURCES: KNOW THE STANDARDS – *Please see Standards in Mini Handbook*

The standards governing GALs appear on the back of every Order of appointment provided by the Juvenile Court, and are often listed in Circuit Court Orders, but are rarely reviewed and analyzed. For a multitude of reasons, the standards are often not enforced due to the reticence of attorneys to call problems to the attention of the judge. The specifics of the standards are sometimes ignored by lackluster GALs or, in some cases, due to unresponsive parties, short timeframes, or other extenuating circumstances, can be impossible to perform. This issue has been the subject of widespread discussion by many groups including a task force that explored this specific issue in a survey sent to the Family Law bar.

The first consideration by any attorney who becomes frustrated with a GAL should be the specifics of the standards. If a GAL has failed to communicate with one of the parties, has failed to meet with the child, or has not reviewed records that are important for the Court to consider in determining the child's best interests, attorneys are well advised to remember that the relationship with the GAL should remain professional and not become antagonistic or hostile. Below are some scenarios about which attorneys have expressed frustration and some tips for assisting your client while maintaining the highest degree of professionalism.

POTENTIAL PROBLEMS AND ETHICAL, PROFESSIONAL WAYS TO ADDRESS THEM:

1. GAL has failed to meet with the child and/or your client:

Meeting with the child is probably the most basic requirement for the GAL and is often something that does not happen on the timetable that the parties' counsel would prefer. In fact, sometimes the GAL fails to meet with the child at all. From the perspective of the conscientious GAL, an officer of the Court should not, in good faith, make a recommendation about the custody and visitation of a child he or she has not met. While there are exceptions to every rule, such as a traumatized child who is being evaluated by a psychologist, a child who is placed out of state and the Court has not authorized travel, or a child who is otherwise unavailable, for the most part, the GAL should not appear in Court without interviewing the child.

While it is easy for Counsel to become frustrated with the GAL, there are some ways to elevate the situation and to do the right thing for your client by becoming a better colleague for the GAL and a more of an asset to the Court:

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A. <u>Keep in close contact with the GAL without becoming critical</u>. While it may seem obvious, the best way to remind the GAL that there are tasks to be performed is to politely and effectively provide information and/or opportunities for the GAL to perform these tasks properly. For example, as soon as the GAL is appointed, provide the GAL with the following:

1. Permission under LEO 1870 to contact your client OR a written request to be present for whichever contacts for which you would like to be present as well as some available dates that have already been coordinated with your client;

2. Contact information for your client, including name, address, phone number, email. Provide the names and ages of the children as well as where the children go to school;

3. If the children have special needs, if CPS is involved, or if there are other extenuating circumstances, let the GAL know these may be issues that will require special attention or more time for investigation. Be careful to provide information rather than your opinions about how the GAL should do his or her job. *Avoid saying to the GAL that he or she needs to do certain things, as the GAL is a professional and should not be subject to criticisms or accusations simply because he or she has a preferred procedure.*

B. <u>Offer Assistance to the GAL in Plenty of Time for the GAL to Recover</u>

If you are concerned that the GAL's investigation is not progressing, contact him or her *well before the eleventh hour* to find out if there is any further information he or she needs, find out if there is anything the GAL would like your client to provide, or if there are releases or documents that are necessary to assist the GAL. This prompt should be accomplished in a professional and helpful way rather than a critical way, and the GAL, if he or she has failed to perform the tasks in a timely fashion, will be likely to appreciate the reminder, if it is delivered in a collegial way rather than an accusatory one.

Even a wonderfully competent and diligent GAL can make a mistake, allow a case to be placed on the back burner, or lose contact information for a parent, school, or provider. Often, a GAL intends to contact counsel or the party regarding executing releases or gathering information, but pushes off the task to a more convenient time. A gentle reminder or offer of help from counsel can be the impetus the GAL needs to finish an investigation or schedule tasks that still need to be performed.

2. GAL has failed to communicate his or her recommendations

Every attorney who regularly has cases with GALs has undoubtedly sat with a nervous client who has no idea what the GAL will recommend, even right until the case is called. It is indeed maddening to try to prepare for a trial when you have no idea what the GAL is going to say or recommend. While it may be tempting to attack the GAL personally and to come to court loaded for bear, there is a better way to approach this issue, and as with the suggestions above, it has to do with making sure your preparation is everything it should be, and making sure that you do not wait for the last minute to address any issues that you believe might impact your client.

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A. Contact the GAL and Opposing Counsel well in advance of the trial and request a Settlement Conference or Mediation.

Often, a pretrial hearing, a settlement conference, or another deadline will encourage the GAL to complete his or her investigation earlier than if the trial is the first deadline. If the GAL arrives at a settlement conference with no recommendation or suggestions, participating in the conference will at least allow the GAL to meet the parties in person and hear what they have to say.

While any competent GAL would not come to the table having nothing done, it is better to provide an opportunity for the GAL to get involved than it is for your client to meet the GAL for the first time at trial while you are tasked with complaining to the Judge about it or trying to combat an unfavorable recommendation with arguments that may sound like sour grapes about the GAL at trial. Obviously, if you settle the case at the settlement conference, that is also better for your client than a contested trial.

B. File a Motion for a Continuance if the GAL has not met with your client or Communicated with Counsel at least 7 – 10 Days before Trial

While the standards only create a duty for the GAL to communicate his or her recommendations to the Court and Counsel 5 days prior to trial, if the GAL has not even spoken to your client or given you any indication of the status of the investigation, it does not help your client to fail to bring to the court's attention that the GAL has failed to communicate in a meaningful way until trial. If you have requested information from the GAL, or if you know that your client has not met with the GAL, or if a pretrial order mandates a settlement conference and it has not yet happened, it may be appropriate to move for a continuance to allow the parties and GAL to open the lines of communication so that the Court received the best possible information and your client receives the best chance at having the GAL recommend the most appropriate outcome.

C. Prepare Your Case as if the Court Has Not Appointed a GAL

In cases where the GAL conducts a shoddy investigation, or when the GAL does not have the applicable information, it behooves your client for you to prepare the case as thoroughly as you would if you were the only person before the Court. DO NOT rely on the GAL to present evidence or information, even though he or she is required to do so. DO NOT fail to subpoena records, evidence, or witnesses just because you believe the GAL will or should have done so. GALs are human, they make mistakes, and they miss things, sometimes willfully and sometimes because they see the evidence differently than you or your client. Regardless of what has caused the differences in the point of view between you and the GAL, you owe it to your client to present the best possible case, with the most thorough preparation you can in your best professional judgment.

Present your best case in the right way for the right reasons – in other words, keep it as an aspirational goal to prepare the case as you would if it were your only case. It does not serve your client for you to rely on the GAL or wait for the GAL to issue a report. Do your job the right way no matter what anyone else is doing.

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3. It appears that the GAL has formulated what appears to be a personal opinion rather than a recommendation based on the appropriate evidence, rules, and standards.

KNOW THE RULES – COMPETENCE (1.1) DILIGENCE 1.3), COMMUNICATION (1.4) and CONFLICTS (1.9)

GALS are not social workers or CASA workers, they are attorneys. They are expected to follow all of the same Rules and adhere to the same standards that all party attorneys are. Having a working knowledge of the Rules will help all of the attorneys in each case behave professionally and assist the Court in the best way possible. Some of the most commonly implicated rules in domestic cases are those related to Conflicts, Competence, Diligence, and Communication. *For a summary of these Rules as well as some applicable comments, please see the Mini Handbook provided as well as the full text of the Model Rules.*

In addition to the standards stating that the GAL must communicate with the court and counsel prior to the hearing, the GAL is also expected to adhere to the Communication standards of any attorney in a case. Failing to respond to reasonable inquiries from counsel about the status of the investigation, or failing to respond to a request to meet with a party or accept information about the parents' concerns is no more acceptable than it is for an attorney who is not a GAL.

While filing a bar complaint is not necessarily a viable option in the middle of a custody case, sometimes it can be useful to communicate the GAL, after you have exhausted all other possibilities, to remind the GAL that he or she has a duty under a certain rule to communicate or to be diligent in the performance of duties. A phone call, letter or email citing a Rule is an aggressive move, but again, may help the GAL and your client open a dialogue, which will help your client more than if there is a stunted silence between the GAL and one of the parties which ultimately leads to an unproductive day in court, a poor outcome for your client, a delay that prejudices your client or depletes resources or harms the children in a custody matter.

UNDERSTAND RULE 4.2 and LEO 1870

RULE 4.2 (as interpreted by LEO 1870) Communication with Persons Represented by Counsel

As stated above, it is critical for young family attorneys and new GALs to understand that GALs are not witnesses and are not parties, they are attorneys representing the interests of the child. A GAL may not speak to a represented party about the subject of the litigation without Counsel present unless permission of Counsel is granted. Likewise, the children may not be interviewed by Counsel for the parties without GAL consent or without the GAL present.

Many GALs use forms to be sure the communication and permission is clearly granted or denied, and that representation status is clear.

Even when permission is granted, a GAL must be careful to respect the boundaries of the parties and counsel must in turn respect that the GAL is independent and should not be badgered or cajoled. The GAL may not agree with your client, and may not agree with either parent. Rather

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than becoming hostile, angry or aggressive with the GAL, it is more helpful to your client if you consider that the GAL may be a valuable resource to find out if your client's case has deficiencies that may only be clear to someone who has talked to all involved. The GAL most likely has more information that anyone else in the case if he or she has done a good job.

QUESTION 2. (For Judges): What are some pet peeves you have regarding young lawyers or those who are new to the practice of family law? What mistakes do you see new lawyers make in domestic relations cases? How do you reprimand attorneys who are behaving in a not-so-civil manner?

RESOURCES: Rules of Evidence, Procedural Rules, Rules Regarding Discovery

QUESTION 3. (For Judges): What is the best way to resolve Discovery disputes prior to getting the court involved? When is the right time to file Motions to compel, requests for sanctions and attorneys' fees? *Note: See Subsection (8) below*

RESOURCES: Rules of Court, Rules of Civil Procedure

Discovery Rules can be found in the Rules of the Supreme Court of Virginia, Part Four, entitled Pretrial Procedures, Depositions, and Production at Trial

Rule 4:1. General Provisions Governing Discovery.

Family law attorneys must be mindful of the restrictions that place more limitations on what may be sought in divorce and custody matters when compared to other areas of the law. Rule 4.1 (B)(5) should be familiar to you and should guide you in preparing discovery that is not overly broad. Invariably, opposing Counsel will likely object to some of the discovery, and in many cases, all of the discovery based on an objection that it is overly broad. A disturbing trend had concerned many family lawyers, as it appears that more often than not, attorneys simply object to everything, answer nothing, and force the party who propounded the discovery to chase it down, costing both clients time and money while these useless motions are prosecuted and defended.

If we seek to elevate our practice and be truly professional in our behavior, the practice of objecting and refusing to provide an answer when it is clear that the information will inevitably have to be disclosed because it is relevant, or clearly may lead to discoverable information, should be avoided. Being honest and forthright in your discovery is not the same as selling out your client. The Rules are our guides to allowing the case to move forward in a dignified manner, and we must abide by them faithfully. It does not assist your client if the Court has to intervene in squabbles and the Court sees that you are simply trying to evade the Rules. Eventually, the Court may penalize you or your client if it is clear that you are simply objecting frivolously.

Motion to Compel: (8) Pre-Motion Negotiation. A motion under this Rule must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

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QUESTION 4. Please give us a primer for entering social media and Facebook evidence in family law cases.

Social Media has provided new challenges with respect to the Rules of Evidence and trial procedure. It is quite difficult to authenticate social media accounts, as it is always possible for the opposing party to claim that the account was hacked, stolen, or that it simply is not the actual account of the person in question. The good news is that most parties will not deny that the account belongs to him or her, and if the party admits it is his or her account, and admits to making the post, it has been successfully authenticated and can typically be admitted. Most of the time, if an objection is made or any suggestion can be raised in good faith that the post was not actually posted by the party, admitting these items can be difficult.

Pitfalls of social media also include advising a client to delete or alter social media posts after a discovery request has been made. If a matter has been filed, especially when discovery is pending, it is unethical to advise a client to delete or alter the evidence that has been requested. Good policy to preserve ethics and professionalism is to advise your client to scrub his or her social media *before* any pleadings are filed. This is a good idea not only for the litigation, but to assist your client in elevating his or her ideals and present the best possible version of him or herself in public. It is often humiliating to children when their parents are posting rude, obscene, or unflattering material, and it can often enflame the situation. If your client presents a positive, child-friendly image on the internet, and in person, that is preferable for many reasons including more beneficial for the children.

HYPOTHETICAL 1: CLIENT COMMITING PERJURY ON STAND

Rules Implicated: 3.3 (Candor)

4.1 (Truthfulness)

During a JDR custody hearing (the parties are not married but share children and formerly shared a home), the subject child's mother told the GAL and her counsel that there is video of the father, post-separation, trying to break into the house to take property and/or to scare her. This video later became the basis of the mother's Petition seeking a Protective Order as well as a criminal complaint, filed with the magistrate, against the father, after the mother discovered that some tools and other property was missing from the garage.

At some point, it becomes clear that the hooded person in the video was the child, not the father. The child, age 16, who is roughly the same height as the father, is wearing a dark hoodie and can be seen on the video, which was taken on a rainy night by the family's security camera, struggling with the lock on the garage. The child told the GAL that it was him in the video and that the father was not involved and that he was not sure why his mom was trying to send his father to jail using this video, but that he was scared to take sides in the matter because he didn't want to get anyone in trouble and he loves both of his parents.

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The attorneys discussed the existence of the video prior to trial. At the time of the initial discussion, the mother either believed that the video showed the father, or she knew that the video was of the child, but said it was the father to try to gain an advantage. Later during the negotiations, the mother tells her lawyer she is not sure who is on the video and that she may have made a mistake in filing for the protective order and the criminal matter.

During witness preparation, the lawyer advises the mother not to mention the video, and tells her she cannot lie on the stand, but that she has no obligation to say that she had initially made a mistake about the video. He advises her to withdraw the criminal matter and the protective order petitions, but since he does not represent her on those matters, he feels that he has done his duty regarding the video as long as she does not use it against the father in court.

At the hearing, under cross examination, when asked about the video, the mother panics and testifies that there was never any video and that she never told the GAL that she had a video of the father trying to get into the house. She denies ever saying to anyone that the father tried to break in. When shown her previously filed pleadings, the mother says the clerk made a mistake, and so did the magistrate, and that everyone is lying except her.

At this point, what duty does the mother's attorney have to the Court regarding this testimony? Does it matter that the testimony has less relevance to the custody hearing than the criminal complaint against the father, which is now withdrawn, or soon to be withdrawn? Does it matter that the mother's attorney does not represent her with respect to the protective order and criminal trial?

Resources: Rule 3.3 is implicated here with respect to the attorney's duty to be candid before the tribunal. Please review all parts of Rule 3.3 in the mini-handbook and formulate an opinion regarding what the lawyer must do at trial.

Rule 4.1 is also implicated with respect to the GAL. Does the attorney's obligation change because the statement was made to the GAL and not the Court? What if the mother knows the GAL will put these statements in his or her report? Does the GAL have a separate duty to correct information provided to the court, even if it is reported to the GAL as fact by the parent?

HYPOTHETICAL 2: EMERGENCY HEARING WITHOUT NOTICE

Rules Implicated: 4.2 (Communication With Represented persons),

4.3 (Communication with Unrepresented persons)

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The parties in a case, Amy and Arthur Adams, do not have an active matter on the docket. The Adams family is operating under a custody arrangement set forth in a Final Decree that was entered 3 years ago, when the children were age 1 and 3 and did not attend school. For several months, the children's mother and father have been exchanging e-mails about various scheduling issues they are having now that the children are enrolled in school. The youngest child has some developmental delays and is enrolled in early intervention. The older child just entering first grade.

In some emails, father's prior counsel from the divorce was cc'd on the emails from the father, however he never tells the mother explicitly that he has engaged an attorney. After several months of email communication, the mother rehires her divorce counsel and shows her all of the emails. In response, the mother's counsel files for an emergency hearing seeking an immediate change to the custodial and visitation arrangement, since she alleges that the father is refusing to send the children to school during his visitation time.

The mother's attorney did not contact the father's prior attorney to see whether the attorney is still representing the father in Juvenile Court. The father's attorney has not filed any formal pleadings, a notice of appearance, or a petition seeking any modification to custody or visitation, so mother's counsel believed that the father's counsel was not yet Attorney of Record and that there was no reason to contact counsel.

The mother and her counsel knew the father's contact information, as well as the father's attorney's contact information, which was evident from the emails to the father as well as the emails that had been copied to the father's lawyer.

The mother's attorney did not let the father know that she had scheduled an emergency hearing for change of custody. At the emergency hearing, the father's existing joint legal and shared physical custody was amended, allowing him only limited visitation, and permitted the mother to dictate the visitation schedule, and to change the father's visitation to accommodate the children's school hours and therapy appointments.

QUESTIONS OF ETHICS:

1. What duty does the mother's counsel have to the Court and the opposing party regarding scheduling such emergency hearing and *ex-parte* communication with Court, when the attorney knew of the father's contact and it was reasonable for the counsel to know that the father has been in contact with his counsel regarding developments and discussions?

2. If the mother's attorney had contacted the father, what should she say? Can she tell him she is just looking out for the children and that he really needs to send the children to school? Can she tell him she really does not want to be filing this pleading but that she has to because he won't work with his ex?

Resources: Rule 4.2 is implicated here if the opposing party is represented

Rule 4.3 is implicated here if the opposing party is not represented

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The *ex-parte* prohibition is implicated regardless of whether the opposing party is represented. There is no scenario in which it is permissible to file motions on an *ex-parte* basis unless it is specifically permitted such as in the case of an emergency protective order.

Rule 4.3 explicitly forbids a lawyer from stating or implying that the lawyer is disinterested. How does this impact the behavior stated above in Question 2? Rule 4.3 also states that a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client. In this case, is the father's interest reasonably going to conflict with the mother's or the children's best interests? Does it matter why the father is not sending the children to school?

2. What can the father's Counsel do to ameliorate the situation? His first thought is to file a bar complaint, motion for Sanctions, and to seek to have the mother's lawyer removed, since she is now a witness who can testify as to the mother's intent to deprive the father of custody without the benefit of a hearing where he would have a chance to present his point of view…is this a valid course of action? Is it ethical? Is it professional? Does it help his client in the long run?

3. **GAL Questions (*see standards*):** Does the GAL from the divorce have an ethical obligation to investigate when the mother calls and tells him or her that the children are not being sent to school or that the father is neglecting them even if he or she hasn't been appointed in JDRC? When does the GAL's duty to the children begin and end? What is the GAL obliged to do? Does the GAL have to intercede to ask the father to change his habits, if he is failing to send the children to school, or does the GAL simply have to investigate and formulate recommendations to provide to the Court?

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MINI-HANDBOOK OF RULES AND COMMENTARY USEFUL IN ANSWERING HYPOTHETICALS PRESENTED IN ETHICS MATERIALS

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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COMMENT

[1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.

[2- 4] *ABA Model Rule* Comments not adopted.

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

RULE 4.2 Communication With Persons Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

RULE 4.3 Communication with Persons Unrepresented by Counsel

RULE 4.3 Dealing With Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN Adopted June 23, 2003

These standards apply to all attorneys serving as guardians ad litem for children in child protection, custody and visitation, juvenile delinquency, child in need of supervision, child in need of services, status offense and other appropriate cases, as determined by the court, in juvenile and domestic relations district courts, circuit courts, the Court of Appeals and the Supreme Court of Virginia. These standards augment the policies governing the qualification of attorneys as guardians ad litem.
In fulfilling the duties of a guardian ad litem (GAL), an attorney shall:

A. meet face-to-face and interview the child,

B. conduct an independent investigation in order to ascertain the facts of the case,

C. advise the child, in terms the child can understand, of the nature of all proceedings, the child's rights, the role and responsibilities of the GAL, the court process and the possible consequences of the legal action,

D. participate, as appropriate, in pre-trial conferences, mediation and negotiations,

E. ensure the child's attendance at all proceedings where the child's attendance would be appropriate and/or mandated,

F. appear in court on the dates and times scheduled for hearings prepared to fully and vigorously represent the child's interests,

G. prepare the child to testify, when necessary and appropriate, in accord with the child's interest and welfare,

H. provide the court sufficient information including specific recommendations for court action based on the findings of the interviews and independent investigation,

I. communicate, coordinate and maintain a professional working relationship in so far as possible with all parties without sacrificing independence,

J. file appropriate petitions, motions, pleadings, briefs, and appeals on behalf of the child and ensure the child is represented by a GAL in any appeal involving the case, and

K. advise the child in terms the child can understand, of the court's decision and its consequences for the child and others in the child's life. **END OF MATERIALS**

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2019 SESSION

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HB 2127 Children; maximizing amount of time minor children spend with each parent.

Introduced by: Glenn R. Davis | all patrons ... notes | add to my profiles | history

SUMMARY AS PASSED HOUSE:

Best interests of a child; frequent and continuing contact with each parent. Provides that, while considering the best interests of a child for the purposes of determining custody or visitation arrangements, the court shall, when appropriate, assure frequent and continuing contact with each parent.

SUMMARY AS INTRODUCED:

Best interests of a child; maximizing amount of time minor children spend with each parent. Provides that, in considering the best interests of a child for the purposes of determining custody or visitation arrangements, the court shall assure minor children of frequent and continuing contact with both parents so as to maximize the time minor children spend with each parent, when appropriate.

CHAPTER 857

An Act to amend and reenact §20-124.2 of the Code of Virginia, relating to joint legal or physical custody.

[H 1351]
Approved May 18, 2018

Be it enacted by the General Assembly of Virginia:

1. That §20-124.2 of the Code of Virginia is amended and reenacted as follows:

§20-124.2. Court-ordered custody and visitation arrangements.

A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. The court may enter an order pending the suit as provided in §20-103. The procedures for determining custody and visitation arrangements shall insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members. Mediation shall be used as an alternative to litigation where appropriate. When mediation is used in custody and visitation matters, the goals may include development of a proposal addressing the child's residential schedule and care arrangements, and how disputes between the parents will be handled in the future.

B. In determining custody, the court shall give primary consideration to the best interests of the child. *The court shall consider and may award joint legal, joint physical, or sole custody, and there shall be no presumption in favor of any form of custody.* The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. ~~The court may award joint custody or sole custody.~~

B1. In any case or proceeding involving the custody or visitation of a child, as to a parent, the court may, in its discretion, use the phrase "parenting time" to be synonymous with the term "visitation."

C. The court may order that support be paid for any child of the parties. Upon request of either party, the court may order that such support payments be made to a special needs trust or an ABLE savings trust account as defined in §23.1-700. The court shall also order that support will continue to be paid for any child over the age of 18 who is (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the party seeking or receiving child support until such child reaches the age of 19 or graduates from high school, whichever first occurs. The court may also order that support be paid or continue to be paid for any child over the age of 18 who is (a) severely and permanently mentally or physically disabled, and such disability existed prior to the child reaching the age of 18 or the age of 19 if the child met the requirements of clauses (i), (ii), and (iii); (b) unable to live independently and support himself; and (c) residing in the home of the parent seeking or receiving child support. In addition, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law. The court shall have no authority to decree support of children payable by the estate of a deceased party. The court may make such further decree as it shall deem expedient concerning support of the minor children, including an order that either party or both parties provide health care coverage or cash medical support, or both.

D. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court may order an independent mental health or psychological evaluation to assist the court in its determination of the best interests of the child. The court may enter such order as it deems appropriate for the payment of the costs of the evaluation by the parties.

E. The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section or §20-103 including the authority to punish as contempt of court any willful failure of a party to comply with the provisions of the order. A parent or other person having legal custody of a child may petition the court to enjoin and the court may enter an order to enjoin a parent of the child from filing a petition relating to custody and visitation of that child for any period of time up to 10 years if doing so is in the best interests of the child and such parent has been convicted of an offense under the laws of the Commonwealth or a substantially similar law of another state, the United States, or any foreign jurisdiction which constitutes (i) murder or voluntary manslaughter, or a felony attempt, conspiracy or solicitation to commit any such offense, if the victim of the

offense was a child of the parent, a child with whom the parent resided at the time the offense occurred, or the other parent of the child, or (ii) felony assault resulting in serious bodily injury, felony bodily wounding resulting in serious bodily injury, or felony sexual assault, if the victim of the offense was a child of the parent or a child with whom the parent resided at the time of the offense. When such a petition to enjoin the filing of a petition for custody and visitation is filed, the court shall appoint a guardian ad litem for the child pursuant to §16.1-266.

F. In any custody or visitation case or proceeding wherein an order prohibiting a party from picking the child up from school is entered pursuant to this section or §20-103, the court shall order a party to such case or proceeding to provide a copy of such custody or visitation order to the school at which the child is enrolled within three business days of such party's receipt of such custody or visitation order.

If a custody determination affects the school enrollment of the child subject to such custody order and prohibits a party from picking the child up from school, the court shall order a party to provide a copy of such custody order to the school at which the child will be enrolled within three business days of such party's receipt of such order. Such order directing a party to provide a copy of such custody or visitation order shall further require such party, upon any subsequent change in the child's school enrollment, to provide a copy of such custody or visitation order to the new school at which the child is subsequently enrolled within three business days of such enrollment.

If the court determines that a party is unable to deliver the custody or visitation order to the school, such party shall provide the court with the name of the principal and address of the school, and the court shall cause the order to be mailed by first class mail to such school principal.

Nothing in this section shall be construed to require any school staff to interpret or enforce the terms of such custody or visitation order.

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National Parents Organization: Preserving the Bond Between Parents & Children

The National Parents Organization (NPO) is a 501 (c)(3) organization focused on promoting shared parenting, where both parents have equal standing raising children after separation or divorce.

Mission: National Parents Organization improves the lives of children and strengthens society by protecting every child's right to the love and care of both parents after separation or divorce. We seek better lives for children through family court reform that establishes shared custody responsibilities and rights for every parent.

Why Does Family Law Need Reform? Of those American children whose parents no longer live together, an overwhelming 86% live primarily with just one parent. Aside from the increased risk factors to which these children are subjected (school dropouts, teen pregnancy, teen suicides, etc.), there is clearly an imbalance when it comes to custody awards. Without maximized custody and visitation established for both parents, court battles for sole or primary custody will continue to place stress on children, tie up the legal system and bankrupt families facing enormous legal bills. The courts create winners and losers – creating a disincentive to pursue mediation.

The Solution for Our Children. Social Science researchers have conclusively established that, barring the verified presence of abuse, children are better off when both parents play a meaningful role in their lives through maximized custody and visitation. Such arrangements are ardently desired by children, make children happier, improve their school performance and decrease delinquency.

- 32 family law experts in the *Association of Family and Conciliation Courts* (2014): "Children's best interests are furthered by parenting plans that provide for continuing & *shared parenting* relationships..."
- 110 child development experts in the *American Psychological Association* Consensus Report (2014): "...*shared parenting* should be the norm for parenting plans for children of all ages..."
- The *Journal of Epidemiology & Community Health* (2015) found that *shared parenting* after divorce or separation is in children's best interest & children with *shared parenting* were significantly less stressed.

Our Goals for Shared Parenting in Virginia. (1) Establish maximized custody & parenting time for both parents in temporary orders, except in the presence of proven harm or danger; (2) Establish maximized custody & parenting time for both parents in permanent orders, except in the presence of proven harm or danger.

Shared Parenting Benefits Both Genders and the LGBT Community. As an increasing number of same-sex couples become parents, the NPO's core belief that children should have two parents who share parenting responsibilities and rights, including financial support, will be even more relevant and timely.

Shared Parenting Increases Child Support Compliance. An Arizona State University study found that child support compliance increased to 93% when both parents' roles in raising their children are maximized.

Shared Parenting is a Growing Trend. In 2015, almost 20 states considered shared parenting legislation. Alaska & Kentucky have established a presumption of shared custody during temporary orders, while Kentucky passed the same for permanent orders in 2018. Oklahoma & Utah have passed legislation supporting shared custody in temporary orders. Nevada, Arizona & Virginia have also passed legislation supporting shared custody.

- A 2014 study showed that the percentage of cases in Wisconsin that ended in shared parenting grew from 5% in 1986 to 27% in 2008.

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Shared Custody: Debunking the Myths

1) **MYTH:** **Shared custody mandates a 50/50 split of the children no matter what.**

   ACTUALLY: **There is no mandatory 50/50 split; shared custody is a flexible arrangement.**

   Shared custody means *starting* at 50/50 and then, if warranted, deviating from that starting point. Today's modern society has many different family types and work requirements that a clean 50/50 split may not always be possible. Shared custody does mean having each parent in the child's life to the greatest extent possible -- for at least 30% of the time – such a figure is absolutely attainable in a vast number of situations.

2) **MYTH:** **Shared custody limits judicial discretion.**

   ACTUALLY: **Shared custody does not limit judicial discretion.**

   Shared custody only means that the *starting point* for custody hearings is shared legal ***and*** shared 50/50 physical custody. The judge would (and should) still have the discretion to deviate from that starting point for each individual situation, in the best interests of the child. The judge would explain his/her reasoning for any deviations in writing.

3) **MYTH:** **It is not in children's best interest to go back and forth. One stable home is most important.**

   ACTUALLY: **What matters most for children is stability in parental relationships, not stability in location.**

   Nearly 30% of American children are raised in households where parents no longer live together. In this situation, maintaining the stability of strong relationships with both parents is the best thing for our children because what matters most for children after parental separation is stability in relationships, not stability in location. The truth is kids are flexible with regard to where they are, but not with regard to their parental relationships. Experts published by the American Psychological Association and the Association of Family and Conciliation Courts agree: "children's best interests are furthered by parenting plans that provide for continuing & shared parenting relationships."

4) **MYTH:** **Shared custody is "One Size Fits All" and that does not work.**

   ACTUALLY: **Shared custody is a very flexible arrangement and gives courts multiple options. Each and every family situation is unique, and custody should be decided in children's best interest.**

   Unfortunately, "one size fits all" (i.e., every other weekend/Wednesday) is what we already have in the majority of cases in Virginia today. We can do better than this, and 30 years of social science (52 empirical, peer-reviewed studies) supports making this change for our children's benefit.

5) **MYTH:** **Most cases of disputed custody are settled out of court anyway, so there is no need to change the laws.**

   ACTUALLY: **Most settle out of court due to burdensome financial implications; current laws need reform.**

   Most cases are settled out of court because of the incredibly high cost of litigation. Under the current system, it is made clear to both parties that one parent has the clear advantage if custody is contested, and that the other parent will be "swimming upstream" and forced to spend thousands of dollars in an that has little chance of succeeding – just to potentially see their children one-fifth the time they saw them before. Unless this "other parent" has unusually large financial resources, that parent will not be able to pursue any legitimate course of action in court. Our goal with shared custody is to make the process fair and balanced from the beginning and to allow the best interests of the

child to be equitably weighed and pursued – this change will benefit the vast majority of our children. For those children that would not benefit from shared custody, judges maintain the ability to act in their best interests.

6) **MYTH:** **Shared custody protects abusers and facilitates access to their victims.**

ACTUALLY: **No one is in favor of protecting abusers; shared custody still allows victims to be protected.**

As parents, we fully support the prosecution of abusers to the fullest extent possible. Therefore, we favor and support legislation that presumes shared custody of our children, except in the presence of proven harm or danger, and advocate for legislation that makes this clear.

7) **MYTH:** **Shared custody forces parents who dislike each other to work together.**

ACTUALLY: **Shared custody allows parents to spend more time with their children – not with each other.**

This implies that parents don't have to work together in a sole custody arrangement, which is simply not true. They still have to work together in a sole custody arrangement; the only difference is that they interact from a combative perspective, since one parent has been declared "the winner" and the other "the loser." Shared custody alleviates this toxic dynamic and actually allows both parents to spend more time with their children – not with each other. Without reform, the current system incentivizes prolonged court battles by creating winners and losers, with our children as pawns in the middle of a stressful, costly, and ultimately harmful court experience. Equitable custody and parenting time will allow parents to focus their energy on their children, where it should be, rather than on each other. Furthermore, it can actually decrease the amount of time and interaction the parents have with each other (as we have seen in Utah's recent passing of legislation supportive of shared custody).

8) **MYTH:** **There is no reason to change the status quo roles of who the primary caregiver was.**

ACTUALLY: **Shared custody facilitates the balancing of parental responsibilities and decreases stress.**

This myth quickly falls apart when one realizes that both mother and father have to assume roles they may not have been previously holding, while still continuing their previous "assigned" role. Sometimes, the father may have been the "breadwinner" and the mother may have been the "caregiver," and sometime those roles may have been the opposite, and sometimes those roles may have been shared. The point is that now, post-divorce or separation, each parent will have to care for children, cook, clean, and work at a job. They must balance these responsibilities on their own – shared custody actually facilitates this process and decreases the stress involved for parents and children.

9) **MYTH:** **Geographic separation does not allow for shared custody.**

ACTUALLY: **Shared custody maximizes flexibility and can be adjusted for factors such as geography.**

It means *starting* at 50/50 and then adjusting for such factors as geographic separation, which is very easy to demonstrate and account for. Some situations will accommodate 50/50 custody, while others may have to adjust to 60/40, 65/35, or 70/30 (as examples). Shared custody maximizes flexibility for parents and benefits to children.

10) **MYTH:** **Fathers are not as involved in raising their kids as mothers are.**

ACTUALLY: **Children benefit when BOTH parents are involved to the greatest extent possible.**

This myth is unfortunately along the same lines of "Mothers aren't as capable of earning a paycheck as fathers are." Clearly, women/mothers can and should be able to make a living (just like fathers) and fathers can and should be involved in raising their children (just like mothers). As a country, we have thankfully moved beyond the "1950s Mad Men" era...and our family courts should, too.

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Executive Summary of Recent Shared Custody Studies

Study #1: **Journal of Epidemiology & Community Health** **April 2015**

Title: ***Fifty moves a year: is there an association between joint physical custody and psychosomatic problems in children?***

The most recent of many studies recently appeared in the Journal of Epidemiology & Community Health, which found that shared parenting after divorce or separation is in the best interest of children's health. The study evaluated the mental health of children living in both shared parenting and sole custody situations after divorce or separation and concluded that the children with shared parenting – children spending substantial time with each parent – were significantly less stressed than children living with one parent a great majority of the time.

Study #2: **Association of Family & Conciliation Courts** **April 2014**

Title: ***Closing the Gap: Research, Policy, Practice, and Shared Parenting***

This report lays the foundation for outlining how research, policy, and practice about shared parenting can be more effectively integrated. Thirty-two (32) family law experts supported the notion that "children's best interests are furthered by parenting plans that provide for continuing & shared parenting relationships..." This report also states that separating and divorcing families will benefit most from narrowing the gap between social science research and family law policy/practice. Finally, the 32 family law experts in this report believe that "when all potential hazards are addressed, shared parenting offers unparalleled opportunities for families to reorganize and sustain their better selves."

Study #3: **American Psychological Association** **2014**

Title: ***Social Science and Parenting Plans for Young Children: A Consensus Report***

110 child development experts contributed to this report, which addresses not only shared parenting for children, in general, but also for children under 4 years of age, in particular. The overarching finding was that "shared parenting should be the norm for parenting plans for children of all ages..." Other findings include:

- Evidence supports shared residential arrangements for children under 4 years of age
- Policy makers should recognize that depriving young children of overnights with their fathers could compromise the quality of the developing father-child relationships
- Sufficient evidence does not exist to support postponing the introduction of regular and frequent involvement, including overnights, of both parents with their babies and toddlers