FINAL REPORT OF THE
VIRGINIA COMMISSION ON YOUTH

Juvenile Records

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

COMMISSION ON YOUTH DOCUMENT

COMMONWEALTH OF VIRGINIA
RICHMOND
2002

COMMONWEALTH of VIRGINIA

Commission on Youth

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December 28, 2002

TO: The Honorable Mark R. Warner, Governor of Virginia

and

Members of the Virginia General Assembly

The 2002 General Assembly reviewed House Joint Resolution 72 requesting that the Virginia Commission on Youth "...be directed to study the need for consistency in state laws governing the collection, dissemination, and disclosure of confidential juvenile records." Although the resolution failed to pass, the Commission on Youth unanimously adopted the study of juvenile records as a 2002 legislative initiative.

Enclosed for your review and consideration is the report which has been prepared in response to this request. The Commission received assistance from all affected agencies and gratefully acknowledges their input into this report.

Respectfully submitted,

Phillip A. Hamilton
Chairman

MEMBERS OF THE VIRGINIA COMMISSION ON YOUTH

From the Virginia House of Delegates

Phillip A. Hamilton, Chairman
Robert H. Brink
L. Karen Darner
Robert F. McDonnell
John S. Reid
Robert Tata

From the Senate of Virginia

R. Edward Houck
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Steven V. Cannizzaro
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TABLE OF CONTENTS

Appendices

I. Authority for Study

Section 30-174 of the *Code of Virginia* establishes the Commission on Youth and directs it to "…study and provide recommendations addressing the needs of and services to the Commonwealth's youth and their families." This section also directs it to "…encourage the development of uniform policies and services to youth across the Commonwealth and provide a forum for continuing review and study of such services."

Under § 30-175 of the *Code of Virginia* the Virginia Commission on Youth has the power and duty to "undertake studies and to gather information and data in order to accomplish its purposes as set forth in § 30-174, and to formulate and present its recommendations to the Governor and the General Assembly." In addition, "at the direction or request of the legislature by concurrent resolution or of the Governor, or at the request of any department, board, bureau, commission, authority or other agency created by the Commonwealth or to which the Commonwealth is party, study the operations, management, jurisdiction or powers of any such department, board, bureau, commission, authority or other agency which has responsibility for services to youth."

During the 2002 session of the General Assembly, House Joint Resolution 72 (HJR 72) was introduced but not enacted. Instead, the Commission on Youth elected to undertake this study on its own initiative, utilizing the resolution as guidance in conducting the study. As introduced, HJR 72 directed the Commission to study the need for consistency in state laws governing the collection, dissemination, and disclosure of confidential juvenile records.

II. Members

Members of the Commission on Youth are:

Del. Phillip A. Hamilton, Chair, Newport News
Del. Robert H. Brink, Arlington
Del. L. Karen Darner, Arlington
Sen. R. Edward Houck, Spotsylvania
Del. Robert F. McDonnell, Virginia Beach
Sen. Yvonne B. Miller, Norfolk
Del. John S. Reid, Chesterfield
Sen. D. Nick Rerras, Norfolk
Del. Robert Tata, Virginia Beach
Mr. Steve Cannizzarro, Norfolk
Mr. Gary Close, Vice Chair, Culpeper
Mr. Marvin H. Wagner, Alexandria

III. Executive Summary

The Commission on Youth elected to undertake the study of Juvenile Records when House Joint Resolution 72 did not pass during the 2002 Session of the General

Assembly. The Juvenile Records study builds on the prior work of the Institute of Law, Psychiatry and Public Policy (ILPPP) at the University of Virginia and the Virginia Department of Criminal Justice Services (DCJS). Through this initiative, DCJS and ILPPP conducted a comprehensive review of the laws, practices and culture surrounding information sharing; assembled a statewide workgroup composed of professionals and policymakers working with children's issues; and developed a manual that explains the law, addresses misconceptions and makes practical recommendations regarding the sharing of information.

During the DCJS/ILPPP initiative, a number of concerns were identified including: inconsistencies with federal law; inconsistencies within the Virginia Code; grey areas needing clarification; and competing needs to balance the facilitation of exchange of information with safeguarding confidentiality. It is these concerns on which the Juvenile Records study focused.

Based upon an analysis of the issues and the input and expertise of the Advisory Group, the following recommendations are offered:

A. SCHOOL RECORDS

Recommendation 1

Amend the Code to require that notice be given to the superintendent when the charges, of which they were originally notified under § 16.1-260 (G), are withdrawn, dismissed, reduced, "nol prossed" or the juvenile is found not guilty, or is subject to a deferred disposition.

Recommendation 2

Amend the Code to require that the principal who was notified, pursuant to § 16.1-301 (A), that a student is a suspect in or has been charged with an enumerated offense, receive notice that the student was not charged with the suspected offense or if charged, the charges were withdrawn, dismissed, reduced, "nol prossed" or the juvenile is found not guilty, or is subject to a deferred disposition.

Recommendation 3

Amend the Code to authorize a superintendent to forward to another superintendent notices of adjudication received pursuant to Va. Code § 16.1-305.1 when the subject student is not enrolled in the school division that received notification from the clerk of court.

Recommendation 4

The Commission on Youth or its successor shall study and make recommendations on the advantages and disadvantages of adopting the *Federal Family Education Rights and Privacy Act* (FERPA) as Virginia's student records provisions and Virginia's compliance with the *No Child Left Behind Act of 2001*. Such a study should include assembly of an advisory group comprised of persons with an expertise in education and education law, and consideration of existing, Virginia statutory

provisions that are either in violation of or not addressed by FERPA and the *No Child Left Behind Act of 2001*.

B. MENTAL HEALTH AND SUBSTANCE ABUSE

Recommendation 5

Amend the Code to authorize the director or his/her designee of a secure facility or shelter to obtain from a health provider protected health information that is necessary to protect the health and safety of the juvenile, other juveniles, officers or employees at the facility.

Recommendation 6

Amend Va. Code § 2.2-3705 (A) (5) by adding language to clarify that the provisions contained therein apply "except as otherwise provided by law."

C. JUVENILE JUSTICE AND COURT RECORDS

Recommendation 7

Amend Virginia Code § 16.1-300(A) (4) to allow a person 18 years or older who was previously supervised by the Department access to his/her own records. This amendment shall include a provision authorizing the Department to withhold information it has reason to believe would be potentially harmful to a third party.

Recommendation 8

Amend the Code to allow disclosure of all information on adjudications of juveniles found delinquent or guilty that are entered into the Central Criminal Records Exchange pursuant to Virginia Code § 16.1-299 to officers or employees of criminal justice agencies for the purposes of the administration of criminal justice as defined in Va. Code § 9.1-101.

IV. Study Goals and Objectives

The resolution provided the following objectives for conducting the study of Juvenile Records:

- Identify and review current mandatory state and federal privacy, confidentiality, and disclosure laws;
- Determine the circumstances under which disclosure laws supercede confidentiality laws;
- Identify inconsistencies in state laws governing privacy, collection, dissemination, and disclosure of confidential juvenile records information;
- Recommend appropriate and feasible changes to the *Code of Virginia* to clarify conflicts in state laws, while maintaining compliance with federal laws and regulations governing such areas; and
- Evaluate the need for standardized guidelines that protect the confidentiality of juvenile records during information-sharing, while facilitating access to juvenile records by authorized persons and state and local agencies.

Several issues were identified as central to this study, including:

- The need and desire to maintain the confidentiality of records must be balanced with opportunities to improve service provision through the exchange of information.
- Laws and regulations governing the sharing of juvenile records are complex requiring an understanding of federal and state laws. Such complexity presents a challenge to agency personnel, the juvenile and their families.
- Amending the inconsistencies and conflicts in statute requires consideration of the multiple systems (juvenile justice, education, child welfare) that could be impacted by a change.

In response to these issues and study objectives, the Commission undertook the following activities:

1. Convened an advisory group to provide assistance and expertise in analysis of the issues.

2. Established a philosophical framework upon which identified inconsistencies and policy questions could be resolved.

3. Collected information on:
   - Prior efforts to study the topic;
   - Known inconsistencies in the law or practices and policy questions related to the issues stated above;
   - Records that may be in each type of file;
   - Parties who may want access;
   - The type of information commonly requested from files;
   - Parent and child access to records; and
   - Barriers to resolving inconsistencies and policy questions.

4. Developed appropriate and feasible recommendations to address statutory inconsistencies and policy questions.

5. Evaluated the need for standardized guidelines that protect the confidentiality of juvenile records during information sharing while facilitating access to juvenile records.

V. Methodology

In conducting this study, the Commission relied upon two primary research and analysis activities.

A. ADVISORY GROUP

The staff of the Commission on Youth developed a study workplan and, following its approval by the Commission, organized an advisory group to examine the issues and

provide relevant expertise. The 20-member Advisory Group, chaired by Delegate David Albo, included representatives from the Department of Mental Health, Mental Retardation and Substance Abuse Services, the Department of Social Services, the Department of Medical Assistance Services, the Department of Juvenile Justice, the Department of Education, the Office of the Executive Secretary, Supreme Court of Virginia, the Office of the Attorney General, and a Circuit Court Judge, a Juvenile and Domestic Relations District Court Judge, a Juvenile and Domestic Relations District Court Clerk, a Commonwealth's Attorney, a member of the Private Bar, and members of the Virginia General Assembly. Several of the advisory group members were also participants in the ILPPP/DCJS effort. The advisory group membership list is provided as Appendix B.

The advisory group met six times during the course of the study. Minutes from these meetings are provided as Appendix C.

B. RESEARCH

Staff collected information to support and supplement the work of the Advisory Group. Documents and reports from the ILPPP/DCJS efforts were consulted, as were persons involved with this project. Staff and Advisory Group members researched the status of Virginia and federal law regarding the authority of parents and children to access or consent to the release of various types records including those related to mental health, substance abuse, education, juvenile justice and court proceedings. Also gathered was information on persons who might want access to a juvenile's court file and the type of information and documents that can be found in a juvenile's court file. Finally, staff monitored the activities and progress of the Joint Subcommittee to Study the Protection of Information Contained in the Records, Documents and Cases Filed in the Courts of the Commonwealth (HJR 89, 2002).

VI. Background

This study builds upon the work completed by the Department of Criminal Justice Services (DCJS) and the Institute of Law, Psychiatry and Public Policy (ILPPP). The ILPPP/DCJS project was supported with funds from a State Challenge Grant as part of the programs funded by the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) and funds from the Juvenile Accountability and Incentive Block Grant (JAIBG). Information sharing was the focus of the effort with three specific areas of inquiry: state and federal confidentiality laws; the culture of information sharing; and technology issues in information sharing. Using these funds, the Institute completed the following: a comprehensive review of the *Code of Virginia* and the federal code, an examination of the juvenile code in other states, a survey of Juvenile and Domestic Relations District Court judges to identify issues in implementing the Virginia Code, and the development of the Juvenile Records and Information Sharing Manual. The Juvenile Accountability and Incentive Block Grant Trust Fund grants provided support for the Charlottesville Albemarle Youth Commission to survey over 140 juvenile justice and child-serving agency professionals. An additional grant also allowed Virginia

Commonwealth University to conduct regional focus groups validating the Charlottesville findings with a statewide audience.

A significant product of the ILPPP/DCJS effort was the Juvenile Records and Information Sharing Manual. Members of the Juvenile Records Advisory Group received a copy of both the 2001 and 2002 versions of this manual. At the time of publication of this report, the 2002 version of the manual is available on the Institute's website at http://www.ilppp.virginia.edu.

The manual contains the reports that are products of the focus groups and surveys, a comprehensive overview of Virginia and federal law related to information sharing and confidentiality of juvenile records and statutory appendices of the *Code of Virginia* and federal statutes and regulations.

Through the ILPPP/DCJS effort a number of concerns were identified including: inconsistencies with federal law; inconsistencies within the Virginia Code; grey areas needing further clarification; and competing needs to balance the facilitation of exchange of information and confidentiality safeguards. The ability to address these concerns was outside the scope of the ILPPP/DCJS project.

Building on these concerns, Commission staff compiled these and other concerns brought to their attention in a list of policy issues for consideration. This list was presented to the Advisory Group. The scope of these issues included mental health and substance abuse, education, juvenile justice and court records. Some issues were removed from the list since they were seen as already resolved, not of significant concern or outside the scope of this study. The final list of issues considered by the Advisory Group can be found as Appendix D.

The Advisory Group agreed on the following guiding philosophy to be used in their consideration of the policy issues:

The legal requirements for the authorized dissemination of confidential information are grounded in four overarching principles:

- *Presumption of confidentiality is necessary.*
- *Limited information sharing for legitimate purposes is beneficial.*
- *Formality and clearer guidelines are preferable to informality in the exchange of information.*
- *Waiver of confidentiality by a child/parent is permitted.*

The identified policy issues were separated into three areas (mental health and substance abuse records; school records; and juvenile justice and court records), with each area being the focus of a particular meeting. In the area of juvenile justice, it was recognized that information sharing was necessary and important with regards to public safety in some instances. The detailed minutes for each of the six Advisory Group meetings in which the policy issues were thoroughly discussed are in the Appendices.

VII. Findings and Recommendations

A. School Records

Findings

Under existing Va. Code § 16.1- 260 (G), the superintendent is notified if a student is charged with one of the listed serious offenses. If the student is adjudicated delinquent of one of the listed offenses, the superintendent is notified within 15 days under § 16.1-305.1 (and may redisclose that information in conformance with § 22.1-288.2) but, if the student is found not guilty or subject to a deferred disposition, or if the charges are withdrawn, dismissed, reduced, or "nol prossed," the school is not notified.

There was a sense that, if the information on the charge is important enough to report to school officials, it also should be important to provide information that could exonerate the student in the eyes of school officials.

Recommendation 1

Amend the Code to require that notice be given to the superintendent when the charges, of which they were originally notified under § 16.1-260 (G), are withdrawn, dismissed, reduced, "nol prossed" or the juvenile is found not guilty, or is subject to a deferred disposition.

Findings

This situation is similar to those explained above in Recommendation 1, except that it arises as a result of 2001 amendments to § 16.1-301(A). These changes permit notification of the school principal (not the superintendent) when a student is "a suspect in" or charged with a listed offense. Again, there are no provisions to notify the principal if the student is considered a suspect but never charged, or if the student is charged but found not guilty or is subject to a deferred disposition or if the charges are withdrawn, dismissed, reduced, or "nol prossed."

Recommendation 2

Amend the Code to require that the principal who was notified, pursuant to § 16.1-301 (A), that a student is a suspect in or has been charged with an enumerated offense, receive notice that the student was not charged with the suspected offense or if charged, the charges were withdrawn, dismissed, reduced, "nol prossed" or the juvenile is found not guilty, or is subject to a deferred disposition.

Findings

Va. Code §16.1-305.1 directs the clerk of court to provide written notice to the superintendent when a juvenile is adjudicated delinquent or convicted of a crime. The difficulty arises when the student stops attending division "A" and begins attending division "B." There is usually no knowledge of this by division "A" until there is a request by "B" for the student's records. This information is unknown to the clerk who sends the adjudication information to division "A." At this time, division "A" cannot forward this information to division "B" leaving division "B" unaware of the incident.

Recommendation 3

Amend the Code to authorize a superintendent to forward to another superintendent notices of adjudication received pursuant to Va. Code § 16.1-305.1 when the subject student is not enrolled in the school division that received notification from the clerk of court.

Findings

A number of pupil records provisions in Article 5 of Chapter 14 of Title 22.1 are inconsistent with the Federal Family Education Rights and Privacy Act (FERPA). FERPA supercedes Virginia law, except where Virginia chooses to be more restrictive in its provisions. The inconsistencies between FERPA and Virginia law are at the very least confusing for school divisions and may make it impossible for them to comply with both.

Two options for resolving the conflicts were considered by the Advisory Group:

- *Maintain Virginia's own statutory scheme for managing student records, but reconcile it with federal law and regulations.*
- *Adopt FERPA as Virginia's student records provisions.*

The group received extensive information on possible inconsistencies. The Advisory Group determined that, given the complexity of the possible changes and policy decisions involved, it did not have enough information and the necessary stakeholders at the table to make a recommendation to the Commission as to which option would be preferable. Furthermore, such an undertaking would be quite large, requiring the dedication of considerable staff time and would be best handled as a separate and distinct study.

Recommendation 4

The Commission on Youth or its successor shall study and make recommendations on the advantages and disadvantages of adopting the Federal Family Education Rights and Privacy Act (FERPA) as Virginia's student records provisions and Virginia's compliance with the No Child Left Behind Act of 2001. Such a study should include assembly of an advisory group comprised of persons with an expertise in education and education law, and consideration of existing Virginia statutory provisions that are either in violation of or not addressed by FERPA and the No Child Left Behind Act of 2001.

B. Mental Health and Substance Abuse

Findings

Staff of juvenile detention or shelter facilities may be unaware of existing medical or mental health conditions, including current medications, of the juveniles in their care. If the juvenile or parent cannot provide medical details necessary to protect the health and safety of the juvenile or other persons within the facility, prompt contact with the physician or mental health provider will help ensure that the juvenile receives the necessary and appropriate care, while taking into consideration existing conditions and current medications.

Recommendation 5

Amend the Code to authorize the director or his/her designee of a secure facility or shelter to obtain from a health provider protected health information that is necessary to protect the health and safety of the juvenile, other juveniles, officers or employees at the facility.

Findings

The provision in § 2.2-3705 (A)(5) which specifies that a minor's right of access to medical and mental health records may only be asserted by his guardian or his parent is in conflict with existing provisions of Va. Code § 54.1-2969 (E) in which a minor is deemed an adult for the purposes of consenting to the release of medical records related to:

- *Medical or health services for the diagnosis or treatment of venereal disease or any infectious or contagious disease; or*
- *Medical or health services required in the case of birth control, pregnancy or family planning, except for sterilization.*

Va. Code § 2.2-3705 (A) provides an exception "where such disclosure is prohibited by law." Neither this clause nor any other provision in this section makes an exception for those circumstances in which the minor may provide his/her own consent for the release of records.

Recommendation 6

Amend Va. Code § 2.2-3705 (A)(5) by adding language to clarify that the provisions contained therein apply "except as otherwise provided by law."

C. JUVENILE JUSTICE AND COURT RECORDS

Findings

Currently, access by a person 18 years or older requesting his/her own Department of Juvenile Justice (DJJ) records is restricted to those persons who had previously been committed to DJJ. (Va. Code §16.1-300(a)(4)). This limitation was found to be without a rationale, allowing persons who were likely found guilty of more serious crimes to access their records, while prohibiting those who were likely found guilty of less serious offenses from accessing their records.

Recommendation 7

Amend Virginia Code § 16.1-300(A) (4) to allow a person 18 years or older who was previously supervised by the Department access to his/her own records. This amendment shall include a provision authorizing the Department to withhold information it has reason to believe would be potentially harmful to a third party.

Findings

Va. Code § 16.1-299 requires fingerprints and photographs to be taken of juveniles 14 years or older charged with a violent juvenile felony as defined in § 16.1-228. The fingerprints and dispositions of 1) any juvenile who is found guilty of a felony or any other offense which is required to be reported to the Central Criminal Records Exchange (CCRE) by § 19.2-390 or 2) a juvenile 14 years or older charged with a "violent juvenile felony" as defined in § 16.1-228, or a crime ancillary thereto are forwarded to the CCRE. State police can disseminate this information contained in CCRE according to § 19.2-389.1; however, the CCRE cannot be used for general law enforcement purposes.

Law enforcement needs this information in order to enforce probation terms and to know about potentially violent juveniles when they are taken into custody. The recommendation is to amend Va. Code § 19.2-389.1 so that the information can be disseminated to law enforcement.

Recommendation 8

Amend the Code to allow disclosure of all information on adjudications of juveniles found delinquent or guilty that are entered into the Central Criminal Records Exchange pursuant to Virginia Code § 16.1-299 to officers or employees of criminal justice agencies for the purposes of the administration of criminal justice as defined in Va. Code § 9.1-101.

VIII. Acknowledgments

In addition to the individuals who served on the Advisory Group, the Virginia Commission on Youth extends its appreciation to the following agencies and individuals for their assistance and cooperation on this study:

Family Behavioral Health Clinic
William T. Burke, Ph.D.

Division of Legislative Services
Jessica French, Esq.
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Freedom of Information Advisory Council
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Virginia Detention Home Association
Joanne Smith, President

Virginia State Police, Criminal Justice Information Services Division
Lieutenant Robert Kemmler

Appendix A

HOUSE JOINT RESOLUTION NO. 72

Offered January 9, 2002

Prefiled January 8, 2002

Directing the Virginia Commission on Youth to study the need for consistency in state laws governing the collection, dissemination, and disclosure of confidential juvenile records.

Patron-- Hamilton

Referred to Committee on Rules

WHEREAS, the intent of the juvenile justice system is to balance the welfare of the juvenile and the family with the safety of the community and the protection of the rights of victims; and

WHEREAS, the juvenile justice system attempts to divert, to the extent possible, those juveniles who can be cared for or treated through alternative programs to assure public safety; and

WHEREAS, the juvenile justice system is responsible for protecting the community from harmful acts by juveniles, reducing the incidence of delinquent behavior, and holding juvenile offenders accountable for their behavior; and

WHEREAS, the juvenile justice system strives to provide judicial procedures which assure the parties involved a fair hearing, and recognize and protect their constitutional and other rights; and

WHEREAS, the juvenile justice system is authorized to collect, disseminate, and share confidential information about juveniles with parties that have a legitimate or vested interest in such information; and

WHEREAS, such confidential information may include records pertaining to arrests, criminal investigations, court documents, court services units, treatment and rehabilitation, social services, scholastic and educational data, mental health treatment, and medical care; and

WHEREAS, parties with a legitimate or vested interest in a juvenile's confidential record may include the juvenile's parents, the attorney for the juvenile, the judge, the attorney of the Commonwealth, law enforcement agencies, court services, school, and social services personnel, mental health care providers, and medical professionals; and

WHEREAS, ensuring the confidentiality of such information is integral to working effectively with juveniles and their families, protecting them from stigmatization, and encouraging families to seek needed services; and

WHEREAS, the laws and regulations safeguarding confidentiality are not intended to impede service, treatment, or public safety; and

WHEREAS during the past few years, laws governing the sharing and disclosure of confidential juvenile records have dramatically changed the landscape of juvenile justice, posing significant challenges to juvenile justice professionals, and to juveniles and families that receive service; and

WHEREAS, juvenile justice and social services personnel are often thrust into unfamiliar territory, and must grapple with complicated and conflicting laws and policies regarding minors; and

WHEREAS, juveniles and their families and victims of juvenile crime have to navigate an increasingly sophisticated and adversarial system in which knowledge of their rights is essential; and

WHEREAS, it is imperative that professionals working with juveniles be knowledgeable of the laws governing the collection, dissemination, and sharing of confidential information; and

WHEREAS, the Department of Criminal Justice Services, in conjunction with the University of Virginia's Institute of Law, Psychiatry and Public Policy, convened a work group last year to develop a training manual designed to assist professionals in coping with the complexities of disclosure and confidentiality laws; and

WHEREAS, while producing the training manual, the work group identified inconsistencies within the Code of Virginia concerning the collection, dissemination, and disclosure of confidential juvenile records information; and

WHEREAS, many of these inconsistencies and conflicts in statute cannot be resolved without deliberate study, careful consideration of underlying juvenile justice, education, child welfare, medical care, and mental health treatment public policies, and appropriate legislation; and

WHEREAS, given the complexity of and changes to state and federal laws governing the collection, dissemination, and disclosure of confidential juvenile records information, a comprehensive review of state and federal laws and practices is necessary to provide consistency while facilitating treatment, service, public safety, and confidentiality; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Commission on Youth be directed to study the need for consistency in state laws governing the collection, dissemination, and disclosure of confidential juvenile records. In conducting its study, the Commission shall (i) identify and review current mandatory state and federal privacy, confidentiality, and disclosure laws; (ii) determine the circumstances under which disclosure laws supercede confidentiality laws; (iii) identify inconsistencies in state laws governing privacy, collection, dissemination, and disclosure of confidential juvenile records information; (iv) recommend appropriate and feasible changes to the Code of Virginia to clarify conflicts in state laws, while maintaining compliance with federal laws and regulations governing such areas; and (v) evaluate the need for standardized guidelines that protect the confidentiality of juvenile records during information-sharing, while facilitating access to juvenile records by authorized persons and state and local agencies.

All agencies of the Commonwealth shall provide assistance to the Commission for this study, upon request.

The Virginia Commission on Youth shall complete its work by November 30, 2002, and shall submit its written findings and recommendations to the Governor and the 2003 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Appendix B

ADVISORY GROUP MEMBERS

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Appendix C

ADVISORY GROUP MEETING MINUTES

June 25, 2002
House Room 1, Capitol

Organization • Study Overview • Policy Issues

Members Present: Del. David Albo, Chair, Brenda Barrett, Don Carignan (for Deron Phipps), Chris Doucette, Jeanette DuVal, Lelia Hopper, D. Patrick Lacy, William W. Muse, John Oliver, Michelle Parker, Phyl Parrish, William Reichhardt, Judge Richard Taylor, Adrienne Volenik, Sen. Mary Margaret Whipple.

Members Absent: Gary Close, Suzanne Fleming, Del. Ken Melvin, Sen. Bill Mims

Guest Present: Grant Prillaman

Staff Present: Amy Atkinson, Leah Hamaker, Kristi Wright

Kristi Wright announced that Del. Albo had phoned that he was on his way and had asked that the meeting move forward until he arrived. Members introduced themselves, providing information on their agency or perspectives represented. Ms. Wright passed around the membership list asking that each member check the information for accuracy and note any corrections. She also announced, with the exception of those who had requested other methods, that email would be the primary method of communication between staff and advisory group members.

Ms. Wright provided a brief history of this study as well as information on related studies both current and past. She reviewed the directives of HJR 72 and explained that while the resolution did not pass the General Assembly, the Commission on Youth at their April 16, 2002 meeting elected to undertake the study. The resolution will provide guidance and direction to the group in accomplishing the task.

This study builds upon the work completed by the Department of Criminal Justice Services (DCJS) and the Institute of Law, Psychiatry and Public Policy (the Institute). Included in the materials was an excerpt from the 2000 Annual Report of the Virginia Juvenile Justice and Delinquency Prevention Advisory Committee. This excerpt provides a summary of their work as completed using *Challenge* funds. Using these funds, the Institute completed the following: a comprehensive review of the Code of Virginia and the federal code, an examination of the juvenile code in other states, a survey of J&DR judges to identify issues in implementing the Virginia Code and an Information Sharing and Confidentiality Training Manual. Juvenile Accountability and Incentive Block Grant Trust Fund grants provided support for the Charlottesville Albemarle Youth Commission to survey over 140 juvenile justice and child-serving agency professionals. An additional grant also allowed Virginia Commonwealth University to conduct regional focus groups validating the Charlottesville findings.

A significant product of their efforts was the Juvenile Records and Information Sharing Manual. Some members of the advisory group already have a copy of the manual. Photocopies of it

were available to members who did not have a copy. It is also available on the Institute's website at http://www.ilppp.virginia.edu. Revisions have been made to the existing June 2001 version. Ms. Wright has placed a request with DCJS for the 2002 version. When received, copies will be provided to all advisory group members.

Ms. Wright then reviewed related studies including the current HJR 89 (2002) the Study of the Protection of Information within Records, Documents, and Cases Filed in the Courts of Virginia, which Ms. Wright will monitor since there may be intersecting topics with the work of this group. Also reviewed briefly was a sheet listing 2002 legislation related to juvenile records.

Lelia Hopper provided additional information on HB 1344 which gives Commonwealth's Attorneys and probation officers direct access to offenders' juvenile delinquency records for the strictly limited purpose of preparing a presentence report, discretionary sentencing guidelines or transfer or sentencing hearing. Ms. Hopper noted that reprogramming of the Court Automated Information System is now occurring to ensure that Commonwealth Attorneys and probation officers only have access to juvenile delinquency records not child abuse or other juvenile records. Despite these programming changes, those who have access to the delinquency records will have access to all juvenile delinquency records not just the records of one individual. While it is a significant change in policy, the sentiment of General Assembly members was that those who have access are not going to abuse their access and that it should assist Commonwealth Attorneys in doing their jobs.

Ms. Wright also highlighted reports from prior studies related to juvenile records including:

- HD 52 (1991) -The Impact of Laws Protecting Client Confidentiality on Cooperative Relationships of Agencies Working to Address Problems of Children and Families.
- HD 71 (1993) - Access to Juvenile Records for Purchase of Firearms
- SD 54 (1994) - The Study of Confidentiality of Juvenile Records
- HD 65 (1996) - State and Federal Law on Privacy, Confidentiality, and Mandatory Disclosure of Information Held or Used by Governmental Agencies
- SD 0D (2001) **-** Review of the Confidentiality of Patient Medical Records Study
- SD 19 (2002) - Report of the Interagency Substance Abuse Screening and Assessment Committee: 2001 Annual Report.

The Advisory Group reviewed the draft study overview and workplan. The group considered whether the topics were to be limited to inconsistencies in the law and practice, those problems identified in the listing of "Policy Issues for Consideration," or if additional areas of concern could be considered. It was explained that the contents of this listing were pulled from the training manual, focus groups, judicial and agency surveys completed for the DCJS/Institute project, and information provided by Lynda Frost, Brenda Barrett and Lelia Hopper.

Mr. Lacy requested that the group look at the practice of defense attorneys subpoenaing the education records of student victims and then using this information to impeach the victim. Ms. Hopper shared her concern that in addressing an issue such as this that the advisory group does not have the people around the table that should weigh in on the issue. Ms. Atkinson suggested that this issue could be noted as important and be included in the recommendations as an issue to be addressed in a second year.

Additional questions and discussion about the workplan included whether the advisory group was to meet after the recommendations are final to discuss drafts of legislative language. The group agreed that recommendations for change to the workplan would be discussed after

reviewing the listing of "Policy Issues for Consideration" and there was a better feel for the group's workload.

The group then reviewed the listing of "Policy Issues for Consideration." The first topic discussed was access to records. In addition to those issues listed, Bill Muse raised a question about records that are open to a parent. Can a parent publish this information beyond the parent? To whom can they distribute it? While Va. Code §161.-300 states that the Department of Juvenile Justice cannot release a record, does this same prohibition extend to parents? Additional issues related to access include telephone inquiries, use of a computer screen to inspect (once access is provided one has less control over what happens), and publication of information by those who have access. It was also noted that juvenile justice, court and criminal records are statutorily different and where one is not able to get a document located in a court record, a person may get it from a social service or juvenile justice file.

Ms. Hopper stated that the Office of the Executive Secretary of the Supreme Court of Virginia takes the stance that "inspection" means viewing only. The concept of "open for inspection" dates to the mid-1970's Code revisions. It contemplates a hard copy record rather than electronic access. A question was raised about the practice of copying custody orders and whether this is in violation as a custody order is a court record. Mr. Muse expressed concern that the "open for inspection" issue causes a practical problem for the child's or family's attorney or treatment provider who can only inspect the information.

John Oliver noted that there are philosophical issues that should be addressed and in which consensus should be reached before the group undertakes these other areas. Related to the values issues are the fundamental language problems that exist because of a competing system of values. In the context of juvenile records, the two primary competing values are access and protection (confidentiality). Bill Reichhardt agreed and suggested that the advisory group first decide on a guiding principle that will set forth the framework for the discussion of the issues. He noted that if a framework is not established the group will wrestle with competing interests that are given the same weight. One possible framework is to start with the goal of maintaining confidentiality. From this basis legitimate exceptions would be considered followed by agency exchange of information. The advisory group agreed that the establishment of a framework is necessary and that it will be the topic for the next meeting.

Documents filed with the court contain information about individuals as well as information about the proceedings. In analyzing the issues around juvenile records it was suggested that the following questions be addressed: What kind of records are at issue - mental health, substance abuse, juvenile justice, etc.? Should there be consistency in the way in which these different types of records are handled or as Sen. Whipple asserted, do their varying contents call for different rules? Who wants access (the parties, agencies involved or the public)? Is it a civil or criminal matter? Are we addressing access at the courthouse or electronic access?

Regarding the different kinds of records and the different rules that apply, there was discussion about mental health or education records that are submitted to the court and then become a part of the court file. The issue was whether they maintain their identity as that type of record or whether they become a court record and can be accessed through court procedures. As the conversation lingered around the area of court records, Sen. Whipple reminded that group that the study is not limited to court records. Del. Albo agreed that we are to look at records in juvenile files, but did not want to reevaluate school records. However, of concern was the difference in who can access school records at the court and who can access them from the school.

Ms. DuVal reminded the advisory group of the federal regulations and statutes impacting state laws. She stated that the information pulled together by DCJS and the Institute did so before HIPAA. However, Mr. Oliver explained that regarding children's records, HIPAA has yielded authority over these records to the state. Mr. Oliver also explained that current Virginia law on children's mental health and substance abuse records is problematic. For example access to mental health records varies depending on whether treatment was provided by a public or private provider.

Del. Albo observed that the group's progress through the "Policy Issues for Consideration" sheet was slow and that it would be necessary to move through the list and determine those issues that the group believed should remain on the list and those that should be removed. The group addressed each of the policy issues. The following were discussed:

- **There are numerous Code sections and Rules of the Supreme Court that address information sharing**. Brenda Barrett explained in further detail the clerks' concerns briefly outlined in the handout. The public comes to the clerks for access to records and given the numerous rules they must apply it is difficult. Review of the application rules often requires that the clerk seek direction from the judge which means that the information cannot be immediately released. There is no one comprehensive document for the clerks to reference to assist them in making these determinations. It was suggested that this is a training and technical assistance issue for the Supreme Court. It was resolved that this issue be stricken from the list. However, it will be brought to the Commission on Youth as a recommendation that the Supreme Court develop a manual or other reference and provide training to the clerks on this issue.

- **The determination of a "legitimate interest" is left open**. Issue will remain.

- **Disclosure of delinquency adjudication and probation information to law enforcement is limited.** Issue will remain.

- **Emergency disclosure of mental health information is limited.** Issue will remain.

- **Access by a person 18 years or older requesting his/her own records is restricted to those persons who had previously been committed to DJJ. Issue will remain.** "DJJ" should be added before "records" for clarification.

- **Parents are authorized to inspect DJJ records pursuant to Va. Code §16.1-300(A)(3), however, there is no provision for parents to correct inaccuracies.** DJJ may be correcting this through regulations. This issue will be removed provisionally with a footnote.

- **Pleadings in which custody, visitation and support issues are combined make it difficult to separate the identifying and personal information that may have different confidentiality and access requirements.** Issue will remain. These matters should be filed separately. It is a practice issue for counsel.

- **Whether child protective orders and related documents should be kept in the offending adult's file or in the child's file**. Issue will remain. Ms. Hopper provided additional information. This is partly a filing issue. Courts make the determination as to whether it is child or adult related.

- **Victim notification regarding a juvenile's release from a DJJ correctional facility**. Group agreed to strike the issue.

- **Timeliness of judges obtaining records that would be helpful in court proceedings from treatment providers and schools.** Group agreed to strike. There was discussion about whether this is a problem of existing law or people not doing their jobs. Judge Taylor commented that he does not have the problem.

- **Frequently statutes do not provide for mutual exchange of information between agencies.** Issue will remain. Mr. Muse gave an example that DJJ cannot receive records (such as medical information) from the Commonwealth Center for Children and Adolescents and that the Center cannot share information with DJJ.

- **Disclosure of delinquency adjudication and probation information to schools is limited.** Issue will remain.

- **Notice of adjudication.** Issue will remain. There was discussion as to whether the letter becomes a part of the record that is transmitted to the receiving school district. Mr. Muse also cited a requirement that the report must go to the public school district in which the student resides even if there is knowledge that the child is enrolled in a private school.

- **Virginia Code § 22.1-287(A)(5) does not conform to the Family Education Rights and Privacy Act ("FERPA") (20 U.S.C. §1232g).** Issue will remain.

- **Standardization of criminal penalties.** Group agreed to strike the issue and send it to the Crime Commission to be incorporated into their study of Title 18.2.

- **Virginia Code §§ 16.1-222 through 225 conflict with 16.1-300.** Group agreed to strike the issue as it has been resolved.

For the next meeting, staff will work on the following:

- List of records that may be in each type of file.
- List of parties who may want access
- The type of information commonly requested - either information about the proceedings or information about the individual.
- Parent/child access to records.

Ms. Wright will survey members for available dates for future meetings. Meetings will be scheduled for July, early August, September, October and early November. The topic of the next meeting will be the discussion of a philosophical framework. Future meetings will focus on one area or topic. Advisory group members who hold an expertise in that area will be asked to brief the group on the status of that area.

July 17, 2002
House Room 2, Capitol

Philosophy & Framework • Juvenile Court Records

Members Present: Del. David Albo, Chair, Brenda Barrett, Don Carignan, Chris Doucette, Suzanne Flemming, Lelia Hopper, Sen. Bill Mims, Bill Muse, Judge Kim O'Donnell, Michelle Parker, Deron Phipps, and William Reichhardt.

Members Absent: Gary Close, Jeanette DuVal, D. Patrick Lacy, Del. Ken Melvin, John Oliver, Phyl Parrish, Adrienne Volenik, and Sen. Mary Margaret Whipple.

Staff Present: Amy Atkinson (via speaker-phone), Kristi Wright

The amended minutes from the June meeting and the amended study plan were presented to the advisory group and unanimously approved.

Del. Albo led the group in reviewing the listing of those persons who might want access to a juvenile's Juvenile and Domestic Relations District Court file. Several changes were made to the list, including eliminating, expanding or combining several categories. There was discussion about the need to create a laundry list all persons who potentially want access or only those who have statutory authority to access it. There was consensus that those entities that may access the records under the court's ability to determine "legitimate interest" should be combined with reference to Va. Code §§16.1-305 (A)(4) and 16.1-300 (A)(6).

There was further discussion about providing a definition of "legitimate interest." A proposed definition was "legitimate interest shall include but shall not be limited to any person or agency who has a request substantiated by state or federal law." It was determined that since the question of defining "legitimate interest" is one of the policy issues the group is to consider, further attention will be given it during that discussion.

Del. Albo then led the group in reviewing the listing of items that may be found in Juvenile and Domestic Relations District Court Files. The following additions were made: Intake records, probation reports and warrants/indictments.

The group discussed the level of confidentiality, if any, given to adult files within the J&DR Court. Although there was consensus that those file are open, there was concern about information contained in adult files that pertains to a child. Ms. Hopper noted that as for child protective orders there are ways to administratively handle the protection of the information. Sen. Mims was reluctant to designate anything within an adult's files as confidential, noting that there are ways to manage it such as court ordering the file be under seal or filing certain records in the child's file.

The group turned its attention to the development of a philosophy and framework that will guide the work of the advisory group. They worked from the sheet that was distributed titled "Development of a Philosophy and Framework." The group entered into a discussion of the scope of the study, including whether the scope reached beyond court records to other juvenile records such as mental health, social service or juvenile justice records. Mr. Muse added that he had hoped that there would be discussion of the consolidation of statutes related to records thereby achieving consistency.

Sen. Mims suggested some changes to the three overarching principles listed on the sheet distributed. With his suggestions, the three principles would read:

1. Presumption of Confidentiality
2. Limited information sharing for legitimate purposes is beneficial
3. Formality is preferable to informality
4. Waiver of Confidentiality by child/parent is permitted.

Mr. Reichhardt expressed concern that the parent's and child's interests are not always the same and that number four in the list above should read "parent and child." There was also discussion that the age of the child impacted his/her ability to consent. Mr. Reichhardt suggested that there be a presumption that at 14 years and older a child have the ability to waive consent, but that before 14 years, consent would be required from the parent and child.

There was discussion of limiting access to only certain items in a file unless it's for a legitimate purpose. Ms. Hopper questioned who is the person who will determine if there is a legitimate purpose? What about those situations when the child is developmentally delayed or when mental health records are requested? Generally, it is the court clerk who makes the determination and when in doubt the clerk will ask the judge for guidance.

The group discussed items such as mental health records that are contained in court files. For example, a parent has access to the mental health records of an 8 year old in which it is recorded that he/she has said things about the mother. Ms. Hopper echoed concern that parent and child interests are not necessarily the same, but that giving control over the records to the parents of a child 13 years or younger presumes that they are. Sen. Mims agree that there should be some protections for children under 13 when the interests are adverse.

Another aspect of this concern was raised. This entails a child having access to parents' mental health records that are also contained in the file. Sen. Mims asserted that a child's records are confidential to protect the child, therefore the release of a parent's records should not be of concern. In fact, one can find the same social history in a circuit court's file. Others disagreed arguing that in protecting the parent, you are protecting the child.

Judge O'Donnell suggested that public safety be added to the four overarching principles since it sometimes overrides confidentiality. There was some discussion that public safety would be included in the legitimate purposes specified in the second principle. She also noted that she feels that the question is not really around the age at which a child has control over access to the file but instead the contents of the file. She suggested being more informative and specific about what can be accessed rather than excluding certain items since there can be many things in a file. Mr. Muse agreed that a child may not know what’s in a file, thereby raising questions of informed consent. If age remains the determining factor, Judge O'Donnell suggested that it be consistent with involuntary commitment.

Judge O'Donnell asserted that the problem is not that the law doesn't have all the provisions needed. Instead, people just don’t know the law and because it is a crime to improperly release information, clerks are very cautious. Sen. Mims inquired if current law prohibits a parent from publishing the information found in a file. Mr. Muse argues that the prohibition on "release" applies to a parent further publishing the information. Others disagreed saying that it is the parent's or child's information and they can talk about it.

The group agreed that there should be language added to the Legal Framework for Information Sharing stating that a juvenile fourteen years of age or older may request access to or consent to another's access to his/her own records except those enumerated in §16.1-305 (A). A parent of a juvenile thirteen years of age or younger may request access to or consent to another's access to the juvenile's records except those enumerated in §16.1-305 (A.) The records referred to in §16.1-305 (A) include social, medical and psychiatric or psychological records, including reports or preliminary inquires, predisposition studies and supervision records, or neglected and abused children, children in need of services, children in need of supervision and delinquent children.

Ms. Barrett raised a question at the end of the meeting about whether or not the court needs to keep all the juvenile's records, particularly those for which the J&DR court is the secondary custodian. She questioned whether these records could be given back to the primary custodian?

The proposed schedule for discussion of remaining topics is as follows:

- Thursday, August 1, 2-5 p.m. - Identified policy issues related to mental health and substance abuse records. Sixth Floor Senate Conference Room, GAB.

- Monday, September 9, 2-5 p.m. - Identified policy issues related to juvenile justice and school records; state and federal laws (FERPA). Sixth Floor Senate Conference Room, GAB.

- Wednesday, October 9, 2-5 p.m. **-** Identified policy issues related to court and juvenile justice records. Sixth Floor Senate Conference Room, GAB.

- Wednesday, November 6, 2-5 p.m. - Final review of recommendations and proposed language. Sixth Floor Speaker's Conference Room, GAB.

Del. Albo asked the members to email Ms. Wright with suggestions or comments related to the topic if they are unable to make it to any of the upcoming meetings.

August 1, 2002
Senate Leadership Conference Room
General Assembly Building

Mental Heath & Substance Abuse Records

Members Present: Brenda Barrett, Don Carignan, Chris Doucette, Jeanette DuVal, Suzanne Fleming, Sen. Bill Mims, Bill Muse, John Oliver, Deron Phipps, and Sen. Whipple

Members Absent: Del. David Albo, Gary Close, Lelia Hopper, D. Patrick Lacy, Del. Ken Melvin, Judge Kim O'Donnell, Phyl Parrish, Adrienne Volenik, and Judge Patricia West

Guests: Bill Burke, Licensed Clinical Psychologist, Family Behavioral Health Associates; Betsy Draine, DMHMRSAS; Stacie Fisher, DMHMRSAS; Beth Rafferty, Richmond Behavioral Health Authority; and Joe Stalings, DMHMRSAS

Staff: Amy Atkinson and Kristi Wright

Minutes from the July meeting were presented to the advisory group and unanimously approved.

Update on HJR 89

Kristi Wright presented a summary from the July 23rd public hearing of the Joint Subcommittee to Study the Protection of Information Contained in the Records, Documents and Cases Filed in the Courts of the Commonwealth (HJR 89). The Joint Subcommittee discussed two options for the approach of the study. One approach would be very comprehensive identifying all types of records and deciding from the list compiled which should be protected and which should be open. This research would then be compared to the national strategies set forth by the National Council of State Courts. The alternative approach would be to adopt a philosophy that all records are open and then set aside particular records as confidential.

The subcommittee also placed on the table the larger policy issues of the treatment of electronic and paper records, registration for access to electronic records and bulk access to records. Mr. Teich from Norfolk Circuit Court will be compiling a list of records that are not court records but are held by the court. Members expressed a need for a better understanding of the historical reasons why court records are handled the way they are currently handled. Rob Baldwin noted public accountability of judges, helping ensure due process and appropriate verdicts and overall exposure of the system to the light of day enhancing trust in the system. The Joint Subcommittee resolved that it would look at domestic and divorce matters and all civil records because of the sensitive and potentially damaging information contained therein.

HIPAA

Chris Doucette gave the Advisory Group an update of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Mr. Doucette explained in general terms the content of HIPAA, including its Privacy Rule which addresses the privacy rights of individuals and accompanying compliance and enforcement provisions. The HIPAA Privacy Rule was signed into law on April 14, 2001. All covered entities must meet HIPAA standards by April 14, 2003. Covered entities include: 1.) All health care providers who transmit any health information electronically in connection with standard financial or administrative transactions; 2.) All health plans; and 3.) All health care clearinghouses. Six different Virginia agencies are considered a

“covered entity” under HIPAA: Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS), Department of Medical Assistance Services (DMAS), Virginia Department of Health (VDH), Department for the Aging (VDA), Department of Rehabilitative Services (DRS), Department for the Blind and Visually Impaired (DBVI)

Mr. Doucette discussed the concept of pre-emption, which means that state laws that are less protective of privacy are pre-empted. However, states are free to enact more stringent statutes. HIPAA assumes that states do a better job of ensuring personal rights and confidentiality.

Mr. Doucette noted that some of the information regarding HIPAA contained in the Juvenile Records Information Sharing Manual is out of date. Specifically, the criminal penalties have increased to $250,000 in fines and up to years in prison for knowingly and improperly disclosing or obtaining protected health information (PHI) under false pretenses.

Mr. Doucette explained juvenile records under HIPAA. The proposed changes issued on March 27, 2002 clarify areas affecting juvenile records. Regarding a parent's access to his or her child's records, the proposal clarifies that state law governs disclosures to parents. In cases where state law is silent or unclear, the revisions would preserve state law and professional practice by permitting a health care provider to use discretion to provide or deny a parent access to such records as long as that decision is consistent with state or other law.

Regarding parents as personal representatives of unemancipated minors, the Privacy Rule's approach remains that where state and other applicable law regarding disclosure of health information about a minor exists, such law should govern. However, where the state law is silent or unclear, the HIPAA legislation takes precedence.

Also notable in under HIPAA are the exclusion of two areas under the definition of PHI: Individually identifiable health information that is part of an education records governed by FERPA; and Individually identifiable health information of inmates of correctional facilities and detainees in detention facilities.

<u>Virginia Law Governing Mental Health and Substance Abuse Records</u>
Ms. Wright reviewed the handout containing the chart on state provisions governing a parent's and minor's access to and control over mental health, substance abuse and medical treatment records. Beth Rafferty pointed out that the licensing regulations under the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) require that the minor patient must sign his/her treatment plan, which appears to be in conflict with the Virginia Administrative Code. At her agency, all children sign their treatment plans. Stacie Fisher pointed out that parents can and often do co-sign the treatment plans, thereby showing compliance with parental consent provisions. However, there are instances when this does not occur. It was also noted that the signing of the treatment plan may be considered consent to treatment which minors are authorized to do for outpatient mental health treatment under Va. Code §54.1-2969.

Bill Muse brought the group's attention to Section Va. Code §16.1-300 dealing with juvenile records held by the Department of Juvenile Justice (DJJ). Section 32.1-127.1:03 states that a minor must have parental consent to release his/her mental health records or a provider, with parental consent or court order, may disclose records. However, under §16.1-300, DJJ can release the same type of mental health record to anyone listed in that section of the Code without further consent. Mr. Muse stated that he would like to see one statute dealing with all

juvenile records. He would like to have the focus be on the type of the record instead of the agency who holds the record.

Bill Burke gave an example of psychiatric records that become part of the school record. As with DJJ records, once an agency (the school) holds the records, their rules apply, particularly FERPA, which is not consistent with the law governing mental health records. They become a part of the new agency's records. Ms. Rafferty agreed that it is the same with CSB files, noting that all records in the "file" are mental health records, even school records, and would be sent if requested.

Ms. Rafferty highlighted the problem of out-dated information in the files. For example, old evaluations continue to be cited and there is no expiration date for the records. Dr. Burke mentioned a possible solution of preventing the secondary release of records. Deron Phipps expressed concern over that suggestion. He gave the example that the Richmond Community Services Board (CSB) may be serving a DJJ juvenile. DJJ releases the mental health records to the CSB so that they have full information in order to provide the needed services for the juvenile. That CSB may contract certain services to another entity and that entity would need the same records. Under Dr. Burke's suggestion, that entity would have to go back to DJJ to get the records and treatment time may be lost in the process.

The group again revisited the concept of one statute to govern the confidentiality and release of juvenile records wherein the rules would apply to the record not the agency with the records. While not ready to endorse such a concept, the group found it to be an interesting concept that would flavor the remaining work of the advisory group.

John Oliver questioned the placement of this new confidentiality statute and whether Title 16.1 is the best place to put it. The same situation exists for adults, as confidentiality of adult records cites are scattered throughout different titles. He suggested that the group keep the focus on informing clients. In practice, the release of information should not come as a surprise to the client. For example, if anyone receives a health record, they are prohibited from releasing it to anyone except in cases where the intent is the same as the original release. In the case of the probation officer releasing information found in DJJ files, Mr. Oliver argued that the probation officer is still responsible to watch the release of that information.

Sen. Mims pointed out that Title 16.1 is entitled "Courts not of Record" and may not be appropriate as this proposed statute would address not just juvenile court records. Mr. Muse stated that Title 2.2, "Records Held by Public Agencies," might not be appropriate either since the records are held by private entities as well. Mr. Oliver stated that we might want to consider requesting that the Michie Company produce a volume on "Confidentiality of Juvenile Records" to pull the different titles in one place.

Sen. Mims reflecting on the discussions from the group's last meeting, noted that for court records there would be a presumption of confidentiality for certain records in a file. Other types of records pleading, dockets, etc. would be open to those with proper access. For the records of other agencies, it involves interagency exchange and there is a different standard. A reporter would not go to a school, for example, with the expectation that a child's school record would be released. Brenda Barrett stated that usually parties involved with the case wants the record, not a third party.

Mr. Oliver stated that court clerks have a huge burden placed upon them. He suggested looking at the level of protection and how a file is generally handled (i.e., how records are kept or have a

judge determine what is confidential). In addition, he expressed a desire to clarify terms as opposed to one super statute. In his experience with the UVA project, different terminology in the Code has different meanings regarding access, and in some cases the same terminology is given different interpretations.

Ms. Rafferty expressed a concern that the Code is silent on a definition of “treatment” as it is included in §54.1-2969 (E) (4). She said that due to liability issues, a CSB would not give medication to a child without parental consent.

Ms. Wright reframed the issues discussed into four areas: 1.) Caretaker of the record vs. the type of record in determining its release and confidentiality; 2.) New comprehensive statute vs. clarification of existing law; 3.) Conflict between mental health and substance abuse law regarding a parent's and minor's access to and ability to release the minor's records; and 4.) How is treatment defined, for example as used in §54.1-2969 (E)(4)? Does it include medications?

Sen. Mims led the discussion on Title 2.2, the Government Data Collection and Dissemination Practices Act. He suggested this as a possible location for the placement of the new juvenile records section as this Title includes many principles discussed at the meeting. This section deals with the flow of information among state agencies on public records. The group then discussed if this section would allow private providers to be covered under it.

Va. Code §54.1-2929 (E) (1-4) specifies those circumstances in which a minor shall be deemed an adult for the purpose of consenting to certain types of medical services. Section 54.1-2929 (E)(5) also states that the minor is deemed an adult for the purpose of consenting to the release of medical records related to the treatment of venereal disease, any infectious or contagious disease or in the case of birth control, pregnancy or family planning. The Advisory group agreed that §54.1-2929 E-5 should also deem the minor an adult for purposes of consenting to the release records in the case of outpatient care, treatment or rehabilitation for substance abuse, and outpatient care, treatment or rehabilitation for mental illness or emotional disturbance. This change as it pertains to substance abuse would not change current practice as it is dictated by Federal law, but would simply have Virginia law reflect existing Federal requirements.

Ms. Rafferty suggested that "treatment" as used in §54.1-2969 be defined to include medication and that an age limit be set so that parental consent for outpatient treatment below a certain age would be necessary. Discussion followed on whether an age should be specified or if it should be left to whether the child understands the treatment. Sen. Mims expressed concern that we were going beyond the scope of the study by dealing with consent for treatment. Mr. Oliver, disagreed, stating that consent to treatment and access to records are inextricably linked. In addition, Mr. Oliver noted that there are potential conflicts in several other titles of the Code, including Title 20, regarding the right of parents to have records (§20-124.6), as well as other sections pertaining to DJJ and the Freedom of Information Act (FOIA) and the Virginia patient health records privacy statute (Va. Code §32.1-127.1:03).

Don Carignan stated that §54.1-2969 allows the minor to consent to the release of records but other sections of the Code bar others from getting the information. In addition, if a minor is given the right to consent to release a record, it is unclear if the minor is given the right to prohibit its release. John Oliver expressed a need to more clearly define what it means to be able to consent to the release of the record. Ms. Wright stated that it is a problem if a minor has the authority to release a record but does not have the authority to access or view the same

record. This denies the minor the ability to make an informed decision about the release of the record.

Sen. Mims expressed concern about restricting a parent's right to access his/her minor child's records. Mr. Oliver suggested that if the minor objects to the release of a record to his/her parent, that parent can appeal the minor's objection by bringing the issue before a judge. Mr. Oliver stated that there is already precedence for this approach as in the case of abortion.

The group discussed whether additional categories such as "in loco parentis" and "natural guardian" should be included with parent. Mr. Oliver stated that we may need to research the use of these terms and their applicability in this context.

The group achieved consensus that the minor who is capable of consenting for outpatient substance abuse and mental health treatment under §54.1-2969 should be allowed access to his/her own records, and that the minor be deemed an adult for the purpose of consenting to the release of records pertaining to this treatment. The group also agreed that the minor should be able to note an objection to the release of information to persons who have rights to the record under other Code sections. These objections would then be heard by a judge.

Mr. Muse restated that the emphasis should be on the type of record rather than who holds the record.

Discussion turned to the emergency disclosure of mental health information to law enforcement personnel when a juvenile is taken into custody. Sen. Mims inquired if detention workers can obtain information from Court Service Units (CSUs) and whether there is a transparency between the two. Mr. Carignan explained that there is not always a transparency between the two because CSUs are state agencies while detention homes are independently, locally operated. Night and weekend times can be difficult as well when there is one CSU worker on call who may or may not know of the juvenile.

Mr. Doucette explained that the HIPAA legislation is generous in allowing the sharing of information with law enforcement. However, the state does not allow, without a parent's consent, the sharing of medical or mental health treatment information to law enforcement.

The group discussed the extent to which information should be shared. The group quickly agreed that medication information should be shared, but expressed concern that sharing of information beyond that may not serve a positive purpose. Sen. Mims suggested that consideration be given to allow the sharing of information to the extent necessary to protect the health or save the life of the juvenile. He argued that there are times when information beyond medication is necessary to save the juvenile's life, for example a peanut allergy.

There was consensus that the medical information should be allowed to be shared as long as the information relates to: 1) Any known medications; and 2) Any medical information necessary to protect the health or save the life of the juvenile.

The group suggested that staff look to §§16.1-252 and 253 look for model language. Several sections were also suggested for the placement of this new language, including §16.1-248.1 and sections related to CSU and detention home communications. It was agreed that there should be a cross-reference to the section governing release of medical records.

September 9, 2002
Senate Leadership Conference Room
General Assembly Building

Education Records

Members Present: Del. David Albo, Brenda Barrett, Don Carignan, Chris Doucette, Jeanette DuVal, Lelia Hopper, D. Patrick Lacy, Lynette Isbell (representing Phyl Parrish), Bill Muse, Judge Kim O'Donnell, Michelle Parker, Deron Phipps, William Reichhardt, Adrienne Volenik, and Judge Patricia West

Members Absent: Gary Close, Suzanne Fleming, Del. Ken Melvin, Sen. Bill Mims, John Oliver, and Sen. Mary Margaret Whipple

Guests: David Crossley, Virginia Department of Education, Jessica French, Division of Legislative Services, and Mike Newman, Henrico County Public Schools

Staff: Amy Atkinson and Kristi Wright

Minutes from the August meeting were presented to the advisory group and unanimously approved.

Update on August meeting

Kristi Wright noted that a Health and Human Services Fact Sheet regarding the final rule for HIPAA standards for privacy, including issues regarding parents and minors, was in the meeting's handouts. Additional changes were not made to the final rule regarding parents and minors.

Ms. Wright also presented draft recommendations and language related to mental health issues as discussed at the August meeting. The group approved the staff's language recommendation in §54.1-2969 and §32.1-127.1:03.

Ms. Wright gave two language options for accomplishing the group's August recommendation to allow for the sharing of health information to secure facilities or shelter care in order to protect the health and safety of the juvenile. *Version 1* allows for the sharing of information strictly to protect the health and safety of the juvenile, while *version 2* allows the sharing of information to protect the health and safety of the juvenile, other juveniles or the officers or employees of the secure facility or shelter. William Reichhardt voiced a concern that *version 2* was too broad. Judge West stated that the detention home should have as much information as possible in order to protect staff and other juveniles. Pat Lacy suggested using *version 2* as the basis and then leaving the decision up to the health care provider if the release of the information would be necessary to protect those mentioned in the language. Jeanette DuVal also echoed Mr. Reichhardt's concern about protecting the confidentiality of the juvenile and added that "staff" might not be the appropriate level to be authorized to receive information from a provider.

Bill Muse pointed out that if *version 2* is adopted, the term "Department" should not be used as the juveniles would be in a local or contract facility. Use of the phrase "secure facility or shelter" was suggested. Lelia Hopper suggested that in drafting the language consideration be given to the use of the words "custody" versus "placement."

Ms. Wright highlighted the changes made to §16.1-261. The group discussed whether this information should be allowed to be disclosed during the disposition and sentencing phase of the proceedings. The group agreed to add the phrase "prior to disposition" thereby allowing this information to be used during disposition. Also discussed was the use of the term "child" versus "juvenile."

Presentation on Juvenile Justice and School Records

Issue as presented to Advisory Group:

Virginia Code § 22.1-287(A)(5) does not conform to the Family Education Rights and Privacy Act ("FERPA") (20 U.S.C. §1232g).

a. Section 22.1-287(A)(5) addresses the release of school records to law enforcement personnel. The language does not parallel FERPA and FERPA regulations and leaves unclear provisions regarding the following:
    1. FERPA requires that access must be prior to adjudication (post-adjudication access requires a court order or written consent of the parents);
    2. The allowed reporting or disclosure of the records is to enable the juvenile justice system to effectively serve the student; and
    3. The officials and authorities to whom the information is disclosed certify in writing that the information will not be redisclosed according to State law and with the prior written consent of the parent.

Mr. Lacy gave a presentation of research and information related to student records: a comparison of Virginia pupil records statutes with the Family Educational Rights and Privacy Act (FERPA). He provided a brief history and explanation of federal and state education laws. Currently, Virginia law is inconsistent with federal law, despite the federal law's acceptance of more restrictive provisions. Numerous examples of where the Virginia statutory provisions are in conflict with FERPA were provided in Mr. Lacy's memorandum presented to the group. The memo provides about eight pages (he notes that more could have been written) in which inconsistencies and possible changes were suggested. As stated by Mr. Lacy, the overarching question is “Should we adopt FERPA as our student record provisions or should we amend Virginia’s current law so that it is in compliance?”

Mr. Lacy stated that all school divisions in Virginia use FERPA , and as a matter of simplicity and clarity, when he receives questions about pupil records he refers to FERPA. Federal laws also come with interpretive regulations unlike Virginia laws. Mr. Lacy noted that in addition to conflict between the Virginia Code and FERPA, there are internal conflicts and inconsistencies within the Virginia statutes. Mr. Lacy stated that while many of these sections attempt to follow FERPA, many do not.

Del. Albo inquired if the Virginia Code sections were eliminated, whether there would be immense changes? Mr. Lacy responded that significant changes would not result since FERPA is followed by Virginia school divisions. David Crossley made distinctions between a scholastic and an education record. Also discussed was scholastic versus adjudication records. Mr. Lacy explained that it FERPA was adopted as the basic law, additional statutes regarding adjudication could be put in place.

Lynette Isbell expressed concern that the current Virginia statute authorizing the release of information to local Departments of Social Services is in violation of FERPA. Ms. Isbell

expressed her opposition to the elimination of this provision. Mr. Lacy clarified that since a consent form is used to authorize the release of this information, the Virginia Code section is not providing the legal basis for the release of the information.

Del. Albo clarified that if FERPA is to be the basis of Virginia law governing pupil records, one could not simply repeal all related sections. Instead, it will require a review of all sections and selective deletion of some. He suggested that the Commission on Youth work with Legislative Services to identify a list of sections that could be maintained and those that should be repealed.

Disclosure of Delinquency Records

The Advisory Group moved to the discussion on disclosure of delinquency records. Issue as presented to the Advisory Group:

Disclosure of delinquency adjudication and probation information to schools is limited.

b. Under Va. Code § 16.1- 260(G), the superintendent is notified if a student is charged with one of the listed serious offenses. Under § 16.1-305.2, the superintendent may redisclose that information to school personnel when necessary for safety. If the student is adjudicated delinquent of one of the listed offenses, the superintendent is notified within 15 days under § 16.1-305.1 (and may redisclose that information in conformance with § 22.1-288.2), but if the student is found not delinquent or if the charges are dropped or reduced to an offense not included in the list, the school is not notified.
c. Should schools be informed of adjudications and charges that are dropped?
d. This problem was exacerbated by changes to § 16.1-301(A) in the 2001 General Assembly. The changes permit notification of the school principal (not the superintendent) when a student is *"a suspect in"* or charged with a listed offense. Again, there are no provisions to notify the principal if the student is considered a suspect but never charged, or if the student is charged but not convicted.

Mr. Reichhardt suggested that the Group shift its approach from whether the school should be notified to how the school should be notified. Mr. Lacy provided two reasons why schools want information on a student's delinquency charges: 1.) It is a matter of safety and 2.) The 2001 General Assembly, through the work of the Virginia Commission on Youth, amended student disciple section of the Virginia Code providing school systems the authority to send certain students to alternative education.

Mike Newman stated that as principal he is responsible for the safety of 1300 middle school students and he needs information in order to protect other students. The Advisory Group discussed what type of follow-up information the schools may need once the case goes before the court and is adjudicated. Del. Albo suggested that the actual words of the adjudication be sent to the schools. Mr. Lacy noted differences between acts that occur on school property or are school related and those delinquent acts that are not school related. Mr. Newman said that there are cases where another student may be the victim of the crime and the schools would need to know in order to take precautionary measures.

Del. Albo polled the group to assess consensus for the need to notify school officials of not guilty findings or when the charges have been dropped. There was consensus for this. Judge O'Donnell noted that she supports the concept of this notification, but is concerned about its tremendous system impact. This recommendation would increase the amount of work required of the clerks, who are already working at their capacity. Lelia Hopper added that before this provision is put into place, there should be some assurance that court clerks can handle this in

an automated manor. Mr. Muse suggested that we should consider having the Department of Juvenile Justice do the follow up through their intake officers since it is the intake workers who have the responsibility for the initial notification. Del. Albo suggested that any related bill should reflect the fiscal impact of the proposed changes.

Adrienne Volenik suggested that if the charge is reduced to an offense that is not reportable under the current law, that the specifics on the new offense should not be reported in this follow-up notification. Instead, the follow-up notification should simply state that the charge is no longer applicable. Judge O'Donnell acknowledged Ms. Volenik's desire to protect the child but noted that a reduction would be positive information and would be better than the school thinking that action was taken on the more serious offense. Mr. Newman likened it to founded and unfounded child abuse cases, in which case knowing that it is resolved is sufficient. However, he also acknowledged that if he received information that it was reduced to a lesser charge, he would be curious about the new charges. Mr. Reichhardt suggested that the parent and child be notified that both the initial and follow-up information was being communicated to the school.

Mr. Muse was in favor of communications as to what the actual disposition was so that for safety purposes certain steps could be taken such as keeping students apart. Deron Phipps noted that even if the lesser offense information is known, the school may not necessarily be able to act on that information. Judge West supported the communication of whether the juvenile was found guilty or not guilty. Judge O'Donnell reminded the group that disposition will include everything including any punishment or treatment ordered.

Ms. Volenik expressed concern that Va. Code § 22.1-277 should not be expanded so that students are expelled for lesser offenses than are already specified. Judge O'Donnell suggested that to resolve this matter, notice be given to schools of when charges are withdrawn or there is a finding of not guilty. For serious offenses, current law (§16.1-305.1) already provides that the school receive notice of adjudication. Del. Albo reiterated that if the information is important enough to report, it should be important enough to clarify.

Ms. Hopper stated that there will be a disposition of each case in court, including those instances in which the charge is dropped. The group agreed that where a charge was reported to a school the results of adjudication should also be reported using literal terms. Determinations as to where this new provision should be placed in the Code will be left to Legislative Services.

Mr. Reichhardt reiterated his desire that there be a provision for notice to go to the parent and child that this information has been communicated to the school. He argued that this notice is tantamount to adults knowing an employer has been notified. Ms. Hopper suggested one way to provide notice would be to include it on the back of the summons. Del. Albo noted that Mr. Reichhardt's intent was to give parents the ability to know to check up on the school records to see how it is reflected in those records. Judge O'Donnell stated that parents already have the ability to review those records and that a child's attorney also has a responsibility to follow-up with this. Mr. Reichhardt suggested that the notice be provided as it is regarding expungement of records (§16.1-306).

The group discussed the second issue regarding disclosure of delinquency records. The second issue as presented to the Advisory Group:

> Notice of adjudication: Va. Code §16.1-305.1: The clerk of the court shall provide written notice, within 15 days if there has been no notice of appeal filed, to the superintendent when juvenile is adjudicated delinquent or convicted of a crime.
>
> > a. If the child withdraws from the school district, what provisions are there for this information to be transmitted to the new school district? Should it be?

Del. Albo polled the group to determine if anyone felt that the new superintendent should not be notified of the adjudication. Ms. Volenik stated that she disagreed with the notification if the student was found not guilty. Mr. Lacy provided further explanation of the problem and how the student will immediately begin efforts to transfer to another school division. The former division is not aware of the change until the student does not show for classes and there is a request from the new division for the student's transcripts. In the mean time, the clerk is unaware of where the child is. Ms. Volenik suggested that the court service unit should know where the child is. The group discussed whether the delinquency records are kept by the school and whether delinquency records become part of a student's education record that is passed from one school to the next.

There was consensus that this should be handled between schools and that the superintendent from the former school should be able to forward that information to the new school superintendent. It was recommended that language similar to the following be added to §16.1-305.2 to say that "if the juvenile is not enrolled as a student in a public school in the division to which the notice was given, the superintendent shall promptly so notify the intake officer of the juvenile court in which the petition was filed *and the other school superintendent, if known*."

October 9, 2002
Senate Leadership Conference Room
General Assembly Building

Juvenile Justice and Courts Records

Members Present: Del. David Albo, Brenda Barrett, Don Carignan, Gary Close, Chris Doucette, Lelia Hopper, Bill Muse, Judge Kim O'Donnell, John Oliver, Michelle Parker, Deron Phipps, William Reichhardt, Adrienne Volenik, Judge Patricia West, and Sen. Mary Margaret Whipple

Members Absent: Jeanette DuVal, Suzanne Fleming, D. Patrick Lacy, Del. Ken Melvin, Sen. Bill Mims, and Phyl Parrish

Guests: David Crossley, Virginia Department of Education; Steven Dalle Mura, Office of the Executive Secretary, Supreme Court of Virginia; Jessica French, Division of Legislative Services; and Lieutenant Robert Kemmler, Virginia State Police.

Staff: Amy Atkinson and Kristi Wright

Minutes from the September meeting were presented to the advisory group and unanimously approved. A copy of the PowerPoint presentation on the Juvenile Records study prepared for the October 1, 2002 Commission on Youth meeting was provided to each Advisory Group member.

The group began with the following identified policy issues related to juvenile justice and court records as listed on the distributed yellow sheets. The first two are issues not previously identified by the group, but identified by staff as needing clarification. The remaining issues were identified by the group at the first meeting with consensus that they required further discussion.

1. **Juvenile Records Study Guiding Philosophy** - Ms. Wright asked the group for input regarding the intent of the role that the "Legal Framework for Information Sharing" would play in the discussion of juvenile justice and court records. The consensus was that it was to provide a framework and be used as guidance in the group's discussions.

2. **Should the confidentiality of and access to a record be governed by the type of record it is or by the custodian of the record?** Ms. Wright explained that this question has arisen in several discussions of this study. Each of these two approaches (type of record vs. custodian of the record) has been taken by various members of the Advisory Group. Of primary concern are the federal laws and regulations that govern records like substance abuse or educational records that attach to the record regardless of who is the custodian. Present state practice is structured around laws governing specific custodians and who has access to the records in their custody.

   Bill Reichhardt clarified that the question is not whether the record is confidential but instead the determination of the release of information. Concerns were expressed that if current practice (which already poses significant challenges) was altered by requiring frontline staff to know numerous laws governing each type of record, there would be considerable confusion and difficulty implementing the laws. Lelia Hopper argued that documents once

introduced into evidence should be available to all parties. The court proceeding gives the record a new "appearance." Items in the court file that have not been introduced into evidence are more problematic as is the distinction between parties and nonparties. Ms. Hopper argued that court records should be distinguished from other types of records and deserve a discrete look. Others distinguished access during the proceedings from access after the proceedings as well as parties from non-parties who might have a legitimate interest.

Concerns were also raised over information gathered from various sources and compiled into a home study or social history. How is this information protected? If the information is protected, some expressed concern over parties' abilities to correct error.

Bill Muse also explained how the differences in the rules of access can affect a person's ability to access records held by two different entities. He gave the example of a home study and how a person can get it from DJJ but not from the court.

3. **Language regarding access is unclear.** Ms. Wright explained that there were several issues here including the use of various terms among the Code sections that address access to records, the need for definitions of these terms, and whether specific authorization for faxing or electronic transfer of records is needed.

Del. Albo clarified that several years ago the General Assembly made the decision that laws would not apply differently to electronic and regular paper versions of documents. Although open to other views, he recommended that this approach be maintained.

Regarding the use of different words in sections, Del. Albo suggested that there may not have been any magic at work; instead it may be attributable to differences in drafting choices. However, others asserted that there is distinction between "released," which would mean that a copy of the record could be given to someone, and the words "disclosed" or "open for inspection," which means that the person can view but not take the record. There was agreement with this distinction. Although a question was raised about whether the term "released" denotes a change of custody of the record, which if could be problematic.

Staff was requested to review applicable sections and make recommendations of ways to make the language consistent throughout. However, Mr. Muse suggested that this group only deal with the term "open for inspection" because it is used in the juvenile justice, law enforcement and court records sections. The group agreed that this should be the focus and asked that staff review § 16.1-300, 301, 305 and where appropriate replace "open for inspection" with "open for inspection and copying."

Regarding the issue of whether specific authorization is needed to fax a document, Del. Albo recalled that the Code sections specifically authorizing the faxing of a document were added to give the faxed copy legal significance. Brenda Barrett expressed her discomfort with faxing documents because of uncertainty of who will have access to it at the point of reception. Ms. Barrett also suggested adding § 16.1-250B to the list of Code sections that specifically authorize the use of faxed copies. Mr. Muse noted that while leaving the language at "open for inspection" would eliminate the fax issue, he is in favor of changing the language to allow copying in every instance. The final consensus was that there would be no specific sections or language related to faxes.

4. **The determination of a “legitimate interest” is left open.** The issue is whether "legitimate interest" should remain in the discretion of the judge or agency, or if the Code should specify who has a "legitimate interest." The group quickly reached consensus that the determination of "legitimate interest" should remain in the discretion of the judge or agency.

5. **Disclosure of delinquency adjudication and probation information to law enforcement is limited.** Ms. Wright explained that law enforcement argues that this information is needed in order to enforce probation terms and to know about potentially violent juveniles taken into custody. While there was judicial support for such disclosure, some judges had concerns that this information may be used inappropriately.

   Members discussed how this information could be used inappropriately. Judge O'Donnell explained how she had received, but declined, a request to disclose all convictions for persons in public housing in order to enforce federal housing law. Adrienne Volenik explained that Federal language requires that this sort of information be obtained on an individual basis and not by checking everyone at those addresses. Judge West, however, noted that individual's name cannot be given to the court if the name is not known.

   Bill Reichhardt expressed concern about juveniles who are on probation with a deferred disposition. In addition, he questioned who determines the purpose for which this information is used. Gary Close argued that the issue is not about police going to mental health providers seeking information, but rather dealing with the kids on the street corner. Mr. Reichhardt again argued that it is in the interpretation and mind of law enforcement that will determine how this information is used. Sen. Whipple also raised the question of who is a "potentially violent juvenile" as noted by law enforcement. How is this defined?

   Lieutenant Robert Kemmler explained that law enforcement doesn’t have access to general criminal histories of juveniles. They can access juvenile criminal history for the purpose of purchasing a firearm. He explained that although information on juveniles 14 years or older and convicted of a felony go into the Central Criminal Records Exchange (CCRE), State Police cannot release the data to law enforcement pursuant to § 19.2-389.1.

   Judge West expressed concern that the information on 14 year olds convicted of a felony is not going into the database as she had received a call from a U.S. attorney. Lt. Kemmler explained that this information goes into the database but is disseminated only for certain purposes as listed in § 19.2-389.1. Brenda Barrett also clarified that that information is automatically and electronically communicated from the court system to the CCRE. Judge O'Donnell questioned why it is dissemination if law enforcement is using it. Lt. Kemmler explained that the CCRE is a State Police function and dissemination is largely to local law enforcement.

   Judge O'Donnell stated that she understands law enforcement's perspective and has similar concerns when a juvenile who was just charged with cocaine distribution and then released is picked up by law enforcement for the same charge and released because law enforcement was unaware of the prior charge. She stated that is diminishes her credibility and community safety. On the other hand, she urged cautioned in considering why and to what extent this information be opened. She recommended that information be limited to juveniles 14 years or older who had been convicted of a felony. Judge West disagreed arguing that it is public information. Mr. Reichhardt noted that while it is public information, it required that people visit the courthouse. Instead, an affirmative transmittal of information is

on the table. Lt. Kemmler stated that the limitation with requiring that the information be accessed at the courthouse is that the juvenile may or may not have had a conviction in that jurisdiction. It would require visiting each jurisdiction. The intent of making this information known to law enforcement is to have it available in a useful manner.

Lt. Kemmler gave an example of how limiting it to 14 years and older can produce uneven results. A 13 year old convicted of a felony can buy a gun at 18 years, because his information is not in CCRE, but a 14 year convicted of a felony cannot buy a gun until he is 29.

After considerable discussion of the issue, group members had not reached consensus. Del. Albo suggested that staff draft three versions for discussion at the November meeting. The first would allow disclosure of information to law enforcement on felonies committed by juveniles 14 years or older. The second version would allow disclosure of information on all felonies, and the third would allow disclosure on all violent felonies required to be reported to school officials. The proposed language changes would be made to § 19.2-389.1 which governs dissemination of juvenile record information. If consensus is not reached by the advisory group at the November 6 meeting, the three versions will be submitted to the Commission for consideration.

6. **Access by a person 18 years or older requesting his/her own DJJ records is restricted to those persons who had previously been committed to DJJ.** (Va. Code §16.1-300(A)(4)). Persons 18 years or older who had been under the supervision of DJJ are not authorized under existing law to access their own records. The change discussed would amend § 16.1-300 to allow persons who were supervised by DJJ to access their records.

   Mr. Close inquired if this would include access to investigatory information that could contain information about who snitched to the police. Deron Phipps responded that under existing law, DJJ can withhold from inspection by a child's parent, guardian, legal custodian or other person standing in loco parentis portions of the record that the Department feels would be detrimental to the child. He suggested that a similar provision be included to protect the type of information raised by Mr. Close.

7. **Pleadings in which custody, visitation and support issues are combined make it difficult to separate the identifying and personal information that may have different confidentiality and access requirements.** Lelia Hopper addressed this issue. She noted that it is really an attorney education issue with most attorneys knowing that separate pleadings are necessary for support issues. To address any remaining issues, she argued that statutory change is not needed, but rather that they can be handled internally within the court system through things like training.

   Ms. Barrett inquired if changing the statute to require attorneys to use forms prescribed by the Supreme Court of Virginia would be a way to eliminate mingled pleadings. Language was added to § 19.2-187 requiring attorneys to use the Supreme Court form when requesting copies of certificates of analysis. Ms. Barrett questioned whether this strategy would work for this issue as well. Steven Dalle Mura recommended against a statutory change noting that the Committee on District Courts establishes forms for use in district courts. The Advisory Group agreed that this issue should be taken off the table.

8. **Whether child protective orders and related documents should be kept in the offending adult's file or in the child's file?** Ms. Hopper also addressed this issue. This

has been the issue in cases like domestic violence. She pointed out that it is similar to the issue addressed in number seven in that it is a training issue for the Office of the Executive Secretary of the Supreme Court and clerks offices. The Advisory Group agreed that this issue should be taken off the table.

9. **Frequently statutes do not provide for mutual exchange of information between agencies.** Group members began by trying to better define the issue and problems presented. Ms. Hopper inquired if the issue is the ability of community treatment providers to get the consent of parents for a child's treatment. Del. Albo asked if the problem is that agencies do not want to keep getting releases. While this may be part of the problem, there also are parents who do not want to give the release. Bill Muse gave an example a juvenile who is at Beaumont and is then transferred to a mental health facility. Upon the juvenile's return to Beaumont, DJJ cannot access the information from the mental health evaluation/treatment because DJJ is the custodian rather than the guardian.

   In order to resolve the problem Mr. Muse presented, John Oliver recommended enacting language similar to that in § 53.1-40.10 which applies to the exchange of medical and mental health information and records of adults committed to the Department of Corrections.

   After considerable discussion, the Advisory Group agreed that each agency should handle such recommended changes and any necessary Code amendments on an individual basis.

Mr. Oliver apologized for his late arrival that was unavoidable due to a court hearing. He then inquired if the group had discussed the issue of handling records by the type of record versus the custodian of the record. Ms. Wright explained that the group had discussed this issue earlier in the meeting and what the group's resolution had been.

Del. Albo asked then if mental health records should be treated differently than other records. Ms. Wright confirmed that that was the argument also made earlier in the meeting. Judge West expressed concern about clerks' ability to handle this scenario. Specifically, she inquired about social history reports which contain various types of information and how it would be decided under what standard they would be released.

Ms. Hopper asserted that court records once presented into evidence are changed and should be available to the parties. Mr. Oliver asked about *after* the proceedings. Judge O'Donnell, drawing on her experience with the Richmond Drug Court, agreed with Mr. Oliver but questioned whether Code changes are necessary. Ms. Volenik added in response to the question of the social history report, that it would for example no longer be considered an education record.

Sen. Whipple inquired whether school records currently are kept in a different file. Ms. Barrett responded that at one point records were kept in separate files but that they are no longer. Ms. Barrett stated that implementation of this would be practically impossible as clerks do not have the time to go through files and separate the records. Mr. Oliver agreed that clerks should not be placed in the position of determining how each individual record should be handled. Instead, he suggested that after disposition the judge seal certain information, thereby giving the clerk direction. Members agreed that there are no existing provisions for sealing portions of the file in juvenile cases. Newly enacted provisions related to protective orders and the non-disclosure of information do not specify that the files be sealed but in practice this is the only way to insure the information is protected. There is precedent for it in adult cases, for example adult pre-sentence reports are sealed. Del. Albo suggested that the same ability be given to juveniles to

have portions of their file sealed. Ms. Hopper questioned the need to seal parts of an already confidential file. Judge West questioned the need to extend this ability to seal records beyond juveniles 14 years or older whose files are open. Mr. Oliver asserted that there are parts of a file that people do not need to see, for example substance abuse records for which consent or judicial order is necessary for release.

Ms. Hopper cautioned the group to think about the administration of this process for sealing records. She argued that decisions as to what information should be sealed should not be left to the clerks. Instead, judges need to give clear direction to clerks and be specific about what is sealed. Mr. Dalle Mura suggested that the language used for pre-sentence reports be used as a starting point. Also, there was consensus that the judge should be the one to make the determination on what records are sealed.

The group turned its attention to the pink sheet containing unresolved questions from discussion of the mental health and school records issues.

1. **Amend the Code to authorize staff of a secure facility or shelter to obtain from a health provider protected health information that is necessary to protect the health and safety of the juvenile, other juveniles, officers or employees at the facility.** The first question presented was whether access to the juvenile's health information should be in the event that consent is both unobtainable and refused. Advisory group members agreed that a facility's ability should be in the event of either of these circumstances.

   The second question was whether the juvenile's health information should be released only when it is needed to address an immediate health need. Advisory group members rejected the concept that information should only obtained for immediate health needs. Staff was directed to Va. Code § 53.1-40.10 as a model for language.

2. **Amend the Code to prevent statements made regarding protected health information communicated to the staff of a facility by the juvenile or provider from being admitted at any stage of the proceedings prior to disposition.** Ms. Wright discussed concerns raised in her discussion with Legislative Services which led to recommendations that this amendment not be made. There was considerable discussion by the Advisory Group of this issue. In the end, the group reached consensus that such a provision is not necessary and recommended that it be taken off the table.

The remaining issues were not covered due to a lack of time. Ms. Wright requested that group members look at numbers 3, 4, and 5 on the pink sheet (unresolved questions) and get back to her with their suggestions or comments.

Judge West suggested inviting Joanne Smith of the Merrimac Detention to attend the November meeting.

The next and final meeting of the Advisory Group will be November 6, 2002 at 2:00 p.m. in the Speaker's Conference Room on the Sixth Floor of the General Assembly Building. The draft language will be sent out prior to the November 6 meeting.

November 6, 2002
Senate Leadership Conference Room
General Assembly Building

REVIEW OF FINAL RECOMMENDATIONS

Members Present: Brenda Barrett, Chris Doucette, Betsy Draine (for Jeanette DuVal), Lelia Hopper, D. Patrick Lacy, John Oliver, Michelle Parker, Phyl Parrish, William Reichhardt, Adrienne Volenik and Judge Patricia West

Members Absent: Del. David Albo, Don Carignan, Gary Close, Suzanne Fleming, Del. Ken Melvin, Sen. Bill Mims, Bill Muse, Judge Kim O'Donnell, Deron Phipps and Sen. Mary Margaret Whipple

Guests: Jescey French, Kathy Harris, and Norma Szakal, Division of Legislative Services; Lieutenant Robert Kemmler, Virginia State Police; and Joanne Smith, President, Virginia Detention Home Association

Staff: Amy Atkinson and Kristi Wright

Kristi Wright opened the meeting. Minutes, with revisions, from the October meeting were presented to the advisory group and unanimously approved.

Family Educational Records and Privacy Act (FERPA)
The first item on the agenda dealt with the Family Educational Records and Privacy Act. Kristi Wright presented the "Comparison of Virginia Statute and Regulations with FERPA" prepared by Kathy Harris, attorney for Legislative Services. The group discussed whether or not it had enough information and the necessary stakeholders at the table to make a recommendation to the Commission regarding the options previously set forth - maintain Virginia's own statutory scheme for managing study records while reconciling it with federal law and regulations or adopt FERPA as Virginia student records provisions. The group agreed that this would be a large undertaking and that further study should be done either by a standing legislative committee or by the Virginia Commission on Youth. Staff will present both options to the Commission at their next meeting on November 19, 2002.

A. SCHOOL RECORDS

Draft Recommendation 1:
Amend the Code to require that notice be given to the superintendent when the charges, of which they were originally notified under §16.1-260 (G), are withdrawn, reduced or there is a finding of not guilty.

Ms. Wright reported that the Superintendents-Judges Liaison Committee formally endorsed this recommendation at their October 31, 2002 meeting, including the provision that notice be given if charges are reduced. William Reichhardt suggested substituting "no finding of guilt" for "finding of not guilty." He argued that since there were circumstances leading the court to defer disposition, the juvenile should receive the more immediate benefits of this in the eyes of the school. Pat Lacy stated that as long as the disposition is deferred and the juvenile is subject to the authority of the court, he holds the same status as someone who is charged. Judge West agreed and preferred the recommended language of "finding of not guilty." As in the case of a deferred disposition, the juvenile court judge could find that there is enough evidence to convict

but due to other factors chooses to defer disposition until the juvenile has complied with other requirements. During this period the court keeps the juvenile under its jurisdiction with the ability to find him guilty of the original charge. There was concern that to communicate this information to the school could be misleading since final disposition has not been entered.

Another limitation of sending an interim (in between the charge and final disposition) report that there is no finding of guilt is that only final dispositions are entered into the court's system which is used to comply with existing provisions in which the disposition is communicated to school officials. The group concluded the discussion by agreeing that the original language of "finding of not guilty" be recommended to the Commission. It was also pointed out that "dismissed" charges should be added to the recommendation as it is already included in the draft language. The group agreed to the following recommendation:

- Amend the Code to require that notice be given to the superintendent when the charges, of which they were originally notified under §16.1-260 (G), are withdrawn, dismissed, reduced or there is a finding of not guilty.

Draft Recommendation 2:
Amend the Code to require that the principal who was notified, pursuant to §16.1-301 (A), that a student is a suspect in or has been charged with an enumerated offense, receive notice that the student was not charged with the suspected offense or if charged the charges were withdrawn or reduced, or the student was found not guilty.

Ms. Wright informed the group that the Superintendents/Judges Liaison Committee also formally endorsed Draft Recommendation 2 at their October 31, 2002 meeting, including the provision that notice be given if charges are reduced. The group approved this recommendation with the amendment to add "dismissed" charges.

There was discussion on the draft bill language about how the clerk of the court will know that the principal has received notice pursuant to § 16.1-301. This was recognized by staff to be problematic. Jescey French, who drafted the bill, stated that she will try to address this concern.

Draft Recommendation 3:
Option 1: Amend the Code to require that the superintendent, upon receipt of a notice adjudication received pursuant to Va. Code §16.1-305.1, notify the clerk of court or intake officer that the student is no longer enrolled in the division, and if known, where the student is now enrolled.

Option 2: Amend the Code to authorize a superintendent to forward to another superintendent notices of adjudication received pursuant to Va. Code §16.1-305.1

Ms. Wright noted that Option 2 was the original language as previously discussed by the group, but that staff recommended Option 1. When Judge West questioned the rationale for the change, Ms. Wright explained that it appeared to go through more proper channels when the clerk notifies the superintendent of the disposition. Judge West stated that she preferred Option 2, the original recommendation and did not see the need the added step of taking it back to the clerk. Lelia Hopper voiced a concern about giving additional work to already overloaded clerks' offices. The group decided that Option 2 was the preferred recommendation for Draft Recommendation 3.

There was further discussion on the draft bill language. Ms. Hopper questioned the addition and use of "judicial" on page 3, line 6. Ms. French explained that it was added to distinguish the disposition handed down by the court in which the charges are withdrawn and when the charges are withdrawn informally by intake. To make this clear in the language, it was agreed that "court" be substituted for "judicial" on page 3 line 6 and "or handled informally" be added to page 3, line 14.

The group then discussed the crimes that are included for reporting to school officials under §16.1-260 and §16.1-301. Judge West suggested that the language listing the reportable offenses in § 16.1-301 be amended so that they are consistent with §16.1-260(G). Ms. French, noting that the list in § 16.1-260 (G) is more extensive, explained that under § 16.1-301 a principal could be notified if a juvenile is a suspect. Ms. Wright explained the difficulty that arises with having these two parallel tracks of notification - one to the principal and one to the superintendent who may also disclose information to the principal. It becomes especially difficult when trying to craft language requiring follow-up information when the charges are withdrawn, reduced or dismissed or not even filed.

Mr. Reichhardt suggested that the juvenile or the juvenile's parents be notified that they have been reported to the school as a suspect of a crime. Judge West opposed this suggestion, arguing that there are obvious reasons why someone should not know that they are a suspect in a matter. Ms. Hopper also expressed concerns about due process issues. There was a motion to remove "suspect" from the draft legislation on page one, line 17. Three members voted for, two against, the remainder (11) abstained. The group asked that the Commission be made aware of this discussion and be presented with both sides. In the end, given the large number of group members who abstained, there was little agreement and no recommendation could be made.

Ms. Volenik suggested that § 22.1-277 be amended to include the limiting language that was added in the draft language to §22.1-288.2. The addition of "for an offense listed in subsection G of § 16.1-260" would help alleviate concerns of enlarging the net for crimes that are reported to schools.

B. MENTAL HEALTH AND SUBSTANCE ABUSE

Ms. Wright briefly reviewed the first three recommendations under mental health and substance abuse which are reflected in one draft bill.

a) Draft Recommendation 1:

Amend Va. Code § 54.1-2969 (E)(5) so that a minor is deemed an adult for purposes of consenting to the release of records in all circumstances enumerated in § 54.1-2969 in which a minor is deemed an adult for proposes of consenting to treatment.

The advisory group approved draft recommendation 1 with little discussion.

b) Draft Recommendation 2:

Amend the Code so minors are authorized to access their own records to the extent that they are authorized to consent to treatment under Va. Code § 54.1-2969.

The advisory group approved draft recommendation 2 with little discussion.

c) Draft Recommendation 3:
Amend the Code to include provisions that put into place a method for minors to object to the release of information to persons who are authorized to access the minor's record under other Code sections.

Ms. Wright asked that discussion of the wording of this recommendation be held until Norma Szakal explained her draft legislative language and rationale behind drafting it differently than the group originally envisioned.

Ms. Szakal walked the group through the draft bill containing language that addresses all three recommendations. She added the language on Page 3, lines 9 through 11 to ensure that it is clear that the minor, under certain circumstances, can consent to release of records. John Oliver requested that "or other legal custodian" be added to this portion of the draft legislation. Similarly, Ms. Hopper noted that the term "custodial parent" is not a term commonly used and recommended deletion of the term "custodial." After discussion, the group determined that "custodial" should be dropped and "legal custodian" (without the use of "other") should be added.

Ms. Szakal continued with the explanation of amendments. Ms. Szakal noted that the new language was modeled after the first section of § 32.1-127.1:03 (F) where similar provisions are currently in place for adult records. While the draft legislation does not put into place a method for minors to object to the release of information, the language does allow for the minor patient's physician or clinical psychologist to redact from the minor's record that part which the provider believes to be injurious to the minor patient's health or well-being if reviewed by the minor's parent. Betsy Draine requested that other professionals, such as licensed clinical social workers, and licensed professional counselors, be added to those who may redact information in a record. After discussion, the group agreed that these additional providers should be included.

Mr. Reichhardt stated that although the language is different from the original recommendation, it meets a need and would be useful. He supports the language and suggested that staff draft a new recommendation to reflect the draft legislation language. John Oliver expressed concern that the language may be inconsistent with HIPAA because HIPAA has a broader range of providers and more specific findings. Mr. Reichhardt suggested that the new language be conformed to HIPAA. Mr. Oliver also discussed HIPAA provisions (found in 45 CFR 164.502) stating that if a minor can consent to treatment, they can consent to release of records and that in that case the personal representative cannot without the consent of the minor. Ms. Szakal commented that there continues to be a great deal of controversy around HIPAA even within the health care Bar. In order to receive clarification on these issues, she said that an advisory opinion could be requested from the Center for Medicaid and Medicare Services.

Related to the wording of the recommendation, Ms. Hopper asked that language be added to clarify what type of information is intended. It was agreed that "medical, mental health and substance abuse treatment" be added. The advisory group agreed to go forward with the draft legislation and asked that the wording for the recommendation be amended as necessary.

Draft Recommendation 4:
Amend the Code to authorize staff of a secure facility or shelter to obtain from a health provider protected health information that is necessary to protect he health and safety of the juvenile, other juveniles, offices or employees, at the facility.

Mr. Reichhardt expressed his concern that the draft legislative language gives sweeping authority. He suggested that authority to receive this information should be at the director level or his/her designee and that the communication should be reduced to writing. Betsy Draine also expressed concern about the use of "staff" in the draft language. She asserted that the person who receives the information should possess the knowledge and skills to know what to do with the information once received. In addition, Ms. Draine expressed concern in general about the release of mental health records due to the potentially sensitive nature of the information contained therein.

Joanne Smith said that her detention home would likely use an amended version of their current release of information form in which the need for the information is stated along with a notation as to the authority for the release of information. This form would be faxed to the health care provider. Judge West asserted that a detention home director or designee is not going to seek information that they don't need. They have too much at stake. In addition, Judge West suggested that DJJ should develop regulations to handle the details.

Ms. Smith expressed concern about the definition of "reasonable attempt" and how "reasonable" could or would be interpreted by parents and the courts. Ms. Hopper raised concerns about the "shall be entitled" language on page 1, line 9 of the draft. Ms. Szakal stated that the reference to § 32.1-127.1:03 placed this process within the procedures outlined in § 32.1-127.1:03. There was considerable discussion about the procedure to be followed, including the use of the codified release form versus procedures established by DJJ regulation. The group resolved that this procedure should be excluded from § 32.1-127.1:03 by adding a reference to this procedure in § 32.1-127.1:03 (C) (3) and deleting the new language that had been added to § 32.1-127.1:03 (D) (28). In addition, the group agreed that request for this information should come from the director or his/her designee and that the request should be in writing. The advisory group approved the recommendation with the addition of "the director or his/her designee" in place of "staff" with this and other changes to the draft legislation.

Draft Recommendation 5:
Amend Va. Code §32.1-127.1:03 to authorize providers to disclose health information in compliance with this anticipated new provision.

With the recommended changes to draft recommendation 4 as described above, the advisory group determined that there was no longer a need for draft recommendation 5.

Draft Recommendation 6:
Amend Va. Code §2.2-3705 (A) (5) by adding language to clarify that the provisions contained therein apply except as otherwise provided by law.

Ms. Wright explained that Commission staff discussed this recommendation with Maria Everett, Freedom of Information Act (FOIA) Council Director. Ms. Wright stated that upon the approval of this recommendation by the advisory group, she will present this recommendation to the FOIA Council on November 18, 2002. After a brief discussion the advisory group approved draft recommendation 6.

JUVENILE JUSTICE AND COURT RECORDS

Draft Recommendation 1:
Amend Va. Code §16.1-300 (A) (4) to allow a person 18 years or older who was previously supervised by the Department to access to his/her own records.

Ms. Wright explained that representatives from DJJ could not attend the meeting due to the death of a colleague's spouse. However, Ms. Wright had spoken to Deron Phipps earlier that day, and after a quick review of the language, DJJ did not have any comments on the draft legislative language. Ms. Wright also explained that DJJ acknowledged that the task of consolidating and making consistent the Code sections related to juvenile justice, law enforcement and the courts was larger and more complex than what could be handled by this group at this time. In addition, there were concerns about the having the necessary stakeholders around the table. Ms. Wright reported that DJJ may bring this to the Commission on Youth for potential study next year. The advisory group approved this recommendation.

Draft Recommendation 2:
Amend Va. Code to allow disclosure of juvenile record information maintained in the Central Criminal Records Exchange (CCRE) to officers or employees of criminal justice agencies.

Staff provided the advisory group with four options regarding this recommendation, allowing for authorized officers or employees of criminal justice agencies to have access to:

1. All juvenile information contained in the CCRE;
2. Information on felony convictions committed by a juvenile 14 years or older;
3. Information on all juvenile felony convictions; or
4. Information on all juvenile felony convictions of crimes listed in §16.1-260 (G) (those that are reported to superintendents).

Lt. Kemmler provided a background of the CCRE, including an explanation of the information that goes into the system and what information can be retrieved from it. He stated that he preferred Option 1. The addition of age requirements will complicate any programming changes that will need to be made to the system. Ms. Hopper stated that a public policy decision had been made to treat 14 year-olds differently throughout the justice system and that this group should stay with that policy decision. Judge West offered that a public policy decision was made to enter the information into the CCRE and stressed the importance of law enforcement having access to the information for public safety purposes. Mr. Lacey questioned how police officers used the CCRE to obtain information. Lt. Kemmler responded that law enforcement must be able to say why they were running the records and are subject to audits by the FBI. Mr. Reichhardt noted that police officers should have the same information that is provided to school superintendents and expressed a preference for Option 4. Under Option 4, Lt. Kemmler explained that, for a 13 year old convicted of sexual battery, law enforcement would not be able to get that information from the CCRE. Both ends of the system need to be addressed: what goes into CCRE and what is allowed to come out of CCRE. Currently, the only way that a law enforcement officer can use CCRE for information on a juvenile is if the juvenile is purchasing a firearm.

Mr. Oliver asked Lt. Kemmler which of the options, from a practical standpoint, he would prefer. Lt. Kemmler again state Option 1 because any inquiry would be run against both adult and juvenile records. Any other option would pose implementation problems and therefore have a

fiscal impact. Mr. Lacy clarified that with Option 1 nonfelony convictions for juveniles 14 years or older and any convictions for juveniles under 14 would be available in addition to felony convictions for juveniles 14 years or older that are already public record.

After a lengthy discussion, the advisory group was unable to come to consensus on this recommendation. The group narrowed it to two options and staff agreed to present these options to the Commission with the arguments for both.

Option 1:
All information on adjudications of juveniles found delinquent or guilty that are entered into the Central Criminal Records Exchange pursuant to Virginia Code § 16.1-299.

The supporting argument here is that the policy decision has been made that this information may be entered into the CCRE and law enforcement should be able to access the information for public safety purposes. Simply maintaining the information in the system is meaningless unless it can be used, in this case for public safety purposes.

Option 2:
Only information on adjudications of juveniles, fourteen years or older found guilty of a felony.

The supporting argument here is that a policy decision has been made that juveniles fourteen years and older and convicted of a felony can be treated as an adult and their records are already open to the public. For those juveniles who do not meet these criteria, the philosophy of the juvenile court continues to focus on rehabilitation and allowing juveniles an opportunity to learn from their mistakes. The availability of this information may be detrimental to this objective.

Ms. Hopper made a motion to take recommendations 3 and 4 off the table. The motion was approved. She noted that the Clerk's Association will likely ask Rob Baldwin, Executive Secretary of the Supreme Court of Virginia to look at these issues.

The meeting adjourned at 6:05. Recommendations of the advisory group will be presented to the Virginia Commission on Youth at their next meeting, November 19, 2002 at 12:30 p.m. in House Room C of the General Assembly Building.

Appendix D

POLICY ISSUES FOR CONSIDERATION

COURT AND JUVENILE JUSTICE RECORDS:

II. **Language regarding access is unclear.** The Code of Virginia allows some records to be viewed, others to be transferred or released, and others to be open for inspection.
   a. What does open for inspection mean - visual inspection only (most common interpretation), photocopying, faxing?
   b. Are there or should there be restrictions on the publication of information by those who have access to records, including parents?
   c. Is there authority in the Code for the faxing or electronic transfer of records? More than a third of respondents in the judicial survey indicate that alternative means of records dissemination are accepted practice.
      1. Should the Code be amended to make clear that this is permitted since electronic information exchange and integrated computer databases will become increasingly prevalent?
   d. The use of facsimiles has been specifically authorized in the Code. For example:
      1. § 54.1-4201.1. *Notification by sponsor of firearms show to State Police and local law-enforcement authorities required; records; penalty:* Specifies that a list of all vendors can be delivered to State Police by mail, by hand or by fax.
      2. § 16.1-279.1. *Protective order in cases of family abuse*: "As used in this section, "copy" includes a facsimile copy." See also §§ 16.1-253.1, 253.4. (Preliminary Protective Orders and Emergency Protective Orders, respectively.)
      3. § 16.1-260. *Intake; petition; investigation*: "…[A]ny documents filed may be transmitted by facsimile process"

III. **The determination of a "legitimate interest" is left open.**
   a. Should interpretation be left to judicial or agency discretion?
   b. Should it be defined by statute?

IV. **Disclosure of delinquency adjudication and probation information to law enforcement is limited.**
   a. Should law enforcement be informed of adjudications and probation status?
   b. Law enforcement officers argue that they need the information in order to enforce probation terms and to know about potentially violent juveniles taken into custody.

V. **Access by a person 18 years or older requesting his/her own DJJ records is restricted to those persons who had previously been committed to DJJ.** (Va. Code §16.1-300(A)(4)).

VI. **Pleadings in which custody, visitation and support issues are combined make it difficult to separate the identifying and personal information that may have different confidentiality and access requirements.**
   a. Custody and visitation issues are filed in the child's file, whereas support issues are filed under the name of the person against whom support is sought.

b. Some courts have a local policy not to accept these pleadings. If a court does not have such a policy, the Supreme Court's Technical Assistance Department provides special instructions for their processing.

VII. **Whether child protective orders and related documents should be kept in the offending adult's file or in the child's file?** Should this be filed in adult file or child's file (where it would be subject to more stringent confidentiality rules)?

VIII. **Frequently statutes do not provide for mutual exchange of information between agencies.**
   a. In most cases, mutual exchange depends upon client consent or court order. Are these requirements valuable in safeguarding confidentiality and respecting client autonomy or are they unnecessary barriers to more effective and advantageous information sharing?
   b. Is there a need for others to have greater access to juvenile records?
      1. Judges felt that mental health and social service providers should have greater access to juvenile records, particularly treatment, social service and school records. They were opposed to allowing law enforcement and school personnel greater access to juvenile records.

MENTAL HEALTH AND SUBSTANCE ABUSE RECORDS:

IX. **Parental access to a child's records and the child's control of his or her own records.**

X. **Emergency disclosure of mental health information is limited.**
   a. Should the Code of Virginia be amended to allow for emergency disclosure of mental health information (such as suicidal or homicidal history and current medications) to law enforcement personnel when a juvenile is taken into custody?
   b. What constitutes an emergency? Does this call for a professional judgment? Whose professional judgment?

JUVENILE JUSTICE AND SCHOOL RECORDS:

XI. **Disclosure of delinquency adjudication and probation information to schools is limited.**
   a. Under Va. Code § 16.1- 260(G), the superintendent is notified if a student is charged with one of the listed serious offenses. Under § 16.1-305.2, the superintendent may redisclose that information to school personnel when necessary for safety. If the student is adjudicated delinquent of one of the listed offenses, the superintendent is notified within 15 days under § 16.1-305.1 (and may redisclose that information in conformance with § 22.1-288.2), but if the student is found not delinquent or if the charges are dropped or reduced to an offense not included in the list, the school is not notified.
   b. Should schools be informed of adjudications and charges that are dropped?
   c. This problem was exacerbated by changes to § 16.1-301(A) in the 2001 General Assembly. The changes permit notification of the school principal (not the superintendent) when a student is *"a suspect in"* or charged with a listed offense. Again, there are no provisions to notify the principal if the student is considered a suspect but never charged, or if the student is charged but not convicted.

XII. **Notice of adjudication:** Va. Code §16.1-305.1: The clerk of the court shall provide written notice, within 15 days if there has been no notice of appeal filed, to the superintendent when juvenile is adjudicated delinquent or convicted of a crime.

a. If the child withdraws from the school district, what provisions are there for this information to be transmitted to the new school district? Should it be?

STATE AND FEDERAL LAWS:

XIII. **Virginia Code § 22.1-287(A)(5) does not conform to the Family Education Rights and Privacy Act ("FERPA") (20 U.S.C. §1232g).**

a. Section 22.1-287(A)(5) addresses the release of school records to law enforcement personnel. The language does not parallel FERPA and FERPA regulations and leaves unclear provisions regarding the following:

1. FERPA requires that access must be prior to adjudication (post-adjudication access requires a court order or written consent of the parents);
2. The allowed reporting or disclosure of the records is to enable the juvenile justice system to effectively serve the student; and
3. The officials and authorities to whom the information is disclosed certify in writing that the information will not be redisclosed according to State law and with the prior written consent of the parent.