

March 29, 2019

Emily V. Webb
Director for Board Relations
Virginia Department of Education
101 North 14th Street, 25th Floor
Richmond, Virginia 23219

Submitted via email to emily.webb@doe.virginia.gov

Re: Public Comment on Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia

Dear Ms. Webb:

As members of the Coalition for the Improvement of School Safety (“Coalition”), we write to provide public comment to the Virginia Board of Education (“Board”) on the proposed Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia.

In 2015, Virginia enacted a law to require the Board to adopt regulations on the use of seclusion and restraint in public elementary and secondary schools. This law was passed after media coverage and reports, including a report by Virginia’s Commission on Youth, brought to light the dangerous—and even deadly—restraint and seclusion practices in use in Virginia’s public schools. The statute requires the Board’s final regulations to be consistent with its *Guidelines for the Development of Policies and Procedures for Managing Student Behavior in Emergency Situations* and the *Fifteen Principles* contained in the United States Department of Education’s Restraint and Seclusion Resource Document. Over the past several years, the Coalition for the Improvement of School Safety has offered extensive comment and feedback on the regulations. We are pleased that the Board has issued proposed regulations at long last.

Many parts of the proposed regulations will make school safer for students—particularly students with disabilities and students of color, against whom seclusion and restraint are disproportionately used. We are pleased that the regulations prohibit the use of restraint and seclusion solely to prevent property damage (proposed 8VAC20-750-30(A)(5)(iv)), which is consistent with the *Fifteen Principles*, which state that restraint and seclusion should not be used except to protect the child and others from serious harm and to defuse imminently dangerous situations. We also support the requirement that schools make a reasonable effort to ensure direct, same-day (in-person or by telephone) notification to a child’s parent when any child has been restrained or secluded, as well as the requirement to send a written incident report to parents within two days of an incident of restraint or seclusion (proposed 8VAC20-750-60 *et seq.*). We support the explicit prohibition on restraint or seclusion when medically or psychologically contraindicated (proposed 8VAC20-750-30(A)(8)). We urge the Board to keep these important protections.

Notwithstanding these strong protections for student safety, the regulations still require changes to be fully consistent with the *Fifteen Principles* and to comply with Virginia law. We outline those areas and our recommendations below.

Recommendation 1: Restore language explicitly prohibiting prone restraints.

Relevant section: Proposed 8VAC20-750-30

The proposed regulations contain an enumerated list of actions that are explicitly prohibited under all circumstances. This enumerated list contains some important prohibitions, including, but not limited to, prohibitions on the use of mechanical and pharmacological restraints, restraint or seclusion solely to prevent property damage, restraint or seclusion when medically or psychologically contraindicated, and restraint or seclusion in any manner that restricts a student's breathing or harms the student. Each of these prohibitions is consistent with the *Fifteen Principles* and will protect students in Virginia's public schools from harmful practices. Notably absent from this enumerated list, however, is an explicit prohibition on prone restraint.

Prone restraints are inherently dangerous and can cause serious injury or death. They should never be used in the school setting. The seventh of the *Fifteen Principles* articulated by the U.S. Department of Education directly address the unique dangers of prone restraints:

Restraint or seclusion should never be used in a manner that restricts a child's breathing or harms the child. Prone (i.e. lying face down) restraints or other restraints that restrict breathing should never be used because they can cause serious injury or death (U.S. DOE, 2012 (*bold in original*)).

Because of the unique dangers of prone restraints, they are explicitly prohibited in Virginia's Regulations for the Operation of Private Schools for Students with Disabilities (8VAC20-671-650). Students in Virginia's public schools deserve the same protections from these harmful practices. Prone restraints were explicitly prohibited in an earlier draft of these regulations that was publicly disseminated for commentary, and this Coalition provided written commentary specifically supporting that provision. Without an explicit prohibition on prone restraints, the proposed regulation does not comply with Virginia law, which requires language consistent with the *Fifteen Principles* (Va. Code § 22.1-279.1:1). The language prohibiting prone restraints must be restored.

Recommendation 2: Eliminate language that allows for the seclusion of students during investigations of a violation of the code of student conduct.

Relevant section: Proposed 8VAC20-750-10

Seclusion is defined in the *Fifteen Principles* as "the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving." The proposed regulations adopt this definition verbatim, but also provide a list of interventions that do not constitute seclusion, including:

[C]onfinement of a student alone in a room or area from which the student is physically prevented from leaving during the investigation and questioning of the student by school employees regarding the student's knowledge of or participation in events constituting a violation of the code of student conduct, such as a physical altercation, or an incident involving drugs or weapons.

This exception not only authorizes the use of seclusion during the investigation of an alleged violation of the student code of conduct, but by excluding such incidents from the definition of seclusion, it ensures that such incidents will not be subject to the multiple protective provisions contained in these very regulations. Student codes of conduct, which are set out by local educational agencies and vary from division to division, often include such long, vague lists of infractions that it is hard to imagine a scenario that would not be covered by this exception. The proposed regulation as written would permit the use of seclusion for such minor behaviors as possessing a cell phone, attendance violations, or lying, and such vague behaviors as being disrespectful or disrupting a classroom.

We note that this exception would also allow seclusion to be used for instances of property damage—a code of conduct violation—which the regulations otherwise forbid, and could be used to investigate behavior that arises solely as a manifestation of a student’s disability. The exception is inconsistent with Virginia law and with the *Fifteen Principles*, which indicate that seclusion should never be used except where a student’s behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective. The regulations must prohibit the use of seclusion during the investigation of possible student code of conduct violations.

Recommendation 3: Clarify that restraint and seclusion may be used ONLY when necessary because of an “imminent threat of serious physical harm to self or others.”

Relevant section: Proposed 8VAC20-750-40

The *Fifteen Principles* are very clear about when restraint and seclusion may be used consistent with its terms:

Physical restraint or seclusion should not be used except in situations where the child’s behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective and should be discontinued as soon as imminent danger of serious physical harm to self or others has dissipated.

The draft regulations provide a list of five circumstances when restraint and seclusion *may* be used. The fourth of these circumstances, which allows for the use or restraint or seclusion to “obtain possession of controlled substances or paraphernalia upon the person of the student or within the student’s control” (proposed 8VAC20-750-40(B)(4)), authorizes the use of restraint or seclusion in circumstances where the student’s behavior poses no imminent danger of serious physical harm to anyone. Indeed, the language authorizing the use of restraint or seclusion to obtain possession of paraphernalia within a student’s control would seem to authorize the use of these dangerous practices to obtain paraphernalia believed to be in a student’s backpack. The second of the enumerated circumstances authorizes the use of restraint or seclusion to “quell a disturbance or remove a student from the scene of a disturbance in which such student's behavior or damage to property threatens serious physical harm or injury to persons.” The language of this

provision is convoluted and could be read to authorize restraint or seclusion in circumstances where a student’s behavior poses no threat of harm to anyone.

These enumerated uses of restraint and seclusion form a loophole in the regulation and are inconsistent with the *Fifteen Principles* and Virginia Law. The Board must adopt a standard that clearly limits the use of restraint and seclusion to those circumstances when they are necessary because of an imminent threat of serious physical harm to self or others.

Recommendation 4: Eliminate the exclusion of “incidental, minor, or reasonable physical contact or other actions designed to maintain order and control” from the purview of the regulations.

Relevant section: 8VAC20-750-10

This language is subject to broad interpretation and could result in undocumented and unregulated restraints occurring under the guise of “reasonable physical contact or other actions designed to maintain order and control.” To the extent that such actions do not immobilize a student, or prevent the child from moving freely, these actions are already excluded from the definition of physical restraint. To the extent that they do, they should be subject to the same protective limitations as all other restraints. The regulations governing the use of restraint or seclusion in private schools for students with disabilities do not contain this exception, and neither should the regulations currently under consideration for public schools in Virginia. The *Fifteen Principles* define “physical restraint” as a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely and require that such restraints are not used except in situations where the child’s behavior poses imminent danger of serious physical harm to self or others AND other interventions are ineffective. By eliminating actions designed to “maintain order and control” from the definition of physical restraint, the regulations are inconsistent with the *Fifteen Principles*.

We thank you for your work on these regulations, and we urge you to adopt our recommendations to ensure that the regulations follow Virginia law and that they protect all students in the Commonwealth’s schools.

Coalition for the Improvement of School Safety

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