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Virginia Board for People with Disabilities

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TO: Emily V. Webb, Director for Board Relations

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Board of Education

FROM: Heidi L. Lawyer

Virginia Board for People with Disabilities (VBPD)

RE: Comment on proposed new regulation governing seclusion & restrain in public elementary & secondary schools

I am writing to provide comments on behalf of the Virginia Board for People with Disabilities (the Board) regarding the proposed new regulations governing seclusion and restraint in Virginia’s public schools. The Board is the Developmental Disabilities Council for the Commonwealth of Virginia, and as such it has an interest in ensuring that students with disabilities receive educational services in an environment that is safe. Available data demonstrates that students with disabilities are disproportionately subjected to restraint and seclusion in schools in Virginia and around the country. According to the U.S. Department of Education, Office of Civil Rights (OCS) data collection, students with disabilities constituted 12 percent of enrolled students in the 2015-16 school year, but 71 percent of students who were reported to OCS as having been restrained, and 66 percent of students who were reported as having been secluded.

The Board is grateful for the many opportunities that have been provided to advocates and others to provide input and feedback throughout this lengthy regulatory process, and we are pleased that the process is nearing its completion. The Board, as well as other advocates and individuals have offered recommendations on the several iterations of these regulations that have been shared and discussed publicly, and we are pleased that a number of those recommendations are reflected in the proposed regulations. The proposed regulations in their current from contain important protections for students with disabilities. We offer the following recommendations to make them stronger.

**1. The Board strongly supports the notification and reporting provisions contained in proposed 8VAC20-750-60 as currently written.**

According to the OCR’s data, 122,000 students were subjected to restraint or seclusion during the 2015-16 school year. This number is likely a significant underestimation, because in most states, including Virginia currently, there is no state requirement that schools document and report incidents of restraint and seclusion, and no uniform policies or practices with respect to the documentation and reporting of incidents at the local level. Because of a lack of uniform and consistent documentation and reporting of incidents of restraint or seclusion, it is not knowable how many incidents of restraint or seclusion have occurred in Virginia’s public schools in the five years since the General Assembly of Virginia passed legislation directing the Board of Education to promulgate regulations of the use of restraint and seclusion in Virginia’s public schools. It is essential that we obtain accurate data about the use of these practices.

It is also important that parents receive same day notification of every incident of restraint or seclusion involving their child and subsequent written incident reports containing detailed information about the incident, as required by proposed 8VAC20-750-60(C). The thirteenth of the U.S. DOE’s Fifteen Principles states that “parents should be notified as soon as possible following each instance in which restraint or seclusion is used with their child.” Children can and do suffer injuries, both visible and invisible, during incidents of restraint or seclusion; and parents must be made aware of these incidents so that they can be alert to any signs of physical or psychological injury that could require attention and care. Detailed incident reports are also very important for parents to be able to effectively participate in subsequent meetings aimed at eliminating the need for future incidents of restraint or seclusion by modifying behavioral intervention plans, implementing positive behavioral interventions and supports, and/or other steps.

**2. The Board also strongly supports the existing, modest provisions of the proposed regulations pertaining to positive behavioral interventions and supports, but suggests the following edits to make them even stronger:**

**8VAC20-750-70(A)(1)** A. Each school division that elects to use physical restraint or seclusion shall develop and implement written policies and procedures that meet or exceed the requirements of this chapter and that include, at a minimum, the following:

1. A statement of intention that the school division will ~~encourage the~~ use ~~of~~ positive behavioral interventions and supports to reduce and prevent the need for the use of physical restraint and seclusion.

The Board strongly supports the use of positive behavioral interventions and supports to avert the need for restraint and seclusion. Positive behavioral interventions and supports are proven strategies to address challenging behavior in ways that respect the dignity and protect the safety of students. Their use is consistent with the first of the Fifteen Principles, which reads:

Every effort should be made to prevent the need for the use of restraint and for the use of seclusion.

The Board believes that this provision can be strengthened, however, by removing the word “encourage” and simply requiring that school divisions who choose to use restraint and seclusion employ positive behavioral interventions and supports as a first option.

* **8VAC20-750-100:** 1. Ensure that all school personnel receive initial **and ongoing** training that focuses on skills related to positive behavior support, conflict prevention, de-escalation, and crisis response. The tenth of the Fifteen Principles reads:

Teachers and other personnel should be trained **regularly** on the appropriate use of effective alternatives to physical restraint and seclusion, such as positive behavioral interventions and supports… (emphasis added) (U.S. DOE, 2012).

Initial training, as required by the proposed regulation, is important, but teachers should receive ongoing training throughout their career as well. The Board understands that there is a monetary cost associated with training, but ongoing training is necessary for teachers to develop and maintain the skills necessary to adequately apply the principles of positive behavioral interventions and supports.

**Additionally, the Board supports the language in 8VAC20-750-80 as is:** Thissection requires 504 and IEP teams to consider the use of positive behavioral interventions for students who display behaviors that are likely to result in the use of restrain or seclusion, or who have been subjected to multiple incidents of restraint or seclusion. This is consistent with the eighth of the Fifteen Principles, which reads:

The use of restraint or seclusion, particularly when there is repeated use for an individual child, multiple uses within the same classroom, or multiple uses by the same individual, should trigger a review and, if appropriate, revision of strategies currently in place to address dangerous behavior; if positive behavioral strategies are not in place, staff should consider developing them. (U.S. DOE, 2012).

**3. The Board recommends the following changes to ensure that restraint and seclusion are only used in instances in which a student’s behavior poses imminent danger of serious physical harm to self or others:**

**8VAC20-750-10. Definitions related to permitted and prohibited actions**

"Physical restraint" means a personal restriction that immobilizes or reduces the ability of a student to move freely. The term "physical restraint" does not include (i) briefly holding a student in order to calm or comfort the student; (ii) holding a student's hand or arm to escort the student safely from one area to another~~; or (iii) the use of incidental, minor, or reasonable physical contact or other actions designed to maintain order and control~~.

"Seclusion" means the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.

Provided that no such room or space is locked, the term "seclusion" does not include (i) time-out, as defined in this chapter; (ii) in-school suspension; (iii) detention; (iv) student-requested breaks in a different location in the room or in a separate room; (v) removal of a student for a short period of time from the room or a separate area of the room to provide the student with an opportunity to regain self-control, so long as the student is in a setting from which the student is not physically prevented from leaving; ***or*** (vi) the removal of a student for disruptive behavior from a classroom by the teacher as provided in § 22.1-276.2 of the Code of Virginia~~; or (vii) confinement 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~~.

The definitions of restraint and seclusion contained in the proposed regulations include language that explicitly excludes certain actions from the definitions, and thereby excludes actions described by these exceptions from the purview of the proposed regulations. Some of the language of these exclusions is too broad or too vague and subject to problematic interpretation. The exception to the definition of restraint, for instance, excludes “incidental, minor, or reasonable physical contact, or other actions designed to maintain order and control.” The last part of this exception (actions designed to maintain order and control) is subject to such broad interpretation that it threatens to swallow the regulations in their entirety. Indeed, it is difficult to imagine an intervention that could not be described as an “action to maintain order and control.” The preceding parts of this exception (incidental, minor, or reasonable physical contact) can either be interpreted as unnecessary, or as too broad: It is unnecessary if it describes actions that do not meet the basic definition of restraint in the first place, and it is too broad if it is interpreted as excluding behavior that amounts to restraint from the purview of the regulations. The Board recommends striking this exception in order to avoid the possibility of its misinterpretation, which would result in students being restrained without the protections of these proposed regulations.

The exclusion from the definition of seclusion of the confinement of a student alone in a room or area during the investigation of an alleged code of conduct violation is also exceptionally broad. Student codes of conduct often contain lengthy lists of infractions ranging from behaviors that are very dangerous, to those that are fairly innocuous. Indeed, it is difficult to imagine a scenario where seclusion would be used where there has not been a code of conduct violation. This exception will result in students being secluded in a room or area without the multiple protective provisions of the proposed regulations applying, and for this reason the Board recommends striking this exception from the definition.

**8VAC20-750-40. Use of physical restraint and seclusion**

B. School personnel may implement physical restraint or seclusion only when other interventions are or would be, in the reasonable judgment of the particular school personnel implementing physical restraint or seclusion in an emergency situation, ineffective and only to~~:~~

~~1.~~ Prevent a student from inflicting serious physical harm or injury to self or others;

~~2. 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;~~

~~3. Defend self or others from serious physical harm or injury;~~

~~4. Obtain possession of controlled substances or paraphernalia that are upon the person of the student or within the student's control; or~~

~~5. Obtain possession of weapons or other dangerous objects that are upon the person of the student or within the student's control.~~

Proposed 8VAC20-750-40(B) enumerates five circumstances when restraint and seclusion may be used. The Fifteen Principles are very clear about when the use of restraint and seclusion is consistent with its principles. Principle three states:

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 (U.S. DOE, 2012).

The first of the five circumstances enumerated in the proposed regulations is consistent with the Fifteen Principles. The subsequent four circumstances can be interpreted either as subsets of the first, or as allowing for the use of restraint and seclusion in circumstances where there is no threat of harm to anybody. For the sake of clarity, and to ensure that the regulations are consistent with the Fifteen Principles as required by statute, the Board recommends striking all except the first enumerated circumstance where restraint or seclusion may be used.

**4. Lastly, the Board recommends restoring an explicit prohibition of prone restraints in 8VAC20-750-30.**

Earlier iterations of these regulations had included an explicit prohibition of prone restraints. Such a prohibition is consistent with the Fifteen Principles, which state as follows:

**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)).

Proposed 8VAC20-750-30 includes a prohibition of the “use of restraint or seclusion in any manner that restricts a student’s breathing or harms the student.” Arguably, because prone restraints restrict breathing, this provision would have the effect of prohibiting prone restraints. The Board is concerned, however, that removing the explicit prohibition of prone restraint could result in varied interpretations of this provision. For this reason, the Board recommends restoring the explicit prohibition of prone restraints.

Thank you for your continued efforts and for your careful consideration of these and other public comments that you will receive. The Board looks forward to working with you and with Virginia’s public schools to ensure that these important regulations are implemented effectively and with fidelity.