

# Coalition for Improving School Safety

## *Keeping Students and Staff Safe by Preventing Dangerous Restraint and Seclusion in Virginia Schools*

October 17, 2016

John Eisenberg, Assistant Superintendent, Div. of Special Education & Student Services  
Virginia Department of Education  
101 North 14th Street, 25th Floor  
Richmond, VA 23219

*Re: 8 VAC 20-750, Proposed Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia: **Line By Line Changes***

Dear Mr. Eisenberg;

The undersigned organizations submit these line-by-line proposed edits to the proposed restraint and seclusion regulations, per Director Eisenberg's request. The coalition thanks VDOE, the Board of Education, and staff for its deep dedication and longstanding efforts to create positive learning environments for students. We appreciate very much your dedication and work in drafting the proposed regulations and your desire to prevent restraint and seclusion, practices that can traumatize, injure, and even kill students. We also appreciate your time and effort to hear from parents and stakeholders at the round table sessions this month.

As we explain in our line by line proposals, we do not believe the regulations follow the 2015 statute, which requires the regulations to follow the Department of Education's 15 Principles. Those principles limit restraint and seclusion to emergencies posing an imminent threat of serious physical harm; require notification of all parents; require thorough data collection; and require positive and preventative approaches to challenging behaviors. In adopting this legislation, the General Assembly and Governor did not create the exceptions in the proposed legislation. The corporal punishment statute does not require them, either, as it simply defines corporal punishment. It does not specify that certain acts will be permitted, but only that they are not corporal punishment. But even if the corporal punishment statute somehow allows restraint and seclusion in these ways, they must be part of the regulations, not defined out. This will enable parents to be notified, data to be collected, and the other protections in the regulations to apply. If these things are defined out of the regulations, then they will be concealed from parents and concealed from the data. Concealment likely was not the intent here, but it is the effect. Such concealment could never have been the legislature's intent. Nor is it a fair reading of the legislation, or even a strained reading of the corporal punishment statute.

The regulations must emphasize evidence-based positive and preventative approaches. The evidence demonstrates that these approaches prevent and reduce challenging behaviors,

benefitting everyone. Unfortunately, the regulations mention positive approaches only in two places and at points, appear to turn the 15 Principles' emphasis of these approaches on their head.

It is important for all children to be protected from dangerous restraint and seclusion, and to be included in preventative activities. The 15 Principles apply equally to all children. For this reason, the regulations must include all children in notification, written reporting, data collection and debriefing. Children in the regular classroom should not be excluded, as the data shows restraint and seclusion used there, too. Restraint and seclusion are disproportionately used on children with disabilities and children of color, and so there is a need for heightened awareness, reporting, and data collection, regardless of the setting in which restraint or seclusion happens. Furthermore, volunteers, with their own busy lives, should not be the ones asked to inform parents that their child may have been put into dangerous restraint and seclusion. That obligation rests with the school district and its employees. The regulations should enable schools to either call or email parents as they request.

Thank you for considering our line-by-line proposed changes to the regulations. Again, we deeply appreciate your dedication to Virginia's school children and to making schools safe for everyone.

For further questions about the Coalition's comments, please contact Jamie Liban, Executive Director, The Arc of Virginia, [jliban\[@\]thearcofva.org](mailto:jliban[@]thearcofva.org)

Sincerely,

**Coalition for Improving School Safety:**

Autism Society Central VA.  
Autism Society, Tidewater Virginia  
Blue Ridge Independent Living Center, Roanoke  
DisAbility Law Center of Virginia  
disAbility Resource Center of the Rappahannock Area, Inc.  
Down Syndrome Association of Greater Richmond  
Independence Center, Inc.  
Greater Richmond SCAN (Stop Child Abuse Now)  
Independence Empowerment Center  
Legal Aid Justice Center's JustChildren Program  
Lynchburg Area Center for Independent Living Inc.  
National Alliance on Mental Illness of Virginia  
Parents of Autistic Children of Northern Virginia  
Partnership with People with Disabilities at VCU  
Prevent Child Abuse Virginia  
The Advocacy Institute  
The Arc of Augusta

The Arc of Eastern Shore  
The Arc of Hanover  
The Arc of Harrisonburg and Rockingham  
The Arc of North Central Virginia  
The Arc of Northern Virginia  
The Arc of Southside  
The Arc South of the James  
The Arc of Virginia  
The Autism Society of Central Virginia  
The Autism Society of Northern Virginia  
VersAbility Resources  
Virginia Association of Community Services Boards (VACSB)  
Virginia Association of Centers for Independent Living  
Virginia Board for People with Disabilities  
Virginia Autism Project  
Virginia Coalition for Students with Disabilities  
Virginia TASH  
Wrightslaw

CC: Virginia Board of Education

**CISS COMMENTS AND PROPOSED LINE BY LINE CHANGES, Oct. 17, 2016**  
**REGULATIONS GOVERNING THE USE OF SECLUSION AND RESTRAINT IN PUBLIC**  
**ELEMENTARY AND SECONDARY SCHOOLS IN VIRGINIA**

Code: Blue, dotted underlining denotes proposed additions to the regulations. Blue strike-outs are deletions. Blue italicized Rationale denote our explanation of our changes and are not themselves changes to the regulations.

Preamble

Virginia's schools should foster learning in a safe and healthy environment for all children, teachers, and staff. All behavioral interventions must be consistent with the child's rights to be treated with dignity and to be free from abuse. Because restraint and seclusion are dangerous, every effort should be made to prevent their use. They should be used only in emergencies threatening serious physical harm when less restrictive alternatives would not prevent the danger to self or others, and use must end when the emergency ends. Parents must be informed and all students and all incidents included in the data. School Division policies must emphasize and implement evidence-based positive and preventative supports to support children with behavioral needs and to keep schools safe for everyone.

***8 VAC 20-750-5. Application.***

These regulations are applicable to all students and school personnel in the public elementary and secondary schools of the Commonwealth of Virginia, all as defined 8 VAC 20-750-10.

***8 VAC 20-750-10. Definitions.***

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

**“Aversive stimuli”** means interventions that are intended to induce pain or discomfort to a student for the purposes of punishing the student or eliminating or reducing maladaptive behaviors, such as:

1. Noxious odors and tastes.
2. Water and other mists or sprays.
3. Blasts of air.
4. Corporal punishment as defined in Va. Code § 22.1-279.1.

5. Verbal and mental abuse.
6. Forced exercise when:
  - a. The student's behavior is related to his disability;
  - b. The exercise would have a harmful effect on the student's health; or
  - c. The student's disability prevents participation in such activities.
7. Deprivation of necessities, including:
  - a. Food and liquid at a time it is customarily served;
  - b. Medication; or
  - c. Use of restroom.

**"Behavioral Intervention Plan" or "BIP"** means a plan that utilizes positive behavioral interventions and supports to address: (i) behaviors that interfere with a student's learning or that of others; or (ii) behaviors that require disciplinary action.

**"Board"** means the Virginia Board of Education.

**"Business day"** means Monday through Friday, twelve months of the year, exclusive of federal and state holidays (unless holidays are specifically included in the designation of business days).

**"Chapter"** means these regulations.

**"Calendar days"** means consecutive days, inclusive of Saturdays and Sundays. Whenever any period of time fixed by this chapter expires on a Saturday, Sunday, or federal or state holiday, the period of time for taking such action shall be extended to the next day that is not a Saturday, Sunday, or federal or state holiday.

**"Child with a disability" or "student with a disability"** means a public elementary or secondary school student evaluated in accordance with the provisions of 8 VAC 20-81 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disability (referred to in 8 VAC 20-81 as an emotional disability), an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities who, by reason thereof, requires special education and related services. This also includes developmental delay if the school division recognizes this category as a disability under 8 VAC 20-81-80.M.3. If it is determined through an appropriate evaluation that a child has one of the disabilities identified but only needs related services, and not special education, the

child is not a child with a disability under 8 VAC 20-81. If the related service required by the child is considered special education rather than a related service under Virginia standards, the child would be determined to be a child with a disability. As used in this chapter, the disability categories set forth in this definition and the terms “special education” and “related services” shall have the meanings set forth in 8 VAC 20-81-10.

**“Day”** means calendar day unless otherwise designated business day or school day.

**“Department”** means the Virginia Department of Education.

**“Evaluation”** means procedures used in accordance with 8 VAC 20-81 to determine whether a child has a disability and the nature and extent of the special education and related services the child needs.

**“Functional behavioral assessment”** or **“FBA”** means a process to determine the underlying cause or functions of a student’s behavior that impede the learning of the student or the learning of the student’s peers. A functional behavioral assessment a review of existing data or new testing data or evaluation as determined as set forth in 8 VAC 20-750-60.

**“Individualized Education Program”** or **“IEP”** means a written statement for a child with a disability that is developed, reviewed and revised at least annually in a team meeting in accordance with the Regulations Governing Special Education Programs for Children with Disabilities in Virginia (8 VAC 20-81). The IEP specifies the individual educational needs of the child and what special education and related services are necessary to meet the child’s educational needs.

**“Individualized education program team”** or **“IEP team”** means a group of individuals described in 8 VAC 20-81-110 that is responsible for developing, reviewing or revising an IEP for a child with a disability.

**“Mechanical restraint”** means the use of any material, device or equipment to restrict a student’s freedom of movement. This term does not include devices implemented by trained school personnel or used by a student that have been prescribed by an appropriate medical or related services professional and are used with parental consent and for the specific and approved purposes for which such devices were designed, such as:

1. Adaptive devices or mechanical supports used to achieve proper body position, balance or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
2. Vehicle restraints when used as intended during the transport of a student in a moving vehicle;

3. Restraints for medical immobilization; or
4. Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.

**“Pharmacological restraint”** means a drug or medication used on a student to control behavior or restrict freedom of movement that is not (i) prescribed by a licensed physician or other qualified health professional under the scope of the professional’s authority for the standard treatment of a student’s medical or psychiatric condition and (ii) administered as prescribed by the licensed physician or other qualified health professional acting under the scope of the professional’s authority.

**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.~~

**Rationale:**

***Summary: This is an important point. The law does not support the view that the corporal punishment statute allows restraint to maintain order or respond to educational disruptions, like tantrums. The General Assembly and Governor adopted a law that requires adherence to the 15 Principles which clearly limits restraint and seclusion to emergencies threatening serious physical harm only. But even if the corporal punishment statute somehow allows restraint for educational disruption, it in no way supports defining it out of the regulations entirely. It would instead be listed as a permitted use. The effect of defining it out is to fail to keep data, fail to notify parents, fail to provide safeguards (e.g., use less dangerous methods), and thus, enable schools to conceal its use. The national media have reported on incidents where school staff hid incidents of restraint and seclusion. Every use of restraint must be counted; every parent notified. Again, we believe strongly that allowing restraint for education disruption is not permitted by the 2015 restraint and seclusion statute.***

1. *Our changes remove language that is contrary to the statute adopted by the General Assembly and Governor, §22.1-279.1:1 (2015 Statute). The 2015 statute requires the regulations to be consistent with the Fifteen Principles in the 2012 United States Department of Education’s Restraint and Seclusion: Resource Document and Virginia’s 2009 Guidelines. Those limit the use of restraint and seclusion to situations where the child’s behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective. They do not permit it for maintaining order or control. Restraint and seclusion are too injurious and potentially life-threatening to allow them for maintaining order, which can include a response to a tantrum, inability to stand in line, repeating bad words, or otherwise acting out that threatens no one. Such actions may be a manifestation of the child’s disability. See CISS 3/23/16 Comments, p. 2-7, CISS Comments 8/18/15, p.1, 25, 27 for more explanation.*

2. *The corporal punishment statute does not mandate that restraint to maintain order be excluded from the definition of restraint. Instead, in defining corporal punishment, that law lists several acts that are not corporal punishment. The corporal punishment statute does not contain language creating a right to use them against students (i.e. it does not say “the following acts are permitted....”). The 2015 statute, adopted after the corporal punishment statute, requires the Board to adopt regulations consistent with the Fifteen Principles, and that means defining restraint as we propose. This 15 Principles’ definition does not conflict with the corporal punishment statute, and in any event, as the later-adopted statute, controls any division. See CISS 3/23/16 Comments, p. 2-7, CISS Comments 8/18/15, p.1, 25, 27 for more explanation. The Fifteen Principles are not “silent” about the use of restraint for educational disruption; they very clearly limit it to emergencies threatening serious physical harm. “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.” Principle 3 and Resource Document, p. 2. The 15 Principles Document (p.10) clearly defines restraint and does not include the use to maintain order. These draft regulations must be changed to be consistent with the 15 Principles.*  
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3. *The proposed definition is also contrary to the Civil Rights Data Collection definition, which is the same as the Fifteen Principles Document, see [www2.ed.gov/about/offices/list/ocr/docs/crdc-2011-12-p1-p2.doc](http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2011-12-p1-p2.doc). Virginia School Divisions must report data every 2 years under the CRDC definition. The highly different Virginia definition is likely to confuse school staff and cause very inaccurate reporting either in the CRDC collection or in the Virginia data.*
4. *Even if the corporal punishment statute somehow explicitly permits restraint to be used to maintain order, it should not be defined out of the regulations. **Any permitted use of restraint must be included in the regulation so that Virginia has accurate data, and parents are notified that restraint was used. Narrowing the definition as the proposed regulation does enables schools to conceal that information—from the data and from parents.** All uses of restraint must be subject to the protections in the regulations, must be included in the data, and must be reported to parents. We respect very much the VDOE and its staff and their work. No one may have intended concealment. But adopting a very narrow definition like this has the effect of concealing information that should never be hidden. Every use of restraint must be counted; every parent must be notified. The national media has recently reported on situations where school district personnel hid the use of restraint and seclusion.<sup>1</sup> This loophole would permit school staff to describe incidents of restraint so as to avoid the regulations (simply by classifying the use of restraint as maintaining order). Virginia*

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<sup>1</sup> Allison Ross, JCPs Restrained Thousands of Kids, but Didn't Report It, Louisville Courier-Journal, Mar. 8, 2016; Kara Kenny, CALL 6: School districts misreport seclusion, restraint incidents, WRTV6 ABC (Indianapolis), Oct. 10, 2016.

*statute requires compliance with the 15 Principles and the definitions there. There is nothing in the restraint/seclusion statute or the corporal punishment statute to support concealment by definition, which is unfortunately what this draft would do. See CISS 3/23/16 Comments, p. 2-7, CISS Comments 8/18/15, p.1, 25, 27 for more explanation. Finally, the proposed definitional loopholes are reminiscent of the Virginia School Board Association policy on restraint and seclusion, which used definitions to exclude much restraint and seclusion from coverage. That concept was rejected by the Commission on Youth, and then by the General Assembly and the Governor in adopting the 2015 statute.*

**“School day”** means any day, including a partial day, that students are in attendance at school for instructional purposes. The term has the same meaning for all students in school, including students with and without disabilities.

**“School employee”** and **“school personnel”** means individual(s) employed by the school division on a full- or part-time basis or as independent contractors or subcontractors ~~as instructional, administrative, and support personnel~~, and includes individuals serving as a student teacher or intern under the supervision of appropriate school personnel.

***Rationale:***

*No person employed by a School Division should use restraint or seclusion improperly. Virginia’s 2015 Statute and the 15 Principles do not include this exception. This provision appears to inappropriately exempt other school personnel, including bus drivers and aides, and others working at the school with children. The media nationwide has reported on the use of restraint and seclusion by other personnel, including school bus incidents. When a parent puts their child on the school bus, the parent expects that child to be protected until the child comes home.*

**“Seclusion”** means the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving until the student no longer presents an immediate danger to self or others ~~or poses an immediate threat of damage to property.~~

***Rationale:***

*This allows the use of seclusion for property destruction, even tearing paper or breaking a pencil. Seclusion must be restricted to emergencies posing an imminent threat of serious physical harm, for the same reasons we point out under the physical restraint definitions. The 2015 statute requires the Board to adopt regulations consistent with the Fifteen Principles, which state that “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.” Principle 3 and Resource Document, p. 2. The 15 Principles Document (p.10) clearly defines seclusion and does not include the use to prevent property destruction. These draft regulations must be changed to be consistent with the 15 Principles. The corporal punishment statute also does not require this definition. Instead, it simply lists several acts that are not*

*corporal punishment. The corporal punishment statute does not contain language creating a right to seclude students (i.e. it does not say “the following acts are permitted....”). The definition we propose and in the 15 Principles does not conflict with the corporal punishment statute. See CISS 3/23/16 Comments, p. 2-7, CISS Comments 8/18/15, p.1, 25, 27 for more explanation.*

*These include that the 2015 Virginia Statute requires that seclusion be limited to situations where the child’s behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective. The corporal punishment statute does not require allowing seclusion for property damage, for the reasons we explained in our earlier comments. The proposed definition is also markedly different from the Civil Rights Data Collection definitions that Virginia schools should have been using since 2009 for that collection. It will lead to much confusion and inaccurate data collection.*

“Seclusion” does not include (i) time out, as defined in these regulations; ; (ii) in-school suspension; (iii) detention. This definition makes clear that seclusion does not include (iv) student-requested breaks in a different location in the room or in a separate room as long as the student is free to leave; (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 he is ~~not physically prevented from leaving free to leave;~~ (vi) the removal of a student for disruptive behavior from a classroom by the teacher, as provided in Va. Code §22.1-276.2 as long as the student is not involuntarily confined alone in a room or other area from which the student is prevented from leaving

*Rationale:*

*These 3 provisions appear to describe activities that are not seclusion, e.g., a child asking for a break or a teacher removing a child from the classroom. But without the limiting language we propose, these appear to allow putting children into seclusion (alone in a room they cannot exit) if they ask for a break or when they are first removed from the classroom for disruptive behavior. And once in seclusion, the regulations would not apply. That would violate the 2015 statute. We do not think this is what VDOE staff meant to do. We believe that what you meant was to clarify that seclusion, as you have defined it, does not include these three things.*

*In addition, we add the “as long as....” language at the end for the following reason. The first place a child may be taken when put into seclusion may be the seclusion room. Under the Fifteen Principles, seclusion must be limited to emergencies threatening serious physical harm when less restrictive measures cannot prevent the danger. For these reasons, the regulations must distinguish between moving a child into seclusion (permitted only for emergencies threatening physical harm and governed by the regulations) and simply removing a child from the classroom to a non-seclusion setting (e.g., taking the student from the classroom to principal’s office or to calm down in a hallway). Any use of seclusion must be under the regulations, including parental notice, data collection, reporting to administration, and receive regulatory protection: including*

*requirements to use safer seclusion rooms and provide continuous visual monitoring. We do not believe that staff meant that putting children in darkened closets or rooms unmonitored, with unsafe conditions, is what VDOE staff meant to allow in wording the regulation this way.*

~~; and (vii) confinement of a student alone is 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 student conduct code.~~

**Rationale:**

- 1. This proposal would permit seclusion for any investigation of a conduct code violation. A simple internet search shows that School Division Conduct Codes include prohibitions on horseplay, rudeness, being tardy, dressing immodestly, wearing slippers, minor insubordination, being disrespectful, failing to identify oneself, carrying food without authorization, and the like. Students with disabilities in particular may engage in many of these actions as manifestations of their disabilities and be secluded or restrained as a result. Regulations that exclude what would otherwise be seclusion because it is done while investigating these kinds of violations are not consistent with the Fifteen Principles or the Virginia Guidelines, which limit seclusion to emergencies threatening physical danger. Accordingly, complying with the 2015 statute requires that this section be stricken. See CISS Comments, 3/23/16 p. 2-7; CISS Comments 8/18/15, p.1, 25, 27; Principle 3 and Principles Document p.3, CRDC Data Collection requirements.*
- 2. Data demonstrates that children with disabilities and minority children are already subjected to disproportionate discipline. Permitting seclusion for conduct code violations would only increase the disproportionate use of seclusion against minority children and children with disabilities.*
- 3. Again, as stated in the suggested change to the restraint definition in 8 VAC 20-750-10, even if one believes there is a statutory basis for permitting seclusion for this reason, those uses cannot be defined out of the regulations. This definition means parents will not be notified, the incidents will not be counted in the data, and the other regulatory protections will not apply. In short the use of seclusion will be concealed from parents and from the data, and a loophole will be created that school staff can use to avoid the regulations, even if no one meant to do that in drafting the regulation this way. We respect VDOE staff and their work and deep dedication. But we are highly concerned about the impact of this proposed regulation.<sup>2</sup> A student with a significant disability may engage in horseplay or be rude and putting that child in seclusion for 30 minutes or an hour while one "investigates" the conduct code violation is the same as secluding that child for 30 minutes or an hour. Any permitted use of seclusion must be included in the regulations, so that parents are notified and the events are counted in the data, and children receive regulatory protections, including the use of rooms that meet safety requirements and the requirement for continual visual monitoring. Again, the 2015 statute does not allow such exceptions for student codes of conduct; it requires*

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<sup>2</sup> The national media has reported about the hiding of restraint and seclusion incidents by school staff. See Allison Ross, JCPS Restrained Thousands of Kids, but Didn't Report It, Louisville Courier-Journal, Mar. 8, 2016; Kara Kenny, CALL 6: School districts misreport seclusion, restraint incidents, WRTV6 ABC (Indianapolis), Oct. 10, 2016.

*conforming to the 15 Principles which do not contain this exception. Nor is an exception for horseplay or being rude good public policy. Putting children in closets and unsafe rooms should never be permitted on the basis that one is investigating conduct code violations, as this exception would allow. See CISS Comments, 3/23/16 p. 2-7; CISS Comments 8/18/15, p.1, 25, 27; Principle 3 and Principles Document p.3, CRDC Data Collection requirements.*

4. *The vast majority of states with restraint and seclusion laws or regulations do not use definitions like this. Most simply limit seclusion to a space from which a child is involuntarily confined and physically prevented from leaving.*

**“Seclusion cell”** means a ~~freestanding, small~~ self-contained unit that is used to (i) isolate a student from other students; or (ii) physically prevent a student from leaving the unit or cause the student to believe that the student is physically prevented from leaving the unit.

***Rationale:***

*The issue with seclusion cells is not their freestanding nature but their size. Attaching a tiny cell to a school wall does not make it permissible. Another distinction between the cells and seclusion rooms is that they typically do not comply with fire or building codes.*

**“Section 504 plan”** means a written plan of modifications and accommodations under Section 504 of the Rehabilitation Act of 1974.

**“Student”** means any student, with or without a disability, enrolled in a public elementary or secondary school as defined in Va. Code § 22.1-1. For purposes of these regulations, the term “student” shall also include those students (i) attending a public school on a less-than-full time basis, such as those students identified in § 22.1-253.13:2.N; (ii) receiving homebound instruction pursuant to 8 VAC 20-131-180 and as defined in 8 VAC 20-81-10, without regard to special education status; (iii) receiving home-based instruction pursuant to 8 VAC 20-81-10; and (iv) pre-school students enrolled in a program operated by a school division or receiving services from school division personnel.

As used in these regulations, “student” or “students” shall not include children meeting compulsory attendance requirements of § 22.1-254 by (i) enrollment in private, denominational, or parochial schools; (ii) receipt of instruction by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the relevant division superintendent; or (iii) receipt of home instruction pursuant to § 22.1-254. With regard to restraint and seclusion, students placed through public or private means in a private day or residential school for students with disabilities shall be afforded the protections set forth in 8 VAC 20-671 et seq.

**“Time-out”** means a behavioral intervention in which the student is temporarily removed from the learning activity but in which the student is not confined.

## **8 VAC 20-750-20. Prohibitions.**

- A. The following actions are prohibited in the public elementary and secondary schools in the Commonwealth of Virginia:
1. Use of mechanical restraints;
  2. Use of pharmacological restraints;
  3. Use of aversive stimuli;
  4. Prone "face down" restraints, supine restraint, or any other restraint that restricts breathing, harms the student, or interferes with the student's ability to communicate, or restraint when medically or psychologically contraindicated as stated in documentation by the IEP team, 504 team, school professionals, or by licensed physician, psychologist, or other qualified health professional under the scope of the professional's authority.

### ***Rationale:***

*Supine restraint, like prone restraint, is very dangerous and can kill or injure students, as discussed in the Round Table meetings. The regulation should also ban the use of restraint or seclusion when medically or psychologically contraindicated. In the 15 Principles, Principle 7 states, "Any restraint or seclusion technique should be consistent with known medical or other special needs of a child. School districts should be cognizant that certain restraint and seclusion techniques are more restrictive than others, and use the least restrictive technique necessary to end the threat of imminent danger of serious physical harm." A number of disabilities and health conditions can heighten the risk of harm from restraint and seclusion, including, but not limited to health conditions or disabilities causing children to have weaker bones, enlarged hearts or other heart conditions, gastrointestinal conditions, obesity, asthma, and other medical issues. These are only examples. The 2015 restraint and seclusion statute §22.1-279.1:1, section iii makes clear that the regulations can address the special needs and issues confronted by students with disabilities.*

5. Use of physical restraint or seclusion as (a) punishment or discipline; (b) a means of coercion or retaliation; or (c) a convenience, or in any manner other than as provided in 8 VAC 20-750-40 and 8 VAC 20-750-50, below.
6. Corporal punishment, as defined in Va. Code § 22.1-279.1.
7. Use of seclusion cells.

**8 VAC 20-750-30. Use of physical restraint and seclusion.**

- A. Nothing in this chapter shall be construed to require a school division to employ physical restraint or seclusion in its schools. School divisions electing to use physical restraint and seclusion shall comply with the requirements of these regulations.
- 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:
- (i) prevent a student from inflicting serious physical harm or injury to self or others;
  - (ii) quell a disturbance that ~~threatens poses an imminent threat of~~ serious physical harm or injury to persons ~~or damage to property~~;
  - (iii) remove a student from the scene of a disturbance that ~~threatens poses an imminent threat of serious~~ physical ~~injury-harm to that person or others-to persons or damage to property~~; ~~Physical Escort as defined above is not restraint.~~
  - (iv) defend self or others;
  - (v) obtain possession of controlled substances or paraphernalia which are upon the person of the student or within the student's control; or
  - (vi) obtain possession of weapons or other dangerous objects that are upon the person of the student or within the student's control.

**Rationale:**

1. *We removed language that is contrary to the statute adopted by the General Assembly and Governor, §22.1-279.1:1 (2015 Statute). This statute requires the regulations to be consistent with the Fifteen Principles in the 2012 United States Department of Education's Restraint and Seclusion: Resource Document and Virginia's 2009 Guidelines. Those limit the use of restraint and seclusion to situations where the child's behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective. They do not permit restraint and seclusion for property destruction. No child should be restrained or secluded for tearing paper or breaking a pencil, or other destruction of property that does not threaten to physical danger. Restraint and seclusion are too injurious and potentially life-threatening to allow in these situations. See CISS 3/23/16 Comments, p. 2-7, CISS Comments 8/18/15, p.1, 25, 27 for more explanation.*
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2. *The change to (iii) is likewise to conform with the statute and 15 Principles, and to*

*draw the distinction between removing someone because of the threat of danger to themselves or others, as opposed to simply being at the scene where someone is scraped or has a twisted ankle.*

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- 3. *The corporal punishment statute does not require the language VDOE had proposed in this section. That statute defines corporal punishment, and lists several actions that are not corporal punishment. The corporal punishment statute does not contain language creating a right to seclude students (i.e. it does not say “the following acts are permitted.” and it does not reference seclusion in any way, which is not using force, but involuntarily putting a child in a room from which they cannot exit). The 2015 statute requires the Board to adopt regulations consistent with the Fifteen Principles, and that means defining restraint in the manner above. See CISS 3/23/16 Comments, p. 2-7, CISS Comments 8/18/15, p.1, 25, 27 for more explanation. The Fifteen Principles state that “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.” Principle 3 and Resource Document, p. 2. The 15 Principles Document (p.10) clearly defines restraint and seclusion and does not include their use for these reasons.*

- C. Physical restraint and seclusion shall be discontinued as soon as the conduct or situations set forth in items (i) through (vi) in Subsection A, above, prompting the use of physical restraint or seclusion have ceased, dissipated, or been resolved.

~~D. Nothing in this section shall be construed to require school personnel to attempt to implement a less restrictive intervention prior to using physical restraint or seclusion when, in the reasonable judgment of the school personnel in an emergency situation, a less restrictive intervention would be ineffective.~~

~~Physical restraint or seclusion may not be used when less restrictive and harmful interventions would be effective to prevent threat of serious physical danger to self or others.~~

~~(i) When in the reasonable judgment of school personnel, there is an emergency in which the child’s behavior poses an immediate threat of serious physical harm to self or others, and less restrictive measures would be ineffective, school staff need not use those measures but must document the threat, its immediacy, and why less restrictive measures would be ineffective in the notification and documentation required in Section 8 VAC 20-750-50.~~

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

~~(iii) Behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior. School personnel should implement the use of evidence-based preventative and positive behavioral interventions and supports for children with behavioral needs.~~

including the use of Functional Behavioral Assessments and Behavioral Intervention Plans. Any IEP, 504, behavioral meetings, or other plans about such needs should include a qualified mental health professional as appropriate. School personnel should ensure that the IEP or 504 plan, including any behavioral support plan, is followed with fidelity, and that personnel are informed of the IEP and behavioral support plan requirements.

**Rationale:**

*The regulation as drafted appears to flip the 15 Principles on their head, perhaps inadvertently and without realizing the impact of the changes to the Principles. The 15 Principles emphasize the use of positive and preventative supports, and specify that restraint and seclusion should not be used unless less restrictive measures would be ineffective. These regulations appear to eliminate that emphasis, perhaps inadvertently. The Principles clearly emphasize and require positive supports. These include Principle 1 “Every effort should be made to prevent the need for the use of restraint and for the use of seclusion;” Principle 3 “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;” Principle 9 “Behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior.” The 15 Principles document, in discussing Principles 8 and 9, states that schools should use behavioral strategies that address the underlying cause or purpose of any dangerous behavior. These include a Functional Behavioral Assessment (FBA), Positive Behavioral Supports and Interventions (PBS), and an appropriate positive and preventative Behavioral Intervention Plan (BIP).*

*But the regulations as written do not accomplish this. Instead, they put the emphasis on using restraint and seclusion, making it the default treatment for students. While there is significant evidence and research demonstrating that positive and preventative supports prevent behaviors from developing into emergencies, the regulations mention positive behavioral supports in only two subparts scattered within (requiring district policies to have some examples of positive supports and requiring some training on positive supports). This is inconsistent with the Fifteen Principles and appears to disregard two of them. It is harmful to students in Virginia to emphasize dangerous restraint and seclusion over prevention. As CISS has explained before, in a true emergency, when a child is in immediate danger of physical harm (such as walking in front of a bus), staff should be able to immediately restrain the child without considering less restrictive measures. But the emphasis in the proposed regulation goes too far and appears to make the use of restraint and seclusion the default, rather than the exception. Our revision preserves the ability of school staff to use their reasonable judgment while at the same time requiring the use of less restrictive measures when appropriate, as the 15 Principles require, and emphasizing positive and preventative supports.*

*The proposed regulations should require that every effort be made to avoid the use of restraint and seclusion. These should include evidence-based behavioral accommodations, supports, and interventions to create a positive learning environment which improves both academic and social*

outcomes for students.<sup>3</sup> Virginia should keep students and staff safe by prioritizing positive and preventative supports in these regulations and by strictly limiting restraint and seclusion to emergencies threatening serious physical harm when less restrictive alternatives would fail. For over 20 years, the Montgomery Public Schools in Virginia have not needed to use restraint/seclusion except in very rare emergencies. Instead, staff use easily-accessible, evidence-based positive behavioral supports (PBS) for children with even the most difficult behavioral issues and incorporate positive supports in daily work with children. These less restrictive measures work well. Of those students with individual positive behavioral support plans, 86% made “very significant” behavioral improvements in 2012. Their targeted problem behaviors fell on average by 81%; their crisis level behaviors, by 78%. “Aside from the typical scrapes that occur between children in any public school setting, students with PBS plans injured no adults or children.”<sup>4</sup> See CISS Comments for further explanation, 8/18/15, p. 5-6; CISS Comments 3/23/16, p. 7-9.

### **8 VAC 20-750-40. Seclusion; Standards for Use.**

- A. School divisions electing to use physical restraint and seclusion as permitted by this chapter shall meet the following structural and physical standards for rooms designated by the school to be used for seclusion:
1. The room used for seclusion shall meet the design requirements for buildings used for detention or seclusion of persons, (CISS questions this as explained below in the Rationale because we do not know if this refers to prisons and jails, which would cause deep concern. CISS believes strongly that any seclusion rooms must meet state and municipal fire and building safety code requirements).
  2. The seclusion room shall be at least six feet wide and six feet long with a minimum ceiling height of eight feet.
  3. The seclusion room shall be free of all protrusions, sharp corners, hardware, fixtures, or other devices, that may cause injury to the occupant.

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<sup>3</sup> See these VDOE resources: *Positive Behavioral Interventions and Supports (PBIS) of Virginia* (a Commonwealth of Virginia initiative to support positive academic and behavioral outcomes for all students) <http://ttac.odu.edu/pbisva/>; *Guidelines for Conducting Functional Behavioral Assessment and Developing Positive Behavior Intervention and Supports/Strategies* p. 1-2 (VDOE 2015), <http://v.gd/VDOEfbapbs> (addressing problem behavior is best addressed through positive behavioral support systems); *School-wide Positive Behavior Interventions and Supports (SWPBIS)/Effective School-wide Discipline (ESD) in Virginia* (2011) (school-wide positive behavioral supports are a “framework” necessary for a school “to be an effective learning environment (academic and behavior) for all students.”) <http://v.gd/VDOEPBISfamcom>; *Positive Behavioral Supports*, <http://v.gd/PBSpresentn> (simple PBS presentation; defining positive behavioral supports as “PBS is the application of evidence-based strategies and systems to assist schools to decrease problem behavior, increase academic performance, increase safety and establish positive school cultures).

<sup>4</sup> *U.S. Senate Hearings, Beyond Seclusion and Restraint* (2012), testimony of Cyndi Pitonyak, Coordinator Positive Behavior Interventions and Supports, Montgomery County, Virginia Public Schools, <http://www.help.senate.gov/imo/media/doc/Pitonyak1.pdf>

4. Windows in the seclusion room shall be constructed to minimize breakage and otherwise prevent the occupant from harming himself.
5. Light fixtures and other electrical receptacles in the seclusion room shall be recessed or so constructed as to prevent the occupant from harming himself. Light controls shall be located outside the seclusion room.
6. Doors to the seclusion room shall be at least 32 inches wide, shall open outward and shall contain observation view panels of transparent wire glass or its approved equivalent, not exceeding 120 square inches but of sufficient size for someone outside the door to see into all corners of the room.
7. ~~The seclusion room shall contain only a mattress with a washable mattress covering designed to avoid damage by tearing.~~

***Rationale:***

*CISS strongly believes that Virginia should work to prevent the use of restraint and seclusion through positive and preventative behavioral measures, and through limiting their use of emergencies threatening imminent serious physical harm. Seclusion is inherently traumatizing and dangerous. Seclusion and restraint must be used rarely, if at all. We praise VDOE for writing regulations that would include room features that eliminate dangers to rooms caused by “room conditions,” (e.g. access to electricity, etc.) VDOE included very important requirements like those that rooms be sizeable, ventilated, without fixtures likely to cause injury, viewing panels, and other safety requirements. Children have died in seclusion and been injured in rooms without these requirements. Much of the proposal will help protect students. Still, the regulation contains some extremely dangerous language. Seclusion rooms as described in the regulation appear to be solitary confinement prison cells, with only barren mattresses permitted. This does not permit calming materials such as bean bag chairs or music, and does not require continued de-escalation, so the child is no longer a danger and can return to the classroom. This type of confinement will be harmful to both students and the school environment and is completely inconsistent with the Fifteen Principles. It is also not clear if the reference to buildings for detention of persons suggests subjecting students to jail or prison-like rooms. This also is inconsistent with the Fifteen Principles.*

8. The seclusion room shall maintain temperatures appropriate for the season. The rooms shall not be dark and shall have appropriate lighting.

***Rationale:***

*No child should be placed in a dark room without light. That is inherently unsafe. This is particularly true if the light switches are outside of the room, as in this proposal.*

9. All space in the seclusion room shall be visible through the locked door, either directly or by mirrors.
- B. School divisions electing to use seclusion as authorized by this chapter shall provide for the continuous visual monitoring of any seclusion, either by the presence of school

personnel in the seclusion room or area or observation by school personnel through a window, viewing panel, or half-door meeting the specifications set forth in this section.

**8 VAC 20-750-50. Notification and reporting.**

A. When any pupil has been physically restrained or secluded:

- (i) the staff member involved shall report the incident and the use of any related first aid to the school principal or designee soon as possible by the end of the school day of in which the incident occurred; and
- (ii) the school principal or his designee, or other school personnel, ~~or volunteers organized by the school administration for this purpose~~ shall make a reasonable effort to ensure that direct contact is made with the parent, either in person or through telephone conversation or by electronic mail as designated by the parent, to notify the parent of the incident and any related first aid within one calendar on the same day of the date the incident occurred, and invite the parent to be part of the debriefing described below.

**Rationale:**

*The regulations should be changed so they do not dangerously allow unaccountable volunteers to make some kind of “reasonable effort” to notify parents—rather than requiring school division employees to act promptly. Volunteers lack the accountability school division employees have. A volunteer’s definition of reasonable efforts, when balancing lives, jobs, and other responsibilities, may be fairly low, even if the volunteer has the best intentions. No other state’s restraint and seclusion law allows volunteers to undertake parental notification duties when restraint and seclusion are used. Virginia should not either. The risks to the students are too high; parents must be informed so they can assess their child for injury or trauma.*

*No school should be engaged in so much restraint and seclusion that school personnel cannot call or email parents. Restraint and seclusion are emergency protective measures, to be used when nothing else will prevent a risk of serious physical harm. In addition, the regulations could be improved to allow parents to opt into email notification, further speeding the process and improving efficiency for everyone. Prompt parental notification is vital. A Powhatan, Virginia nine-year-old, Alex Campbell, testified to the General Assembly and Board of Education about being forced into seclusion in an isolation room several times and being told not to tell his parents.<sup>5</sup> See CISS Comments, 3/23/16 p. 11-12; CISS Comments, 8/18/16, p. 18-19.*

*The proposed regulations provide for one calendar day notification. Same day notification is better and is the standard used in the body of the Fifteen Principles (p.21). The sooner parents are informed the better. Moreover, VDOE should resist any efforts to degrade the proposed regulations further to allow multiple days for notification. This would be very dangerous for*

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<sup>5</sup> Rachel Weiner, “Virginia Lawmakers Move to Regulate School Seclusion and Restraint,” *Washington Post*, Jan. 19, 2015, [https://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-move-to-regulate-school-seclusion-and-restraint/2015/01/19/6a46286c-9fee-11e4-9f89-561284a573f8\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-move-to-regulate-school-seclusion-and-restraint/2015/01/19/6a46286c-9fee-11e4-9f89-561284a573f8_story.html)

*Virginia's children and families. The vast majority of states that have parental notification provisions do not allow multiple days for notification. Parents must be alerted to watch for concussions, hidden internal injuries, and trauma so they can get their children needed medical assistance. Delaying for even two days, not to mention a weekend or school break could result in harm to the child. There is no burden in making a phone call or sending an email message.*

*Parents should be part of debriefing meetings. These meetings concern their child and the use of a dangerous practice on their child. Parents can help the school plan to prevent restraint and seclusion and to provide positive and preventative behavioral supports to their children. Parents are part of the IEP team for this reason; they should likewise be part of the debriefing team.*

- B. When any pupil has been physically restrained or secluded outside the regular school day, the notifications required by Subsection A shall be made as soon as practicable in compliance with the school division's school crisis, emergency management, and medical emergency response plan required by Va. Code § 22.1-279.8, as long as notification occurs within one calendar day.

**Rationale:**

*The 15 Principles do not include this exception. Notification should not simply be a matter of a school's response plan. Children restrained or secluded outside the regular school day experience the same risk of injury, death, and trauma as those restrained or secluded during the regular school day. But in recognition that it may take some time to notify a parent if restraint or seclusion occurs at night, a one calendar day limit should be imposed.*

- C. As soon as practicable and within ~~two five~~ school days after an incident in which physical restraint or seclusion has been implemented ~~in a self-contained classroom or other special education setting in which a majority of the students in regular attendance are (i) provided special education and related services and (ii) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day,~~ the school employee involved in the incident or other school personnel, as may be designated by the principal, shall complete and provide to the principal or designee, a written incident report. The school division shall provide the parent with a copy of the incident report within seven (7) calendar days of the incident.

The written incident report shall include, at a minimum:

1. Student name, age, gender, grade, ethnicity and whether the student has a disability;
2. Location of the incident;
3. Date, time, and total duration of incident, including documentation of the beginning and ending time of each application of physical restraint or seclusion;

4. Date of report;
5. Name of person completing the report;
6. The school personnel involved in the incident, their roles in the use of physical restraint or seclusion, and their completion of the division's training program;
7. Description of the incident, including the resolution and process of return of the student to his educational setting, if appropriate;
8. A detailed description of the physical restraint or seclusion method used;
9. The student behavior that justified the use of physical restraint or seclusion;
10. Description of prior events and circumstances prompting the student's behavior, to the extent known;
11. Less restrictive interventions attempted prior to the use of physical restraint or seclusion, and an explanation if no such interventions were employed, including a description of the immediate emergency that made them ineffective.
12. Whether the student has an IEP, a Section 504 plan, a BIP, or other plan;
13. If a student, staff or any other individual sustained bodily injury, the date and time of nurse or response personnel notification and the treatment administered, if any;
14. Date, time, and method of parental notification of the incident, as required by this section; and
15. Date, time of staff debriefing.

**Rationale:**

*Severely limiting reporting requirements like this is wholly contrary to the Fifteen Principles, and thus, the statute adopted by the General Assembly and approved by the Governor. We are deeply concerned that if children in the regular classroom are restrained or secluded, their parents and school administrators would not get written documentation. One purpose of the documentation is so that everyone can work together to prevent the use of restraint and seclusion and to improve positive and preventative supports. Instead, restraint or seclusion used on a 6-year-old with or without disabilities in the regular classroom would escape written documentation and the data. Every child deserves to be counted in the data, regardless of their age, or the setting in which restraint or seclusion occurred, or whether or not the child has a disability. All of the available data shows that restraint and seclusion are disproportionately used on children of color and children with disabilities. It does not show that this happens only in self-contained special education*

*classrooms or to children who spend much of their time there. The data demonstrates the need to provide written incident reports and to include in the data all incidents of restraint and seclusion, regardless of setting or where the child spends much of their day.*

*Principle 4 requires that policies restricting the use of restraint and seclusion should apply to all children not just those with disabilities. Principle 15 requires written documentation of each incident and collection of data to enable better understanding and implementation of the principles. Contrary to the Fifteen Principles and CRDC Data Collection requirements, data would be collected and written notice would be provided only for incidents in classes where a majority of students receive special education. For other students, written notification would not be provided; data would not be collected; and school personnel would not be required to participate in debriefings and reviews to prevent the use of restraint and seclusion. This is contrary to the 2015 statute.*

*Students without identified disabilities are almost never educated in classrooms in which the majority of students are receiving special-education (primarily self-contained classrooms). Existing data has provided very important information. The Civil Rights Data Collection has shown that at least 112,000 students were restrained or secluded in 2011-12. Students without disabilities represent 25% of those restrained and 42% of those secluded. Their parents deserve notification and they deserve to be counted in the data and to receive debriefings if restrained or secluded.*

*Moreover, most students with disabilities are also included in general education classrooms today. Data shows that 63 % of Virginia students with disabilities are in a general education classroom 80% or more of the time; and 21% are in a general classroom 40-79% of the time. Children with very significant disabilities are included in the regular classroom. These include children who cannot speak or whose communications are impaired are included; children with intellectual and developmental disabilities, and mental health issues. (In states where data is broken down by disability, restraint and seclusion use is particularly high for these students). Special education is a program, not a place. Parents concerned about being notified of seclusion and restraint incidents might rethink including their students in a general education classroom vs. a self-contained classroom. This could limit the student's educational prospects and achievement and be inconsistent with the tenets of least restrictive environment (LRE). Surely that cannot be Virginia's intent.*

*According to the data, restraint and seclusion were used disproportionately upon students with disabilities and students with disabilities who are of color. Students with disabilities comprised 12% of the 2011-12 student population, but 75% of those represented in the collection that were physically restrained and 58% of those who were secluded. African-American students made up 19% of students with disabilities under IDEA, but 36% of those subjected to mechanical restraint.<sup>6</sup> State-collected data similarly shows disproportional use with regard to disability and race (particularly on African-American students). This includes data collected by Connecticut, Minnesota, Delaware, Ohio, and Wisconsin school districts and states under their new laws. With*

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<sup>6</sup> CRDC 2011-12 Report at 1.

*its new regulation, Virginia would move in the opposite direction, hiding this data. This may not have been VDOE staff's intent in drafting this section. But this will be its effect. We deeply respect the VDOE staff and their hard work and deep dedication. But because of this effect, the regulation must be changed.*

*Indeed, there is no sound basis for treating students differently for notification, data collection, or prevention activities based on their educational placement. No other state does this.*

*Finally, we would be willing to extend the period for the detailed written notification to five days, premised on including all children. We believe this will enable schools to properly complete the written notification so that parents have all of the necessary information. This is important so that parents and schools can work together to build proper positive behavioral interventions and to prevent the use of restraint and seclusion. We are not willing to extend the time period to five days if the written notification continues to exclude children in the regular classroom or non-majority special education classrooms, as the draft regulation proposes.*

- E. Following an incident of physical restraint or seclusion ~~in a self-contained classroom or other special education setting in which a majority of the students in regular attendance are (i) provided special education and related services and (ii) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day,~~ the school division shall ensure that, within ~~two (2)~~ five (5) school days, the principal or designee reviews the incident with all staff persons who implemented the use of physical restraint or seclusion to discuss:
1. Whether the use of restraint or seclusion was implemented in compliance with this chapter and local policies; ~~and~~
  2. How to prevent or reduce the future need for physical restraint and/or seclusion
  3. The use of evidence-based preventative and positive behavioral interventions and supports to reduce challenging behaviors, including developing a Functional Behavioral Assessment and Behavioral Intervention Plan;
  4. Consider changes to the child's IEP or 504 plan to provide needed supports and services if the child has a disability;
  5. Verify that the IEP or 504 plan, including any behavioral support plan, was followed with fidelity, and that personnel were informed of the IEP and behavioral support plan requirements, and if not, document the situation and immediately take corrective action;
  6. If a nondisabled student has experienced excessive restraint or seclusion, consider the need to initiate a referral to determine if the student has a disability that may require the provision of special education and related services.

**Rationale:**

*The rationale for including all children is the same as the rationale in the immediately preceding section. Again, our willingness to extend this to five days is premised on this including all students, as we believe to be required by the law and also by sound public policy. The rationale for 3-6 is to make the debriefing into a preventative meeting, that has as its main focus implementing positive behavioral supports and interventions; determining the child’s developmental, learning, and behavioral needs so as to prevent challenging behavior; and ensuring that an IEP or 504 plan was implemented properly. This change is necessary because the regulations must implement the 15 Principles, as required by the 2015 Statute. As Principle 9 states, “Behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior.” Principle 8 and its discussion also make clear the need for debriefing work and the inclusion of positive behavioral supports and functional behavioral analyses.*

- F. As appropriate depending on the student’s age and developmental level, following each incident of physical restraint or seclusion ~~in a self-contained classroom or other special education setting in which a majority of the students in regular attendance are (i) provided special education and related services and (ii) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day,~~ the school division shall ensure that, as soon as practicable, but no later than two (2) school days or upon the student’s return to school, the principal or designee, a mental health professional if appropriate, and other school personnel involved in the restraint or seclusion as appropriate, shall review the incident with the student(s) involved. The student(s) parent or guardian shall be informed of this meeting and shall be invited to attend it. This meeting should include discussion of the following:
1. The effects of the restraint or seclusion on the student, including any emotional, psychological or physical harm or consequences;
  2. Details of the incident in an effort to assist the student and school personnel in identifying patterns of behaviors, triggers or antecedents so as to prevent such incidents from arising in the future;
  - ~~3. Alternative positive behaviors or coping skills the student may utilize to prevent or reduce behaviors that may result in the application of physical restraint or seclusion.~~

**Rationale:**

*This kind of meeting with a child should not occur without the child’s parent being part of the meeting. This appears to be a meeting at which the blame for the use of restraint or seclusion is placed on the child. Children may not be able to effectively advocate for themselves in such a meeting or to explain why things happened. The requirement for children to discuss “alternative positive behaviors or coping skills...” appears to ignore the IDEA’s requirements, including providing services to children. A child may need a Functional Behavioral Assessment, Behavioral Intervention Plan, including detailed positive and preventative supports. Perhaps the school failed to implement the child’s IEP properly or with fidelity. Perhaps a child was treated wrongly. There is evidence of teachers in America who have escalated children, abused them, or denied them necessary services or items, and then implemented restraint and seclusion. Although likely not intended, the effect of the proposed regulation is to ignore the requirements of the IDEA and*

*Section 504 of the Rehabilitation Act and to instead place all the blame and responsibility for correction on the child.*

- G. The principal or designee shall regularly review the use of physical restraint or seclusion to ensure compliance with school division policy and procedures. ~~, and, w~~When there are multiple incidents within the same classroom or by the same individual, the principal or designee shall take appropriate steps to address the frequency of use, including 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 develop them.

***Rationale:***

*As worded, the regulation deviates sharply from Principle 8, and thus is contrary to Virginia’s 2015 statute. Principle 8 provides, “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.” In addition, by failing to emphasize positive and preventative supports, the regulation continues to emphasize using restraint and seclusion. There is significant evidence and research demonstrating that positive and preventative supports prevent behaviors from developing into emergencies. The proposed regulations should require that every effort be made to avoid the use of restraint and seclusion. These should include evidence-based behavioral accommodations, supports, and interventions to create a positive learning environment which improves both academic and social outcomes for students.*

- H. Nothing in these regulations shall be construed to require school divisions to develop and implement notification and reporting requirements for incidents involving (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; ~~(iii) the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control.~~

***Rationale:***

*Language should be eliminated for the reasons stated in the suggested change to the restraint definition in 8 VAC 20-750-10. This includes the requirement that all uses of restraint must be documented, counted in the data, and parents notified. It is not appropriate to allow the use of what would otherwise be restraint by saying it is to maintain order, and thus define it out of the regulations. Every incident must be in the data; every parent must be notified. Otherwise, the use of restraint and seclusion will be concealed, contrary to the 2015 statute. In addition, the regulation can cause immense confusion, as every 2 years, Virginia School Divisions must collect and report data using the Civil Rights Data Collection definition. See discussion above under 8 VAC 20-750-10 (definition of restraint). We do not repeat here in order to be concise.*

**8 VAC 20-750-60. Policies and procedures.**

- 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.
  2. Examples of the positive behavioral interventions and support strategies consistent with the student's rights to be treated with dignity and to be free from abuse the school division uses to address student behavior, including the appropriate use of effective alternatives to physical restraint and seclusion
  3. A description of initial and advanced training for school personnel that addresses (a) appropriate use of effective alternatives to physical restraint and seclusion; and (b) the proper use of restraint and seclusion.
  4. A statement of the circumstances in which physical restraint and seclusion may be employed, which shall be no less restrictive than that set forth in 8 VAC 20-750-40.
  5. Provisions addressing the:
    - (a) notification of parents regarding incidents of physical restraint or seclusion, including the manner of such notification;
    - (b) documentation of the use of physical restraint and seclusion;
    - (c) continuous visual monitoring of the use any physical restraint or seclusion, to ensure the appropriateness of such use and the safety of the student being physically restrained or secluded, other students, school personnel, and others. These provisions shall include exceptions for emergency situations in which securing visual monitoring before implementing the physical restraint or seclusion would, in the reasonable judgment of the school employee implementing the physical restraint or seclusion, result in serious physical harm or injury to persons ~~or damage to property~~; and
    - (d) securing of any room in which a student is placed in seclusion. These provisions shall ensure that any seclusion room or area meet specifications for size and viewing panels that ensure the student's safety at all times, including during a fire or other emergency, as required by this chapter.

**Rationale:**

*Property damage that does not threaten imminent physical danger should not be a permitted use for restraint and seclusion, as it conflicts with the 15 Principles and 2015 statute. See our comments under 8 VAC 20-750-10 and 8 VAC 20-750-30. We do not repeat in order to be concise.*

- B. Each school division shall review its policies and procedures regarding physical restraint and seclusion at least annually, and shall update these policies and procedures as appropriate. In developing, reviewing, and revising its policies, school divisions shall consider the distinctions in emotional and physical development between elementary and secondary students and between students with and without disabilities.
- C. Consistent with § 22.1-253.13:1.D, a current copy of a school division's policies and procedures regarding restraint and seclusion shall be posted on the school division's Web site and shall be available to employees and to the public. School boards shall ensure that printed copies of such policies and procedures are available as needed to ~~citizens~~ community members who do not have online access.

**8 VAC 20-750-70. Prevention; multiple uses of restraint or seclusion.**

- A. In the initial development and subsequent review and revision of a student's IEP or Section 504 plan, the student's IEP or Section 504 team shall consider whether the student displays behaviors that are likely to result in the use of physical restraint or seclusion. If the IEP or Section 504 team determines that a future use is likely, the team shall consider the need for (i) an FBA; (ii) a new or revised BIP that addresses the underlying causes or purposes of the behaviors; and (iii) and any new or revised behavioral goals.

Within 10 school days following the third incident in which physical restraint or seclusion in a single school year, the student's IEP or 504 team shall meet to discuss the incident and to consider the need for (i) an FBA; (ii) a new or revised BIP that addresses the underlying causes or purposes of the behaviors; and (iii) and any new or revised behavioral goals.

- B. For students not described in Subsection A, within 10 school days of the third incident, a team consisting of the parent, the principal or designee, a teacher of the student, a staff member involved in the incident (if not the teacher or administrator already invited), and other appropriate staff members, such as a school psychologist, school guidance office, or school resource officer, as determined by the school division, shall meet to discuss the incident and to consider the need for (i) an FBA; (ii) a new or revised BIP that addresses the underlying causes or purposes of the behaviors; (iii) consider the need to initiate a referral to determine if the student has a disability that may require the provision of special education and related services.
- C. Nothing in this section shall be construed to (i) excuse the team or its individual members from the obligation to refer the student for evaluation if the team or members have reason to suspect that the student may be a student with a disability; or (ii) prohibit the completion of an FBA or BIP for any student, with or without a disability, who might benefit from

these measures but whose behavior has resulted in fewer than three incidents of physical restraint or seclusion in a single school year.

### **8 VAC 20-750-80. Reporting.**

- A. ~~The requirements of this section shall only apply to instances in which physical restraint and seclusion are employed in a self-contained classroom or other special education setting in which a majority of the students in regular attendance are (i) provided special education and related services and (ii) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day.~~

#### **Rationale:**

*This has been deleted for the same reasons stated in the Rationale under 8 VAC 20-750-50 (C), which is the first reference to excluding large numbers of students from the reporting requirements, by eliminating reporting and written notification for children in the regular classroom.*

- B. The principal or his designee shall submit to the division superintendent a report on the use of physical restraint and seclusion in the school based on the individual incident reports completed and submitted to the principal or designee by school personnel pursuant to 8 VAC 20-750-40.D, above. The division superintendent shall annually report the frequency of such incidents to the Superintendent of Public Instruction on forms that shall be provided by the Department of Education and shall make such information available to the public.

### **8 VAC 20-750-90. Training.**

School divisions that employ physical restraint or seclusion shall:

- (i) ensure that all school personnel are periodically trained in the use of physical restraint and seclusion; and trained about the content and purpose of these regulations and their legal obligations, including reporting and notification requirements;
- (ii) include all school personnel i.n. receiving initial training that shall focus on skills related to positive behavior support, conflict prevention, de-escalation, and crisis response;
- (iii) provide advanced training in the use of physical restraint and seclusion for a crisis intervention team in each school ~~school personnel assigned to a self-contained classroom or other special education setting in which a majority of the students in regular attendance are (i) provided special education and related services and (ii) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day;~~
- (iv) ensure that any initial or advanced training is evidence-based.

**Rationale:**

*School Division training must emphasize and implement evidence-based positive and preventative supports to support children with behavioral needs and to keep schools safe for everyone. This is what the 15 Principles require, particularly Principles 1 and 9. Schools should focus heavily on evidence-based behavioral accommodations, supports, and interventions to create a positive learning environment which prevents difficult behaviors from arising. In addition, it makes little sense to have these legal requirements if staff are not trained in them. The national media has reported about several incidents of restraint and seclusion where school personnel either were not properly trained or ignored reporting requirements and concealed the use of restraint and seclusion.<sup>7</sup>*

**8 VAC 20-750-100. Construction and Interpretation.**

Nothing in this chapter shall be construed to modify or restrict:

- (i) the initial authority of teachers to remove students from a classroom pursuant to Va.Code § 22.1-276.2;
- (ii) the authority and duties of school resource officers and school security officers, as defined in Va. Code § 9.1-101;
- (iii) the civil immunity afforded teachers employed by local school boards for any acts or omissions resulting from the supervision, care or discipline of students when such acts or omissions are within such teacher's scope of employment and are taken in good faith in the course of supervision, care, or discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct, as provided in Va. Code § 8.01 220.1:2.

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<sup>7</sup> See J. Butler, How Safe is the Schoolhouse, An Analysis of State Seclusion and Restraint Laws and Policies, July 25, 2015, p.100; Allison Ross, JCPS Restrained Thousands of Kids, but Didn't Report It, Louisville Courier-Journal, Mar. 8, 2016; Kara Kenny, CALL 6: School districts misreport seclusion, restraint incidents, WRTV6 ABC (Indianapolis), Oct. 10, 2016.