

# Coalition for Improving School Safety

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

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

**The undersigned organizations submit this first set of comments to follow up our discussion at the State Board of Education Meeting about the proposed restraint and seclusion regulations. This comment also details why the Corporal Punishment Statute does not support the harmful and dangerous provisions contained in the proposed regulations. We discuss the Corporal Punishment Statute in pages 1-4.**

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 work in drafting the proposed regulations and your desire to prevent restraint and seclusion, practices that can severely injure or even result in the death of students. We also appreciate your time spent working with stakeholders and your future efforts to hear from families and the public. We support many strong requirements included in the regulations, such as the bans on prone restraint, aversive, mechanical and chemical restraints, restraints that harm children and restraints that prevent communication. It is critical for parents to get rapid notification to seek needed medical assistance for concussions, injuries (both visible and hidden internal ones) and trauma.

However, we are deeply concerned that the proposed regulations will harm Virginia's students and families by excluding entirely from the regulations whole categories of restraints and seclusion and by eliminating notification, data collection and other protections for students who are in the regular educated classroom. We are extremely troubled that the proposed regulations will allow schools to continue to use restraint and seclusion when no one is in danger. These proposals run contrary to the statute passed by the General Assembly, §22.1-279.1:1 (2015 Statute), which requires the adoption of regulations that are consistent with the *Fifteen Principles* in the 2012 United States Department of Education's *Restraint and Seclusion*:

*Resource Document* and *Virginia's 2009 Guidelines*. Instead, the regulations conflict with those principles and must therefore, be changed.

**The proposed regulations are not required by Virginia's Corporal Punishment statute §22.1-276.2**, which simply prohibits corporal punishment and defines the limits of that specific prohibition. The Corporal Punishment statute does not explicitly bless or authorize the use of force to restrain students, as the proposed regulations seem to suggest. Indeed, there is no case law in Virginia stating that the Corporal Punishment Statute sanctions the use of force. On the other hand, Virginia's 2015 statute, §22.1-279.1:1, requires consistency with the *Fifteen Principles* and *Virginia's 2009 Guidelines for the Development of Policies and Procedures for Managing Student Behavior in Emergency Situations*, both of which limit the appropriate use of restraint and seclusion to emergencies threatening physical harm to students or others.

Restraint and seclusion are inherently dangerous. Preventing these dangers underlies the *Fifteen Principles* and the General Assembly's mandate for consistency with those principles. The U.S. Government Accountability Office identified 20 cases where children died during restraints in school; other students have died in seclusion. Students have suffered broken bones, injuries, and other physical and mental trauma. Statistics show that in 2011-12, at least 110,000 students nationwide were subjected to restraint or seclusion. These students were disproportionately students with disabilities and minority students. The General Assembly and Commission on Youth heard testimony from families and from children who were traumatized by these practices.

**1. The Proposed Regulations Improperly Exempt Categories of Restraint and Seclusion from the Regulations by using Overly Broad Exceptions. This Allows Schools To Use Restraint And Seclusion For The Reasons Described By Those Exceptions Without Any Regulatory Limits—Contrary to the Restraint and Seclusion Statute. Parental Notice and Data Collection Will Not Be Required, Allowing the Practices To Be Hidden.**

At least three categories of restraint and seclusion are excluded entirely from coverage under the regulations, allowing them to be used with no limits and no parental notice of data collection.

(a) The Physical Restraint definition excludes entirely "Actions designed to maintain order and control." Use of restraint for these purposes is also excluded from parental notification in 8 VAC 20-750-50. By excluding these actions, the regulations fail to prohibit the restraint of children who do not sit still, speak out of turn, are unable to pay attention, cannot follow instructions, or have tantrums, even when those acts are manifestations of their disabilities, so long as those restraints are "designed to maintain order and control." This is contrary to the law passed by the General Assembly and the Commission on Youth recommendations.

b) The definition of seclusion excludes seclusion when the child is initially removed from the classroom for disruptive behavior, allowing children to be put into locked closets or seclusion

rooms without monitoring or any other protections if the teacher does so upon removing the student.

(c) Also exempted from the seclusion definition is secluding a child if there is an investigation of whether the child's involvement in or knowledge of student conduct code violations. School division codes of conduct 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 occurs while investigating these kinds of violations are not consistent with the *Fifteen Principles* or the *Virginia Guidelines*.

These 3 provisions violate the requirements of Virginia's 2015 restraint/seclusion statute, §22.1-279.1:1; as they are contrary to both the *Fifteen Principles* and the *Virginia Guidelines*. The current proposal will allow seclusion and restraint for conduct when no one is in danger of injury. This is wholly inappropriate. The *Third Principle* states that "the use of physical restraint and seclusion is prohibited unless necessary to prevent imminent danger of serious physical harm to self or others." The 2009 *Virginia Guidelines* say the same (p.5). The *Fifteen Principles* specifically state that "Physical restraint or seclusion should not be used as a response to inappropriate behavior (e.g., disrespect, noncompliance, insubordination, out of seat)."

The proposed regulation not only contradicts the *Principles* and *Guidelines*, but excludes whole categories of restraint and seclusion from the reach of the regulations. They will be exempt from data collection and parental notification, allowing them to be hidden. None of the limits contained in the *Guidelines*, like prohibitions on prone restraint or observation of seclusion rooms, will apply. Minority children and children with disabilities are often subjected to disproportionate discipline. There is a tremendous risk this will continue to occur and worsen as a result of the broad exceptions contained in the regulations. As written, the regulations create incentives to use restraint and seclusion for these purposes, so as to be free adherence to the statute.

**These exclusions are not required or sanctioned by the Corporal Punishment Statute or by §22.1-276.2.** The Corporal Punishment statute forbids corporal punishment, but contains the following caveat: "This prohibition on corporal punishment shall not be deemed to prevent..." several enumerated actions. Nothing in this statute contradicts the clear directive in the Restraint and Seclusion Statute to adopt regulations consistent with the *Fifteen Principles* and the *Virginia Guidelines*. The provisions of the proposed regulations described above are inconsistent with the *Fifteen Principles* and the *Virginia Guidelines*. They create harmful public policy which would allow restraint and seclusion to be used without regulation or limitation and hidden from public view.

The Corporal Punishment statute does not authorize the use of force to restrain students. It simply defines what the prohibition on corporal punishment does not prevent—in other words,

it defines what corporal punishment is not. The Corporal Punishment Statute does not create a right to use force against students. Such an authorizing statute would use language of permission (“the following acts are permitted....”), not language of exclusion, as the statute does.

There is no case law stating that the Corporal Punishment statute is to be interpreted to explicitly authorize these practices. To interpret the statute as granting such authority is to read more into the statute than an appropriate and literal reading of its terms allows. It derives a meaning from something other than the words of the statute itself in contravention of clear Supreme Court of Virginia precedent.

When interpreting Virginia statutes, the Supreme Court of Virginia applies these rules of statutory construction:

1. One should assume that the General Assembly carefully chose the terms it used when it enacted a statute.<sup>1</sup>
2. When the General Assembly does not define the terms of a statute, its terms are to be construed according to their “ordinary,” dictionary meaning.<sup>2</sup>
3. Legislative intent should be gathered from the words used within a statute, unless a literal construction would result in an absurdity.<sup>3</sup>
4. Whenever possible, statutes that deal with the same subject matter should be harmonized so as to give effect to both statutes.<sup>4</sup>
5. While repeal by implication is disfavored, when two statutes are irreconcilably inconsistent, the latter enacted statute amends or repeals the former.<sup>5</sup>

The new Restraint/Seclusion Statute directs the Board to adopt regulations that are consistent with the *Fifteen Principles and the 2009 Virginia Guidelines*. Because *consistent* is not defined in the statute, the dictionary meaning is applied.<sup>6</sup> According to Miriam Webster, “consistent with” means “marked by agreement.”<sup>7</sup> If a regulation is not in agreement with the *Fifteen Principles and the 2009 Virginia Guidelines*, the regulation is not consistent with these documents and violates the statute. Indeed, regulations that directly conflict with the terms of the *Fifteen*

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<sup>1</sup> See *Alger v. Commonwealth*, 267 Va. 255 (2004) (explaining that “had the General Assembly intended to permit convicted felons to possess a firearm in their residence, it would have done so. We assume that the legislature chose, with care, the words it used when it enacted the relevant statute.” (internal quotation marks and citations omitted)).

<sup>2</sup> See, e.g., Op. Va. Att’y Gen. Op. No. 03-032 (2003) (citing *Grant v. Commonwealth*, 223 Va. 680, 684 (1982)).

<sup>3</sup> *Barr v. Town & Country Props.*, 240 Va. 292 (1990).

<sup>4</sup> See, e.g., *Phipps v. Liddle*, 267 Va. 344, 593 S.E.2d 193 (2004).

<sup>5</sup> Op. Va. Att’y Gen. Op. No. 03-032 (2003) (citing *Standard Drug Co., Inc. v. Gen. Elec. Co.*, 202 Va. 367, 378 (1960) (“Although the repeal of statutes by implication is not favored, if two statutes are *in pari materia*, then to the extent that their provisions are irreconcilably inconsistent and repugnant, the latter enactment repeals or amends the earlier enacted statute.”). See also *Seymour & Burford Corp. v. Richardson*, 194 Va. 709 (1953) (“Where inconsistent and irreconcilable provisions are found in statutes they must be construed so as to give effect to the latest expression of the legislative intent.”)).

<sup>6</sup> *Supra*, p. 2.

<sup>7</sup> Miriam-Webster.com, <http://www.merriam-webster.com/dictionary/consistent> (last accessed January 26, 2016).

*Principles* or the 2009 *Virginia Guidelines* are not consistent with them. The *Virginia Guidelines* do not incorporate the exclusions from the Corporal Punishment Statute. They state that restraint and seclusion should be limited to emergencies threatening physical harm, just like the *Fifteen Principles*.

Even if there is a conflict between the new statute and the old one, the new one controls.

Furthermore, given the dangers of death and injury that restraint and seclusion pose, they are never “incidental, minor or reasonable” interventions, as described in the Corporal Punishment Statute.

There is also no conflict between the newly adopted restraint and seclusion statute and Virginia Code §22.1-276.2, which authorizes the initial removal of disruptive students from classrooms. Virginia Code § 22.1-276.2 does not address seclusion. It merely allows teachers to remove disruptive students from the classroom. Removing students from the classroom and secluding students are two very different things. Creating a broad exclusion based on this statute is to rewrite both statutes and to create an exception that swallows the rule. Worse still, it creates a category of unregulated seclusion. There would be no rules against locking children in closets or rooms for any length of time—with no protections or even parental notification—as long as it happened when they were initially “removed” from the classroom.

Cyndi Pitonyak of Montgomery County Public Schools in Virginia testified to the U.S. Congress, “Restraint and seclusion may be necessary tools in the immediate urgency of an emergency situation when the alternative is serious injury, but restraint and seclusion are not teaching tools. They do not prevent crisis behavior and they do not teach positive alternatives.”<sup>8</sup> Indeed according to nationally-known expert Dan Crimmins, Ph.D., “The vast majority of professionals agree that these techniques are not effective means of changing student behavior and are of no therapeutic or educational use. In fact, seclusion and restraint can escalate a child’s arousal, deepen negative behavior patterns, and undermine the child’s trust and capacity for learning.”<sup>9</sup> But the proposed regulations, by exempting these actions from the definition of restraint and seclusion, are likely to encourage more use of restraint and seclusion.

As of July 25, 2015, 18 states by statute or regulation limit restraint to emergencies threatening physical danger for all children, 22, for children with disabilities; 16 protect all students from non-emergency seclusion, 22, children with disabilities. These approaches have been used by the vast majority of states that have adopted restraint/seclusion statutes or regulations in the last 6 years (since Congress prioritized the physical danger standard in its bills).<sup>10</sup> A large American municipal reinsurer (underwriter), Munich Reinsurance, has specifically

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<sup>8</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://v.gd/PitonyakTest>

<sup>9</sup> *U.S. Senate Hearings, Beyond Seclusion and Restraint* (2012), testimony of Daniel Crimmins, Ph.D., Director, Center for Leadership in Disability, Georgia State University, <http://v.gd/CrimminsTest>

<sup>10</sup> J. Butler, *How Safe Is the Schoolhouse?*, July 25, 2015, <http://v.gd/ButlerHowSafe>

recommended that restraint and seclusion be used only in emergencies threatening physical danger.<sup>11</sup>

The proposed exclusions are dangerous and keep the status quo as it existed before the General Assembly passed the new statute. In Virginia, a 7 year old with autism was confined in an isolation room for 30 minutes to 2 hours repeatedly for tearing paper, running around, and banging on the door--not putting anyone at risk of harm.<sup>12</sup> This child testified to the General Assembly, and his testimony was one of the impetuses for the new statute, which was intended to prevent restraint and seclusion for these acts. Instead, the regulations would endorse his seclusion.

A U.S. Department of Education Office of Civil Rights (OCR) investigation of Prince William County schools found that the district used restraint and seclusion as a “one-size fits all” response to disruptive behavior that threatened no one despite evidence it didn’t work and that children needed more supportive services.<sup>13</sup> The proposed regulations, however, would endorse the improper use of restraint to address this kind of disruptive behavior. They would exclude such use entirely from the regulation under the maintain order and control definition exception.

The regulatory definitions are also inconsistent with the definitions used by the Office of Civil Rights Civil Rights Data Collection (CRDC). The Commonwealth’s school divisions are required to collect data for the CRDC every 2 years. A different Virginia regulatory definition--excluding much restraint and seclusion conduct--will confuse school divisions. As a result, they may not properly report data as part of the CRDC. The CRDC definitions are included in the *Fifteen Principles* on page 10 and they do not support these exclusions.<sup>14</sup>

## **2. The proposed regulations would allow restraint and seclusion for all property destruction, including breaking a pencil or tearing paper.**

Restraint and seclusion are not appropriate responses to simple destruction of property that poses no risk of harm to anyone. The role of seclusion and restraint is only to protect someone from serious physical harm. The use of seclusion and restraint does not teach appropriate behaviors and is not effective in preventing challenging behaviors. Positive behavioral supports are the appropriate strategy for managing disruptive behavior and are a vital protection for students. Restraint or seclusion may be justified for destruction of property that threatens

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<sup>11</sup> <http://www.munichre.com/us/property-casualty/knowledge/expertise/research-spotlight/schools/index.html?QUERYSTRING=restraint>

<sup>12</sup> Rachel Weiner, “Virginia Lawmakers Move to Regulate School Seclusion and Restraint,” *Washington Post*, Jan. 19, 2015, <http://v.gd/WaPoVaSRJan19>.

<sup>13</sup> H. Vogell, “Cracking Down on the Use of Restraints in Schools,” *ProPublica*, Aug. 11, 2014, <http://v.gd/ProPublicaSR2>.

<sup>14</sup> The CRDC definition is also available in 2011-12 Civil Rights Data Collection Part 1 and 2, OMB No. 1875-0240, page 37 (Expiration Date 9/30/2014), [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).

serious physical harm. This is already encompassed, however, in a danger to self or others standard for the use of restraint and seclusion: there is no need for a separate property destruction standard for their use, experts agree.<sup>15</sup> This regulation violates the 2015 restraint and seclusion statute, §22.1-279.1:1, by violating the *Fifteen Principles* and *Virginia Guidelines* which allow for the use of restraint and seclusion only as last resorts to prevent serious physical harm. See above in 1.

Also, for the same reasons as laid out above, an exception for property destruction is not endorsed by the Corporal Punishment statute. There is simply no basis in the *Fifteen Principles* or the 2009 *Virginia Guidelines* to permit restraint and seclusion when there is no threat of imminent physical harm. Doing so is directly contrary to these two documents with which the regulations must be consistent. The General Assembly could have passed a statute that stated “develop restraint and seclusion regulations” without imposing any direction or even “develop restraint and seclusion regulations modeled on the Virginia School Boards Association (VSBA) policy.” But they did not do that and the Commission on Youth specifically rejected such a proposal. Unfortunately, these regulations more closely resemble the VSBA policy than regulations the Board was directed to develop by the General Assembly.

We acknowledge and appreciate that the regulatory definitions exclude restraint and seclusion for property destruction from regulatory coverage. In this way, draft regulation 8 VAC 20-750-30 is better than the definitions that exclude whole categories of restraint and seclusion from the regulations. Any permitted restraint and seclusion activity should be included in 8 VAC 20-750-30, so that parents are notified, data is collected, and the protections in the regulations apply. However, the Coalition strongly opposes allowing restraint and seclusion for anything other than risk of serious physical harm. A less rigorous standard would endanger students and violate §22.1-279.1:1 (2015 statute) by contradicting the *Fifteen Principles* and *Virginia’s Guidelines*.

**3. The *Fifteen Principles* and *Virginia Guidelines* emphasize positive and preventative measures. The proposed regulations must place greater emphasis on less restrictive, preventative alternatives and require that every effort be made to avoid the use of restraint and seclusion.**

Principle 1 explicitly requires that every effort be made to prevent the need for using restraint and seclusion, including by implementing positive behavioral interventions and supports and ensuring that students’ academic and functional needs are met through appropriate services. Principle 9 states that schools should use behavioral strategies to address dangerous behavior should address the underlying cause or purpose of the dangerous behavior, including with a Functional Behavioral Assessment (FBA), Positive Behavioral Supports and Interventions (PBS), and an appropriate positive and preventative Behavioral Intervention Plan (BIP). The proposed regulations do not accomplish this. While there is significant evidence and research demonstrating that positive and preventative supports prevent behaviors from developing into

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<sup>15</sup> Reece L. Peterson (Professor, University Of Nebraska), *Developing School Policies & Procedures For Physical Restraint And Seclusion In Nebraska Schools, A Technical Assistance Document*, Nebraska Dept. of Educ. 2010, p.20, [http://www.education.ne.gov/documents/Restraint-Seclusion\\_final\\_guidance\\_document\\_6-22-10.pdf](http://www.education.ne.gov/documents/Restraint-Seclusion_final_guidance_document_6-22-10.pdf)

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 by emphasizing dangerous restraint and seclusion over prevention.

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>16</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>17</sup> The benefits of Positive Behavior Intervention and Support include reduction in problematic and disruptive behaviors, increased academic achievement scores, and improved school climate and morale – all at significant savings in financial costs as well as the psychological wear-and-tear on all involved.”<sup>18</sup>

Virginia Treatment Center for Children (VTC), Richmond, Virginia is a hospital that changed from using restraint and seclusion to Collaborative Problem Solving in order to deescalate and prevent challenging behaviors. In 2009, VTC became seclusion and restraint free. Workers’

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<sup>16</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>17</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://v.gd/PitonyakTest>

<sup>18</sup> *U.S. Senate Hearings, Beyond Seclusion and Restraint* (2012), testimony of Daniel Crimmins, Ph.D., Director, Center for Leadership in Disability, Georgia State University, <http://v.gd/CrimminsTest>

compensation claims dropped from \$530,000 to \$15,000, according to testimony to the Commission on Youth from Dr. Bela Sood, Professor, Psychiatry and Pediatrics, VCUHS. If a hospital which is a significantly more intensive environment can make this change, so can school divisions.<sup>19</sup>

A Virginia child who suffered broken bones when forced into a seclusion room is now in a school where research-based interventions are used to virtually extinguish any aggressive behaviors, his mother testified.<sup>20</sup> A Virginia first-grader was confined in a seclusion room repeatedly for tearing paper, running around, and banging on the door. He was too fearful to sleep at night because of the seclusion. He was moved to a school that used positive behavioral supports, where his father reported that he was doing extremely well, making all A's.<sup>21</sup>

Many other states require less restrictive measures to be ineffective before physical restraint is used for students with disabilities (SwDs) (26 states) and all students (21); before seclusion is used, for SwDs (25) and all students (20) as of July 25, 2015. When nonbinding policies are included, 33 urge a less restrictive measures requirement for physical restraint of SwDs, 28, all students; 30 for seclusion of SwDs; 25, all students. Indeed, many of the states that have adopted or strengthened their laws in the last 6 years have adopted this requirement, putting Virginia in good company.<sup>22</sup>

**4. 8 VAC 20-750-40 describes seclusion conditions. There are many requirements to keep students safe if they must be secluded in an emergency because someone is in danger. Some of the suggested requirements are very good. But some are quite dangerous and appear to resemble solitary confinement in a jail or prison.**

We agree with the requirements for seclusion rooms to be safe, sizeable, ventilated, without fixtures likely to cause injury, viewing panels, and other safety requirements. Children have died in seclusion and been injured in unsafe rooms, and these provisions will help protect Virginia's students. But 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. It 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*.

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<sup>19</sup> Statement of Dr. Aradhana Bela Sood, Child Mental Health Policy Professor, Psychiatry and Pediatrics, Statement for Commission on Youth Seclusion and Restraints in Schools to Virginia Commission on Youth, 2014.

<sup>20</sup> Rachel Weiner, "Virginia Lawmakers Move to Regulate School Seclusion and Restraint," *Washington Post*, Jan. 19, 2015, <http://v.gd/WaPoVaSRJan19>

<sup>21</sup> Rachel Weiner, Virginia Lawmakers Move to Regulate School Seclusion and Restraint, *Washington Post*, Jan. 19, 2015; Bill Sizemore, Panel OKs Regulation of Seclusion, Restraint in Va. Schools, WHSV- Channel 3, whsv.com, Jan. 19, 2015, <http://v.gd/PanelOKsAP>.

<sup>22</sup> J. Butler, *How Safe Is the Schoolhouse?*, July 25, 2015, p.56, 59, 94, <http://v.gd/ButlerHowSafe>

**5. The *Fifteen Principles* and 2009 *Virginia Guidelines* require parental notification, data collection, and staff reviews and prevention. But the proposed regulations, 8 VAC 20-750-50 and 8 VAC 20-750-80, eliminate these requirements for most children. They also eliminate the requirement for notification when restraint is used to maintain order and control. These regulations are alarming and highly inconsistent with the *Principles* and *Guidelines*.**

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, written notice would be provided only for incidents in classes where a majority of students receive special education. For all other students, written notification would not be provided; data would not be collected; and school personnel would not be required participate in debriefings and reviews to prevent the use of restraint and seclusion.

Students who do not have disabilities are almost never educated in classrooms in which the majority of students are receiving special-education (primarily self-contained classrooms). Most students with disabilities are included in general education classrooms. The most recent 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.

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. These practices 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. Students without disabilities represent 25% of those restrained and 42% of those secluded. African-American students made up 19% of students with disabilities under IDEA, but 36% of those subjected to mechanical restraint.<sup>23</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

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<sup>23</sup> CRDC 2011-12 Report at 1.

Wisconsin school districts and states under their new laws. With its new regulation, Virginia would move in the opposite direction, hiding this data.

Under the proposed regulations, the parents of an African-American kindergartener who is restrained or secluded would not be informed and she would not be counted in the data. There is no basis for treating students differently for notification, data collection, or prevention activities based on their educational placement. No other state does this.

Similarly, the regulation must be rewritten so it does not exclude restraint to maintain order and control from the requirements for parental notification, for the reasons stated in comment 1. Children should not be subjected to restraint or seclusion except for emergencies threatening serious physical harm. There should be no exclusions for restraint or seclusion used when children are unable to sit still, follow instructions, remain quiet, remain in their seats, have tantrums, or other similar activities. This is explained more fully in item 1 above.

**6. Parents should be notified on the day of a restraint or seclusion incident. The regulations allow for notification within 24 hours and would dangerously leave notification up to volunteers who have little incentive to notify parents. Combined with the limits on written notification, parents may never learn what happened to their children. The regulations should also permit email notification to improve efficiency for everyone.**

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 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 harmful consequences to the child. There is no burden in making a phone call or sending an email message.

**Furthermore, 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. No other state law explicitly allows volunteers to undertake parental notification duties. Virginia should not either.

If there is so much restraint and seclusion that making the calls is a burden, then it is clear that there is far too much restraint and seclusion. These should be emergency protective measures, when nothing else will prevent a risk to physical safety. Indeed, most restraint and seclusion will occur during the school day, when school secretarial staff and others can notify parents. If there is an issue about after-hours notification, there are school employees with after-hours

responsibilities who can call. 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 about being forced into seclusion in an isolation room several times and being told not to tell his parents.<sup>24</sup> “We never knew about it. We never knew why, until one night, my son begged us not to go back to school,” said his father.<sup>25</sup>

A Colorado mother testified to Congress that when her daughter was restrained in a manner that injured her head and body, the parents should have been immediately informed. “We should have been watching Paige for possible signs of a concussion that afternoon and any possible subdural hemorrhage.” Instead, staff did not inform the parents, who learned the next day of the injuries at a previously-scheduled routine medical appointment.<sup>26</sup>

Prince William County Schools in Virginia were found to have repeatedly restrained and secluded children under "one-size-fits-all" behavior management policies that took them away from the learning environment and denied them a free appropriate public education. Parental notification was inconsistent and inadequate, compounding the problem.<sup>27</sup> This kind of evidence shows how important systematic parental notification requirements are and how important it is that school staff make the notification.

## **7. The regulations should require schools to work with School Resource Officers (SROs) and School Security Officers (SSO) to implement positive and preventative supports, rather than dangerous restraint and seclusion.**

Everyone in the schools, including SROs and SSOs, should receive training, including on the requirements to use positive behavioral supports and preventative measures, their role in decreasing, preventing, and diffusing difficult behavior, and the requirements of the regulations. Moreover, schools or individuals should not be able to avoid the restraint and seclusion law by simply calling law enforcement and having SROs restrain or seclude the child. In Virginia, a four year old with ADHD in Green County was handcuffed for causing a ruckus last year. "Charlottesville psychologist Jeffrey Fracher says the use of shackles and handcuffs on a four-year-old could have long-term consequences," WVTF Radio reported.<sup>28</sup>

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<sup>24</sup> Rachel Weiner, “Virginia Lawmakers Move to Regulate School Seclusion and Restraint,” *Washington Post*, Jan. 19, 2015, <http://v.gd/WaPoVaSRJan19>

<sup>25</sup> Father Claims School Leaders Locked Son In Closet Nine Times, CBS6, Mar. 28, 2014, <http://is.gd/cbs6seclu>

<sup>26</sup> Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools, Hearings before the House Comm. on Education and Labor, 111th Congress (2009), testimony of Ann Gaydos, <http://v.gd/HouseGaydos>

<sup>27</sup> D. St. George, “Prince William Schools Restrain, Seclude Disabled Kids Frequently, Inquiry Finds,” *Washington Post*, Aug. 6, 2014, <http://is.gd/PrinWmSecluRestWP>

<sup>28</sup> Hawes Spencer, "Child Handcuffed and School Policies Questioned," *WTF Radio*, Dec. 9, 2014, <http://wvtf.org/post/child-handcuffed-and-school-policies-questioned#stream/0>.

We are committed to seeing Virginia avoid the terrible events in the recent Kentucky news, including young children restrained by an SRO with mechanical handcuffs on their biceps behind their backs.<sup>29</sup> In that situation, inadequate training likely contributed to the situation, including a lack of awareness of all elements of the state regulation.

Although these two news stories involve younger children, we are as deeply concerned about protecting older children, including those in high school. All children subjected to restraint and seclusion are in danger of injury and trauma, and they are not learning. Following seclusion and restraint, they may not be in a condition to effectively participate in learning for some time. Instead, the cycle of violence is likely to worsen. All children deserve these protections.

**There are many good requirements in the regulations, and we would like to point these out. We strongly support the following provisions.**

**8. We strongly support the ban on mechanical and chemical restraint in 8 VAC 20-750-20. These are important protections for students.**

Mechanical and chemical restraint is very dangerous. The dangers of chemical restraint have been known since they were documented by the *Hartford Courant* in 1998.<sup>30</sup>

Mechanical restraints include duct tape, straps, bungee cords, and ropes used to tie children to furniture or to tie body parts together; chairs and furniture that children are locked into; devices that restrain arms, legs, torsos and other body parts; weighted materials; and similar mechanisms. They are hazardous, as the GAO and numerous organizations have found. Special therapy chairs intended to help children with certain physical disabilities sit have been misused as restraints because children can effectively be locked in with belts and trays. Mechanical restraints are dangerous and subject to overuse and misuse. Children have been left in mechanical restraints for long periods of time or placed in locked seclusion rooms, exacerbating the danger.

**9. Regulation 8 VAC 20-750-20 importantly bans the use of dangerous aversive stimuli. We strongly support this provision.**

This regulation incorporates the 2009 *Virginia Guidelines* and Principle 5. Every child's dignity must be respected. No child should ever be subjected to mental or physical abuse. These are basic human rights. Aversive interventions are painful, abusive, and inhumane. They are not educational practices. They do not teach anything and they are not effective, except in causing pain and harm. They do not keep anyone safe (the ostensible reason for restraint and seclusion). They represent cruel punishment and mistreatment.

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<sup>29</sup> Holly Yan, "School Resource Officer Sued for Allegedly Handcuffing Children with ADHD," *CNN*, Aug. 4, 2015 <http://www.cnn.com/2015/08/04/us/aclu-disabled-students-handcuffed-lawsuit/>

<sup>30</sup> Eric Weiss and others, "Hundreds of The Nation's Most Vulnerable Have Been Killed by the System Intended to Care for Them," *Hartford Courant*, Oct. 11, 1998, <http://v.gd/HartCouraChem> .

**10. Regulation 8 VAC 20-750-20 forbids the use of prone or face down restraints, restraints that restrict breathing, harm students, or interfere with a student’s ability to communicate. We strongly support this.**

Principle 7 requires that life-threatening restraint be forbidden. Prone restraint and life threatening restraint are also banned in the private school regulations, 8 VAC 20-671-650.

Prone restraint and other restraints that impede breathing or are otherwise life threatening are inherently dangerous and should be forbidden. The Government Accountability Office (GAO) documented the deaths of 20 students from restraint, four of whom said that they could not breathe. One young Texas teenager with a disability died when his teacher put him in prone restraint. A trauma survivor who had been deprived of food, he tried to leave to get food after she had delayed his meal. The teacher put him in prone restraint and he died from suffocation. She later went on to teach in Northern Virginia, until the GAO contacted the school division prior to the U.S. House hearings.<sup>31</sup>

The vast majority of states that have adopted statutes or regulations in the last 6 years have included a ban on life-threatening restraint, including restraint that impedes breathing. Indeed, 21 states have statutes or regulations banning the use of life-threatening restraints on all children; 28, on children with disabilities, as of July 25, 2015. Moreover, roughly 1/3 of these states ban both restraints that impede breathing and prone restraint, specifically.<sup>32</sup>

It is equally important to forbid restraint that harms students or interferes with the ability to communicate, as the proposed regulation does.

Principle 7 forbids the use of restraint or seclusion that harms a child. The Principles Document 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 where children 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.

The proposed prohibition on restraint that interferes with the ability to communicate is also part of Principle 7’s ban on restraint or seclusion that harms children. A child must be able to

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<sup>31</sup> United States Government Accountability Office, *Seclusions and Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* 1, 8, 10-12 (2009); *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools*, Hearings before the House Comm. on Education and Labor, 111th Congress (2009), p. 42-52.

<sup>32</sup> J. Butler, *How Safe is the Schoolhouse*, p. 63-64.

communicate about medical distress and bodily needs. As the 15 Principles document states, “A child’s ability to communicate (including for those children who use only sign language or other forms of manual communication or assistive technology) also should not be restricted unless less restrictive techniques would not prevent imminent danger of serious physical harm to the student or others. In all circumstances, the use of restraint or seclusion should never harm a child.”

**11. The regulations require continual visual monitoring of students in seclusion in 8 VAC 20-750-40. We strongly support this provision.**

Principle 11 requires careful continuous visual monitoring of students in restraint or seclusion. Restraint and seclusion are dangerous practices that have resulted in deaths, injuries, and psychiatric trauma. Children in seclusion must be watched continuously. It is not sufficient to simply check the room every few minutes; this would be contrary to Principle 11. A child can die or be injured in that time frame. Children have attempted suicide in seclusion rooms, and been injured, including a young Atlanta teen who hung himself in a seclusion room as staff sat outside. Staff checked the room at intervals of several minutes. Between intervals, the student killed himself.<sup>33</sup>

### Conclusion

Thank you again for your work on this first draft of the regulations. Thank you for considering the coalition’s views about protecting Virginia’s students and families from dangerous restraint and seclusion. VDOE has worked hard on the topic of restraint and seclusion, and we know you are committed to protecting children. We appreciate the time and energy that has been devoted to developing the draft. However, the regulations as drafted violate §22.1-279.1:1 as passed by the 2015 General Assembly. The regulations broadly and dangerously exclude entire categories of restraint and seclusion. They also exclude children in the regular classroom from written parental notification and data collection requirements and allows unaccountable volunteers to make their best efforts to orally notify parents. The regulations are not supported or required by the Corporal Punishment statute.

The coalition requests that VDOE rewrite these regulations to comply with the requirements of the new Virginia law, and to be consistent with the *Fifteen Principles* and 2009 *Virginia Guidelines*. These draft regulations look in part far more like the VSBA’s model policy than the statute adopted by the General Assembly. Please revise the regulations to protect students from these very dangerous practices. Our children’s safety is at stake.

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<sup>33</sup> Alan Judd, *Death Highlights Lack of Regulation at Psycho-Educational Schools*, ATLANTA J. CONSTITUTION, July 27, 2009.

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, 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  
Endeppendence 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 TASH  
Wrightslaw