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| **Virginia Board of Education Agenda Item** | **Seal of the Commonwealth of Virginia** |

# Agenda Item: G

## Date: September 23, 2021

### Title: First Review of Exempt Action to the *Regulations Governing the Operation of Private Schools for Students with Disabilities* based on 2021 General Assembly Action

#### Presenter: Dr. Samantha Hollins, Assistant Superintendent, Department of Special Education and Student Services

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## Purpose of Presentation:

Action required by state or federal law or regulation.

## Executive Summary:

In 2021, the Virginia General Assembly passed a budget amendment, [HB 1800, Item 138.I](https://budget.lis.virginia.gov/item/2021/2/HB1800/Enrolled/1/138/), requiring that the Board of Education “… develop and promulgate regulations for private special education day schools on restraint and seclusion that establish the same requirements for restraint and seclusion as those for public schools.” This legislative action reflects a response to the Joint Legislative Audit and Review Commission’s (JLARC) [*Review of the Children's Services Act and Private Special Education Day School Costs*](http://jlarc.virginia.gov/pdfs/reports/Rpt541-1.pdf) report, dated November 16, 2021. The JLARC report, at recommendation #9, stated that the General Assembly may wish to consider including language in the *Appropriation Act* directing the Virginia Board of Education to develop and promulgate new regulations for private day schools on restraint and seclusion that establish the same requirements for restraint and seclusion as those established for public schools. The JLARC study was previously presented to the Virginia Board of Education on January 28, 2021.

The Board has language in its current [*Regulations Governing the Operation of Private Schools for Students with Disabilities*](https://www.doe.virginia.gov/special_ed/day_residential_schools/regs-oper-private-schools.docx), effective August 26, 2015, amended on October 5, 2017, which address the application of restraints and use of seclusion in the private schools licensed by the Virginia Department of Education (VDOE). Upon review of the requirements for restraint and seclusion established for public schools as outlined in the [*Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*](http://register.dls.virginia.gov/details.aspx?id=8093)*,* it is apparent that the changes needed can be accomplished by modification of the current regulationsand would not necessitate a complete redevelopment of those regulations.

The proposed revisions to the *Regulations Governing the Operation of Private Schools for Students with Disabilities* support Priority 1 of the Board’s Comprehensive Plan to “pr*ovide high quality, effective learning environments for all students.”*

## Action Requested:

The Board is requested to waive first review and approve the exempt action to the *Regulations Governing the Operation of Private Schools for Students with Disabilities*.

## Superintendent’s Recommendation:

The Superintendent of Public Instruction recommends the Board of Education waive first and approve the exempt action to the *Regulations Governing the Operation of Private Schools for Students with Disabilities*.

## Previous Review or Action:

No previous review of action.

**Background Information and Statutory Authority:**
The proposed exempt action revisions to the *Regulations Governing the Operation of Private Schools for Students with Disabilities* include the legislative changes detailed below. The current [*Regulations Governing the Operation of Private Schools for Students with Disabilities*](https://www.doe.virginia.gov/special_ed/day_residential_schools/regs-oper-private-schools.docx) are available online*.*

Relevant Legislation:

1. [HB 1800, Item 138.I](https://budget.lis.virginia.gov/item/2021/2/HB1800/Enrolled/1/138/) requires that the Board of Education develop and promulgate regulations for private special education day schools on restraint and seclusion that establish the same requirements for restraint and seclusion as those for public schools.

**Summary of proposed revisions to the *Regulations Governing the Operation of Private Schools for Students with Disabilities****.*

The following are changes resulting from legislation from the 2021 General Assembly and the requirements outlined in the *Code.* There are four distinct topic areas, identified below, which are embedded throughout the proposed exempt action regulations:

1. Additions and changes to the **Definitions** section (8VAC20-671-10);
2. New and revised language added to provide additional standards under the heading of **Behavior intervention** (8VAC20-671-630);
3. New language added to provide additional standards under the heading of **Prohibitions** (8VAC20-671-650);
4. New and revised language added to provide additional standards under the heading of **Managing student behavior in emergency situations** (8VAC20-671-660);

The table below highlights the proposed exempt action changes to be made to the *Regulations Governing the Operation of Private Schools for Students with Disabilities*:

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| **Reason for the change** | **Page numbers in Attachment A** | **Proposed Regulatory Change**  |
| GA Budget Amendment #138.I (2021)JLARC Recommendation #9 Language in the *Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia* (8VAC20-750), effective January 1, 2021. | 2-7, 8-11, and 13  | The following definitions, under 8VAC20-671-10, **Definitions**, were added or modified as indicated: 1. Behavioral intervention plan (BIP) – modified;
2. Chapter – added;
3. Child with a disability – added;
4. Corporal punishment – added;
5. Day – added;
6. Evaluation – added;
7. Functional behavioral assessment (FBA) – added;
8. Individualized education program team – added;
9. Mechanical restraint – modified;
10. Physical restraint – modified;
11. Restraint – added; School day – added;
12. School personnel – added;
13. Seclusion – modified;
14. Section 504 – added;
15. Student – added; and
16. Time out – modified.
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| 14-16 | Under 8VAC20-671-630, **Behavior intervention**, modified and/or added language to provide more definitive guidance on what must be contained in the school’s policies and procedures manual and the school’s student/parent handbook.  |
| 16-17  | The following prohibitions, under section 8VAC20-671-650, **Prohibitions**, were added:1. Use of seclusion that restricts a student's breathing or harms the student;
2. Use of physical restraint or seclusion as (i) punishment or discipline; (ii) a means of coercion or retaliation; (iii) a convenience; or (iv) to prevent property damage, or in any manner other than as provided in 8VAC20-671-660;
3. Use of restraint or seclusion when medically or psychologically contraindicated as stated in documentation by the IEP team, the student's Section 504 team, school professionals, or by a licensed physician, psychologist, or other qualified health professional under the scope of the professional's authority; and
4. Use of seclusion rooms or freestanding units not meeting the standards set forth in this chapter.

Added the following statement: Nothing in this section shall be construed to prohibit physical restraint or seclusion under the conditions outlined in 8VAC20-671-660. |
| 17-25 | Under 8VAC20-671-660, **Managing student behavior in emergency situations**, required modified and/or added language to the following sections of the regulations:1. Use of Physical Restraint and Seclusion
2. Seclusion; Standards for use
3. Prevention; multiple uses of restraint and seclusion
4. Training Requirements
5. Notification and Reporting

Added a requirement that data collected on the use of restraint and seclusion be reported to the Superintendent of Public Instruction and made available to the public.Added language describing to whom these regulations applied. |

The following information is written in the [*Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*](http://register.dls.virginia.gov/details.aspx?id=8093)but are not included in the proposed revisions to the *Regulations Governing the Operation of Private Schools for Students with Disabilities* because they were deemed to be irrelevant to the operation of a private school for students with disabilities:

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| Language in ***Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*** | Reason not included in the proposed revision to the ***Regulations Governing the Operation of Private Schools for Students with Disabilities*** |
| **8VAC20-750-70.B** – School divisions utilizing school resource officers shall enter into a memorandum of understanding with local law enforcement addressing the use of seclusion and restraint by law enforcement personnel in school settings. | Private schools for students with disabilities do not employ school resource officers. |
| **8VAC20-750-110 –** Nothing in this chapter shall be construed to modify or restrict:1. The initial authority of teachers to remove students from a classroom pursuant to § 22.1-276.2 of the *Code of Virginia*;2. The authority and duties of school resource officers and school security officers, as defined in § 9.1-101 of the *Code of Virginia*, except to the extent governed by a memorandum of understanding between the local law enforcement agency and the school division; 3. The authority of the Virginia Department of Juvenile Justice with regard to students in its custody at any of its sites or in any of its programs; or4. 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 § 8.01-220.1:2 of the *Code of Virginia*. | This language is specific to public school employees, resource and school security officers, and DJJ and, as such, not applicable to private school employees. |
| **8VAC20-750-20** – 1. For purposes of this chapter, 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 of the *Code of Virginia*; (ii) receiving homebound instruction pursuant to 8VAC20-131-180 and as defined in 8VAC20-81-10, without regard to special education status; (iii) receiving home-based instruction pursuant to 8VAC20-81-10; and (iv) who are preschool students enrolled in a program operated by a school division or receiving services from school personnel.2. As used in this chapter, "student" shall not include children meeting compulsory attendance requirements of § 22.1-254 of the *Code of Virginia* 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; (iii) receipt of home instruction pursuant to § 22.1-254 of the *Code of Virginia* [ or (iv) receipt of instruction in a secure facility or detention home as defined in § 16.1-228 of the *Code of Virginia* or in a facility operated by the Virginia Department of Behavioral Health and Developmental Services. | These definitions of student do not apply to students enrolled in private schools for students with disabilities. |

The Board’s current *Regulations Governing the Operation of Private Schools for Students with Disabilities* already address the use of seclusion and the application of restraints in private schools for students with disabilities licensed by the VDOE. As such, there is limited to no anticipated impact from the proposed amendment to the regulations. The recommendation from JLARC and the requirement of the General Assembly 2021 HB1800 budget amendment required that the Board develop and promulgate regulations for private special education day schools on restraint and seclusion that establish the same requirements for restraint and seclusion as those for public schools. The *Regulations Governing the Operation of Private Schools for Students with Disabilities* are already in alignment to the*Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*. The proposed amendments to the regulations address the addition of terms and their definitions that are not currently identified and defined in the existing *Regulations Governing the Operation of Private Schools for Students with Disabilities*, minimal modification of the requirements associated with the development of policies and procedures related to the use of seclusion and application of restraints, and minimal modifications to the requirements for reporting the use of seclusion and application of restraints.

However, the proposed revisions to the *Regulations Governing the Operation of Private Schools for Students with Disabilities* would greatly increase the requirements associated with staff training. The proposed changes in the regulations would require:

1. that all school personnel receive training that focuses on skills related to positive behavior support, conflict prevention, de-escalation, and crisis response, including follow-up support and social-emotional strategy support for students, staff, and families;
2. that all school personnel receive initial training regarding the regulations, policies, and procedures governing the use of physical restraint and seclusion;
3. advanced training in the use of physical restraint and seclusion for at least one administrator in every school building and for school personnel assigned to work with any student whose IEP or Section 504 Team determines the student is likely to be physically restrained or secluded; and
4. that any initial or advanced training is evidence-based.

While the restraint protocols currently used by private schools for students with disabilities may be evidenced-based, these proposed changes may lead to considerable commentary from the private school administration given the costs that may be associated with the increased training requirements or the need to change to another restraint protocol that is evidenced-based and/or more in line with the new requirements.

**Timetable for Further Review/Action:**

Upon Board approval, these regulations will be submitted to the Regulatory Town Hall, pursuant to the Administrative Process Act.

Once finalized, the VDOE will conduct professional learning opportunities needed for private schools for students with disabilities to effectively revise their own policies and procedures as needed. Additionally, the VDOE will support professional development to ensure implementation of the required revisions to the *Regulations Governing the Operation of Private Schools for Students with Disabilities* as they relate to the application of restraints and use of seclusion.

## Impact on Fiscal and Human Resources:

Private schools for students with disabilities licensed by the VDOE may incur costs associated with aligning their individual policy and procedures to the updated regulations and the need for increased training for all school personnel. Specifics on each area have been identified in the background section above. There will be no direct fiscal impact on local school divisions, the VDOE, or the Commonwealth due to the need to update the policies and procedures unless the private schools seek to defer the costs associated with the development and dissemination of their revised policies and procedures and the additional training requirements by increasing their rates for enrollment in their individual programs. The VDOE will incur some cost related to updating professional learning and providing training to guide the private schools for student with disabilities in implementing the revised regulations.