

Virginia Board of Education
Work Session
Wednesday, February 22, 2017
10:00a.m.
Jefferson Conference Room, James Monroe Building

A work session of the Virginia Board of Education was called to order by Board President Dr. Billy Cannaday on Wednesday, February 22, 2017, in the 22nd floor Conference Room in the James Monroe Building. Members present were: Dr. Billy Cannaday, President; Mr. Daniel Gecker, Vice President; Mrs. Diane Atkinson; Mr. James Dillard; Ms. Anne Holton; Mrs. Elizabeth Lodal; Mr. Sal Romero; Dr. Jamelle Wilson; and Dr. Steve Staples, superintendent of public instruction. Dr. Cannaday welcomed and introduced new board members, Ms. Anne Holton and Dr. Jamelle Wilson. Ms. Holton and Dr. Wilson thanked the committee for the opportunity to serve.

Dr. Cannaday explained the purpose of the meeting was to hear from staff of the Department of Education and to ask questions or seek clarification regarding the sole agenda item, the “*Proposed Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*” (Proposed Stage).

Mr. John Eisenberg, assistant superintendent in the Office of Special Education and Student Services, thanked the Board for the opportunity to brief the committee in advance of the Board meeting on Thursday and to provide an overview of the difficult decisions the Board would need to make in before final review of the draft regulations. Mr. Eisenberg introduced Mrs. Patricia Haymes, director of the Office of Dispute Resolution and Administrative Services, who would be assisting him. Mr. Eisenberg explained that as an overview, a brief history of the process would be provided, and would be followed by a review of the 12 critical decision points for Board consideration, key developments, guidance received from the Office of the Attorney General, and discussion of the guiding principles referenced in the documents. Mr. Eisenberg emphasized that he and Mrs. Haymes would be glad to answer the Board’s question.

As a point of reference, Mr. Eisenberg noted that the Virginia General Assembly enacted H.B. 1443 in 2014, amending the *Code of Virginia* by adding § 22.1-279, 1:1 providing the following: the Board of Education shall adopt regulations on the use of seclusion and restraint in public elementary and secondary schools in the Commonwealth that are consistent with its *Guidelines for the Development of Policies and Procedures for Managing Student Behavior in Emergency Situations* (document developed by the Department of Education in 2009) and the *Fifteen Principles* contained in the U.S. Department of Education’s *Restraint and Seclusion: Resource Document* (2012).

Mr. Eisenberg then reviewed the 15 Principles. He noted that public comments have been received and reviewed to ensure the proposed regulations are consistent with the principles.

Mr. Eisenberg noted that since 2009, the Virginia Department of Education has had a guidance document for school divisions to use in developing local policies and procedures for

use of restraint and seclusion practices. The eight principles in the document are consistent with the USDOE document; however, the document was never regulatory. Sample guidance documents, sample policies, practices and procedures are provided to school divisions for use in developing local policies. At the time these regulations were being developed, a survey disclosed that approximately 30-35 school divisions do not have local policies in place. This is problematic as there are no protections in place for students, families, teachers or administrators.

Dr. Cannaday commented that the key principles constantly use the language “should,” even though there is an expectation that it is not a choice. He questioned, in looking at DOE’s guidance document, to what extent should the Board consider language that goes beyond “should?”

Mr. Eisenberg responded that the regulations would need to be written so that it must be a requirement. Previous documents were guidance with no regulatory power. The intent of these regulations will be to require compliance with the principles.

Mr. Romeo asked if there is anywhere in the proposed regulations that focuses on notification? Mr. Eisenberg responded yes, the focus is prevention, root causes, and patterns of behaviors. He noted this is a new requirement for regular education students. Mr. Romeo’s follow-up question was “after an incident?” Mr. Eisenberg noted that specific question, including when, who needs to be involved, how to report back and what notifications needed to be done are part of the notification process.

Mr. Eisenberg then commented that there was a third component to the drafting of these regulations – corporal punishment – which has long-standing regulations on its use and prohibitions of its use. (See attachment – *Code of Virginia*, Title 22.1. Education. Chapter 14. Pupils)

At its February 25, 2016, meeting, the Board asked for legal guidance from the Office of the Attorney General, particularly on the issue of when one can put hands on a student to prevent injury to property. After the first review, the Office of the Attorney General’s guidance indicated that the draft regulations, which attempted to merge the two statutes to prevent conflict, could permit the use of restraint and seclusion to protect property. .

Mr. Eisenberg then noted that in January, the attorney general’s office reversed its guidance regarding damage to property and suggested it be prohibited and not be included in the draft regulations. Mr. Eisenberg noted that the provision has been stricken from the proposed regulations but that it is within the purview of the Board to revise and do something different. He noted that change could potentially lead to legal conflict; however, he was unsure of any unintended consequences of taking it out.

Mrs. Atkinson commented that with the AP process there would be an opportunity for another review by the attorney general’s office.

In response to a question from Dr. Cannaday regarding school resource officers, Mr. Eisenberg explained that applicability depended on the contract status of the individual providing

the service to the division. However, President Obama's administration issued a guidance document in December advising that any person within the public school building would be governed by the regulations in place. That meant that police officers or SROs that are employees of the local sheriff's department would be governed by these regulations, according to the administration's guidance. However, he noted that guidance is not regulatory.

Mrs. Haymes clarified the statement noting that the USDOE guidance document does not prohibit a police officer from taking a particular action but rather that the school division could be held liable for the action taken.

Mr. Dillard asked what the rationale was for the attorney general's office to exclude the language regarding destruction of property. Mr. Eisenberg explained that it was felt that inclusion of the language would violate one of the 15 Principles and therefore make the regulations inconsistent with the principles.

Mrs. Atkinson asked that it be clarified that the exclusion was not an opinion of the Attorney General but rather guidance from staff. Mr. Eisenberg noted for the Board that the second guidance statement was unsolicited guidance from a staff person.

Mrs. Haymes read the summary statement which provided, in part, "to sum, it is our opinion that the use of reasonable necessary force authorized by §22.1-279.1 to quell a disturbance which threatens damage to property is unrelated to the regulations on restraint and seclusion pursuant to §22.1-211:1 and the reference to damage in the proposed regulations violates statutory law.

In response to discussion concerning SROs, Dr. Staples provided the following as information for the Board. The relationship of SROs to schools is an area of struggle because SROs are not guided or directed by the DOE, they come through DCJS (Department of Criminal Justice Services). There has been recent collaboration to work on model memorandum of understanding (MOU) language to give school divisions a starting point to negotiate because each agreement is locally specific. After much discussion they reached a point to agree to disagree. DCJS's model policy says that law enforcement officials would act as trained law enforcement officials in all circumstances in a school as they would outside the school. There is a model MOU coming from DCJS that has significant impact on these discussions.

Mrs. Haymes advised that the draft regulations do contemplate that any employee of the school division will receive the initial training on evidence-based practices and positive behavioral interventions and the basics of the restraint and seclusion regulations, to include cafeteria workers, bus drivers, and that the only people VDOE did not have authority to include were SROs who are not employees of the school division.

Mr. Eisenberg stated he contemplates basic-knowledge training for all employees of their responsibility for all individuals and that learning modules of the law and what an individual can and cannot do to a student.

Regarding the draft regulations, Mr. Eisenberg commented that there has been significant stakeholder input into the process. An August 2015 roundtable discussion of professionals, parents, and advocacy organizations went well with lots of disagreements and very disparate points of view on how to draft the regulations. Based on that meeting, the first review of the draft regulations was presented to the Board on March 26, 2016. At that point legal guidance from the Office of the Attorney General was requested. Upon receiving that guidance, a second draft was proposed. Before presenting the second draft to the Board, a series of three stakeholders were held across the state (Hampton City, Botetourt County, Stafford County) to present the draft regulations, the core principles, guidance documents, and the current corporal punishment document. A summary of public comments will be presented to the Board on Thursday. A total of 132 contentious items were identified from the comments, including seminal issues for educators, parents, and advocates moving forward.

As far as the draft there is a 50/50 split on agreement. Mr. Eisenberg advised that the Board should expect to hear from a wide variety of stakeholders on what their opinions would be on the tough choices [the Board] has to make.

Mrs. Haymes noted that additional comments have been received regarding the 12 Decision Points from organizations. The 132 items were addressed from a wide range of individual parents, advocacy groups, a coalition of four advocacy groups around the state who all weighed in on the regulations, as well as the School Board Association and the Secondary School Principals. There has been a great deal of interest and controversy. Mr. Eisenberg read the list of groups and organizations that had been invited to provide comment on the first draft of the regulations.

Mr. Eisenberg advised the Board that Mrs. Haymes would walk the members through the 12 core decision points needing guidance from the Board. After direction from the Board at its Thursday meeting, corrections will be made to the current document to develop a final draft to be presented at the March meeting of the Board. After the March meeting, a draft for the Administrative Procedures Act process will be presented to the attorney general's office, the Secretary of Education, the Department of Planning and Budget, and then the Governor's Office will weigh in on the regulations. They would then either be sent back to the Board for further changes or for final review. Public comment period will be held after the Board's final review.

Mrs. Haymes began her review of the 12 Key Decision Points. The following is a summary of her review.

Decision Point 1 – Prohibitions – Should seclusion be banned outright? Many comments from parents involved stories of students being injured while in seclusion rooms; or being left for significant periods of time. However, staff understands that there is efficacy to seclusion rooms for certain students to calm down. Excluded from the definition are time-out, in-school suspension, detentions, student-requested breaks, removal for short period to regain self-control, removal of student for disruption, and confinement of student during investigations of violations of Code of Student Conduct.

Mr. Eisenberg explained “confinement of student during investigation”, as an example, would be an educator team needing to separate students to get to root cause and what might happen next in a disciplinary action. In response to a question from a former board member if there were other states that banned seclusion, a survey identified five states (Georgia, Hawaii, Nevada, Pennsylvania, and Texas) do not allow local school divisions to use seclusion. Of note, in many cases this is not a special education or regular education situation. In some other states it might be banned for special education students but appropriate for regular education students.

Mr. Eisenberg noted that it is permissible by statute to differentiate between different populations and the Board can direct that seclusion be banned for students with disabilities but make it permissible for regular education students under certain circumstances or vice versa.

Mrs. Atkinson commented that having worked with special education students in a day treatment program with severely mentally disabled students, she was familiar with time-out rooms that were seclusion rooms. She advised that there were very strict procedures related to the use of the room, including time related to appropriateness for the age of the child; two-way mirrors to see the child. Any time the room was used the parent knew by the end of the day because whatever triggered the child to be in the room would have an impact at home.

Mrs. Haymes advised that the staff recommendation was that the Board allow seclusion, pursuant to draft language, in that it is the belief that protections can be built in to allow the use of techniques and ensure the safety of students.

Mrs. Atkinson said that she had no recollection of time being included, which is an important component and needs to be appropriate to the age of the child. Schools need to have specific timeframes for seclusion.

Dr. Wilson noted she had similar comments and that providing some guidance to schools in terms of time is an important point.

Mr. Eisenberg noted that another option would be to differentiate between certain populations.

Ms. Holton had a clarification question regarding the “physically prevented from leaving” clause. If a student is instructed to go to a room and stay there while staff is figuring out what is going on, as long as there is not a locked door or something else physically preventing the child from leaving, is it correct that that does not come within the definition of seclusion and these constraints?

Mrs. Haymes responded that Ms. Holton was correct. There are significant comments regarding physically able to leave from advocacy groups who want language that the child “is free to leave.” In this example the child is not free to leave but is not physically restrained.

Decision Point 2 – Definition of seclusion regarding the last exception to what constitutes seclusion involving confinement of students during the investigation of violations of the Code of Student Conduct. Comments from administrators indicate the desire to have ability to separate

students – special education and general education students – to determine details of violation. The draft language allows the exception to address school disciplinary issues. Of the three options, based on concern for student safety, staff recommended that the language be eliminated as students should not be left alone without adult supervision.

Ms. Holton made a point for clarification. As long as the door is not locked, the proposed regulations would not constrain the school administrator.

Mr. Eisenberg added that instances where a SRO or teacher is guarding the door – is that physically preventing the student to leave? He stated that this is a gray area.

Dr. Cannaday expressed his concern that the language assumes you can push a button to pause, access whatever you see, and then make a determination as to whether or not you comply with different principles, and that the language is overly simplified to suggest people have more than a moment to make a decision.

Mrs. Atkinson observed that as a teacher, the expectation was that kids remain in their room. There seems to be an underlying premise that kids are free to roam the building but that if a child is put in a room they should remain in the room. Mr. Eisenberg asked Mrs. Atkinson if she would provide draft language regarding the issue.

Mr. Dillard asked for clarification regarding adult supervision. Is a two-way mirror or a visual monitor in the room adult supervision? He noted that it is important to understand what is meant by adult supervision.

Mrs. Haymes said the short answer is the requirement that the student is to be visually monitored, whether with a mirror or someone standing in the room.

Mr. Gecker commented that he sees the corporal punishment document as a liability shield and noted that these regulations can be geared toward behavior issues as opposed to investigations and corporal punishment.

Discussion Point 3 – Definition of seclusion, regarding exceptions. Strong comments from parent advocacy groups that the definition should not be “physically prevented from leaving” but should be “free to leave.” Staff’s recommended adding the language “so long as the student is not physically prevented from leaving” to all exceptions.

Mr. Romeo commented that in cases of imminent danger, it is important to know the students and their behaviors.

Decision Point 4 – Standards for seclusion rooms. Language is adopted from the Virginia Department of Behavioral Health’s regulations governing the use of seclusion rooms in residential facilities. VDOE received comments from superintendents, particularly on the prescriptive nature. Staff also received questions as to whether certain items could be in a room, i.e., comfort items, manipulatives, sensory items. Staff recommended maintaining current

language regarding dimensions, physical characteristics, but that it be modified to allow flexibility with regard to contents, so long as items do not pose a danger to the student.

Decision Point 5 – Prone and supine restraints. Draft language originally proposed to prohibit use of both as these tend to cause the most harm for students where breathing is restricted. Staff receive comments that some situations may require their use and when done correctly will not restrict a student’s airway. The 15 Principles do not ban prone or supine restraints but rather state they should never be used in a manner that restricts the airway or harms the child. Staff recommended that the Board adopt the language of the 15 Principles.

Decision Point 6 – Notification and reporting – parent. The current draft requires reasonable efforts be made to notify parents of an incident involving restraint and seclusion within one calendar day of the incident. Parents and advocacy groups argue for same-day notification. School organizations believe that one day was not long enough. Another option was one school-day notification. Because of concerns regarding traumatic brain injury and safety reasons, same-day notification to parents outweigh the inconvenience of trying to make contact with parents. Note, however, that the same-day notification is not the requirement but that reasonable efforts be made to contact the parent. Staff recommended same-day notification.

Mrs. Atkinson noted the opportunities for immediate notification; she is very much in favor of same-day notification.

Decision Point 7 – Notification and reporting – incident report timing. The current draft requires a written report within two school days. Comments from Superintendents indicated that the timeline was impractical while special education administrators urged five school days. Parents wanted written reports by the next calendar day. The original language was a compromise between practicality and risk of fading memory. Therefore, staff recommended that the current language be retained.

Decision Point 8 – Notification and reporting content. The draft regulations require 15 specific items in the notification. Special education administrators urged that the requirements be more general.

Staff suggested that while a more general report might elicit some of the requested information, asking specific questions would more readily assure the information is complete. If the goal is to understand the cause of the behavior in order to address it proactively, more details rather than less are necessary.

Mr. Gecker asked about the frequency of these reported incidents. Mr. Eisenberg responded that we did not have an answer because the data is not currently collected and the incidents vary widely. Part of the reason for these regulations is that, except for self-reporting data to the USDOE, this information does not and is not required to come to the Department of Education.

Ms. Holton commented on three points. In responding to Mr. Gecker’s question, with the narrow definition of restraint and seclusion, how many times does a faculty member put their

hands on a child in a dangerous situation – she would guess frequently. How many times would it meet the definition of restraint and seclusion – rarely, except in the context of perhaps gun control, special education circumstance, juvenile justice, etc.

Second, she proposed the following compromise language: “the written report shall include information on the incident sufficient to inform the parent fully, including typically the following:” then provide the full list. .

Finally, she stated that the issues involving SROs and juvenile justice facilities are very significant and thinking is needed but concern if we “try to think through” as part of this document they may never be completed. Apply regulations to all students and school personnel in public schools. Perhaps apply first to school personnel and think about opportunities to address with other agencies that may interact with students.

After a very lengthy discussion, Dr. Cannaday commented there were four additional points to review and asked members if they wished to continue or take a break. The consensus was to continue.

Decision Point 9 – Student debriefing. The current draft requires that the student and principal or principal designee meet to debrief about the incident and how to prevent a reoccurrence. Parents and advocates wanted the parent and/or other individuals at the parent’s request in the meeting. Options are to retain or expand to include parents or others. In terms of the purpose of the debriefing, staff suggested retaining current language.

Decision Point 10 – Prevention; use of multiple instances of restraint and seclusion – non IEP/504 students. The draft language requires that a school team convene after two incidents to consider, among other things, behavioral supports or possible referral for evaluation involving non-special education students. Parents and advocacy groups request that, for non-IEP or 504 students, after two incidents of restraint and seclusion a referral be mandated. Existing law already requires an evaluation for a suspected disability. Staff recommended retaining the current language.

Decision Point 11 - Prevention; use of multiple instances of restraint and seclusion – trigger. School commenters believe there should be more flexibility with regard to when a review is triggered, noting that it may be necessary to restrain a student with more challenging behaviors multiple times in a day. Options for consideration are to retain current language; change to provide discretion; or to provide some other trigger point for the review. Because the review point serves the purpose of encouraging use of evidence-based positive behavior interventions, staff recommended retaining the current language.

Mrs. Atkinson noted that when speaking of multiple incidents in a classroom, perhaps there would be a need to provide training and assistance for the teacher.

Decision Point 12 – Training. The current draft requires training for all school personnel in de-escalation, the restraint and seclusion regulations and advanced training for personnel employed in self-contained special education settings. One advocacy group proposed replacing

the advanced training for personnel in self-contained settings with a school-based crisis team. School groups were concerned with cost of the training and who would be required to have the training. Training levels could be differentiated. Every school person would receive initial training in evidenced-based practices and positive behavioral interventions. Teachers in self-contained special education settings where data shows the most serious incidences of injury occur would receive the more advanced training, through organizations that provide these types of trainings. Staff recommended retaining the current differentiation but in order to assist with cost, the Department of Education will develop the module for the first level training which would be similar to the existing dyslexia modules.

Mrs. Atkinson asked for clarification of the first level training or tier-one training. Mr. Eisenberg explained that it would be a basic training on preventive strategies, de-escalation strategies, required techniques if one should need to restrain a child.

Dr. Wilson commented that Attachment B of the information provided to Board members talks about initial v. advanced tiers. There should be consistency and if there is a level two it should be reflected in the document.

Mrs. Atkinson commented that training is very important and she is extremely concerned about cost. She noted, however, that there will be an opportunity to determine fiscal impact through the APA process.

Mr. Eisenberg noted that rough estimates suggest \$20 million would be necessary based on first-level training for every school. That figure would need to be modified to include cost of developing or modifying data bases, reporting requirements, advanced tier training and other variables.

Dr. Cannaday thanked staff for the presentation. The work session concluded at 12:15 p.m.