



**COMMONWEALTH OF VIRGINIA**  
*Department of Education*  
*Division of Special Education and Student Services*  
*Office of Dispute Resolution & Administrative Services*

April 2009

## **REPORT**

- TO: Special Education Directors Council  
State Special Education Advisory Committee
- FR: Judy Douglas and ODR/AS Staff
- RE: Review of Implementation of VDOE's "Guidelines for the Development of Policies and Procedures for Managing Student Behaviors in Emergency Situations in Virginia Public Schools: Focusing on Physical Restraint and Seclusion", November 2005 (Guidance Document)

## **BACKGROUND**

In November 2005, the Virginia Department of Education (VDOE) published the above referenced Guidance Document relative to the use of physical restraint and seclusion. This initiative was spearheaded by the SSEAC in an effort to assist Virginia's school divisions in developing local policies and procedures for physical restraint and seclusion of students in emergency situations. Through public comments in 2008 and at its January 2009 meeting, the SSEAC heard concerns from parents and advocates asserting that school personnel were mismanaging the use of physical restraint and seclusion, and that a number of Virginia's school divisions lacked local policies, procedures, regulations, or protocols on this subject, or were not relying on Virginia's Guidance Document.

This issue gained national coverage through the media (including "Dr. Phil") when a Georgia 13-year old boy with disabilities committed suicide after being secluded multiple times. The Georgia Superior Court issued its decision in this case on January 2, 2009, finding the school division not liable for the student's death. The case, however, triggered considerable national debate over the need for laws regarding restraint and seclusion.

In January 2009, the National Disability Rights Network (NDRN) issued its investigative report on abusive restraint and seclusion in schools, "School Is Not Supposed To Hurt".<sup>1</sup> NDRN found that 41% of states have no laws, policies, or guidelines concerning restraint or seclusion; almost 90% of states allow prone restraints<sup>2</sup>; and, 45% require or recommend that school administrators notify parents of restraint/seclusion use. Virginia's responses are noted as follows:

#### Virginia Response

Has statewide restrictions on restraint or seclusion	Restraint or seclusion restricted to ensure immediate physical safety of student or others	Prone Restraint banned	Automatic notice after restraint or seclusion	School staff training
Guidelines	No*	No	Parent (recommended in the Guidelines)	Yes (recommended in the Guidelines)

\*Virginia guidelines state that physical restraint and seclusion should only be used in "emergency situations", but do not define that term. (NDR Report, p. 45)

The report also examines the risks of using restraint or seclusion; presents case summaries that chronicle the harm of such practices;<sup>3</sup> reviews best practices of positive behavioral support programs; and details recommendations for public policy. The report states that NDRN staff are in the process of meeting with Secretary of Education Duncan and Congressional members with their recommendations, including insertion of language in the reauthorizations of the IDEA, NCLB, and Substance Abuse and Mental Health Administration to ban prone restraints, ban the use of seclusion, and permit the use of restraints by trained individuals only for immediate endangerment situations.<sup>4</sup>

Against this backdrop, at its January 2009 meeting, the SSEAC asked VDOE to determine whether local school divisions had adopted local policies or procedures implementing VDOE's guidance document on physical restraint and seclusion. As a part of this inquiry, VDOE was asked to ascertain the rationale of the school divisions that had not adopted such policies. Staff in VDOE's Office of Dispute Resolution and Administrative

<sup>1</sup> The report is available at: [www.NDRN.org](http://www.NDRN.org)

<sup>2</sup> Prone Restraint is a physical restraint in which an adult holds a child's face on the floor while pressing down on the child's back. Sudden fatal cardiac arrhythmia or respiratory arrest due to a combination of factors causing decreased oxygen delivery at a time of increased oxygen demand can occur through prone restraint. "The Lethal Hazard of Prone Restraint: Positional Asphyxiation, published by Protection and Advocacy, Inc. (2002), p. 3.

Web page: <http://www.pai-ca.org/pubs/701801.pdf>

<sup>3</sup> Note p. 26 of a Virginia incident.

<sup>4</sup> The NDRN Report does not include a definition of "endangerment situations". Their policy recommendations, however, include provision for the use of restraint "...when the immediate physical safety of the student, staff, or others is clearly required." (NDRN Report, pp. 38, 39, 40, 41)

Services (ODR/AS) developed its report to present to the SSEAC at its April 23-24 meeting, as well as to the Special Education Directors Council at the Council's April 21 meeting.

## SURVEY

ODR/AS staff contacted each Virginia public school division. The following chart reflects the responses.

- **LEAs that have adopted a written policy, procedure, regulation, protocol, or VDOE's Guidance Document: 38**

On restraint and seclusion: **34**

Campbell	Hampton	Norfolk	Spotsylvania
Chesapeake	Harrisonburg	Norton	Stafford
Chesterfield	Henrico	Orange	Sussex
Covington	Lynchburg	Pittsylvania	Westmoreland
Fairfax City	Madison	Prince George	Williamsburg-James City
Fairfax County	Manassas Park	Rappahannock	Wise
Fauquier	Mathews	Roanoke City	York
Frederick	Montgomery	Scott	
Grayson	New Kent	Southampton	

On restraint only: **4**

Augusta\*\* Culpepper Salem Staunton

- **LEAs that have no written policy, procedure, regulation, protocol, or are not using VDOE Guidance Document: 96**

Of the 96 school divisions, **20** LEAs are in the process of adopting a policy, procedure, regulation, or protocol:

Albemarle	Goochland*	Prince William
Alexandria	Greene	Rockingham
Arlington*	Louisa	Tazewell*
Bedford City*	King and Queen	Virginia Beach
Bedford County*	Newport News*	Washington
Bristol*	Portsmouth	
Caroline	Roanoke City (restraint only)	
Floyd (restraint only)* **		

76 school divisions have no plans at this time to develop/adopt a local policy, procedure, regulation, protocol, or use VDOE's Guidance Document.

Accomack	Charlottesville	Gloucester*	Martinsville	Richmond Co
Alleghany	Clarke	Greensville	Mecklenburg*	Rockbridge*
Amelia	Colonial Beach	Halifax*	Middlesex	Russell**
Amherst*	Colonial Heights	Hanover*	Nelson*	Shenandoah*
Appomattox	Craig**	Henry	Northampton	Smyth
Bath	Cumberland	Highland	Northumberland	Suffolk
Bland	Danville**	Hopewell	Nottaway	Surry
Botetourt*	Dickenson	Isle of Wight*	Page	Warren
Brunswick	Dinwiddie	King George	Patrick**	Waynesboro*
Buchanan**	Essex	King William*	Petersburg	West Point
Buckingham	Falls Church	Lancaster	Poquoson	Winchester
Buckingham	Fluvanna	Lee	Powhatan*	Wythe*
Buena Vista	Franklin City	Lexington	Prince Edward	
Carroll	Franklin County*	Loudoun* **	Pulaski	
Charles City	Fredericksburg	Lunenburg*	Radford* **	
Charlotte	Galax* **	Manassas City*	Richmond City	

- The school divisions identified with a single asterisk (\*) stated that they rely on the protocols as found in training programs contracted by the LEAs for responding to restraint issues but have no written policy, regulation, or other standard documenting their reliance on these protocols. Examples of the training programs:
  - ✓  MANDT
  - ✓  Non-Violent Conflict Intervention (NCI)
  - ✓  Crisis Prevention Institute (CPI)
  - ✓  Applied Crisis Training (ACT)
  - ✓  Handle with Care
  - ✓  Managing Aggressive Training
- The school divisions identified with a double asterisk (\*\*) reported that the division does not permit restraint and/or seclusion but has no written policy, regulation, or other standard describing this prohibition.

## II. Rationale for not adopting a policy, procedure, regulation, or protocol, or using VDOE's Guidance Document:

- Several school divisions rely solely on the Virginia School Board Association's Policy Service, and nothing has been forthcoming from VSBA in the form of a policy on this issue.

- Several school divisions said that their school board attorney or the VSBA advised them not to establish a policy, regulation, etc... on this issue.
- Several LEAs said that their superintendent and school administrators see no need for it; determined that such policy is unnecessary.
- Two LEAs said that the issue is too difficult to regulate.
- Two school divisions said that if a student needs the level of intervention involving restraint and/or seclusion, then the LEA would consider that the student needs a private placement.

### **III. Response from the Legal Community**

ODR/AS staff contacted 5 school board attorneys and the VSBA regarding their reluctance to support their clients adopting a written policy, procedure, etc... or relying on VDOE's Guidance Document. Their responses include the following comments.

- It is not possible to put everything that should occur in a situation involving restraint and/or seclusion in a local policy, procedure, regulation, or protocol.
- If the LEA adopts a policy, regulation, etc... on restraint and seclusion, the LEA is giving a potential plaintiff a standard against which the LEA's action can be judged. The LEA's failure to follow its own protocol arguably is negligence.
  - ✓ Several of the school board attorneys amplified this comment to further say that preserving the school division's immunity defense is critical as part of the attorney's advising their clients on matters that potentially may be litigated. For example, a school division could be held liable for establishing a policy that causes constitutional deprivations when that policy is used by someone who is reckless or deliberately indifferent to the consequences. When that happens, one has a difficult time arguing that one is immune from the consequences. The charge could be that the person did not follow the policy and therefore, was negligent in his/her actions. On the other hand, if there is no "policy", then the school division could argue that the school individual used his/her own discretion based on the circumstances at the point restraint was used with the student, and therefore, the person was not negligent in his/her use of the restraint.
- School divisions are better served in this instance having training programs that include well-established protocols for managing student behaviors in emergency situations.

#### **IV. Review of Case Law and SEA Systems**

##### VDOE Dispute Resolution Systems

- VDOE had one due process hearing on this subject initiated this year. The case was resolved before hearing and the parent withdrew the request for the hearing. A search of previous due process decisions over a 10-year period disclosed that this issue has not been the subject of other due process cases.
- VDOE has had one complaint in the last 10 years. In that case, the LEA was found in compliance with the FAPE regulations and safety. The record supported that the child's aide had been trained and certified in MANDT restraint techniques and had specialized training in behavior management. VDOE determined that the school division had acted reasonably in responding to protect the student and others in using restraint techniques, notified the child's parents immediately thereafter, and did not compromise the child's FAPE entitlement.

##### Case Law

Our search could not find any case law on point, and nothing remotely related in the Fourth Circuit. The only directly applicable case is the Georgia Superior Court decision referenced earlier. Training of school personnel on the use of physical restraint appears to be the critical factor in these situations, demonstrating the school division's commitment to protecting the safety of all students and school personnel.

##### SEA Practices

As noted earlier, the NDRN Report includes its survey of SEAs on this subject. ODR/AS searched other SEAs to determine if they had initiated any special projects involving the use of restraint and seclusion and children with disabilities.

Wisconsin DOE reported on its specialized initiative that involves a comprehensive, standardized program for all school employees (including bus drivers, kitchen staff, and maintenance people) in simple, safe seclusion and restraint procedures. According to Wisconsin DOE, such standardization provides consistency among the school divisions in the application of the use of restraint and seclusion and most importantly, ensures that the appropriateness of the children's IEPs is not compromised. To date, the training has been provided in more than 300 Wisconsin schools. The course is "available and open to all online as an easy-to-teach multimedia presentation."

The web site is: <http://www.specialed.us/S&R/S&R-index.html>

Our search could find no other SEA that has initiated or is planning initiatives on this subject.

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