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Fast-Track Regulation Agency Background Document

Agency name	Virginia Board of Education
Virginia Administrative Code (VAC) Chapter citation(s)	8VAC20-671-10; 8VAC20-750-20
VAC Chapter title(s)	<i>Regulations Governing the Operation of Private Schools for Students with Disabilities (8VAC20-671); Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia (8VAC-20-750)</i>
Action title	Fast Track Regulatory Action to Conform Definitions of "Traumatic Brain Injury"
Date this document prepared	October 25, 2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

During the 2021 Special Session I, the Virginia General Assembly enacted [Chapter 170](#) of the Acts of the Assembly, which directed the Board of Education ("Board") to amend the definition of "traumatic brain injury" in 8VAC20-81-10. At its meeting on September 23, 2021, the Board approved an exempt action ("Legislative Amendments to Regulations Governing Special Education Programs for Children with Disabilities in Virginia," effective November 24, 2021) to conform the definition as required by the legislation.

However, the legislation left the definition of "traumatic brain injury" in 8VAC20-671-10 untouched. There does not appear to be a reason for the definitions to differ across chapters. Further, there is not currently a definition of "traumatic brain injury" in 8VAC20-750-20. These changes were beyond the scope of the

legislation that required the Board to amend the definition in 8VAC20-81-10 and were inappropriate for the exempt action.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

None

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The Board approved "Fast Track Regulatory Action to Conform Definitions of 'Traumatic Brain Injury'" on October 21, 2021.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

During the 2021 Special Session I, the Virginia General Assembly enacted [Chapter 170](#) of the Acts of the Assembly, which directed the Board to amend the definition of "traumatic brain injury" in 8VAC20-81-10. At its meeting on September 23, 2021, the Board approved an exempt action ("Legislative Amendments to Regulations Governing Special Education Programs for Children with Disabilities in Virginia") to conform the definition as required by the legislation.

However, the legislation left the definition of "traumatic brain injury" in 8VAC20-671-10 untouched. There does not appear to be a reason for the definitions to differ across chapters. Further, there is not currently a definition of "traumatic brain injury" in 8VAC20-750-20. These changes were beyond the scope of the legislation that required the Board to amend the definition in 8VAC20-81-10 and were inappropriate for the exempt action.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter

number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The Board's overall regulatory authority is found in § [22.1-16](#) of the *Code of Virginia*, which states that "[t]he Board of Education may adopt bylaws for its own government and promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of this title."

The Board's regulatory authority over schools for students with disabilities is found in § [22.1-321](#) of the *Code of Virginia*, which states in part that "[t]he Board of Education shall make regulations [regarding schools for students with disabilities] not inconsistent with the law for the management and conduct of schools."

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The rationale for the regulatory change is to maintain consistency in the definition of "traumatic brain injury" across chapters of the Board's regulations. The 2021 General Assembly passed [House Bill 2182](#) requiring the Board to amend the regulatory definition of "traumatic brain injury" in 8VAC20-81-10 of the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* to read as follows:

"Traumatic brain injury" means an acquired injury to the brain caused by an external physical force or by other medical conditions, including stroke, anoxia, infectious disease, aneurysm, brain tumors, and neurological insults resulting from medical or surgical treatments, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma (34 CFR 300.8(c)(12))."

The expansion of the traumatic brain injury definition may allow more students to be identified under the traumatic brain injury category for special education services. The legislation did not change the definition of "traumatic brain injury" in 8VAC20-671-10 of the *Regulations Governing the Operation of Private Schools for Students with Disabilities*, and there is currently no definition of "traumatic brain injury" in 8VAC20-750-20 of the *Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*.

The regulatory change is essential to maintain consistency across the public and private school contexts in both the application of regulations and the protections afforded to students with disabilities.

The goal of the regulatory change is to maintain consistency across the public and private school contexts in both the application of regulations and the protections afforded to students with disabilities.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

This regulatory action will amend the definition of “traumatic brain injury” in 8VAC20-671-10 to conform to the definition of the same term in 8VAC20-81-10. The definition of “traumatic brain injury” in 8VAC20-81-10 was amended by the General Assembly in [Chapter 170](#) of the Acts of the Assembly. This regulatory action will also add a definition of “traumatic brain injury” to 8VAC20-750-20 to mirror the definition set by the General Assembly for 8VAC20-81-10.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantages to the regulatory change to the public and the agency/Commonwealth are that the Board will ensure consistency across the public and private school contexts in both the application of its regulations and the protections afforded to children with disabilities. There are no disadvantages to the regulatory change nor are there other pertinent matters of interest to the regulated community, government officials, or the public.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

The regulatory changes are not the result of changes to the federal requirements, but legislative changes enacted by the Virginia General Assembly.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. “Particularly affected” are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

This change will not affect other state agencies.

This regulatory change will effect school divisions. However, school divisions are already required to follow the Board’s regulations.

This regulatory change will effect private schools for students with disabilities. However, private schools for students with disabilities are already required to follow the Board’s regulations.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>It is anticipated that any costs associated with implementation would be absorbed within existing operational resources.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>It is not anticipated that this regulatory change will affect other state agencies.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change is essential to maintain consistency across the public and private school contexts in both the application of regulations and the protections afforded to students with disabilities.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>It is anticipated that any costs associated with implementation would be absorbed within existing operational resources.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change is essential to maintain consistency across the public and private school contexts in both the application of regulations and the protections afforded to students with disabilities.</p>

Impact on Other Entities

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>Private schools for students with disabilities</p>
<p>Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p>	<p>There are currently 118 private schools for students with disabilities in the Commonwealth licensed by the VDOE.</p>

<p>a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>This regulatory action will not affect small businesses.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.</p>	<p>It is anticipated that any costs associated with implementation would be absorbed within existing operational resources.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change is essential to maintain consistency across the public and private school contexts in both the application of regulations and the protections afforded to students with disabilities.</p>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

There are no alternatives to the regulatory change.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

There are no alternatives to the regulatory change.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

As required by § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Board of Education is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted Jim Chapman by email to jim.chapman@doe.virginia.gov or by mail to the following address:

Jim Chapman
 James Monroe Bldg.
 101 N. 14th St, 25th Floor
 Richmond, VA 23219

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
8VAC20-671-10		This section includes definitions, including the following definition of "traumatic brain injury":	The definition of "traumatic brain injury" will be amended as follows: "Traumatic brain injury" means an acquired injury to the brain caused by an

		<p>"Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative or to brain injuries induced by birth trauma.</p>	<p>external physical force or by other medical conditions, including stroke, anoxia, infectious disease, aneurysm, brain tumors, and neurological insults resulting from medical or surgical treatments, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative or to brain injuries induced by birth trauma.</p>
<p>8VAC20-750-20</p>		<p>This section does not currently include a definition of "traumatic brain injury."</p>	<p>The following definition of "traumatic brain injury" will be added:</p> <p>"Traumatic brain injury" means an acquired injury to the brain caused by an external physical force or by other medical conditions, including stroke, anoxia, infectious disease, aneurysm, brain tumors, and neurological insults resulting from medical or surgical treatments, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative or to brain injuries induced by birth trauma.</p>