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Fast-Track Regulation Agency Background Document

Agency name	State Board of Education
Virginia Administrative Code (VAC) Chapter citation(s)	8VAC20-671-10, 650, 660 [amend] 8VAC20-671-665 [new section]
VAC Chapter title(s)	Regulations Governing the Operation of Private Schools for Students with Disabilities
Action title	Legislative mandate to establish the same requirements on restraint and seclusion for private special education day schools as those for public schools
Date this document prepared	January 7, 2022

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 552](#) of the Acts of the Assembly, which amended and reenacted Chapter 1289 of the 2020 Acts of the Assembly, Special Session I, which appropriated funds for the 2020-2022 Biennium.

[Item 138.I](#) of Chapter 552 directed the Board of Education to “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* (8VAC20-671) are already in close alignment to the *Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia* (8VAC20-750). The amendments to the *Regulations*

Governing the Operation of Private Schools for Students with Disabilities adds definitions, adds requirements associated with the development of policies and procedures related to the use of seclusion and application of restraints, and alters the requirements for reporting the use of seclusion and application of restraints.

All regulatory changes are necessary to “establish the same requirements for restraint and seclusion [for private special education day schools] as those for public schools”—as directed by the General Assembly—with minimal, technical modifications to account for the differences between private day schools and public schools.

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.

“Board” means the Virginia Board of Education.

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 reviewed and adopted the action “Legislative mandate to establish the same requirements on restraint and seclusion for private special education day schools as those for public schools” on January 27, 2022.

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.

The regulatory change is the result of a legislative mandate. The change is to enact the General Assembly’s directive to the Board. The Board expects that this action will be noncontroversial because it has exercised minimal discretion in effectuating the legislative mandate.

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.

[Item 138.I](#) of Chapter 552 directed the Board to “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 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 private schools for students with disabilities is found in § [22.1-321](#), which states that “[t]he Board of Education shall make regulations not inconsistent with law for the management and conduct of [schools for students with disabilities]. The regulations may include standards for programs offered by the 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 or justification for this regulatory action is that it is the result of a legislative mandate.

The action will help protect the health, safety, and welfare of special education students by ensuring that adequate standards are in place for the use of seclusion and restraint in private special education day schools.

The goal of this regulatory action is to establish the same requirements on restraint and seclusion for private special education day schools as those for public schools. Currently, the requirements for restraint and seclusion differ between the public and private school contexts.

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.

The changes are limited to those necessary to effectuate the legislative mandate.

The changes to [8VAC20-671-10](#) add definitions that are in [8VAC20-750](#) (*Regulations Governing the Use of Seclusion and Restraint in Public Elementary and Secondary Schools in Virginia*) or conform current definitions to those in [8VAC20-750](#). The action modifies the following definitions in [8VAC20-671-10](#):

- aversive stimuli;
- behavioral intervention plan;
- consent;
- education records;
- mechanical constraint;
- physical restraint;
- seclusion;
- Section 504 plan, which eliminates the need for a definition of 504 plan); and

- time-out.

The action adds definitions for the following terms to [8VAC20-671-10](#):

- child with a disability;
- corporal punishment;
- day;
- evaluation;
- functional behavioral assessment;
- individualized education program team;
- restraint;
- school day;
- school personnel; and
- student

The changes to [8VAC20-671-650](#) align this section with the parallel requirement for public schools in [8VAC20-750-30](#).

The changes to [8VAC20-671-660](#) strike all the current requirements regarding restraint and seclusion for private schools for students with disabilities.

A new section sets the same requirements for restraint and seclusion for private special education day schools as those for public schools:

- Subsection A corresponds to [8VAC20-750-40](#) A;
- Subsection B corresponds to [8VAC20-750-40](#) B through F;
- Subsection C corresponds to [8VAC20-750-50](#);
- Subsection D corresponds to [8VAC20-750-60](#);
- Subsection E corresponds to [8VAC20-750-70](#);
- Subsection F corresponds to [8VAC20-750-80](#);
- Subsection G corresponds to [8VAC20-750-90](#);
- Subsection H corresponds to [8VAC20-750-100](#); and
- Subsection I corresponds to [8VAC20-750-110](#)

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 advantage of this action to the public is that this action effectuates the legislative intent of [Item 138.I](#) of [Chapter 552](#). The action has no disadvantages to the public. There are no advantages or disadvantages to the agency or the Commonwealth, 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.

There are no applicable federal requirements.

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.

There are no other state agencies that will be particularly affected by this action. There are no localities that will be particularly affected by this action. There are no other entities that will be particularly affected by this action.

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

<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	It is not anticipated that this regulatory change will affect agency operations or resources.
<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.	It is not anticipated that this regulatory change will affect other state agencies.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	The primary advantage of this action to the public is that this action effectuates the legislative intent of Item 138.I of Chapter 552 .

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	It is not anticipated that this regulatory change will affect localities.
Benefits the regulatory change is designed to produce.	The primary advantage of this action to the public is that this action effectuates the legislative intent of Item 138.I of Chapter 552 .

Impact on Other Entities

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.	Private schools for students with disabilities.
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: 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.	There are currently 118 private schools for students with disabilities in the Commonwealth licensed by the VDOE. This regulatory action will not affect small businesses.
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.	It is anticipated that any costs associated with implementation would be absorbed within existing operational resources.
Benefits the regulatory change is designed to produce.	The primary advantage of this action to the public is that this action effectuates the legislative intent of Item 138.I of Chapter 552 .

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		The definition of “504 Plan” will be removed.	This definition will be added as “Section 504 plan” to align with the terminology and definition in 8VAC20-750-20.
8VAC20-671-10		The definition of “aversive stimuli” will be changed.	The definition will be changed to align with the definition in 8VAC20-750-10. The new definition will not include “placement of a student alone in a room, where the door is locked or held shut and the student is prevented from leaving the room.” However, this aspect of the definition will be addressed through regulations regarding the use of seclusion.
8VAC20-671-10		The definition of “behavioral intervention plan” will be changed.	The definition will be changed to align with the definition in 8VAC20-750-20.
8VAC20-671-10			A definition of “child with a disability” or “student with a disability” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10		The definition of “consent” will be changed.	These are technical edits to the definition to make the reference to “parent” consistent. There is no substantial difference between the current language and the proposed change.
8VAC20-671-10			A definition of “corporal punishment” will be added to align with the definition in 8VAC20-750-10.
8VAC20-671-10			A definition of “day” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10		The definition of “education records” will be changed.	These are technical edits to the definition to make the reference to “parent” consistent. There is no substantial difference between the current language and the proposed change.
8VAC20-671-10			A definition of “evaluation” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10			A definition of “functional behavioral assessment” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10			A definition of “individualized education program team” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10		The definition of “mechanical restraint” will be changed.	The definition of “mechanical restraint” will be changed to align with the definition in 8VAC20-750-10.
8VAC20-671-10		The definition of “physical restraint” will be changed.	The definition of “physical restraint” will be changed to align with the definition in 8VAC20-750-10. The new definition

			specifies that physical restraint does not include “the use of incidental, minor, or reasonable physical contact or other actions designed to maintain order and control.”
8VAC20-671-10			A definition of “restraint” will be added to align with the definition in 8VAC20-750-10.
8VAC20-671-10			A definition of “school day” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10			A definition of “school personnel” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10		The definition of “seclusion” will be changed.	The definition of “seclusion” will be changed to align with the definition in 8VAC20-750-10.
8VAC20-671-10			A definition of “Section 504 plan” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10			A definition of “student” will be added to align with the definition in 8VAC20-750-20.
8VAC20-671-10		The definition of “time-out” will be changed.	The definition of “time-out” will be changed to align with the definition in 8VAC20-750-10.
8VAC20-671-650		The current 8VAC20-671-650 1 prohibits the use of restraint and seclusion except in cases where necessary for student safety.	The action will add substantive provisions regarding the use of restraint and seclusion. The proposed 8VAC20-671-650 A 1 has been changed to prohibit the use of mechanical restraints, as in 8VAC20-750-30.
8VAC20-671-650		The current 8VAC20-671-650 2 prohibits the use of prone restraints, mechanical restraints, pharmacological restraints, restraints that restrict a student’s breathing, restraints that harm the child, and restraints that interfere with the child’s ability to communicate.	<p>The proposed 8VAC20-671-650 A 2 will narrow to prohibit prone restraints and other restraints that restrict the student’s breathing or harm the student.</p> <p>The prohibition on the use of mechanical restraints is addressed in the proposed 8VAC20-671-650 A 1. The prohibition on the use of pharmacological restraints is addressed in the proposed 8VAC20-671-650 A 9.</p> <p>The prohibition on restraints that interfere with the child’s ability to communicate will be removed, since there is no comparable prohibition in 8VAC20-750. To keep this prohibition would violate the legislative directive to “establish the same requirements for restraint and seclusion [for private special education day schools] as those for public schools.”</p>

8VAC20-671-650		The current 8VAC20-671-650 3 prohibits the deprivation of drinking water or food.	In the proposed action, this prohibition is already included in the definition of "aversive stimuli." Therefore, the prohibition will be removed as redundant.
8VAC20-671-650			The current 8VAC20-671-650 4 will be renumbered as 8VAC20-671-650 A 3.
8VAC20-671-650			The current 8VAC20-671-650 5 will be renumbered as 8VAC20-671-650 A 4.
8VAC20-671-650			The current 8VAC20-671-650 6 will be aligned with the parallel requirement in 8VAC20-750-30 7 and renumbered as 8VAC20-671-650 A 5.
8VAC20-671-650		The current 8VAC20-671-650 7 prohibits the deprivation of approved prescription medication or other necessary services.	In the proposed action, this prohibition is already included in the definition of "aversive stimuli." Therefore, the prohibition will be removed as redundant.
8VAC20-671-650		The current 8VAC20-671-650 8 prohibits against the denial of access to toilet facilities.	In the proposed action, this prohibition is already included in the definition of "aversive stimuli." Therefore, the prohibition will be removed as redundant.
8VAC20-671-650			The current 8VAC20-671-650 9 will be aligned with the parallel requirement in 8VAC20-750-30 3 and renumbered as 8VAC20-671-650 A 6.
8VAC20-671-650			The current 8VAC20-671-650 10 and 11 will be renumbered as 8VAC20-671-650 A 7 and 8, respectively.
8VAC20-671-650			The prohibition on use of pharmacological restraints will be added to align with the parallel requirement in 8VAC20-750-30 A 2.
8VAC20-671-650			The prohibition on use of seclusion that restricts a student's breathing or harms the student will be added to align with the parallel requirement in 8VAC20-750-30 A 5.
8VAC20-671-650			The prohibition on use of physical restraint or seclusion as (i) punishment or discipline; (ii) a means of coercion or retaliation; (iii) a convenience; (iv) to prevent property damage, or in other manner other than as provided by regulation will be added to align with the parallel requirement in 8VAC20-750-30 A 6.
8VAC20-671-650			The prohibition on use of seclusion rooms or freestanding units not meeting the standards set forth in regulation will be added to align with the parallel requirement in 8VAC20-750-30 A 8.
8VAC20-671-650			The prohibition on use of restraint or seclusion when medically or psychologically contraindicated as stated in documentation by the IEP team, the

			<p>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 will be added to align with the parallel requirement in 8VAC20-750-30 A 9.</p>
8VAC20-671-650			<p>The proposed action will add the interpretive directive that nothing in the section shall be construed to prohibit physical restraint or seclusion under the conditions outlined in the regulation. This parallels the requirement in 8VAC20-750-30 B.</p>
8VAC20-671-660		8VAC20-671-650 B includes the current substantive provisions regarding the circumstances under which restraint and seclusion are currently allowed in private special education day schools, parental notification, documentation of the application of physical restraint and seclusion, and reporting requirements.	<p>These provisions will be removed and promulgated in a new section that parallels the requirements in 8VAC20-750 40 through 110. The requirements in 8VAC20-750-10 through 30 have already been made in the proposed changes to 8VAC20-671-10 and 8VAC20-671-650.</p>
	8VAC20-671-665		<p>The proposed new section will add the substantive provisions regarding seclusion and restraint in order to realize the legislative directive to “establish the same requirements for restraint and seclusion [for private special education day schools] as those for public schools.”</p> <p>The proposed 8VAC20-671-665 A clarifies that the chapter shall not be construed to require a school to employ physical restraint or seclusion, in accordance with the parallel requirement in 8VAC20-750-40 A.</p> <p>The proposed 8VAC20-671-665 B includes provisions regarding the use of physical restraint and seclusion that parallel the requirements in 8VAC20-750-40 B through F.</p> <p>The proposed 8VAC20-671-665 C includes provisions regarding the standards for the use of seclusion that parallel the requirements in 8VAC20-750-50.</p> <p>The proposed 8VAC20-671-665 D includes provisions regarding the notification and reporting of instances of</p>

			<p>physical restraint and seclusion that parallel the requirements in 8VAC20-750-60.</p> <p>The proposed 8VAC20-671-665 E includes provisions that set standards for school policies and procedures that parallel the requirements in 8VAC20-750-70.</p> <p>The proposed 8VAC20-671-665 F includes provisions regarding multiple uses of restraint and seclusion that parallel the requirements in 8VAC20-750-80.</p> <p>The proposed 8VAC20-671-665 G includes provisions regarding annual reporting that parallel the requirements in 8VAC20-750-90.</p> <p>The proposed 8VAC20-671-665 H includes provisions regarding training of school personnel for schools that employ seclusion and restraint. These provisions parallel the requirements in 8VAC20-750-100.</p> <p>The proposed 8VAC20-671-665 I includes provisions governing the construction of the chapter that parallel the requirements in 8VAC20-750-110.</p>
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