

**LEGAL ANALYSIS**  
**SENATE BILL 782 AND HOUSE BILL 1443: THE USE OF SECLUSION AND**  
**RESTRAINT IN PUBLIC SCHOOLS ARE ILLEGAL**

**VIRGINIA & FEDERAL LAWS VIOLATED**

**Point 1: The “Imminent Danger of Serious Physical Harm” required by SB 782 and HB 1443 violates the following Virginia and Federal Laws**

**The United States Constitution:**

Specifically, 2nd, 5th, 9th and 14th Amendment rights to due process/equal protection. Defense of self and others is considered to be an inherent and fundamental right.

***Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1969)**

Holding, students [and teachers] do not shed their Constitutional right [to self defense] at the schoolhouse gate.

**The Constitution of the State of Virginia**

**Section 1. Equality and rights of men** “That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty..., and pursuing and obtaining happiness and safety.”

**Section 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.** That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation....

**Conclusion:** Virginia’s Constitution gives educators the right to defend life, liberty, natural and inalienable rights by all means reasonable. An employee who works at a Virginia school does not lose her right to defend self and others at school. This right is not subject to a “serious bodily injury standard.” Further, the use of safely engineered prone holding methods is entirely reasonable and lawful.

**Common Law Decisions Upholding a Person’s Constitutional Right of Defense of Self and Others**

**Use of physical force in defense of a person.**

- “[A] person who reasonably apprehends bodily harm by another is privileged to exercise reasonable force to repel the assault. *Diffendal v. Commonwealth*, 8 VaApp 417, 421 (1989).
- “[A] person assaulted while in the discharge of a lawful act, and reasonably apprehending that his assailant will do him bodily harm, has the right to repel the

assault by all the force he deems necessary, and is not compelled to retreat from his assailant, but may, in turn, become the assailant, inflicting bodily wounds until his person is out of danger. *Jackson v. Commonwealth*, 96 Va. 107 (1898).

- "This right of self-defense is founded on the law of nature, which confers on every individual the right to defend and maintain the possession of that which belongs to him, by those means which are necessary to attain this object." *Dodson v. Commonwealth*, 159 Va. 976 (1933) (quoting Davis' Criminal Law pp. 70, 72, 76-7.)

### **Use of physical force in defense of others:**

- The right to defend another "is commensurate with self defense" *Foster v. Commonwealth*, 13 Aa. App. 380 (1991).
- The right of self-defense is not merely personal, but extends to defending others against attack. *Id* at 385-6.

### **Analysis:**

"Serious physical harm" and "serious bodily harm" are interchangeable terms that have significant meaning under the law. According to the proposed bill, teachers must ignore non-serious injuries like burns, fractures, fights, beatings, severe property destruction, joint dislocations, bites, hair pulls, temporary concussions, lacerations that require stitches, brain concussions and knife and gun wounds that fail to dismember or injure a vital organ.

While the Legislature<sup>1</sup> believes teachers should not act until a child, campus visitor or coworker is about to lose an arm or an organ, Virginia law says otherwise and requires a "reasonable" standard when protecting self, others or property; Virginia Constitution. It is illegal, to require a teacher or any citizen of Virginia, for that matter, to refrain from defending herself or intervening until she or another is subjected to 'serious physical harm.' In their haste to establish a standard that would make it nearly impossible to physical intervene, the authors of this Bill were inexplicably ignorant or intentionally blind to the severity of injuries that legally constitute serious physical harm.

Serious physical harm is defined by statute as "physical injury that creates a substantial risk of death; extreme physical pain; or that causes protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, mental faculty or organ." 18 U.S.C. 1365; VA Code 16.1-283. Thus a teacher following SB 782 or HB 1443 would have to allow an out-of-control child in her classroom to continue beating another child, maybe your child, until it reached the threshold of losing an eye or a limb or the child was about to be permanently disfigured or killed before intervening physically.

Examples of non-serious injuries include: kicking a teacher's shins and stomping on her toes until both her legs and feet were red; brain concussion, lacerations that require stitches, abrasions, bruises, burns, bites, a temporary loss of consciousness (a "KO"), loss of hearing, loss of a tooth, bone fractures, stabbing and gunshot wounds that fall sort of dismembering or injuring a vital organ.

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<sup>1</sup> Each Legislator took an oath of office that s/he "will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia." Persons have a Constitutional and State right to protect themselves from bodily harm using reasonable force (including reasonable physical force.).

If the Virginia Legislature enacts this bill, it should add a provision indemnifying school employees from accusations of abuse and neglect. No parent is going to tolerate uninterrupted acts of violence to be perpetrated on her child.<sup>2</sup>

**Point II: Banning physical intervention for the protection of property violates the following Virginia law:**

**VA Code 22.1-279.1: Use of physical intervention in defense of property and to maintain a safe educational environment**

“This prohibition of corporal punishment [by a teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth] shall NOT be deemed to prevent (i) the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) the use of reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance which threatens physical injury to persons or damage to property; (iii) the use of reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) the use of reasonable and necessary force for self-defense or the defense of others; or (v) the use of reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or paraphernalia which are upon the person of the student or within his control.”

The right to property includes the right to protect and preserve said property, is also a natural right that is protected under both the U.S. and Virginia Constitutions and Virginia Statute. Virginia Constitution: Bill of Rights Section 1. VA Code 22.1-279.1.<sup>3</sup>

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<sup>2</sup> Teacher assistant criminally charged with child for failure to take action to protect students. <http://www.wftv.com/news/news/local/2-teacher-assistants-students-charged-after-classr/ncsCb/>. Multimillion dollar suit filed against school for failure to take action to protect students. <http://handlewithcare.com/tn-multimillion-dollar-suit-filed-against-school-for-failure-to-protect-bullying-assault-and-battery>. School bus driver may face charges for failure to protect. <http://handlewithcare.com/student-attacked-on-school-bus>. Michigan courts give teachers right to sue if school system fails to discipline students who are safety risks. <http://handlewithcare.com/mi-michigan-courts-give-teachers-right-to-sue-if-school-system-fails-to-discipline-students-who-are-safety-risks>. Lincoln County School District sued for millions for failing to protect students against a 6 year old.

If the state puts a man (or child) in danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). While legislators may be immune from suit, schools act in loco parentis of students and have an independent duty to protect.

<sup>3</sup> Two years ago, Maine enacted a regulation prohibiting teachers from intervening for property destruction. The resulting disruption in schools was so severe, that the regulation was rescinded and amended less than 6 months after it was enacted.

Kentucky contemplated a similar statute, but wisely decided not to proceed. Attached are pictures of the damage to Maine and Kentucky classrooms when their teachers are not allowed, or fail, to intervene for property destruction.

### **Point III: Federal laws violated by SB 782 and HB 1443: The right to a professional judgment standard when restraint is used as part of an IEP or BP**

#### ***Youngberg v. Romeo, 457 U.S. 307 (1982)***

This Supreme Court applied the professional judgment standard in ruling that the legal responsibility for making treatment and safety decisions rests exclusively with our facility professionals who work directly with our patients and who are best able to 1) determine the clinical needs of the client and 2) balance those needs with the overall safety and security needs of the facility. IDEA and Rule 504 also support the individual's right to treatment and education.

#### **St. Catherine's Care Center of Findlay v. Centers for Medicare & Medicaid Services, Docket No. C-01-721; Decision No Cr1190 (June 14, 2004)**

A Federal Administrative Court ruled that it is the responsibility of the entity that [is in charge of the student] to determine the crisis intervention [restraint] program in place at the [school]. The court also held that the crisis intervention and restraint program and policy in place must meet the "real needs" of the [school] and, further, "neither federal reimbursement practices nor state screening practices relieves the [school] of its responsibility to provide its [students] with necessary [education, safety] and services."

#### **Analysis:**

In deciding *Youngberg*, SCOTUS established the "Professional Judgment Standard" and made it clear that it is only the state-licensed professionals working directly with a student who are 1) qualified and in a position to weigh the physical and emotional needs of the [student] and 2) balance the student's needs against the overall safety and security concerns and needs of the [school]. The safety protocols and restraining decisions which are specified in the student's Individualized Education or Behavior Plan (IEP/IBP) have the stamp of constitutional approval.

The American Association of School Administrators ("AASA") states "Legislation or policy that prohibits parents and school personnel from communicating about the student's needs and corresponding school interventions ***runs counter to the entire purpose of the Individuals with Disabilities in Education Act (IDEA)***." Virginia's education and treatment teams are all operating within the scope of their training and license when they make decisions regarding restraint, including what type of restraint method should be used into an IEP.

The duty and responsibility to provide appropriate treatment, welfare, safety and education decisions rests entirely with the school and treatment team. The opinion of legislators, or state bureaucrats, operating from a remote location and without benefit of contact with the student and no personal stake in a safe outcome matters not according to SCOTUS.<sup>4</sup>

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<sup>4</sup> DOE's guidance (and now HB 1443 and SB 782) on what can be placed in a student's IEP/BP is illegal as it is counter to IDEA and Section 504. DOE's recommendation that schools adopt a "serious bodily harm" or "serious physical injury" standard is illegal. This is why the recommendation was made in a non-binding politically motivated guidance document rather than legislation or by regulation.