HANDLE WITH CARE

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TIME SENSITIVE
PLEASE DISSEMINATE TO ALL SENATORS AND HOUSE MEMBERS

Senate Bill 782 and House Bill 1443: Use of Restraint and Seclusion in Schools = Illegal & Dangerous

Dear Senator or House Member,

If the either of the two Education Bills currently under consideration by the Virginia House and Senate are passed, Virginia's politicians will be imposing their will over the best clinical judgments of the real experts in Virginia, the State-licensed professionals who comprise the Education Teams in every Virginia school. It is as stupid, as it is unlawful.

Background:

The advocacy community and radical disability rights attorneys who are creating all the pressure to pass a new law in Virginia have two things in common; little to no discernable expertise on the subject of restraint and strong visceral feelings that restraint is irreparably harmful to children. They have absolutely no science to support their position that the use of restraint is inherently dangerous or counter-therapeutic. On the contrary, failure to take action when it is needed is dangerous and counter-therapeutic. This law also serves to advance and codify the relentless witch hunt advocates are waging against well-engineered prone restraining methods; completely absent science or reason. If you repeat a lie often enough and loudly enough it will eventually become accepted as truth, which is precisely what is taking place here.

We also suspect U.S. Department of Justice complicity in creating this pressure. DOJ routinely conducts "investigations" into allegations of abuse as soon as they are flagged by the publicly funded disability rights attorneys who are driving this bus. DOJ and the advocate-attorneys all share an ideological/political point of view, the common goal of universally banning restraint and they work in concert with each other. The advocates throw the flag on a school for wholly unsubstantiated civil rights allegations and DOJ shows up to muscle and coerce policy concessions that are ultimately detrimental to safety and order using the threat of a protracted and costly federal lawsuit. It is a cynical racket to extract a plethora of totally unrelated concessions from school districts, agencies and States that meet narrow ideological objectives. Their chronic ignorance and misrepresentations of the actual laws governing restraint usage amounts to malpractice.

The Virginia House and Senate are being manipulated into passing feel-good legislation that purports to protect children from the very professionals who are treating and educating them. You are being played. Two States that have already passed laws identical in substance to the two proposed Bills currently before you have all witnessed a dramatic increase in classroom violence and chaos, wanton destruction of property and daily calls to local law enforcement to manage violent students. When you make it impossible for teachers to do their job they start calling the police. One State repealed the law, the other State cannot rescind its law fast enough. We gave advanced notice to both States that their

proposed restrictions were unlawful and would have unintended consequences. It remains to be seen whether Virginia's government officials are smart enough to profit from their failure.

Fortunately, when common sense fails, there is always the law. There are two main legal theories that apply to the use of physical restraint and seclusion.

SCOTUS and the "Professional Judgment Standard":

The "Professional Judgment Standard" was recognized by the U.S. Supreme Court in deciding *Youngberg*. This decision wisely holds that the only people who are in a position to make restraint and use-of-force decisions are the administrators and the State-licensed professionals who comprise the [student's] treatment team. The Supreme Court recognized that the people who are entrusted with direct responsibility for the care and welfare of the [child] are in the best position to appraise the [child's] physical and emotional needs and balance his needs against the overall safety and security of the [school]. When these State-licensed professionals assess a student's needs, devise a restraint or seclusion plan (the use of a prone hold, for instance) that meets those needs, and they place that plan in the child's Individual Treatment, Behavior, or Education Plan, it has the stamp of Constitutional approval. No one else's opinion matters as long as the professionals on the team are practicing within the scope of their licenses and practice.

Government officials and bureaucrats have no more business telling teachers, psychologists and other professionals how to manage classroom behavior than you do telling the child's psychiatrist or pediatrician what medication to prescribe. Children with emotional and psychiatric conditions that are so serious that they would have been placed in a more protective custodial environment previously are now being kept at home and educated in the public school system. We applaud that. However, you cannot place children who are out-of-control and a risk to themselves and others in a public classroom without giving faculty the tools to manage them safely and appropriately. This law is specifically intended to deprive them of those tools.

Virginia Self-Defense Law:

Virginia has a well-established body of case law regarding defense of self or another. A citizen of Virginia has the right to protect herself or another person or child from harm. A teacher in a Virginia school does not lose her right to come to the defense of self or another when she crosses onto campus grounds. With all due respect, she does not need your permission or the approval of her principal prior to defending life and property.

The law permits her to use "reasonable force" in accordance with a "reasonable person" standard. The entire purpose for training teachers in how to use safe and appropriate restraining methods (including expertly engineered supine and prone floor holds) is to enable teachers to use far less force than the law would otherwise allow. Competently engineered restraining methods fall way within a standard of reasonableness. There are special needs and mainstream students in Virginia's schools who, at twice the height and weight of the faculty, are far more physically capable. The faculty deserves to have the tools to keep themselves and everyone else safe.

The "Serious Bodily Harm" Threshold:

There is nothing in Virginia case law which requires a teacher to wait until someone is about to suffer "serious bodily harm" before protecting herself or another citizen. "Serious Bodily Harm" has a widely

understood legal definition that includes the amputation of limbs, the loss of an eye or permanent disfigurement. A serious blow to the head that would cause a concussion or a broken nose does not rise to the legal threshold of serious bodily harm. Before passing this law, you need to ask yourself, how it will be possible for a teacher to know whether a blow to the head will cause a simple concussion and loss of consciousness (which does not meet the legal threshold) or cause a Subdural Hematoma and the possibility of death (which does).

Moreover, this threshold is so high that it would actually enable a renegade teacher or aide who might be angry toward a particular child to allow that child to be battered by proxy. She could assert that the law requires her to take no action at all because the beating fell short of disfiguring. Quite frankly, any legislator who would deliberately place a school and its teachers and children in this position, is depraved.

Teachers Will Need Indemnification from Criminal Prosecution and Civil Complaints

Teachers will be prosecuted for neglect and abuse when they stand idly by as a child in her care is battered or injures himself. Schools will be targeted with a flood of lawsuits when teachers follow this law to the letter. The only people who will not need indemnification for all the damage this new law will cause are the disability rights industry at large, its advocates and attorneys and, now, Virginia legislators - all operating from the safety and security of your offices.

If you are going to pass a law that places teachers in this position, you should add a clause that indemnifies teachers from criminal charges of abuse and neglect and shields schools and teachers from civil lawsuits. They do not deserve to be held accountable for the errant judgment of their Legislature and Governor.

The Right to an Education:

Children are smart. They will quickly learn that violent behavior that falls just short of "serious bodily harm" is perfectly acceptable. It will not take long for him to figure out where the line is drawn and exactly how much latitude he has to disrupt a classroom or put others at risk before decisive action is taken. Children need to be protected from the physical and emotional consequences of their behavior in the short term and in the long term. If you agree that the ultimate goal of education is to prepare children and adolescents for the realities of adult life to achieve personal and professional success, you are about to make that much harder for a large number of children in Virginia. I know of no post high school graduation work situation or social environment that will ignore the kinds of dangerous and destructive behaviors teachers face every day. Children have a right to an education and some hope of a successful life as adults regardless of their condition or disability.

There is No Need for a New Law:

The current policies that have been developed and instituted by the Virginia Department of Education are effective, reasonable and perfectly lawful. There is nothing to fix. It is clear to us that a considerable amount of thoughtful consideration and balance went into DOE's current formulation of policy. It would be equally clear to you if you read it.

We do not expect the advocates and advocacy attorneys to have any common sense. However, teachers in Virginia's schools, students that attend them and parents expect their Senators, House

Members and the Governor to have common sense or they will hold their politicians accountable for the damage caused them. We hope they do.

In summary:

We apologize for the stark and confrontational language used in this communication. While it may be stark, it is completely honest and historically accurate. We are entering this discussion late and we only have one shot at convincing you and your Governor that a new law containing these provisions and restrictions is a very bad idea. For the record, our company can easily adapt to this new law without any loss of income or distress to us. We advance these arguments on behalf of children and teachers because we feel it is our duty to do so.

Be advised, we will be forwarding this document to every school, teacher and media outlet in the Virginia, along with the "Handle With Care Personal Empowerment Kit". We will be making it easy for teachers to petition their State Attorney General for his legal opinion as to whether this new law violates existing Virginia Law and their rights and to ask for indemnification by the State. HWC House Counsel, Hilary Adler and I had an opportunity to advance similar legal arguments with Virginia's Attorney General in 1999. He found our legal analysis with respect to Virginia self-defense law, as it applies to citizens of the State who are employed by the Virginia Department of Juvenile Justice, concise and completely on point. Sixteen years later, the disability rights attorneys still have no answer for our legal analysis.

Be also advised, HWC will not tolerate retaliation for exercising our right to speak with clarity and authority on a subject we know a lot about. A copy of my CV is attached.
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Attached is our recitation of the constellation of Federal laws, State laws, Administrative Court, Appellate Court and Supreme Court Decisions this new law will violate.

Please, vote "NO".

If you need to speak with me or Attorney and Vice President, Hilary Adler, you can call us directly at 845-255-4031.

Respectfully submitted;

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cc. Governor Terry McAuliffe, Attorney General Mark Herring, DOE Superintendent Dr. Steven Staples, BOE President Christian Braunlich, All Virginia School Superintendents, School Boards, Principles, Risk Management, School Legal Counsel, Special Education Departments, Local government representatives i.e. mayors and teachers.

Retaliation for the exercise of our first amendment rights will not be tolerated.

Attachment A

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[1] 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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[1] 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.[2]

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.[3]

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[2] 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-studens-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.

[3] 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.[4]

[4] 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.