



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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VIRGINIA FEDERAL COURT SAYS SOME STUDENTS MAY REQUEST CLASSMATES WEAR MASKS

On January 15, 2022, Virginia's Governor Youngkin signed Executive Order 2, authorizing parents to opt their children out of any masking requirements in Virginia's schools. The Virginia General Assembly followed suit a month later when it codified the requirement with Senate Bill 739. On March 23, 2022, the United States District Court for the Western District of Virginia entered a limited injunction against the Governor, the Virginia Attorney General, and ten Virginia school divisions from enforcing the E.O. 2 and S.B. 739. The Plaintiff students in *Seaman, et al., v. Commonwealth of Virginia, et al.*, suffer disabilities putting them at significant health risk should they contract COVID-19. They allege that E.O. 2 and S.B. 739 violate their rights under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The Court granted a limited injunction: "[O]nly those schools Plaintiffs attend or would attend are directly impacted by this Court's decision."

Nonetheless, school principals in non-Defendant school divisions should anticipate their students may seek similar relief. "[F]ederal law, namely the ADA and the Rehabilitation Act, affords Plaintiffs a right to request a reasonable modification from state or local laws" because state laws are preempted when creating an obstacle to Plaintiffs' rights. The Court enjoined enforcement of the Virginia laws "to the extent that such actions would seek to prevent or limit Plaintiffs' schools or school districts from *considering in the first instance* whether Plaintiffs' individualized requests for masking

constitute a reasonable modification under federal law."

The opinion reviews: (1) COVID's impact on public health and the Center for Disease Control's/Virginia Department of Health's recommendations regarding mitigation efforts, including vaccination, social distancing, testing, avoiding poorly ventilated spaces, and wearing masks; (2) individuals with certain medical conditions (e.g., cancer, chronic kidney disease, chronic liver disease, chronic lung disease, cystic fibrosis, type 1 or type 2 diabetes, heart conditions, and various other disabilities) are

more likely to get very sick, be hospitalized, need intensive care, require a ventilator, or die from COVID-19; and (3) Virginia's COVID-19/public schools legislation, including (a) former Senate Bill 1303,

which required "in-person instruction in a manner in which it adheres, to the maximum extent practicable, to any currently applicable mitigation strategies for . . . elementary and secondary schools to reduce the transmission of COVID-19 that have been provided by the federal [CDC];" and (b) former Executive Order 79, which mandated masks for students and staff with certain exceptions. E.O.2 rescinded E.O. 79: "The parents of any child enrolled in a[n] elementary or secondary school . . . may elect for their children not to be subject to any mask mandate in effect at the schools' school or educational program." It provides that no parent may be required to give a reason or make a certification concerning their child's health or education.

"The Court need not and cannot rule as a matter of law that required masking is or is not reasonable in all school districts as applied to all student bodies...."

The Court highlighted that Plaintiffs' physicians advised them that universal masking policy in their schools is important and the risks presented to Plaintiffs by voluntary masking policies. The advice varied in degree from student to student based on their respective medical needs and based on differing specific COVID-19 guidelines, such as those issued by the CDC. The medical opinions stated they could not return to their respective schools without universal masking. At the time of the Court's opinion, all the Defendant school division communities had "high" or "moderate" COVID-19 transmission according to VDH; one division was in the moderate level and the remaining nine in the low level under CDC metrics. Community transmission was trending downward significantly.

The opinion addresses "lawyerly" issues: standing of the parties, exhaustion of administrative remedies, and application of a four-part test for injunctive relief. Plaintiffs had standing because they suffered: (1) *actual* injury (forced to forego critical educational opportunities, including in-person learning, in the absence of masking requirements and deficiencies in remote learning); and (2) substantial risk of future harm (because other accommodations, e.g., social distancing, were insufficient to prevent harm). Plaintiffs did not allege inadequate special education programming so were not required to exhaust administrative remedies before filing suit.

The primary substantive question to support injunctive relief was whether mandatory masking is a necessary and reasonable modification for the Plaintiffs under federal law. "The Court need not and cannot rule as a matter of law that required masking is or is not reasonable in all school districts as applied to all student bodies. What federal law requires is a fact-specific inquiry into reasonableness. E.O. 2 and S.B. 739 cannot preclude Plaintiffs from asking for some required masking as a reasonable modification, nor bar their schools from implementing some required masking, if doing so would, in fact, be a reasonable modification." Under preemption

doctrine, "Title II of the ADA trumps state regulations that conflict with its requirements, considering that requiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does." Public entities must make reasonable accommodations to policies, practices, or procedures when the modifications are necessary to avoid disability discrimination, unless they can demonstrate the modifications would fundamentally alter the nature of the service, program or activity.

Several courts have ruled that some required masking is/can be a reasonable accommodation, state laws notwithstanding. Plaintiffs introduced substantial evidence that masking in some form is necessary for them: many of their treating doctors told them it was unsafe for them to return if masking was optional. "Plaintiffs have the better of the argument that masking is a necessary modification and COVID-19 risk mitigation measure for them, notwithstanding other steps that have been (and might be) taken to reduce risk."

The Court ruled for the Plaintiffs, to the extent that the Virginia laws prevented or limited Plaintiffs' school division from *considering* their individualized requests whether some amount of masking is a reasonable modification. It opined threats of illness or even death, along with unavailable and/or substantially inequivalent alternatives to in-person instruction, constituted evidence of harm to Plaintiffs. Finally, the Court recognized the public's interest in giving Plaintiffs and school divisions authority to consider Plaintiffs' individualized requests for some masking, but within limits: the Court enjoined "the Defendants from enforcing E.O. 2 and S.B. 739 *only to the extent* that their actions would seek to prevent or limit *Plaintiffs' schools or school districts* from considering, in the first instance, whether *Plaintiffs'* individualized requests for masking constitute a reasonable modification under federal law."

Despite this limitation, school administrators should expect similar requests from other students and be prepared to confer with School Board counsel about an appropriate response.

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