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Dr. James Lane
Virginia Department of Education
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June 30, 2020

Dear Dr. Lane:

On behalf of our ODACS churches and schools, I want to thank you for your letter of June 24. We appreciate your taking the time to send us a thoughtful response. We also appreciate Holly Coy for sharing with you the letter of June 15 that we had sent to several lawmakers and had copied to her. We believe that your response does preclude our need to get answers from the attorney general's office; we have therefore decided to withdraw our attorney general's opinion request.

We believe that your letter gives helpful and satisfactory answers to five of our seven questions, specifically, to questions 2, 3, 4, 5, and 7. We appreciate your clarifying that VDOE does not have legal authority to approve or to deny any health-related reopening plan for private schools, that VDOE does not have inspection authority related to a private school's reopening plan, that VDOE does not have legal authority to enjoin a private school's operation based on a private school's reopening plan, that submission of a reopening plan by a private school to VDOE does not legally constitute a seeking of permission to reopen, and that reopening guidance gives private schools discretion on whether to make plans publicly available online. Furthermore, we especially appreciate the following clarifying text from your letter: "...the Governor's Phase Guidance serves as a recommendation for Virginia's private schools to mitigate risk associated with COVID-19. Schools should make decisions on implementing such guidance, and assuming additional risk, in consultation with local health departments and school attorneys."

We also watched the governor's June 25 press conference carefully. We appreciated the governor's allowing his chief of staff, Mr. Clark Mercer, to make the following clarifying remarks about the reopening of schools this fall.

"The Virginia guidance document...is intended to inform the discussions happening at the local level, but it does not mandate any one particular approach. Guidance is not law."

"It has been represented that the guidance is in fact law to these localities. That is not the case."

"The final decisions about reopening are squarely in the hands of local school boards."



“Local public health conditions, community concerns, and practical facility constraints have to be taken into account in these school reopening decisions, and we believe our local leaders are best positioned to do that thoughtfully.”

While it was clear that Mr. Mercer’s remarks were made with public schools in mind, since VDOE does not have legal oversight of private schools in Virginia, we believe that it is reasonable to conclude that the substance of his comments applies even more so to Virginia’s private schools.

However, we do believe that two of our questions remain unanswered.

1. Does VDH have the legal authority to require that private schools submit health-related reopening plans to a different state agency such as VDOE?
6. Under the law, is a private school’s submission of a reopening plan to VDOE tantamount to registering its existence with VDOE? If so, can either VDOE or VDH legally require such a registration?

In the absence of direct answers to these questions, and based on our understanding of Virginia code, we conclude that the answer to each of these questions is No. Our request letter included one final question.

Will the plan submission requirement evolve into a permanent registration requirement, essentially by regulatory mandate rather than by legislation?

It is likely that nobody can give a definite answer to this question right now, but we believe that the possibility posed by the question is very real.

Dr. Lane, the dynamics of this reopening plan submission requirement stand in stark contrast to the usual dynamics of how state government works. When the state has the legal authority to require the submission of any sort of plan or documentation, customarily accompanying that authority is the authority to approve, deny, inspect, and ultimately to enjoin operation. Since VDOE has no legal enforcement authority over a private school’s reopening plan, then cannot it not rightly be concluded that VDOE has no legal authority to require the submission of such a plan to begin with? Furthermore, since VDOE has no legal enforcement authority, then cannot it rightly be concluded that a *different* state agency such as VDH cannot legally require a private school to submit a plan to VDOE?

Additionally, we have examined school reopening guidance recently published by the American Academy of Pediatrics.¹ While VDOE’s guidance document, *Recover, Redesign, and Restart*, contains an abundance of helpful suggestions for mitigating the spread of COVID-19 in the coming school year, we find that the AAP’s guidance includes suggestions that, though still challenging, are somewhat less exacting and therefore might better facilitate an effective return to in-person instruction.

Based on all of this information, ODACS will be giving the following advice to its member schools.

1. While we appreciate the extensive and helpful information included in VDOE’s booklet *Recover, Redesign, and Restart*, ODACS advises each school to use the published guidance as a resource only and not to submit reopening plans to VDOE.
2. ODACS advises each school to draft its own reopening plan, taking into consideration current CDC and VDOE guidance, as well as local public health conditions, community concerns, and

facility limitations. Furthermore, we encourage each school to look closely at school reopening guidance published by the American Academy of Pediatrics.¹

3. ODACS advises each school to seek the input of local health officials and/or school attorneys.
4. ODACS advises each school to publish its reopening plans to all parents who seek to enroll their children in the school.
5. ODACS advises each school to make its plan flexible, so that the school can adjust to changing COVID-19 conditions in its local area.

Thank you again for taking time from your busy schedule to address some of our concerns and for taking additional time to read this letter.

Sincerely,

A handwritten signature in black ink that reads "Dan Zacharias". The signature is written in a cursive, flowing style.

Dan Zacharias
Executive Director

¹ <https://downloads.aap.org/AAP/PDF/COVID-19%20School%20Re-entry%20Interim%20Guidance%20FINAL%20062520.pdf>