

Rationale for ODACS Reopening Advice to Schools August 10, 2020



On June 8, 2020, pursuant to §32.1-13 and §32.1-20 of the Code of Virginia, the State Health Commissioner ordered private preschools and K-12 schools, before reopening in accordance with Phase II and III guidelines, to submit to the Virginia Department of Education a plan outlining their strategies for mitigating the spread of COVID-19.

The legal basis for the operation of each ODACS preschool is Virginia's Religious Exemption from childcare licensure; pursuant to §63.2-1716 of the Code of Virginia, each ODACS preschool annually submits to the Virginia Department of Social Services documentation verifying the compliance of its preschool program with §63.2-1716 of the Code of Virginia. Furthermore, the Code of Virginia gives the Virginia Department of Education no direct oversight over private K-12 schools.

Virginia childcare centers that operate pursuant to §63.2-1716 of the Code of Virginia have been allowed to operate throughout the COVID-19 pandemic, communicating their mitigation plans with the Department of Social Services in the process, and without being required to submit mitigation plans to the Virginia Department of Education.

Section §32.1-13 of the Code of Virginia gives the State Health Commissioner authority to issue emergency health regulations; however, §32.1-13 of the Code of Virginia cannot be reasonably construed to give the State Health Commissioner authority to grant to a different state department regulatory authority that does not already exist in the Code of Virginia.

Communications between the Old Dominion Association of Church Schools and the Superintendent of Public Instruction have led to confusion regarding the purpose of the requirement that private preschools and K-12 schools submit reopening plans to VDOE. In a letter dated June 24, 2020, Dr. James Lane, the Superintendent of Public Instruction, informed ODACS that

“[t]he State Health Commissioner's order only requires that schools and school divisions submit their Phase Health Plan to the VDOE. As such, private schools have fulfilled their obligation to submit a plan by virtue of submission alone. The State Health Commissioner's order does not give VDOE the authority to approve plans nor does it require plans to be approved prior to reopening. Therefore, VDOE is not and will not approve or deny Phase Health Plans for any schools, public or private. This process does not constitute an inspection and is only for the purpose of providing additional resources or technical support, if required. VDOE will not be conducting in-person inspections of any kind related to this matter.”

“Additionally, the Phase Health Plan requirement does not assume or allow VDOE authority over the operation of private schools. Private schools may resume in-person operations in alignment with their reopening plan without approval or authorization from VDOE.”

While ODACS schools appreciate that VDOE has stated that it is assuming no oversight authority over private schools, that fact begs the question of why plan submission should be required rather than voluntary. The stated purpose “of providing additional resources or technical support, if required” would make sense only if a private school were voluntarily seeking such resources or support.

According to data published by the Virginia Department of Health on its COVID-19 Daily Dashboard, children are far less likely than older people to contract and to spread COVID-19; as of August 10, 2020, there have been only 11,444 COVID-19 cases in Virginia for individuals under age 20, a number which is less than 1% of the total number of public school students in the Commonwealth. Furthermore, as of August 10, no child in Virginia has died of COVID-19.

Both the American Academy of Pediatrics and the Centers for Disease Control and Prevention have issued public statements advocating the return to in-person instruction for America's students, emphasizing the urgent need for students to return to the classroom, and making the case that a return to in-person instruction can be done safely.