



## **Old Dominion Association of Church Schools**

### **IMPORTANT UPDATE FOR SCHOOL REOPENING RULES ODACS ASKS LAWMAKERS TO ASSIST WITH REQUESTING OPINION FROM ATTORNEY GENERAL**

June 15, 2020

Dear ODACS Friends,

Today, ODACS asked lawmakers for help seeking an opinion from the attorney general regarding the legality of certain aspects of the school reopening rules announced last week by Governor Northam. **Please note that ODACS is advising its ministries *not* to submit reopening plans to VDOE, at least as long as answers to our questions are pending.**

Following is the text of the letter that was sent to several members of the General Assembly and to an assistant superintendent for the Virginia Department of Education. Schools that are interested in doing so are encouraged to use this letter as a template and to submit the same request to their own senator and delegate.

#### **Request for Help Seeking Attorney General's Opinion Regarding Certain Questions about the Legality of the Governor's Back-to-School Orders as They Relate to Private Schools**

ODACS has several important questions regarding Governor Northam's school reopening rules, particularly as they apply to private schools. We have not been able to find the answers to these questions in any of the statements or guidance that have been published by the governor's office, by the Virginia Department of Education, or by the Virginia Department of Health. Before stating our questions, we would like to state our perspective about what has happened to date during the COVID-19 pandemic.

#### **Background**

ODACS cares deeply about the health and safety of its students and teachers. On Thursday, March 12, one day before the governor's initial school closure order, we made the difficult decision to suspend seven ODACS regional and state fine arts competitions that were scheduled over the course of the weeks of March 16 and March 23. We went ahead with our Mountain Region Competition near Lynchburg on Friday, March 13, and we learned about the governor's first school closure order during that competition. A few days later, we were forced to cancel the remaining events that had been suspended.

Throughout the school closure, our schools have done an outstanding job of delivering to their students instruction in new content. Each school formulated its own version of remote learning. Typically, school was

closed for a week or two while teachers were trained, then instruction resumed in earnest. Wrinkles in the new system were ironed out over time, but students were able to continue to make academic progress.

Some of our preschools and daycares, all of which operate under Virginia's Religious Exemption from Childcare Licensure, were closed during the shutdown. Others were able to continue to operate in compliance with the governor's childcare guidelines and in consultation with the Virginia Department of Social Services.

Additionally, our churches willingly complied with the governor's order to discontinue holding services inside our church buildings. Some of our churches held drive-in services, while most provided worship services via livestream.

As the pandemic and the shutdown continued, we paid careful attention to the governor's press conferences, to the information being disseminated by the federal government and the media, and to the data published daily by the Virginia Department of Health. We listened to the initial rationale of the need to "flatten the curve" so that our hospitals would not be overrun with COVID-19 patients beyond their capacity; then we watched as Virginia hospitals remained largely empty and had to respond to lost revenue by laying off tens of thousands of healthcare workers.<sup>1</sup> We have noted that as of June 14, there have been a total of 1,522 deaths attribute to COVID-19 in Virginia,<sup>2</sup> compared to 3,663 pneumonia and influenza-associated deaths during the 2019-2020 season.<sup>3</sup> **We have noted that, according to VDH, to date there have been 0 (zero) deaths of individuals under the age of 20 due to COVID-19;<sup>2</sup> this fact is especially remarkable in light of the fact that childcare centers have been allowed to remain open throughout the pandemic.** We have also noted that there have been 3 deaths of individuals ages 20-29, 12 deaths of individuals ages 30-39, 37 deaths of individuals ages 40-49, and 92 deaths of individuals ages 50-59.<sup>2</sup> Furthermore, we have noted that the majority of COVID-19 related deaths have been of individuals ages 80 and older.<sup>2</sup> While the passing away of any human being is a sad and profound loss, and while there is also no doubt that COVID-19 presents a real danger to Virginia citizens, we also believe that these numbers indicate a public health threat that is much smaller than what we have been led to believe.

#### **Our Questions about the Reopening of Schools for 2020-2021**

Having said all of that, we do remain concerned about the health and safety of our students and teachers as we look ahead to the beginning of the new school year. We believe, however, that individual private schools and public school districts can be trusted to implement their own policies and practices to mitigate the spread of COVID-19, without the need for detailed and cumbersome directives from the governor or the Department of Education. We believe that schools can be trusted to communicate those policies and practices with parents and students, to adjust the policies and practices as the pandemic grows or subsides, and to cope with the outcomes of the policies and practices that they implement.

Furthermore, we have serious concerns about the fact that the commissioner of health has ordered private schools to place themselves in a position of being subject for the very first time to the oversight of the Virginia Department of Education. We have serious concerns about the legality of such oversight as well as about the limits that may or may not apply to that oversight, limits which are enumerated neither in the health commissioner's order nor in the accompanying VDOE guidance. We understand that private school plans are to be submitted first to the Virginia Council for Private Education, but we also see clearly stated in the VDH and VDOE documents that VDOE does have final oversight of private school plans.

**Therefore, ODACS is requesting that you assist us with seeking the opinion of the attorney general with regard to the answers to the following questions.**

- 1. Does VDH have the legal authority to require private schools to submit health-related reopening plans to a different state agency such as VDOE?**

2. Does VDOE have the legal authority to approve or to disapprove private school reopening plans that are submitted to VDOE?
3. Does VDOE have legal inspection authority with regard to reopening plans submitted by private schools?
4. Does VDOE have the legal authority to enjoin a private school's operation on the basis of the private school's reopening plan?
5. Under the law, is a private school's submission of a reopening plan to VDOE understood to be informative only, or is it understood to be an exercise of seeking permission to reopen?
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? Will the plan submission requirement evolve into a permanent registration requirement, essentially by regulatory mandate rather than by legislation?
7. In the guidance document for the reopening plan submission requirement, what is meant by the statement, "Plans must be posted online"? Does it mean that a private school must post its plan on its own web site, or does it mean that the private school must post its plan on the VDOE web site? In either case, does either VDH or VDOE have the legal authority to make such a requirement?

ODACS concedes that the situation would be very different had the health commissioner required reopening plans to be submitted to VDH instead of to VDOE. Serious questions about executive overreach would remain, but questions about the legality of VDOE oversight of private schools would no longer be necessary.

In view of the serious nature of these questions, ODACS deems it necessary to advise its ministries to *not* submit reopening plans to VDOE, at least as long as answers to our questions are pending. Meanwhile, we have heard that several members of the General Assembly are considering mounting a different kind of legal challenge to the governor's school reopening rules. We are interested in participating in such a challenge should you and other members deem it to be a course of action more advisable than an attorney general opinion request.

We thank you for your service to our commonwealth, and we appreciate your consideration of our requests and concerns.

<sup>1</sup> <https://www.nbc12.com/2020/04/10/more-than-virginia-health-care-industry-laid-off-amid-pandemic/>

<sup>2</sup> <https://www.vdh.virginia.gov/coronavirus/>

<sup>3</sup> [https://www.vdh.virginia.gov/epidemiology/influenza-flu-in-virginia/influenza-surveillance/?fbclid=IwAR3Um3kxwVFRK-44AMx5WO\\_cb0GQ3BgT3ZRxlwBj--cJVIPiazuvnXeFhrw](https://www.vdh.virginia.gov/epidemiology/influenza-flu-in-virginia/influenza-surveillance/?fbclid=IwAR3Um3kxwVFRK-44AMx5WO_cb0GQ3BgT3ZRxlwBj--cJVIPiazuvnXeFhrw)