



COMMONWEALTH of VIRGINIA

Jillian Balow
Superintendent of Public Instruction

DEPARTMENT OF EDUCATION
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December 15, 2022

Dr. Jared A. Cotton
Superintendent
Chesapeake Public Schools
312 Cedar Road
Chesapeake, Virginia 23322
jared.cotton@cpschools.com

RE: *Seaman v. Commonwealth of Virginia*, No. 3:22-cv-6 (W.D. Va.)

Dear Dr. Cotton:

On March 23, 2022, the United States District Court for the Western District of Virginia ruled in *Seaman v. Commonwealth of Virginia*, No. 3:22-cv-6 (W.D. Va.), that twelve students in Virginia public schools have the right under the Americans with Disabilities Act (ADA), 42 U.S.C. § 1201 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to request that their schools consider implementing peer masking as a reasonable modification of school masking policies. You are receiving this letter because one of those twelve students attends Grassfield Elementary and one attends Southeastern Elementary in Chesapeake Public Schools.

I write to explain the Department's understanding of the interaction between the ADA and Rehabilitation Act and Senate Bill (S.B. 739), codified at Va. Code § 22.1-2.1, and Executive Order No. 2 (E.O.2). As you know, S.B. 739 and E.O. 2 protect the right of Virginia's parents to decide whether their children will wear a mask in school, notwithstanding any school rule that would require students to wear masks. The ADA and Rehabilitation Act forbid discrimination on the basis of disability, and require schools to make reasonable modifications to their policies and practices to accommodate students with disabilities.

The court has held that S.B. 739 and E.O. 2 remain fully in force and that the right of Virginia's parents to decide whether their children will wear a mask in school remains intact. It also held that the parents of the children in the case have the right to request, and if necessary receive, some amount of required masking of their child's peers as a reasonable modification under the ADA and Rehabilitation Act. Therefore, neither S.B. 739 nor E.O. 2 pose any obstacle to a parent requesting some amount of required masking as a reasonable modification under the ADA or Rehabilitation Act. And if some amount of required masking is a reasonable modification necessary to satisfy the ADA and Rehabilitation Act rights of a student with disabilities, S.B. 739 and E.O. 2 do not prohibit this modification.

The school must engage in the interactive process with the student and his or her parents to determine in the first instance whether some amount of masking is necessary to satisfy the ADA and Rehabilitation Act. In making that determination, a school should consider alternative modifications such as one-way masking, staff or teacher masking, ventilation improvements, and social distancing. If a school nevertheless determines that peer masking is the reasonable modification necessary to satisfy the ADA and Rehabilitation Act rights of a student with a disability, S.B. 739 and E.O. 2 do not prohibit this modification. Any required masking should be limited to the places and times necessary to satisfy the requirements of the ADA and Rehabilitation Act. The school must not require a student with disabilities to be segregated or excluded solely because of his or her need for peer masking as a necessary reasonable modification.

The school must also protect the state-law rights of parents who have decided under S.B. 739 and E.O. 2 that their children will not wear a mask. It must take every reasonable step consistent with state and federal law to ensure that any student whose parents do not want him or her to wear a mask is not required to wear one. For example, the school must, if possible, offer the student an alternative seat or classroom assignment to accommodate his or her parents' wishes. In addition, the school may not require any student to mask when doing so would violate that student's rights under the ADA and Rehabilitation Act, or when doing so would significantly impair that student's health or education due to a demonstrated medical condition.

Thank you for your attention to this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jillian Balow". The signature is fluid and cursive, with a large initial "J" and "B".

Jillian Balow
Superintendent of Public Instruction