



September 13, 2021

Dear Members of Kentucky School Boards and Superintendents,

The ACLU of Kentucky and the Children's Law Center call on you to protect Kentucky students whose disability, including underlying health conditions, makes them particularly susceptible to severe illness from COVID-19. The Kentucky General Assembly recently enacted a law that effectively removes the current emergency regulation, 702 KAR 1:195E, which had required all individuals including students, school employees, contractors, and visitors, to wear a mask while in any school facility. Each individual school district now has the obligation to set its own rules regarding masking in school facilities.

In setting your own school district's requirements, however, schools must continue to uphold the legal rights of students with underlying medical conditions or disabilities that make them particularly vulnerable to COVID-19. School districts therefore must choose whether to ignore CDC recommendations or meet their obligations under federal disability laws, to integrate, not exclude children with disabilities from public education. As long as there are students in your school district who have higher risk for severe illness or even death due to COVID-19, any policy that differs from the existing mask mandate would effectively exclude these students from public schools, in violation of the Americans with Disabilities Act and the Rehabilitation Act.

Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504" or "Rehabilitation Act") provide broad protections for individuals with disabilities. These federal disability rights laws prohibit outright exclusion, denial of equal access, or unnecessary segregation for students with disabilities in public education.¹ Both laws also prohibit methods of administration that defeat the fundamental goals of public schools, that is, to provide an education. Finally, both federal disability rights laws impose affirmative obligations on covered entities to proactively provide reasonable modifications or reasonable accommodations to ensure that individuals with disabilities have an equal opportunity to benefit from their public education. Implementing the CDC's recommended COVID-19 layered mitigation measures, including implementing universal indoor masking by students, staff and visitors would demonstrate an effort by each of your school districts to meet the ADA and Rehabilitation Act's requirements for children with disabilities.

It is highly likely that some of the students at your schools have a physical or mental impairment that substantially limit one or more major life activities, or a record of such an

¹ *Wilson v. Gregory*, 3 F. 4th 844, 859 (6th Cir. 2021); *Zibbell v. Mich. Dept. of Human Servs.*, 313 Fed. Appx. 843, 849 (6th Cir. 2007).

impairment under the ADA.² Likewise, many of the students at your schools meet the “essential eligibility requirements” for participation in the programs or activities provided by the public entity (e.g., they are the right age to be eligible for public education in the state) under the ADA. Refusing to implement all federally recommended mitigation measures, including universal masking, may be considered a willful disregard of the rights of disabled students and casts a negative light on your duties to protect its disabled students.

Failing to continue the universal mask mandate would not permit a public entity to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.³ Relegating students into a separate classroom or remote learning “for their safety” would violate this integration mandate, and therefore would likely violate the students’ rights under Section 504 of the Rehabilitation Act by discriminating on the basis of disability. Indeed, last week, a federal court in Tennessee entered a Temporary Restraining Order ordering a school district to enforce a mask mandate. *See G.S. et al. v. Lee*, Case No. 21-cv-02552 (W.D. Tenn. Sept. 3, 2021).

The COVID-19 pandemic has not absolved Kentucky schools from these requirements, and Kentucky officials cannot waive these obligations for them.

Respectfully,

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² Bonilla, Francisco. *Population Prevalence of Diagnosed Primary Immunodeficiency Diseases in the United States*. Pediatrics. November 2008, 122 (Supplement 4) (calculated prevalence of diagnosed immunodeficiency was 1 in 2000 children, 1 in 1200 people of all ages, and 1 in 600 households). Available online at <https://doi.org/10.1542/peds.2008-2139FFFF>

³ 28 C.F.R. § 35.130(d).