

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

CHRISTOPHER SEAMAN and)
ELIZABETH ALLISON LYONS,)
individually and on behalf of C.S., a minor, et)
al.,)

Plaintiffs,)

v.)

THE COMMONWEALTH OF VIRGINIA,)
et al.,)

Defendants.)

No. 3:22-cv-6-NKM

**FAIRFAX COUNTY PARENTS ASSOCIATION
AMICUS BRIEF IN OPPOSITION OF PLAINTIFFS’ MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

FCPA is a nonpartisan, volunteer, grassroots organization of parents that seeks to ensure students are the first priority in Fairfax County Public Schools. FCPA represents a wide cross-section of families who have a deep interest in the quality of education in Fairfax County Public Schools. FCPA supports the right of parents to decide whether their children should be masked in schools as codified by the Virginia legislature in Senate Bill 739 (“S.B. 739”) and provided for in Governor Youngkin’s Executive Order #2.

The Code of Virginia provides that “A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child.” Va. Code § 1-240.1. Whether a child should wear a mask in school is a decision regarding that child’s upbringing, education and care. There is no federal law that preempts this right.

ARGUMENT

A. Federal Law Does Not Preempt State Law Concerning Parental Choice

Neither the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 *et seq.* nor Section 504 of the Rehabilitation Act (“Section 504”) preempt state law when it comes to parents’ rights to control the education, upbringing, and care of their children. Both these federal laws are focused on ensuring equal access and opportunity to public programs and non-discriminatory practices for individuals with disabilities, but they do not address the right of states to provide fundamental rights concerning parents raising their children.¹ Ensuring that parents are the primary party responsible for decisions regarding the health and safety of their children is a right reserved to the states and not the federal government under the 10th Amendment. Similarly, the American Rescue Plan Act (“ARPA”), 42 U.S.C. § 802 *et seq.* has no preemptive effect on state education laws. It is an appropriations bill, not a regulation.

“States have long possessed primary responsibility in our federal system for protecting the health and safety of their citizens.” *S. Blasting Servs. v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002) (citing “*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Medtronic* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹ The principal purpose of the ADA is to “(1) . . . provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b).

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education. Section 504 provides: “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .” 29 U.S.C. § 794.

There are several ways in which federal law may supersede state law. First, Congress may expressly preempt such laws. *See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Second, in the absence of express preemptive language, Congress’ intent to preempt state law may be implied when “federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Last, preemption can be implied if state law “actually conflicts with federal law.” Such a conflict occurs “when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hillsborough*, 471 U.S. at 713 (internal quotations omitted).

Here, neither the ADA, Section 504, nor ARPA address parental rights concerning the education, upbringing, and care of children—there is no explicit or implied preemption. *See, e.g.*, 29 CFR Appx. to Part 1630 (The ADA “does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part and designed to protect the public health from individuals who pose a direct threat to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation.”). Therefore, the only issue that remains is whether there is a conflict with complying with those laws and the Virginia law providing parents with a fundamental right to make decisions for their children that affect their care, education and upbringing. There is no conflict.

B. Federal Law Does Not Preempt State Law Concerning Parental Choice

The Supreme Court has observed, “to infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.” *Hillsborough*, 471 U.S. at 717. And

the Court has “observed repeatedly that preemption is ordinarily not to be implied absent an ‘actual conflict.’” *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (internal citations omitted). Courts should not “seek[] out conflicts between state and federal regulation where none clearly exists.” *Id.* at 90 (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)). There is no conflict between the Virginia law and Federal law because the laws are separate—the right to care for a child is separate from laws designed to ensure no discrimination of a child.

Moreover, states have historically had the power to regulate the health and wellness of their citizens. The question before this Court is therefore “not whether states have previously regulated in the precise manner or to the degree that the federal government has itself chosen to regulate” *City of L.A. v. AECOM Servs.*, 854 F.3d 1149, 1159 (9th Cir. 2017), but rather whether “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). No such obstacle exists between federal disability laws and the rights of parents to care for their children.

Consistent with Va. Code § 1-240.1, S.B. 739 was passed and signed into law on February 16, 2022, and codified as Va. Code § 22.1-2.1. This law gives parents the right to “elect for [their] child to not wear a mask while on school property.” *Id.* Parents are witnessing harms to their children due to prolonged masking. The harms are especially pronounced in children receiving speech therapy interventions.² Speech therapy interventions are largely ineffective behind masks and the consequences of leaving speech and language disorders untreated are dire.

² See, e.g., Stephanie H. Murray, *Speech Therapy Shows the Difficult Tradeoffs of Wearing Masks*, The Atlantic (Mar. 2, 2022), available at <https://www.theatlantic.com/family/archive/2022/03/how-masks-get-way-speech-therapy-kids/623332/> (specifically noting that “masks hide the mouth from view, which the therapists said is disruptive to some forms of therapy, especially those that target motor speech and motor planning.”).

Not only may the child be unable to fully resolve these learning disabilities if left untreated, the social and emotional impact of being unable to effectively communicate creates a host of behavioral issues resulting in lifelong problems.

Parents are seeing these issues firsthand.³ They are observing the mental health decline of their children as they live more socially isolated lives behind masks. Not being able to see expressions on faces, clearly hear classmates or teachers speak, or be able to communicate without becoming short of breath is resulting in a strain on children's mental health. These parents are not alone in their recognition that masking young children is potentially harmful. The United States has been an outlier in recommending masks from the age of 2 years old. The World Health Organization has never recommended masks for children under age 5⁴ and the European equivalent of the CDC, the European Centre for Disease Prevention and Control, has never recommended them for children under age 12.⁵ The rest of the world has recognized possible harms with masking young children, yet many in the United States still persist in mandating masks even when parents are seeing noticeable harms to their children's mental health. The Legislature saw this as a problem in Virginia and directly in conflict with existing Virginia law, so it chose to act by making it clear that parents have a right to decide whether to have their children masked in schools. Parents are now able to make decisions regarding their children's education quality and mental health as impacted by masks.

³ Anya Kamenetz, *After 2 Years, Growing Calls to Take Masks Off Children in School*, NPR (Jan 28, 2022), available at <https://www.npr.org/2022/01/28/1075842341/growing-calls-to-take-masks-off-children-in-school>

⁴ *Coronavirus disease (COVID-19): Children and masks*, World Health Org. (Aug. 21, 2020), available at www.who.int/news-room/questions-and-answers/item/q-a-children-and-masks-related-to-covid-19.

⁵ *Questions and answers on COVID-19: Children aged 1 – 18 years and the role of school settings*, ECDC (Sept. 8, 2021), available at www.ecdc.europa.eu/en/covid-19/questions-answers/questions-answers-school-transmission.

As President Biden remarked during his State of the Union address on March 1, 2022, we need “full parity between physical and mental health care.”⁶ The mental health of many children suffers in a masked society. Parents see this in their children and have a right in Virginia to care for them by removing the masks. Neither the ADA, Section 504, nor ARPA preempt that right.

C. Widely Available Vaccines Favor Parental Choice on Masking

With the wide availability of vaccines, there is even more of a reason to strengthen and restore the parental right in Virginia “to make decisions concerning the upbringing, education, and care of the parent’s child.” Va. Code § 1-240.1. Parents are responsible in Virginia for properly caring for their children and are unable to do that if mandatory masking is required by local policies. The Virginia legislature recognized this conflict between State and local law and stepped in to preserve parents’ rights.

Vaccinations and one-way masking have proven to be effective mitigation measures for Covid-19.⁷ For those that are vulnerable, these techniques are a reasonable accommodation and for those where that is not available, the Commonwealth of Virginia offers homebound education options and some public school districts offer a program called the Virginia Virtual Academy which is a full-time, tuition-free, online public school program for grades K-12 (<http://vava.k12.com/>) that could be expanded state-wide. Children with learning disabilities, speech delays, and mental health concerns that are worsened by the masking deserve an opportunity to go to school without masks. The pandemic has undoubtedly been difficult on everyone, but it is no longer 2020 and the ability for us to move on thanks to other mitigation

⁶ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.

⁷ Olga Khazan, *One-Way Masking Works*, The Atlantic (Jan 10, 2022), available at www.theatlantic.com/politics/archive/2022/01/does-it-help-wear-mask-if-no-one-else/621177/.

options creates a situation where mandatory school masking is not the best strategy available to combat Covid-19.

CONCLUSION

Public education has long been a power delegated to the states under the 10th Amendment. Virginia has, in part, codified that power by delineating that parents have a fundamental right to the care, education, and upbringing of their children. Neither the ADA, Section 504, nor ARPA preempt that right; therefore, Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

March 4, 2022

Respectfully submitted,

By: /s/ Shawna M. Yashar

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On behalf of
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2022, I electronically filed the foregoing Motion for Leave with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all CM/ECF participants.

By: /s/ Shawna M. Yashar

Shawna M. Yashar