

COVID-19, the ADA, and Reasonable Accommodations

September 25, 2020

According to the Kaiser Family Foundation:

“[N]early **1.5 million** teachers have health conditions that put them at higher risk of serious illness if they were to contract COVID-19. This represents nearly **one in four (24%) of all teachers** around the country, creating challenges for schools trying to provide in-person classroom education safely for students and teachers alike.”

Source: <https://www.kff.org/coronavirus-covid-19/press-release/about-1-5-million-teachers-are-at-higher-risk-of-serious-illness-from-covid-19/>

Return to school guidance from the Massachusetts Department of Education:

“schools have not played a significant role in COVID-19 transmission and children, particularly younger children, are less likely than adults to be infected with COVID-19. Furthermore, if they become infected, it appears children may be less likely to transmit COVID-19 to others...

[C]hildren under the age of 18 make up 22% of the U.S. population, they account for less than 2% of all cases of COVID-19.”

Source: <http://www.doe.mass.edu/covid19/return-to-school/guidance.pdf>

What is the ADA?



- **Americans with Disabilities Act (ADA)** prohibits discrimination against individuals with disabilities in all areas of public life: jobs, schools, transportation, and all public and private places that are open to the general public.
- The ADA requires employers to provide *reasonable accommodations* to qualified applicants or employees.
 - “*Reasonable accommodation*” is a modification to a position (duties, schedule, etc.) which permits employees with disabilities to perform the essential functions of the job.
 - Must be provided unless employer can show it would be an “*undue hardship*” (too much difficulty or expense).

What is a disability?



- A “disability” is any physical or mental impairment that substantially limits one or more major life activity
- The CDC has published a list of underlying medical conditions for people who have a higher risk for severe illness due to the coronavirus
- Many of the underlying conditions on this list likely implicate one or more “disabilities” covered by the ADA:

| | | | |
|--|--|---|--|
| Cancer* | Serious heart conditions (heart failure, coronary artery disease, cardiomyopathies)* | Cystic fibrosis | Pregnancy |
| Chronic kidney disease* | Sickle cell disease* | Hypertension or high blood pressure | Pulmonary fibrosis |
| COPD (chronic obstructive pulmonary disease)* | Type 2 diabetes mellitus* | Smoking | Immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, corticosteroids, or other immune weakening medicines |
| Immunocompromised state from solid organ transplant* | Asthma (moderate-to-severe) | Neurologic conditions, such as dementia | Thalassemia |
| Obesity* | Cerebrovascular disease (affects blood vessels and blood supply to the brain) | Liver disease | Type 1 diabetes mellitus |

Source: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. * indicates underlying conditions that put people at increased risk for severe illness from COVID-19. All others are conditions that might put people at an increased risk for severe illness from COVID-19.

Teachers' and Staff Rights to Accommodation Under the ADA

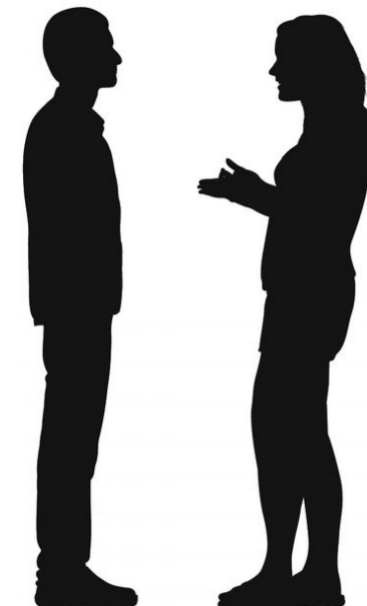
Let's start with the easy questions:



- Does the ADA allow employers to require employees to stay home if they have COVID symptoms? **YES**
- Does the ADA require employers to accommodate employees with remote work to avoid exposing a higher-risk family member? **NO**
 - BUT: consider “associational discrimination” risks
- Does an employee with a mental impairment which has been exacerbated by the pandemic (e.g., anxiety, depression) have a potential right to accommodation? **YES**

How to spot an accommodation request?

- A request for accommodation: does not need to use the phrase “reasonable accommodation” or the ADA. If employer is on reasonable notice of a disability and need for accommodation, employer may need to respond.
- The request may come from the employee or a health professional, or in some cases from a family member or other representative.
- Requests do not need to be in writing.



Employee with an
underlying
medical condition:
*“I don’t feel safe
because of
COVID”*

Steps when you are aware of a disability, or when an accommodation request is made

First: Avoid taking unilateral action

- Even if you know that an employee has an underlying health condition, but s/he does not ask for an accommodation, the ADA does not allow you to unilaterally exclude the employee solely because of the risk of severe illness.
 - For example: if an employee is older, or diabetic, or pregnant, or obese, the school cannot exclude the employee just because s/he might be at a higher risk of illness while performing work duties.
 - You can offer, but not require unilaterally

Steps when an accommodation request is made

Second: Have a conversation

- The process of making reasonable accommodations is an interactive process, also known as the “interactive dialogue”.
- Employers may:
 - ask questions to determine whether the condition is a disability;
 - discuss how the requested accommodation would assist and enable the employee to perform the essential functions of the job;
 - explore alternative accommodations that may effectively meet his/her needs;
 - request medical documentation if needed.
- Employees aren’t necessarily entitled to their “first choice” of accommodation, and employers can explore other options as part of the interactive dialogue
- An accommodation is “reasonable” if it works for both parties

Steps when an accommodation request is made

Third: Provide an accommodation if it does not pose an undue hardship

- Undue hardship: depends on the specific facts and circumstances in each situation
- Factors include:
 - Impact on employee's ability to perform the job
 - the nature and cost of the accommodation
 - the overall financial resources of the school / effect on expenses and resources
 - EEOC: current financial strains due to the pandemic is a relevant factor
 - The impact on others if the accommodation is granted
 - Impact on other staff / teachers
 - Impact on students and learning (i.e., if teacher is fully remote)
 - Impact on the overall operation of the school
 - Risks posed to employee and others

Types of Accommodations



Possible accommodations for staff (e.g., office staff, administrators, custodians):

- Working from home
- Modified work schedules
- Temporary transfer
- Workspace modifications to promote spacing
- Plexiglas separators
- PPE
- Provide parking / avoid public transportation

Possible accommodations for teachers:

- Teaching from home / hybrid
- Classroom modifications
- Provide parking to avoid public transportation
- Permitting use of paid or unpaid leave

- Consider checking the Job Accommodation Network for creative ideas on accommodation:
www.askjan.org

Disability-related inquiries or medical examinations

- This is a separate issue from the accommodation question, and relates only to an employer's right to monitor for COVID risks.
 - In general, any disability-related inquiries or medical exams must be job related and consistent with business necessity.
 - Employers can ask employees if they are experiencing COVID-related symptoms (fever, chills, cough, shortness of breath, or sore throat).
 - Measuring body temperature or testing for COVID *are* medical exams, but they are permissible because of recent CDC/EEOC guidance
- Any medical information disclosed must be kept confidential

Students' Rights

The ADA and Students



- ADA: ensures the right of any otherwise qualified disabled student to participate in any school program or activity
- Independent schools may not discriminate against any student with a disability by excluding the student from fully participating in any school program or activity
- Similar model to the employment context: must sometimes treat differently in order to ensure equal access, via reasonable accommodation

The ADA and Students



- Forms of discrimination include:
 - *Reasonable Modifications*: Failing to make “reasonable modifications” to policies, practices, and procedures that are necessary ensure equal access to programs
 - UNLESS school can demonstrate that making such modifications would **fundamentally alter** the nature of the school programs
 - *Screening out*: Using eligibility criteria that tend to “screen out” students with disabilities from the full and equal enjoyment of school programs, unless necessary for the provision of the programs offered;
 - *Not providing auxiliary services/aids*: Failing to ensure that no disabled student is excluded, denied services, or otherwise treated differently than other students because of the absence of auxiliary aids/services, unless offering them would “fundamentally alter” the program.

Responding to student requests for accommodation

- The same “interactive dialogue” process for teachers and staff can be used for student requests for accommodation
- However, the ADA does not require any accommodation that would **fundamentally alter** the nature or purpose of a school’s programs or cause “undue burden” to the school
- “Fundamental alteration”: Does the accommodation:
 - alter an essential aspect of the program?
 - Have only a peripheral impact, but give the student a material advantage over other students?

Responding to student requests for accommodation

- COVID-related accommodations are less likely to be seen as “fundamental alterations”
 - They’re temporary (we hope!)
 - Likely to relate to physical vs. remote participation, and courts are likely to take a permissive view of remote participation
- Possible accommodations include:
 - Adapting the manner in which specific courses are conducted
 - Alternative testing methods
 - Providing affordable and practicable auxiliary aids (e.g., ones that would facilitate remote learning)

Thank You

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