

Forty-four states currently fail the threshold CDC criteria

CDC's three phase reopening approach is based on whether states are improving in these six categories:

- 1. The number newly diagnosed COVID 19 cases
- 2. The number of hospital visits with "COVID like illness"
- 3. The number of hospital visits with "influenza like illness"
- 4. The percentage of positive COVID 19 tests
- 5. The capacity of hospitals to treat patients without crisis care
- 6. The robustness of diagnostic testing programs

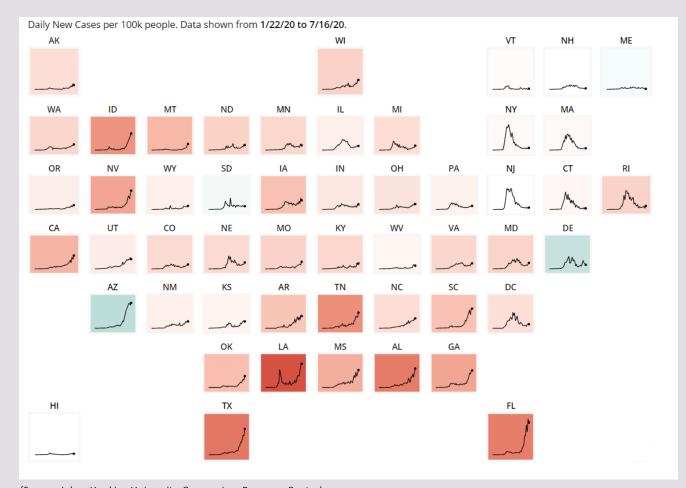


Those Criteria are Not Currently Met

In states marked with shades of orange, new cases are increasing.

In states marked with shades of green, cases are decreasing.

As of July 16, 2020, none of the 44 orange shaded states have had a downward trajectory of new cases over the prior two weeks.



(Source: Johns Hopkins University Coronavirus Resource Center)



Once Threshold Conditions Exist, Schools Must Follow CDC Guidelines to Limit Risk

Three overriding considerations:

- Protect students and staff who are at higher risk for severe illness by providing options such as telework and distance learning.
- Put basic protections in place to prevent spread of COVID 19 (distancing, deterrence, disinfection, detection)
- Make sure students and staff can stay home if they are sick and that they are encouraged to do so.



Distance Deterrence Disinfection Detection

- Physical distance 6 feet between people > hybrid schedules may be necessary given school density
- Deterrence
 - Healthy hygiene practices
 - Masks
 - Ventilation
 - Eliminating Shared Supplies and Equipment
- Disinfection of Schools, Buses & Equipment
- Detection
 - Screening on Entry/at Home
 - Isolating Sick Students and Staff until they can Safely Get Home
 - Closing as Needed to Contain Outbreak in School or Community





<u>ADDED TO SLIDE: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada</u>

Educators May Need Accommodations or Leave Because of..

- ➤ A medical condition that increases risk of serious illness or death from COVID 19
- Living with an individual who is at high risk
- Older age
- Pregnancy
- Childcare responsibilities



You Have Rights!

- Federal Law
 - Americans with Disabilities Act (ADA)
 - Pregnancy Discrimination Act
 - Age Discrimination in EmploymentAct {ADEA}
 - Family and Medical Leave Act (FMLA)
 - Families First Coronavirus Response Act {FFCRA}
 - Workers' Compensation
- State and Local Laws
- Collective Bargaining Agreements and MOUs
- School District Policies





I have a health condition... Do I qualify for an accommodation under the ADA?

- Is your condition a disability?
- Disability = Physical or mental impairment that substantially limits one or more major life activities
- "Disability" is interpreted broadly
 - Impairments do not have to be permanent may be transitory {lasting less than 6 months) and minor
 - Major life activities include e.g., performing manual tasks, breathing, learning, writing, sitting, sleeping; also, the operation of major bodily function, such as immune system, normal cell growth, circulatory, respiratory, cardiovascular



Mental Health Conditions May Also Qualify as a Disability

- Disability = Physical or mental impairment that substantially limits one or more major life activities
- Examples
 - Post traumatic stress disorder
 - Obsessive compulsive disorder
 - Anxiety disorder
- If you have a diagnosed mental health impairment, you may be able to seek an ADA accommodation



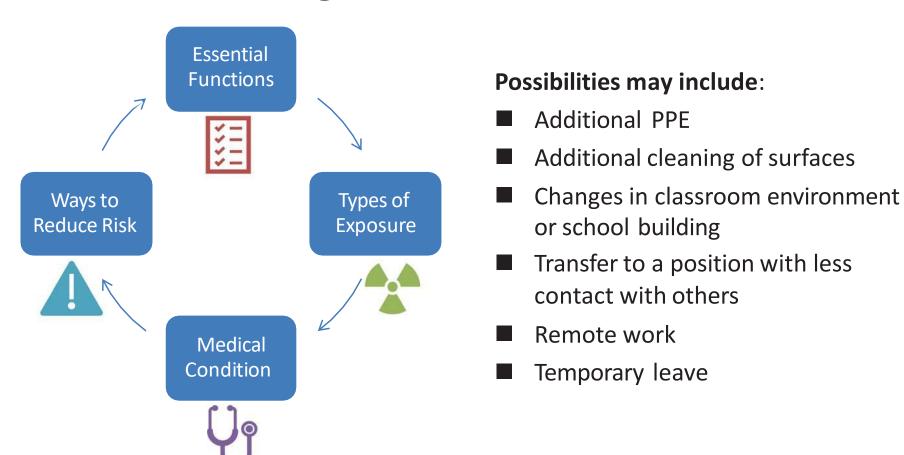
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What rights do I have to a job modification?

- ADA requires
 - That employers provide reasonable accommodations to qualified individuals with disabilities
 - Unless doing so would pose an undue hardship
- A reasonable accommodation is
 - A modification or adjustment to a job or workenvironment that will enable an employee with a disability:
 - ✓ to continue to perform the essential functions of her/his job and
 - ✓ enjoy equal benefits and privileges of employment



Thinking About Accommodations



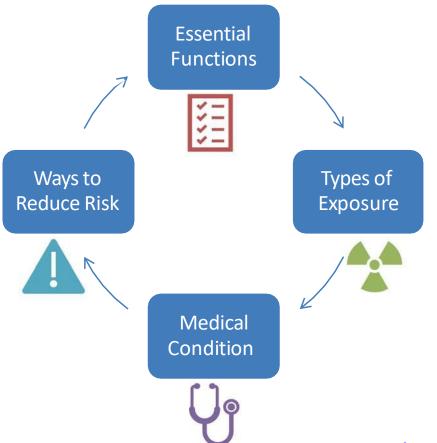


How do I request an accommodation?

- Check with your local association or state affiliate
- Under the ADA
 - ✓ Accommodations can be requested upon hiring or at any point during employment when a need arises
 - √ No "magic words" are required
 - Requests don't have to be in writing.but it's a good idea to make a written record
- Employer surveys may violate the ADA Employees should not be required to disclose their health conditions unless they are requesting an accommodation



Talking to your medical provider



Considerations for Doctor's Notes

- Include statement of medical condition and advisability of reasonable accommodation based on the condition
- Be specific about limitations and possible accommodations that will allow patient to continue to perform the essential functions of the job
- Consider whether there are multiple alternative possible accommodations



What does the employer have to provide?

- Employers must consider requests for accommodations and engage in an interactive process to try to find a suitable reasonable accommodation.
 - Interactive Process: EEOC recommends that employers and employees work together to identify possible accommodations
 - Employers are not required to provide the requested accommodation and may offer alternatives
 - Temporary accommodations may be appropriate during a pandemic
- <u>But</u> accommodations don't have to be provided if they would impose an undue hardship on the employer.



What if my employer denies my request?

- If an employer denies a requested accommodation, ask why it was denied and try to cure any problem, if possible
 - "Undue hardship" Ask for details; discuss alternatives
 - Insufficient information about medical condition or requested accommodations - Provide information; go back to medical provider
 - Propose alternative accommodations
- Report it to your local!
- Be aware of statutes of limitations for filing complaints with EEOC/state agencies
- Object to and report any retaliation for requesting an accommodation



I am worried that my age puts me at high risk.

- CDC advises that the risk of severe illness increases with age, noting that 8 out of 10 deaths from COVID have been of people 65+
- Older age alone is not a disability
- Age Discrimination in Employment Act {ADEA}
 - Does not require accommodations for older people,
 - But it also doesn't prevent employers from accommodating older workers
- Consider whether there may also be an underlying health condition that is a basis for an ADA claim



I am pregnant.

- Pregnancy itself is not a disability, but many pregnancy related medical conditions are considered disabilities under ADA
- Pregnancy Discrimination Act Requires that employees affected by pregnancy, childbirth, and related medical conditions be treated the same as others who have similar limitations
- More than half of all states have pregnancy accommodations laws
- Talk to your medical provider!



What are my options for leave if I can't be accommodated?

Emergency Paid Sick Leave

- Federal law Families First Coronavirus Response Act
 - Covers nearly all public sector employers!
 - Expires December 31, 2020
- Available if you are unable to work or telework for certain COVID related reasons, including
 - You are under self quarantine on the advice of a healthcare provider; or
 - You are caring for someone who is under self quarantine on the advice of a medical provider; or
 - You are caring for your child because their school or daycare is closed
- Total amount is 80 hours of paid leave
- Can be used prior to any other existing paid leave benefits!



Other Options for Leave

S FMLA

- Up to 12 weeks of unpaid, job protected leave
- For a serious health condition that prevents you from performing the essential functions of your job
- Must have 12 months/1,250 hours of employment
- S Other leave under CBA, MOU, or District policy?
- State or employer disability leave?



I live with someone who is high risk.

(S) ADA Protections?

- Unfortunately, the ADA does not require accommodations to protect family members with disabilities
 - ADA only prohibits disparate treatment or harassment because you have a disabled family member

S Family & Medical leave Act (FMLA)?

- Job protected leave for an employee's own medical and family caregiving needs, including caring for a spouse, child or parent who has a serious health condition
- Must have 12 months/1,250 hours of employment

S Families First Coronavirus Response Act?

- Emergency Paid Sick Leave: if individual is under quarantine
- Emergency FMLA Expansion: if caring for son or daughter, for childcare closures

Other types of leave?

 $\underline{www.educatingthroughcrisis.org}$



I have childcare responsibilities.

- Emergency FMLA Expansion Act {part of FFCRA}
 - Temporary federal paid family leave a temporary new category of leave under the FMLA, which terminates December 31, 2020
 - For the limited purpose of caring for a son or daughter whose school or daycare is closed due to the coronavirus pandemic
 - Total amount of leave is 12 weeks
 - Up to 10 weeks is paid at 2/3 your regular rate of pay {capped at \$200/day}
 - Intermittent leave may be available
- Other childcare leave?





Will Workers'
Compensation cover my
medical bills and leave?

- State workers' compensation programs are where workers are ordinarily expected to look when they are injured or become ill because of workplace injuries or illness
- State law governs, and state laws are evolving quickly on COVID exposures and presumptions
 - Check with your local!



General Guidance on Workers' Compensation Claims

- Notify your local if you contract COVID at work
- Causation may be contested when it comes to COVID
 - Ocument in as much detail as possible
 - ✓ Any of your previous COVID test results
 - ✓ Your contacts during the period of possible infection
 - ✓ Possible sources of workplace exposure
 e.g., other cases; proximity to others
 - ✓ Information about onset of symptoms and any other relevant medical records



Contact your Senators and ask them to support
The HEROES Act. You can take action by going to educatingthroughcrisis.org





NYS Education Department – "Recovering, Rebuilding, and Renewing: The Spirit of New York's Schools – Reopening Guidance," Issued July 16, 2020

 District/school plan has written protocol detailing how the district/school will provide accommodations to all students and staff who are at high risk or live with a person at high risk.

http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf

SED Guidance@page 18

SED Guidance Document provisions

What is required by SED?

- ✓ An explanation "how" the district will provide accommodations.
- ✓ The accommodation will be offered to staff who:
 - (1) themselves are at high risk; and/or
 - (2) live with a person at high risk.

Your district can fulfill part of its requirements here by including a statement that they will engage in an "interactive process" with employees who request accommodations.

What is not required?

- X Detailed explanations in the district's reopening plan of what specific accommodations the district will offer.
- X A definition of what is considered 'high risk.' Fortunately . . .

Medically Vulnerable/High-Risk Groups

[...]

Persons in these groups should consult with their healthcare provider regarding prevention:

Individuals age 65 or older;

Pregnant individuals;

Individuals with underlying health conditions including, but not limited to:

- o chronic lung disease or moderate to severe asthma
- o serious heart conditions
- o immunocompromised
- o severe obesity (body mass index [BMI] of 30 or higher)
- o diabetes
- o chronic kidney disease undergoing dialysis
- o liver disease
- o sickle cell anemia
- o children who are medically complex, who have neurologic, genetic, metabolic conditions, or who have congenital heart disease are at higher risk for severe illness from COVID-19 than other children.

SED Guidance@pages 30-31

SED Guidance

Homework:

- Check the plan to see if it includes a statement to the effect that it will "engage" or "consider" employee requests for accommodations.
- Be certain that there are no limiting statements that contradict SED's
 Guidance: e.g., "only for employees who are at high risk" or "employees must
 notify the District of a need for an accommodation no later than August 30,
 2020".
- 3. Also be sure that the plan does not omit coverage: e.g., fails to include high risk persons who live with the employee.
- 4. While helpful, the plan need not include the list of high-risk conditions. Keep in mind that should it become necessary, we would argue that the list provided in the SED Guidance (and the linked CDC documents) is *not* exclusive or exhaustive.

What does SED leave out?

• The SED Guidance Document omits any explanation of how a district should determine how or whether to provide accommodations for someone who lives with a person at high risk.

This omission leaves us all hanging. We will return to this problem in a moment. First, let's look at what the DOH provides.

NYS Department of Health – Master Guidance, Issued July 13, 2020

At a minimum, plans must incorporate the following:

[...]

• Vulnerable Populations: Policies regarding vulnerable populations, including students, faculty and staff who are at increased risk for severe COVID-19 illness, and individuals who may not feel comfortable returning to an in-person educational environment, to allow them to safely participate in educational activities and, where appropriate, accommodate their specific circumstances. These accommodations may include but are not limited to remote learning or telework, modified educational or work settings, or providing additional PPE to individuals with underlying health conditions.

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Pre-K_to_Grade_12_Schools_MasterGuidence.pdf

DOH Guidance@page 4

DOH Guidance Document provisions

What is required by the NYS DOH?

- ✓ "Policies" regarding vulnerable populations "to allow them to safely participate in educational activities".
- ✓ "Vulnerable Populations" includes both those who:
 - (1) are at increased risk for severe illness; and/or
 - (2) "individuals who may not feel comfortable returning to an inperson educational environment".

Your district can fulfill *part* of its requirements here by including a reference to policies concerning ADA/medical accommodations.

What is not required?

X Detailed explanations in the district's reopening plan of what specific accommodations the district will offer.

Also, in the DOH Guidance "Vulnerable Populations", page 4, contains a link to the CDC webpage: "People Who Are at Increased Risk for Severe Illness." This CDC reference links to two additional webpages addressing high-risk individuals: (1) Older Adults; and (2) People with Underlying Medical Conditions.

Here are those links. It is helpful to have a passing familiarity with this information.

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

<u>Homework</u>: It is recommended that you access these pages and save them/print them out. These pages can be updated/removed at any time.

Remember – Under the SED Guidance, members may be entitled to an accommodation based on their own medical vulnerability (which is the same as an ADA request) or the medical vulnerability of someone with whom they live.

DOH & Accommodations Reminders

The DOH suggests that for "Vulnerable Populations" the district offer certain accommodations. The DOH list is not exhaustive and, just like under the ADA, the district and the member should engage in an interactive process in order to determine how best to accommodate the specific circumstance.

Remember that the goal of providing "reasonable accommodations" (as per the ADA) is to provide support to an employee that permits her to engage in work activities. Think of more typical workplace accommodations – a certain type of chair for lower back problems; relocating a workspace to allow for an employee to sit when she cannot stand for long periods of time; etc.

Since we know that PPE, social distancing, face coverings, reduced capacity, and disinfecting are significant components of virus reduction, it makes sense that any accommodation would, in the first instance, strive to improve these components (increased distancing, additional PPE, etc.)

What does DOH leave out?

The DOH Guidance Document omits any explanation of how a district should determine how or whether to provide accommodations for someone who is not comfortable returning to an in-person instructional environment.

This omission leaves us all hanging. We will return to this issue in a moment.

Summary of SED & DOH Guidance

Three distinct groups created:

- (a) Individuals who are at increased risk based on medical condition (SED & DOH);
- (b) Individuals who live with a person at high-risk (SED);
- (c) Individuals who are not comfortable returning to an in-person educational environment (DOH).

The Problem

Neither the SED, nor the DOH, Guidance documents contain processes districts should use to determine who is eligible for an accommodation or what is an appropriate accommodation.

Possible Solutions

- (a) ADA/EEOC processes; recourse through the ADA/NYS DHR + DOL enforcement;
- (b) No stated processes; recourse through Ed. Law §310 Commissioner's Appeal + DOL complaint;
- (c) No stated processes; no stated recourse. Use DOL complaint.

ADA/EEOC/NYS DHR complaints

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

https://dhr.ny.gov/complaint#file

NYS DOL complaint

https://labor.ny.gov/workerprotection/laborstandards/coronaviruscomplaints.shtm

Commissioner's Appeal

Education Law §310 provides that persons considering themselves aggrieved by an action taken at a school district meeting or by school authorities may appeal to the Commissioner of Education for a review of such action. A §310 appeal must be initiated within 30 days of the decision or action complained of, unless the delay is excused by the Commissioner for good cause shown in the petition.

http://www.counsel.nysed.gov/appeals

Where does this leave us?

There is tremendous built-in uncertainty here.

The SED and the DOH create a standard that will not be enforced by the federal government and, possibly, not even by the NYS DHR.

An appeal to the Commissioner is generally a slow process.

We can expect that the EEOC, NYS DHR, and the NYS DOL will be overwhelmed with complaints. And yet, they must be filed.

This leaves us having to scrutinize the grounds on which the district denied such a request. The district may open the door to a challenge or argument that can be resolved at the local level. In the meantime, it is imperative that a member denied an accommodation request (1) file a complaint, as may be possible, and (2) communicate to local leadership.