



COVID-19 TESTING AND VACCINATION PROGRAMS FAQ

As of April 29, 2021

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OVERVIEW

We intend this document to support school district leaders as you navigate common questions regarding COVID-19 screening, testing and vaccination programs being considered by schools. It is intended to support your overall development of successful return-to-learn and return-to-work plans. We based this resource on the guidance, statutes, regulations, policies, and legal precedent available through the date of this document.

Just as COVID-19 is a novel virus, so are many of the legal issues being raised as a result of the pandemic. As new laws, policies, and regulations are passed by federal and state governments specific to the COVID-19 pandemic, this guidance will change. School districts should remember that guidance from public health authorities is also likely to change as the COVID-19 pandemic evolves. Therefore, school districts should continue to consult legal counsel and should follow the most current

information available on maintaining school and district safety. This document cannot capture all legal nuances and is not meant to serve as legal advice. For specific questions or situations, please reach out to your counsel.

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1. What is the PREP Act?

The Public Readiness and Emergency Preparedness (PREP) Act provides immunity for liability when the Secretary for Health and Human Services (HHS) determines the existence of a public health emergency and issues a declaration regarding “Covered Countermeasures.” The PREP Act provides immunity for liability for certain individuals and entities arising out of the administration of “Covered Countermeasures.”

2. Does the PREP Act apply to COVID-19?

Yes. The HHS Secretary has issued a declaration to provide immunity from liability related to Covered Countermeasures against COVID-19.

3. What kinds of activities count as a “Covered Countermeasure?”

Covered Countermeasures for COVID-19 include drug treatments, vaccines, and diagnostic tools. Thus, tests that detect the presence of COVID-19, as well as COVID-19 vaccines, are considered Covered Countermeasures.

4. How can a school district be immune from liability under the PREP Act?

There are two main ways a school district could be immune from liability. First, if a school district provides facilities for COVID testing and/or vaccination, the school district, as well as its employees, can be immune from liability under the PREP Act. In this scenario, the school district would be a “program planner.” Second, a school district can enter into an agreement with the applicable board of public health that has jurisdiction over the geographic area where the school district is located. The agreement should provide that school nurses or other qualified personnel are acting under the direction of the board of public health to administer COVID testing and/or vaccines. In this scenario, the school district, as well as its employees, would be considered a “qualified person” under the PREP Act and would be immune from liability.

An organization, as well as its employees, officials, agents, contractors, and volunteers who are immune from liability under the PREP Act are referred to as a “Covered Person.”

5. Can a school district use their medical CTE programs to do COVID testing and/or vaccinations?

It depends on the rules of the state where the school district is located. Each state sets its own professional and licensing/certification requirements as to who is allowed to administer COVID-19 testing and vaccines and under what circumstances. While some states allow medical or nursing students to administer testing and/or vaccines under supervision, states typically do not allow high school students to do so, even under supervision of an adult. Even some medical professionals must administer testing and/or vaccinations only under the supervision of another, more highly qualified, professional.

School districts should review their state requirements regarding who can administer COVID testing and/or vaccinations. If the state allows CTE students to administer COVID testing and/or vaccines, the students could be considered a “qualified person” under the PREP Act.

Even if CTE students are not allowed to administer COVID testing and/or vaccinations, these students may be able to assist with ancillary tasks, such as welcoming participants and replenishing supplies. Additionally, there may well be educational value in having CTE students observe the process, even if they cannot actively participate in it.

If a school district wants to involve CTE students in COVID testing/or vaccination programs in whatever capacity is allowed by the state, the school district should consider the following:

- Ensure that activities align with the curricular standards of the program
- Ensure that CTE students are not replacing workers in the program but instead are genuinely participating in training
- Ensure that CTE students are acting under the direction and supervision of a qualified professional
- Enter into an agreement with the applicable board of public health that specifies what activities CTE students and school district employees are allowed to perform, and states that the school district, as well as its employees and students, are acting under the direction of the board of public health

6. What is the extent of the immunity from liability?

The PREP Act provides for immunity from both federal and state law claims of loss caused by, arising out of, or relating to the administration of a Covered Countermeasure. For example, if the recipient of a COVID-19 vaccine had an adverse health reaction to the vaccine, the Covered Person who administered the vaccine would be immune from any personal injury or medical malpractice claims arising out of administration of the vaccine.

In addition, the Secretary of HHS has clarified that immunity may also be available when a Covered Person decides to not administer a Covered Countermeasure, provided that the decision is in accordance with public health directives.

For example, if a Covered Person has limited doses of the COVID-19 vaccine, the Covered Person may administer the doses to individuals who are more vulnerable to COVID-19 and higher on the vaccination priority list and withhold the vaccine from others. Note, however, that this extension of liability to *withholding* of a Covered Countermeasure is located in a recent HHS declaration and has not been tested in any court.

7. Are there any limits to the PREP Act's immunity from liability?

Yes. First, immunity applies only to claims that are related to the administration of a Covered Countermeasure. These claims include death; physical, mental or emotional injury, illness, disability, or condition; fear of physical, mental, or emotional injury, illness, disability, or condition, including the need for medical monitoring; and loss of or damage to property, including business interruption loss.

So, for instance, a school district cannot use the PREP act to provide immunity for unrelated claims such as employment discrimination claims, failure to accommodate claims, or free appropriate public education claims under the IDEA.

Additionally, there is no immunity when a "serious physical injury" results due to "willful misconduct." A serious physical injury must be life threatening, permanently impair a body function, permanently damage the body structure, or require medical intervention to avoid such permanent damage.

"Willful misconduct" requires a Covered Person act (1) intentionally to achieve a wrongful purpose; (2) knowingly without legal or factual justification; and (3) in disregard of a known or obvious risk that is so great that it is highly probable that the harm will outweigh the benefit.

8. How worried do I need to be about a staff member committing "willful misconduct?"

Not very. The likelihood of a plaintiff showing "willful misconduct" is low. The burden of proving "willful misconduct" falls on the person making the claim, involves a high standard, and offers limited recovery. Someone claiming "willful misconduct" must first seek compensation through a special, federal fund dedicated to compensating such individuals. If that person elects to receive such compensation, they cannot sue. If that person does not elect to receive such compensation, they can sue a Covered Person only in the United States District Court for the District of Columbia, under heightened pleading and evidentiary standards, with limited recovery. Additionally, a Covered Person cannot be found to have engaged in willful misconduct if they acted consistent with applicable directions, guidelines, and recommendations by the HHS Secretary.¹

That being said, even though the likelihood of committing willful misconduct is low, school staff should be adequately trained and instructed to always act in good faith.

9. What does this mean for school districts' vaccination and testing programs?

A school district can institute a COVID-19 testing and vaccination program, while taking advantage of the PREP Act's immunity protections in two ways. First, a school can provide physical space to allow a medical provider or public health department to administer a testing or vaccination program. Additionally, school districts can develop an agreement with their local public health authorities and direct qualified school personnel (such as school nurses) administer COVID-19 testing and vaccinations. A school district should ensure that it follows all applicable health and safety mandates, including those Emergency Use Authorizations (EUA) and other requirements surrounding administration of testing and vaccinations for COVID-19. (See question 27 regarding EUA).

¹ In addition, HHS has opined that the PREP Act's immunity may not be available if a Covered Person does not comply with other applicable health and safety mandates. For example, if a county health department requires grocery stores to have employees wear masks and observe physical distance, but the grocery store only mandates masks, and not social distancing, the grocery store may not be able to rely on the PREP Act's immunity against a later suit against the store. Accordingly, school districts should ensure that they comply with applicable health and safety mandates related to COVID-19.

STUDENT TESTING FOR COVID-19

10. Can school districts require students to submit to COVID-19 testing as a condition of in-person schooling?

Generally speaking, most federal enforcement agencies are deferring to the CDC on whether certain interventions are legally acceptable, and it is advisable to stay within the CDC's recommendations.²

In short, the CDC is supportive, with some reservations, of school districts using random COVID testing protocols for asymptomatic students generally, but only if the district receives written parental consent, as discussed below.

The CDC does not provide any legal guidance that supports conditioning in-person school attendance on consent to random testing.

11. Can a school district require a student to submit to COVID-19 testing?

While mandatory testing as a condition of accessing in-person learning is not supported by the CDC at this time, there is support for school districts wishing to require mandatory testing of students as a condition of their participation in strictly voluntary offerings, such as athletics.

These extracurricular activities are not part of the core academic program and have historically been subject to additional conditions for participation. However, school districts may need to make some disability-related accommodations to testing.

For instance, if a student has a disability that prevents him from receiving a nasal swab test, the school district may consider a saliva-based test for that student instead. School districts should receive written parental consent to administer any testing.

12. What would an appropriate testing strategy look like?

The CDC is not supportive of one-time entry or universal testing that is only conducted once. Accordingly, school districts should consider either consistent testing for participation in these voluntary activities, testing if an individual shows symptoms, or periodic/random testing of asymptomatic individuals for surveillance testing (or some combination of the three).

Recent CDC guidance³ to support reopening of schools for in-person learning offers the following recommendations:

- Schools should refer individuals who exhibit symptoms of COVID-19, as well as their close contacts, for diagnostic testing, or offer testing themselves.
- If schools conduct surveillance testing of asymptomatic individuals, schools should consider prioritizing those who are tested as follows:
 - Consider prioritizing testing of teachers and staff over students, given their increased risk of severe outcomes, and prioritize testing of older students over younger ones;
 - Consider prioritizing testing in schools that serve populations shouldering a disproportionately high burden of COVID-19 cases or severe disease.

Of course, every test has the possibility of a false positive or false negative. Accordingly, school districts should continue to stress the implementation of mitigation strategies, such as use of masks, hand washing, and social distancing to the extent practicable. As always, school districts should require parents/guardians to sign forms that consent to testing and the disclosure of test results as needed.

13. What should a testing consent form contain?

School districts can use existing parental consent forms used for special education testing and customize them for COVID-19 testing. Chiefs for Change has developed a customizable template for student consent forms that is available [here](#). The consent form should be written, dated, and signed by the parent or guardian. It should contain the following terms, at minimum:

- A brief description of the test (COVID-19 nasal swab, rapid test, saliva test, etc.)
- A brief description of the how often and under what conditions the testing will be administered (random sampling for surveillance testing, each time an athlete attends practice, etc.)
- In the case of random sampling for surveillance testing, a statement that the school district will notify the parent that their student was tested

² The CDC has pertinent information on testing programs by schools here <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-testing.html#:~:text=Persons%20with%20symptoms%20for%20COVID,transmission%20is%20moderate%20to%20high>.

³ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html#learning-modes>

- A statement that the school district will notify the parent of the results of any testing within a set time period
- A statement that a parent may revoke their consent for testing by doing so in writing, a statement that revocation of consent may impact the student's ability to participate in the applicable school activity, and designation of a recipient to receive such revocation of consent
- In the case of third party-administered testing, a statement that the parent allows the school district and the third party to share and exchange all relevant information about the child, including but not limited to the results of any COVID-19 testing
- If the school district intends to seek reimbursement from Medicare/Medicaid, consent from the parent to do so and to share any information necessary to do so

EMPLOYEE SYMPTOM CHECKING AND COVID-19 TESTING

14. May school districts ask employees about their medical symptoms in order to mitigate the spread of COVID-19 in the school district?

Yes. School districts may ask all employees that are working in person (or about to return to in-person work) if they are experiencing any of the symptoms of COVID-19 that have been identified by the CDC or public health authorities. For example, school districts may ask employees if they have a fever, cough, shortness of breath, chills, repeated shaking with chills, headache, sore throat, new loss of taste or smell, or muscle pain, congestion/runny nose, diarrhea, nausea or vomiting.

Likewise, if a particular employee calls in sick or reports feeling ill, a school district may ask that individual employee about their symptoms before permitting them to return to work.

The school district must maintain information regarding employee illnesses as confidential medical records. (*See the Confidential and Privacy section*).

15. May a school district ask employees questions about where they have traveled?

Yes. School districts may ask in-person employees questions about where they have traveled, even if the travel was for personal reasons, so that the school district can enforce any CDC public health recommendations that people who visit specified locations remain at home for a certain period of time.

16. May school districts ask employees whether they have come in close contact with individuals who have COVID-19 symptoms or who have tested positive for COVID-19?

Yes. The CDC has defined "close contact" as being within 6 feet of someone who has COVID-19 for a total of 15 minutes or more; providing care at home to someone who is sick with COVID-19; having direct physical

contact with the person (for instance, hugged or kissed them); sharing eating or drinking utensils; being sneezed or coughed on, or coming into contact with their respiratory droplets. School districts should take caution to frame the question as "*whether the employee has come in close contact with an individual with COVID-19 diagnosis or symptoms*" and not whether the employee's family members have COVID-19. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees any medical questions about their family members. Moreover, practically, asking an employee about his contact with family members would not capture all necessary information about an employee's potential exposure to COVID-19.

17. May school districts take the temperature of their employees during the COVID-19 pandemic?

Yes, during the pandemic. The Equal Employment Opportunity Commission (EEOC) has stated that employers may take their employees' temperatures in light of the COVID-19 pandemic and guidance from the CDC and health authorities. While measuring an employee's body temperature would usually be considered an impermissible medical examination, it is permitted during the pandemic. School districts may take the temperature of all employees entering the building; of randomized employees; or could require employees themselves to take their temperature and only report to work if they are fever-free. Of course, some individuals with COVID-19 do not have a fever and thus temperature-taking should only be one part of an overall preventive strategy.

18. May school districts administer or require employees to take a COVID-19 test?

Yes. School districts may choose to administer COVID-19 testing to employees working in person because an individual with the virus will pose a direct threat to the

health of others. The EEOC has stated that appropriately administered COVID-19 testing will meet the Americans with Disabilities Act (ADA)'s "business necessity" requirement for mandatory medical testing. In order for the testing to be "appropriately administered," school districts should ensure that the tests they are using are considered accurate and reliable, and should stay up to date on information about safe and accurate testing from the FDA, CDC, and other public health authorities.

According to current EEOC and CDC guidance, antibody tests should not be used by employers because these tests constitute an impermissible "medical examination" under the ADA as they only inform whether an individual has previously had COVID-19, not whether they have an active case of the virus. Instead, only tests approved by the CDC, *e.g.* viral tests, for identifying active cases of COVID-19, should be used. School districts should closely monitor CDC updates on testing.

Both false-positives and false-negatives are associated with various COVID-19 tests. The CDC has cautioned that a negative test result does not mean the employee will not acquire the virus later. Based on guidance from public health authorities, school districts should still stress—to the greatest extent possible—that employees observe infection control practices (such as wearing a mask, social distancing, regular handwashing, and other measures) in the workplace to mitigate the spread of COVID-19.

19. If a school district decides to test some employees for COVID-19, do they have to test all employees?

No. School districts may single out a particular employee or group of employees to test, but must have a legally permissible, rational basis for doing so. For example, if a school district has a reasonable belief based on objective evidence that a particular employee may have COVID-19, they may require that individual, and not others, to take a COVID-19 test. For example, school districts may require that in-person employees showing symptoms of COVID-19 be required to take a COVID-19 test.

A school district may not demand that "high risk" individuals (*e.g.* individuals over the age of 65, with preexisting medical conditions, or individuals who are pregnant) be tested, when they otherwise do not require all employees to be tested, unless they have a specific reason to believe the person may be infected with COVID-19. School districts should follow recommendations from the CDC and local health authorities regarding whether, when, and for whom testing or other screening is appropriate.

20. If a school district decides to test all employees once for COVID-19, is that a sufficient testing strategy?

No. The CDC has advised that a one-time entry test of an entire workforce is not an appropriate preventative strategy. Instead, if a school district is going to adopt a broad testing strategy, it should ensure that part of that strategy involves a plan to conduct intervals or follow-up testing. Likewise, it is permissible for school districts to conduct truly randomized testing of its in-person workforce. As with all-employee testing, such a strategy should involve a plan for interval and follow-up testing.

21. What may a school district do if employees refuse to answer COVID-19 symptoms, travel, or exposure questions or refuse to have their temperature taken or to participate in a COVID-19 test?

In light of the current state of the pandemic, the ADA permits employers from barring employees from entering the workplace if they refuse to have their temperature taken, refuse to answer questions about COVID-19 symptoms, travel, or exposure, or refuse to be tested or answer questions about their testing.

As a practical matter, school districts should seek to understand the basis for an employee's refusal as it may be premised on a misunderstanding of how the information will be used. The school district should explain why the information is necessary to ensure the safety of staff, students, and the workplace, and that the district's steps are a result of recommendations from the CDC and public health officials. School districts should also reassure employees that their medical information will not be publicly disseminated and explain the district's confidentiality protocols.

If an employee requests an exception or modification to testing as a reasonable accommodation to a disability, the school district must follow the ADA's traditional interactive process for considering this accommodation request. Likewise, exceptions may need to be made in the event an employee can demonstrate a bona fide religious belief against medical testing under Title VII's anti-discrimination requirements.

22. Do school districts have to pay employees for time spent answering symptom questions or participating in mandatory testing?

Yes. If a school district requires employees to answer questions relating to their symptoms, travel or other exposure to COVID-19 or requires employees to be tested for COVID-19, the school district must compensate the employees for time spent on these tasks. For non-exempt employees under the Fair Labor Standards Act, this means ensuring that employees are “on the clock” and paid during these times. The Department of Labor has made an exception for time that is *de minimus*, e.g. quick personal health screenings without a wait. However, standing in line for employee testing and taking the test would probably not be considered *de minimus* and should be compensated.

23. May school districts require employees to stay home if they have symptoms or test positive for COVID-19?

Yes. The CDC advises that employees with symptoms of COVID-19 should not come to work or leave the workplace when they develop symptoms. School districts should follow current CDC and health officials’ guidelines for when employees may return to work.⁴

24. May school districts require a doctor’s note certifying the employee is fit for duty following their display of COVID-19 symptoms?

Yes. The EEOC has indicated that employers may require a doctor’s note or a fitness for duty certification in order for an employee to return-to-work following illness during the pandemic. The EEOC has cautioned as a practical matter that healthcare professionals may be too busy during the pandemic to provide this documentation. Therefore, school districts are not required to obtain this documentation before permitting an employee to return, and they may instead follow the CDC’s guidelines for quarantining and return to work without the need for a doctor’s note.

EMPLOYEE VACCINATION PROGRAMS

25. Can school districts encourage employees to get the vaccine?

Yes. School districts can strongly recommend and promote the vaccine. Employee communication and reminders regarding opportunities to get vaccinated, as well as facts and benefits of vaccination, are appropriate to be shared. School districts should ensure that the information they distribute is from reputable sources such as the department of health or the CDC.

26. Do federal employment laws permit school districts to require their employees to receive the COVID-19 vaccine?

Yes, with logistical considerations. The EEOC has issued guidance that employers can generally require employees to be vaccinated without running afoul of the federal employment laws governed by the EEOC (Title VII, Pregnancy Discrimination Act, ADA, etc.).⁵ However, employers must still follow the ADA’s traditional interactive process for considering accommodation requests by employees who believe they

need an exception due to a medical disability. Likewise, exceptions may need to be made for employees who hold a bona fide religious belief under Title VII’s anti-discrimination requirements.

The EEOC will likely develop additional guidance on whether mandatory vaccination programs for COVID-19 are necessary, advisable, and legally permissible in the near future. It is possible that the change in presidential administration could impact the guidance of the EEOC.

To require the vaccine, the school district would need to develop a robust and legally compliant process for responding to accommodation requests. That process must be executed in a non-discriminatory fashion and with fidelity. Until the vaccine is practically available to all employees, these issues will likely be moot. However, school districts planning to implement a mandatory employee vaccine program should begin the process of working with legal counsel to plan the vaccine program and policies.

4 A link to current guidelines is here: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

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

27. Does the fact that the current vaccines have only received Emergency Use Authorizations from the Food and Drug Administration impact whether school districts can mandate employees be vaccinated?

As explained above, the EEOC has indicated that from a federal employment law standpoint, employers can mandate COVID-19 vaccinations so long as certain exceptions are made for individuals with protected disabilities and for religious accommodations. However, school districts are cautioned that their PREP Act immunity could be impacted if they mandate a vaccine with only Emergency Use Authorization (EUA). As background, the current Moderna and Pfizer vaccines have only received EUAs from the Food and Drug Administration (FDA), and have not been fully approved by the FDA. This is important because the EUAs that were issued for these two vaccines specifically conditioned their use on the vaccine provider giving notice to the individual recipient prior to administering the vaccine that:

- FDA has authorized the emergency use of the Vaccine, which is not an FDA-approved vaccine.
- The recipient or their caregiver has the option to accept or refuse the Vaccine.
- The significant known and potential risks and benefits of the Vaccine, and the extent to which such risk and benefits are unknown.
- Information about available alternative vaccines and the risks and benefits of those alternatives.

As a practical matter, the FDA is not an employment agency, and school districts should be able to rely on the EEOC's guidance permitting mandatory vaccine programs, at least on a federal level. However, in the event a school district administers the vaccines and wishes to be covered by PREP Act immunity, they may risk that coverage if they mandate employees be vaccinated when there are only vaccines on the market that have been issued EUAs and not full FDA approval. In addition, school districts are cautioned that the EEOC is relying heavily on the CDC, and their guidance is continually being updated. School districts should work with counsel to ensure that they keep abreast of the latest positions being taken by the various federal agencies on vaccines and mandatory programs.

28. Are there other laws that should be considered when determining whether to implement a mandatory vaccine or testing program for employees?

Yes. While the EEOC is currently taking the position that federal employment laws do not prohibit employers from implementing mandatory vaccine programs for employees, school districts should also consult their state laws. There are currently several states in the process of considering legislation that would ban employers from mandating employees be vaccinated.

Additionally, school districts with a unionized labor force will need to take into consideration the National Labor Relations Act. Mandatory testing or vaccine programs would need to be negotiated with those unions through their collective bargaining agreements. Additionally, there is the possibility of workers compensation exposure for employees that had an adverse health reaction when taking a mandated vaccine. School districts should work with counsel to consult their state's workers compensation schemes.

29. If a school district encourages or mandates their employees be vaccinated, does the district have to pay for that time spent by an employee?

Yes, if it is a mandatory job requirement. No, if it is purely voluntary.

30. Are their rules surrounding the pre-vaccination health screening questions that school districts need to know?

Yes. According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure there is no medical reason that the individual should not be vaccinated. If the school district mandates the vaccine to its employees and administers the vaccines directly (or through a contracted third-party provider), these pre-vaccination medical screening questions will likely violate the ADA's prohibition on disability-related inquiries.

There are ways to alleviate this concern. First, the school district could make the vaccines voluntary, and could ask the employee to voluntarily answer the pre-screening questions. If the employee chooses not to answer the questions, the school district would not administer the vaccine to the employee, and of course would need to ensure that the employee was not retaliated against, intimidated, or harassed regarding their decision.

Second, for school districts that choose to mandate vaccinations, they could instruct employees to obtain vaccinations from truly independent third parties that do not have contracts with the school district to administer the vaccination, such as a pharmacy, public health department, or doctor's office. In that situation, the ADA's restrictions on disability-related inquiries would not apply, because the District is not making the inquiry or learning the results.

31. Can school districts require their vendors to receive the COVID-19 vaccine prior to visiting school district property?

Yes, with the conditions explained above. In many jurisdictions, vendor treatment is generally dictated by contract. The school district could place requirements in new or renewed contracts that visitors to school district property must be vaccinated. However, in some jurisdictions, Section 504 of the Rehabilitation Act (Section 504) may require the school district to treat employees of independent contractors the same as its own employees for purposes of responding to reasonable accommodation requests under Section 504.

In other words, there is some risk that the school district would be required to engage in a process of determining whether the independent contractor required a reasonable accommodation of being permitted on school district property despite not taking the vaccine due to a medical disability. While it is clear that the ADA would not apply to independent contractors, there is a circuit court split as to whether Section 504 allows an individual with a disability to sue an entity that is not his/

her employer for discrimination/failure to accommodate under Section 504.

Additionally, logistical hurdles in tracking and ensuring each vendor representative has received the vaccine will need to be addressed, and maintaining proof of vaccinations will require consideration of privacy.

32. Can school districts require their volunteers to receive the COVID-19 vaccine?

Yes, as explained above. Although as with employees and vendors, Section 504 may require the school district to provide reasonable accommodations to volunteers with medical disabilities because Section 504 prevents the school district from "denying participation in, denying the benefits of, or subjecting to discrimination" any otherwise qualified individual with a disability with respect to any of the programs or activities of the school district. As explained above, there are some court circuits that support a non-employee's right to sue for these accommodations under Section 504.

Additionally, as with vendors, logistical hurdles in tracking and ensuring each volunteer has received the vaccine would have to be navigated, and maintaining proof of vaccination will implicate general privacy issues as determined by the school district's state laws. Absent a mandatory program for public school employees, it may be politically challenging to justify a vaccine requirement for volunteers only, and may restrict the supply of volunteers. Of course, as with employees, the school district could strongly encourage that all volunteers receive the vaccine prior to volunteer work.

CONFIDENTIALITY AND PRIVACY

33. Are there any confidentiality considerations for testing?

Yes. If a school district hires an external health clinic to conduct the tests, the test results would likely be considered HIPAA protected health information, which would require additional protections and limitations on who has access to the test results and how a positive test result could be disclosed.

If a school district conducts the test itself, the results may not be subject to HIPAA, but this would depend on a legal analysis of the specifics. For instance, if the school district attempted to bill out the costs of the tests to Medicare/Medicaid, HIPAA may apply.

If a school district decides to conduct the tests itself and bears the costs itself, only FERPA would apply, which

has less stringent requirements regarding protection and disclosure of information. Note, though, that if a school district elects to administer the tests itself, it will need to ensure that whoever provided the tests is appropriately trained and licensed to do so, including a Clinical Laboratory Improvements Act (CLIA) certificate of waiver as applicable and any state requirements, as well.

School districts will also need to train their employees on permissible disclosure of a positive result and how to do so while maintaining the privacy of the student involved. Under both FERPA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the general rule of thumb is that you can disclose a positive COVID result if it is necessary to protect the health and safety of others as long as you disclose the least information possible. Most schools have interpreted this to mean letting people

who were potentially exposed by the individual with the positive result know that they came into contact with a person who tested positive, but not providing any identifying information of that person.

34. What are the employee privacy considerations COVID-19 information?

School districts must maintain all medical information they learn about employee illness (including diagnosis, temperature readings, suspected diagnosis, information about vaccination, and information about symptoms) as a confidential medical record. This information may not be stored in the general personnel file, but can be kept with the employee's already existing medical information. School districts should also ensure there are not state specific laws that mandate other forms of record-keeping and confidentiality.

Employee medical information should generally not be released to third parties without obtaining appropriate consent or being legally compelled through a process such as a subpoena or court order. The school district can report positive COVID-19 cases to the health department, and can internally communicate the information only to the extent that it is necessary for appropriate school district officials to follow public health guidance.

With respect to COVID-19 or vaccine rates, the school district may find that maintaining anonymized employee data for statistical or tracking purposes may be logistically simpler and accomplish the goals of the school district. However, the school district should take care that it is not inadvertently identifying a staff member, even when names are not disclosed, because of unique details or small subset numbers—for instance, if the school district has one music teacher per school and lists the position of “music teacher” at a specific school on a COVID-19 public data report.

35. What are the student privacy considerations COVID-19 information?

As a general rule, personally identifiable student information (PII), must be kept confidential and cannot be disclosed to third parties without a court order, subpoena, or consent or unless based on another specific privacy exception. Within the school district, school officials can discuss or share information about a student for legitimate educational purposes, which should be defined by the school district. However, FERPA does acknowledge health and safety emergencies, and allows school districts to release PII to necessary third parties during an existing emergency if it is necessary to protect the health or safety of others. Examples of appropriate recipients in the event of an emergency includes public health officials and medical personnel. The media will not be an appropriate recipient, and it is unlikely that another parent or student will need to know the identity of a student infected with COVID-19, when simply alerting the family of the exposure would be sufficient.⁶

36. Is the pandemic a health and safety emergency under FERPA?

Generally, yes. However, as with HIPAA, there is no “carte blanche” to release student information and data just because the information has some relevancy to COVID-19. During the COVID-19 public health emergency, the school district may make case-by-case determinations that there is “an articulable and significant threat”⁷, though the school district must record the basis for the disclosure and to whom the information was disclosed in the student's education records.

37. How do we maintain student health information during the pandemic?

Student health information should be maintained as other confidential student information is maintained. With respect to COVID-19 or vaccine rates, as with employees, the school district may find that maintaining or sharing anonymized student data for statistical or tracking purposes may accomplish the goals of the school district. However, the school districts should take care that it is not inadvertently identifying a student, even when names are not disclosed, by sharing unique information that could lead a person to be able to identify the student.

⁶ There may be a rare situation in which school districts may determine (in conjunction with health, law enforcement, or other such officials) that the release of PII to a parent/eligible student pursuant to COVID-19 emergency situation is necessary to address the health risks to the parents/eligible students notified.

⁷ The U.S. Department of Education has published guidance which you can access at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf

38. Can the school district disclose student PII without consent to the health department so that the health department can assess the student's illness?

Yes, if it is a health and safety emergency, but not solely because the information is designated as “directory” information by the school district. As discussed in questions 35 and 36, FERPA permits school district to release PII in connection with a health or safety emergency or pursuant to other applicable FERPA exceptions.

CONSULTING LEGAL COUNSEL

39. When should school districts consult legal counsel?

School districts are advised to work with legal counsel throughout the course of developing their return-to-work and school plans. Attorneys can help school districts mitigate claims at the outset by identifying areas of concern and by guiding on best practices for screening, testing, and vaccination programs in addition to overall District response efforts. In the event districts receive objections, accommodation requests, or actual claims, counsel should be immediately contacted.

The response to COVID-19 involves the compilation and analysis of numerous sources of laws, agency guidance, and legal case precedence. For example, information from the CDC, FDA, EEOC, DOE, and NLRB must be considered, in addition to existing and developing federal

and state laws. School districts should seek legal counsel that are well versed not only on these laws, but also that specialize in representing school districts and educational institutions.

While contact information (name, address, phone number) may be directory information when the parents/eligible student⁸ have not “opted out”, releasing this information would disclose health information that is not just directory information.

Therefore, unless the particular situation is a health and safety emergency or another specific FERPA exception applies, the school district will need parent or eligible student consent.

40. When should school districts consult public health officials?

As with legal counsel, school districts should work with local public health officials and ensure that those officials are in support of the district's protocols. This is an important aspect to defending any claims. Additionally, as the testing, vaccines, and guidance available regarding COVID-19 continues to evolve, school districts should ensure that they check back frequently with the CDC's website and information published by public health officials to ensure continued compliance.

ONLINE CONSENT FORMS AND INCENTIVES

41. My school system wants to offer voluntary asymptomatic (i.e., universal screening or sampling) COVID-19 testing for students and/or staff and use electronic forms to obtain consent. Can we do that?

Yes, school systems can use electronic forms to obtain consent. However, there are three laws to keep in mind: the federal ESIGN Act (the Electronic Signatures in Global and National Commerce Act), the state-level UETA (the Uniform Electronic Transactions Act), and HIPAA (the Health Insurance Portability and Accountability Act). These laws are discussed more fully below. As always, school systems should be mindful to obtain informed, voluntary consent.

42. Is there anything school systems should keep in mind about consent generally?

Whenever a school system seeks consent, it must ensure that the consent is informed and voluntary. HIPAA does not set out standards for consent for medical testing or treatment. Rather, each state has its own laws setting standards for consent. There are some universal guiding principles, however. The concept of consent is rooted in patient autonomy and the right to make one's own decisions. Accordingly, the individual giving consent must have the legal and mental capacity to do so (*i.e.*, independent adults give consent for themselves, while adults can give consent for the children for whom they are responsible), the provider must disclose sufficient

⁸ FERPA rights transfer to the student when the student turns 18 or attends a postsecondary institution at any age, and thereby becomes an “eligible student”.

information about the testing or treatment, the individual must understand what is being consented to, and the consent must be voluntary (*i.e.*, not coerced or given under duress). School systems may choose to reference the methods they already use to obtain consent for special education testing to ensure consent for COVID-19 testing is informed and voluntary.

43. What is the ESIGN Act?

The ESIGN Act is a federal law establishing that electronic signatures have the same legal standing as pen-and-paper, wet ink signatures. Basically, it means that an electronic signature on a document is just as binding as a wet ink signature. The ESIGN Act, or the Electronic Signatures in Global and National Commerce Act defines an electronic signature as “an electronic sound, symbol, process attached to or legally associated with a contract or record and executed or adopted by a person with the intent to sign the record and be legally bound.” Essentially, then, an electronic signature must be associated with/attached to the document and adopted by the signatory.

In order for an electronic consent form to be valid under the ESIGN Act, both parties must consent to do business electronically. Additionally, the signatory should be provided with a method on how to access and retain the electronic document. Finally, the ESIGN Act includes an obligation to retain records, including creation and maintenance of a retrieval process, just as a district must currently retain special education records and other records currently.

44. What is the UETA?

The ESIGN Act was first adopted in 2000 and allowed states to adopt UETA or an equivalent state-level law, to govern electronic contracts. The UETA, or Uniform Electronic Transactions Act, has been adopted by all except two states. Those two states—Illinois⁹ and New York¹⁰—have laws that are similar to the UETA. The UETA, like the ESIGN Act, gives legal standing to electronic signatures. Also, like the ESIGN Act, the UETA requires that all electronic contracts indicate an intent to sign, include an affirmative agreement to use electronic records, and ensure that the electronic signature is associated with/attached to the electronic record. Finally, the UETA requires electronic records to be maintained and available for retrieval.

Many people are already familiar with this type of electronic document and signature system. Think of

those electronic contracts that have the signatory’s name already filled in on the signature line in a cursive font. The signatory must affirmatively click on the signature both to agree to do business electronically and to sign the document. The signatory then has an option to download and save the signed document.

45. Where does HIPAA come in?

HIPAA (the Health Insurance Portability and Accountability Act) allows electronic forms and is technology-neutral. Because HIPAA governs the maintenance of medical records, patient access to records, and privacy of those records, school systems must ensure that any electronic consent forms for COVID-19 testing adhere to HIPAA standards. Specifically, school systems should ensure that the individual consents to using electronic documents and that those documents have adequate security around them. In particular, school systems must both implement an authentication system to ensure that the individual signing the document has the authority to do so and also maintain the security and privacy of the document.

46. Can we automatically sign people up for testing and have them opt-out, instead of getting consent forms to opt into testing?

Most states require written evidence of informed consent (*e.g.*, a signed consent form) prior to conducting medical testing. For example, Florida and Tennessee both require that consent for medical testing and treatment be in writing such that an “opt-out” procedure would not be workable. By contrast, Kentucky does allow school systems to automatically sign people up for COVID-19 testing and to require those who do not wish to be tested to affirmatively opt-out. Other states, such as Texas, have different levels of informed consent requirements, depending on the procedures to be conducted. School systems should consult their individual state laws to determine whether an “opt-out” model is legally compliant in their state.

Even if an “opt-out” model is legally compliant, however, school systems that contract with a healthcare provider to perform COVID-19 testing will still need a consent form signed by the student’s responsible adult (or adult students and employees) to allow the healthcare provider and school system to share relevant information, as described below. Given this, school systems may wish to obtain written evidence of informed consent at the same time, as additional protection.

9 Illinois has adopted the Electronic Commerce Security Act, available here: <https://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=89&ChapterID=2>.

10 New York has adopted the Electronic Signatures and Records Act, available here: <https://its.ny.gov/nys-technology-law#ArticleIII>.

47. How do we make this all work?

School systems may choose to partner with healthcare providers, testing companies, government agencies, or other vendors to provide COVID-19 testing. These healthcare providers may create and maintain appropriate consent forms. Additionally, many software companies (e.g., Google, Adobe, DocuSign) offer products for the creation and maintenance of these types of electronic documents. These vendors can assist with both required minimum technical specifications for documents, as well as maintenance and secure storage of those documents.

School systems may find it most efficient and effective to contract with a healthcare provider or testing vendor to provide COVID-19 testing and to require that the healthcare provider be responsible for appropriately collecting and maintaining electronic consent forms, consistent with federal and state law. The contract with the healthcare provider or testing vendor should clearly delineate the cost for services, the level and type of access the healthcare provider will have to school facilities, and an assurance that the healthcare provider will maintain the confidentiality of any student or employee information it receives. Any contract (and any consent form eventually signed by an individual for testing) should include a separate authorization aligned with HIPAA to allow the healthcare provider to share information with the school system.

Additionally, consider having a consent form that is valid for multiple COVID-19 tests for a given time period (e.g., the academic year). Under this scenario, the consent would be valid through the end of the school year, or until the signer withdraws consent, whichever comes first. The consent would allow for multiple COVID-19 tests, thereby reducing the administrative burden of obtaining new consent for every test. As with consent generally, how long a consent form can be valid will depend on state law and the type of medical treatment involved. For example, in North Carolina, only a single consent is required for ongoing treatment. Accordingly, school systems should check their state laws for any applicable limitations.

If a school system is able to use a consent form that is valid for multiple COVID-19 tests, that consent form will generally be valid unless it is revoked. Also, keep in mind that the authorization to allow any healthcare provider to share information (required by HIPAA) will need to have an expiration date or event. For ease of administration, school systems should consider making their consents valid for the same amount of time as any HIPAA

authorization. For instance, both forms could provide for an expiration date immediately prior to the start of the next school year (such that the consent would be effective over the summer break), until the student reaches the age of majority (for student consents)¹¹, or until the consent is revoked in writing, whichever comes first.

48. Can we offer an incentive for COVID-19 testing consent and/or participation?

Yes, school systems can offer incentives to encourage students and employees to consent to and participate in COVID-19 testing. There is no federal statute prohibiting such incentives (though school systems should check their state laws, as well). In fact, these kinds of incentives are routine, particularly on college campuses, and are expressly permitted in [recent CDC guidance](#). Incentives may be more effective when offered for actually participating in testing, rather than merely signing a consent form.

When offering incentives, there are a few principles school systems should keep in mind. First, school systems should take care that any consent for testing remains voluntary and avoid any incentives that could reasonably be viewed as coercive. By the same token, school systems should keep in mind the audience to whom the incentive is targeted in order to make the incentive meaningful and effective.

For students, effective and appropriate incentives might include token school supplies such as pencils or notebooks, or “school bucks” that can be redeemed at the school store for school-branded items such as t-shirts or water bottles. Meanwhile, school systems should not offer any incentives that could stigmatize students who do not consent or appear for testing. For example, schools should not hold a lunchtime pizza party or allow extra recess time only for those students who have appeared for testing. Likewise, schools should not take away the benefits of the existing school program. For example, under no circumstance should a school require silent lunch or indoor recess only for students who do not consent or participate in testing.

For adult employees, appropriate incentives might include a small gift card to a local coffee shop, a school t-shirt, or the same “school bucks” redeemable at the school store. School systems should avoid any incentives that change the terms and conditions of employment, such as extra pay, extra paid time off, or relief from usual professional duties.

¹¹ Likewise, school systems should be prepared to obtain new consents for students once they reach the age of majority, as the right to consent to medical treatment will transfer to them, absent a power of attorney or guardianship.