

WHAT SHOULD YOUR SCHOOL DO ABOUT COVID-19 THIS YEAR? 4 POLICY UPDATES TO CONSIDER

Insights
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As the COVID-19 pandemic persists and a new academic year is upon us, private and independent schools are understandably exhausted by the additional obligations imposed upon them over the last two years. Many are resistant to further COVID-19 guidelines and would like to simply return to a level of normalcy. However, it is clear that the pandemic and governmental safety and legal requirements will not permit schools to simply do nothing. Instead, you should be reviewing and updating policies to account for evolving federal, state, and local guidelines on managing the spread of COVID-19, keeping in mind how you can balance the desires (and demands) of your community. What protocols should you put in place? How will your community accept them? Here are four pandemic-related questions to consider as you prepare for the new school year.

An Important Opening Note

Before we review the four policy updates your school should consider, it is important to visit an important opening point. When it comes to sometimes contentious topics like masking requirements and quarantines, many schools are taking a more relaxed approach than what the Centers for Disease Control and Prevention (CDC) recommends. For example, instead of requiring quarantines when a student is exposed to the virus, some schools give parents the option to decide whether to send their child to school. Similarly, many schools in areas of high transmission do not require masking indoors.

Related People



Suzanne K. Bogdan

Partner

[954.847.4705](tel:954.847.4705)



Ilanit Fischler

Partner

[954.847.4723](tel:954.847.4723)

As your school decides what rules to set and which policies to adopt, you should consider the needs of your community, your obligation to keep everyone safe, and potential legal exposure. For example, OSHA requires that employers maintain a workplace free of recognized hazards. COVID-19 is such a recognized hazard.

By not following CDC guidance, an employer may open themselves to exposure under OSHA's General Duty Clause. In addition, some states, like Florida, have passed immunity laws which provide a school immunity from COVID-19 claims if the school followed governmental guidelines, and CDC and OSHA are clearly governmental guidelines. You may want to take a collaborative approach with your school administration and legal counsel, taking all of these factors into account, before deciding on how to approach these four policy areas for the 2022-2023 school year.

1. Will You Require or Encourage Vaccination?

Schools will need to continue monitoring state, local, and CDC guidelines and following good practices to ensure all members of your community stay safe. Although the CDC does not set vaccination requirements for schools or childcare centers, the agency recommends that all eligible employees get vaccinated against COVID-19. But should you require vaccination for your students or your staff?

If Your School Decides to Encourage the Vaccine

Due to concerns about employee relations issues and legal exposure, many schools are making COVID-19 vaccinations voluntary for both their students and staff. Many have decided to encourage the vaccine instead of mandating it. If you chose this route, you may want to review CDC guidance, which suggests that schools promote vaccination for employees and students in the following ways:

- Provide information about [vaccines](#) and encourage evidence-based [trust and confidence in vaccines](#).
- Establish supportive policies and practices that make getting vaccinated easy and convenient. For example, you could create [a workplace vaccination program](#) or



Susan M. Guerette

Partner

610.230.2133

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provide paid time off for employees to get vaccinated or assist family members to get vaccinated.

- Make vaccinations available on-site by hosting school-located vaccination clinics or connect eligible children, students, teachers, staff, and families to off-site vaccination locations.

Although COVID-19 vaccines were not yet approved last year for all school-age children, the CDC now recommends vaccination for everyone age 6 months and older – and suggests boosters for every eligible person age 5 and older. Therefore, you may want to update your programs accordingly for encouraging student vaccination.

If Your School Decides to Mandate the Vaccine

If your school is considering or planning to keep a mandatory vaccination policy in place for employees or students, you should evaluate the potential legal issues.

- From a legal standpoint, as to employees, schools must first ensure that they can show how the vaccination is job-related and consistent with business necessity to pass muster under the Americans with Disabilities Act (ADA). This means taking into consideration the level of community spread, whether there is a substantial risk of becoming seriously ill if employees are not vaccinated, and alternatives other than vaccines (such as masking, testing, teleworking, and providing private working areas). A similar analysis is required for students.
- Next, schools must have policies in place that fully inform employees and students of the vaccine requirement.
- The policies should also spell out how employees or students may seek an exemption as an accommodation, based on a medical condition or (for employees) a sincerely held religious belief. If your school is a religious school, you should talk with your counsel about the necessity for accommodating an employee based on a religious belief to determine whether your school may be exempt from the religious accommodation requirement. If an employee seeks an exemption for either or both reasons, the school should

be prepared to engage in, and document, an interactive exchange with the employee to determine whether a reasonable accommodation would enable them to perform their essential job functions without compromising workplace safety. Accommodations might include things like approving a teleworking arrangement or offering a leave of absence, depending on the employee's position with the school.

- Of course, schools must also consider if there are any local or state laws prohibiting mandatory vaccines. For example, under Florida law, an employer with a vaccine mandate must provide five different exemptions for employees to choose from to avoid the vaccine, and the employer can be fined up to \$50,000 by the Attorney General for failing to do so. Other states have similar limitations and penalties.
- As to students, some states may prohibit student mandated vaccines. For example, Florida schools are prohibited from requiring vaccination documentation for students and parents to enter the campus or receive a service from the school. Other states have similar limitations.

2. Will You Enforce Masking Requirements?

When reviewing and revising your masking policies for the new school year, you should consider a number of factors, including the level of COVID-19 transmission in your location, state and local masking laws, which may vary significantly, and how your community may respond.

A Return to Masking?

While many jurisdictions no longer require masking, some have considered reinstating such requirements as cases rise while others have restricted or blocked mask mandates. Notably, even if masks are not required, officials in most states encourage people to wear face coverings when the risk of COVID-19 transmission is high.

"Wearing a well-fitting mask consistently and correctly reduces the risk of spreading the virus that causes COVID-19," according to the CDC, which recommends universal indoor masking in communities with high transmission levels. You can check the current community transition levels on the CDC's website. In K-12

schools, specifically, the CDC continues to recommend indoor masking for everyone age 2 and older, including students, teachers, staff, and visitors, regardless of vaccination status.

Although mask use has waned in recent months, more people may return to masking due to the recent uptick in the COVID-19 positivity rate [due to the BA.5 variant](#). Moreover, future variants will likely shape rules, recommendations, and societal views on masking in the months to come.

Handling Tricky Situations

We have heard from schools that some students are voluntarily wearing masks (at least around teachers and administrators) to avoid having to comply with grooming policies. Some schools are therefore asking if they can prohibit masking. We do not recommend prohibiting masking, but you can assess the necessity for masking and compliance with school rules in appropriate circumstances.

In addition, the CDC has made clear that “schools and ECE programs should consider flexible, non-punitive policies and practices to support individuals who choose to wear masks regardless of the COVID-19 community level,” in [guidance for K-12 schools](#), which was updated in May 2022. Additionally, people may need to take extra precautions if they are immunocompromised or otherwise at risk for getting very sick with COVID-19 or have close contact with someone who has a high risk of getting sick.

In-Person Learning and Accommodations

For student-related policies, access to in-person learning is key. “Schools with students at risk for getting very sick with COVID-19 must make reasonable modifications when necessary to ensure that all students, including those with disabilities, are able to access in-person learning,” the CDC said. “Students with immunocompromising conditions or other conditions or disabilities that increase risk for getting very sick with COVID-19 should not be placed into separate classrooms or otherwise segregated from other students.”

Note, however, if your school is a religious school, you should consult counsel on the school’s obligations, as the

school may have more flexibility regarding managing student disabilities than other schools.

If you have a universal masking policy, you should also consider accommodations for people who cannot safely wear a mask due to a disability that is covered by the ADA or equivalent state law and for workers with job duties that make masking a health or safety risk.

Important Final Points

In addition to masking policies, you should consider incorporating other prevention strategies into your COVID-19 response plan – or continuing such strategies during the new school year – including:

- Optimizing ventilation and improving indoor air quality;
- Educating employees and students on proper handwashing;
- Regularly disinfecting surfaces; and
- Taking measures to avoid crowding.

Finally, when developing policies for student masking, given the high emotions and tension reflected in most schools last year, the administration should carefully consider its policies and how it will communicate those policies to parents. Schools that decide to (or are required to) implement mandatory masking should be prepared for opposition and possible petitions to the Board about these (and other issues). The administration (possibly with input from the Board) should carefully consider its messaging and how it will address opposition. It is always the school's responsibility to ensure safety, compliance with laws, and protection of individuals who may have disabilities or other conditions. Balancing these obligations is not always easy.

3. Will You Require Testing Before Field Trips and Overnight Travel?

If you decide to test employees who supervise extracurricular activities, keep in mind that [EEOC guidelines on COVID-19 testing are evolving](#). In prior guidance, the EEOC broadly allowed employers to screen workers for COVID-19 without running afoul of the ADA due to the state of the pandemic. In [revised guidelines](#),

however, the agency said you can only continue to administer viral tests for employees who are in the physical presence of others if you can show your testing practices are job-related and consistent with business necessity, taking into consideration community transmission rates and other accommodations that may be available.

As to students, even when the COVID-19 community transmission level is low, the CDC says schools can consider screening for the virus before participation in high-risk activities, such as indoor sports and extracurricular activities. However, schools should take into consideration the recent EEOC guidance on COVID-19 testing, as the same standards would apply to a student test as an employee test. In addition, if you decide to conduct COVID-19 testing on students before participation in certain activities – such as sports, field trips, or overnight travel – you should first obtain parental consent. For ease of administration, you may consider offering home test kits and developing procedures for reporting the results. Moreover, you should be aware that some states (like Florida) do not permit schools to require documentary proof of a negative COVID-19 test as a condition of participating in a school's program, although voluntarily testing is permissible.

Consistent with the ADA standard, you should ensure that any tests you administer are accurate and reliable. For example, you may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Make sure to check for updates, as this is still developing field.

Remember that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later. Keep in mind, also, that these are medical exams that must be conducted in a confidential way and the results need to be maintained in a separated medical file.

"Schools are expected to keep test results of students, parents, guardians, teachers, or staff members confidential consistent with applicable laws, regulations, and policies," the CDC said. "But, also consistent with those laws, regulations, and policies, they may need to

share that information with appropriate individuals, like the state health department.”

4. How Will You Handle New Cases and Outbreaks?

Finally, you should encourage employees and students to stay home when they are sick to help curb the spread of COVID-19 and other infectious diseases. You should also consider what protocols to have in place if an employee or student has been exposed to COVID-19, has symptoms, or tests positive.

“To ensure that schools know about COVID-19 cases, it is important to encourage staff, students, and their families to report to the school anytime staff, students, or others who have been in the school or at a school event test positive for COVID-19,” according to the CDC’s [resources for K-12 school administrators](#), which was updated in June. As a reminder, the CDC recommends that school administrators take the following six steps when they are informed about a positive case within the school or at a school event:

1. **Find out the date** the person with COVID-19 started showing symptoms, or if they don’t have symptoms, the date they tested positive for COVID-19. Notify school officials and the local health department according to current protocols.
2. **Provide isolation guidance** to the person who tested positive for COVID-19. The CDC offers a [sample letter](#) and an [overview of isolation](#) you may provide to the person who tested positive.
3. **Quickly identify the person’s close contacts** [in all settings within the school](#), including the classroom, cafeteria, afterschool activities, and school-sponsored events.
4. **Notify all applicable people** of their [“close contact”](#) status and provide them with [CDC quarantine and isolation recommendations](#). The CDC currently recommends that close contacts wear a mask around others, monitor for [COVID-19 symptoms](#) for 10 days, and [get tested](#) at least five days after having the close contact unless they had confirmed COVID-19 in the last 90 days and subsequently recovered.

5. **Notify the school community** and mention that all people determined to be close contacts have been told. The CDC also provides a [letter template for general notification](#).
6. **Document the earliest possible return date** for people who test positive or are deemed close contacts to resume in-person schooling or school activities and ensure that students do not rejoin in-person class participation until their [isolation](#) or [quarantine](#) period is over. If a close contact ultimately develops COVID-19 symptoms or tests positive, the process should be repeated for that individual and their close contacts.

Although most schools do not permit teachers or student-facing employees to work remotely due to the precedent such action may set for employees with other disabilities wanting to work remotely, many schools still permit students to participate online during isolation and quarantine periods.

Conclusion

As noted above, schools should consider myriad federal, state, and local rules and recommendations before implementing new policies on vaccinations, masks, and other COVID-19-related safety measures. Should you have questions or need assistance in managing any of these issues, you should contact your Fisher Phillips attorney, the authors of this article, or any member [of our Education Practice Group](#). To ensure you stay up to speed with the latest developments, make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information.