



COVID-19 and the 2021-22 School Year: Questions and Answers

August 27, 2021

With the beginning of the new school year, administrative “guidance” and “recommendations” have replaced past mandates from now-rescinded Executive Orders directing school closures or particular mitigation measures as schools reopened. Each school district now determines what procedures their school systems will follow during the 2021-2022 school year and will need to clearly communicate the district’s COVID-19 protocols, expectations, and requirements to staff, students, and parents.

Circumstances relative to the spread of the virus, however, continue to change. While school districts needed to clearly outline their COVID-19 policies and practices at the start of the school year, they also will need flexibility as the school year progresses, in order to respond quickly if federal, state, and local laws, rules, regulations, administrative orders, or guidance suddenly change. Additionally, there may be an increased or decreased need to change present practices based on the spread of the virus.

To assist schools in addressing these issues, NCSBA has compiled the following answers to many of the questions schools have posed^[1]. These answers and suggestions may change throughout the school year, and NCSBA may update this document periodically to reflect such changes.

We know that school districts have worked tirelessly during the pandemic to remain alert to the most current mandates and recommendations. NCSBA will, of course, work to provide you with any updated information as it becomes available.

^[1] Substantial portions of this Q&A were drawn from the following sources: (1) the Minnesota School Boards Association’s “COVID-19 and the 2021-2022 School Year: Questions and Answers” and (2) the U.S. Equal Employment Opportunity Commission’s “What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws.” See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. The information in this Q&A is for educational purposes only and does not constitute legal advice. No attorney-client relationship is created or intended through receipt or review of this document. For advice on specific matters addressed in this Q&A, please consult with your board attorney or other legal counsel.

MASKS

Q1. Our school board has adopted a resolution on masks. Are we also required to adopt a formal policy?

A1. On August 25, 2021, the North Carolina House and Senate both passed Senate Bill 654, which includes the following provision:

For the 2021-2022 school year, all public school units shall adopt a policy regarding the use of face coverings by employees and students. The governing body of the public school unit shall vote at least once a month on whether the face covering policy should be modified.

The Governor has not yet signed the bill; however, it is expected that he will do so. NCSBA will issue a model policy for PLS subscribers that can be tailored to reflect the mask option (mask optional or mask required) that a board has adopted.

COVID-19 VACCINATIONS

Q2. May school districts ask employees if they have been vaccinated against COVID-19?

A2. Yes. The ADA limits employers' ability to make "disability-related inquiries" of their staff. However, pursuant to current guidance from the EEOC, asking an employee whether he or she is vaccinated or requesting proof of vaccination does not constitute a disability-related inquiry. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (subsection K.9).

Note that disability-related inquiries—questions that are likely to elicit information about a disability—are only permitted under the ADA if they are job-related and consistent with business necessity. If the district has not enacted a vaccine mandate and is only trying to determine the percentage of its staff that have been vaccinated, the district should consult with its counsel before asking any follow-up questions, such as *why* a particular staff person has not been vaccinated. Such a question may constitute a disability-related inquiry.

If school districts create and maintain a record of staff members' vaccination status, then they will need to ensure compliance with the ADA's prohibition on disclosure of confidential medical information. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (subsection K.9).

Q3. May school districts require employees to get vaccinated against COVID-19?

A3. Yes, an employer may require all of its employees to be vaccinated as a condition of

employment, subject only to medical exceptions required by the Americans with Disabilities Act (“ADA”) and the religious exceptions required by Title VII of the Civil Rights Act of 1964 (“Title VII”).

The U.S. Equal Employment Opportunity Commission (“EEOC”) administers the ADA and Title VII. It recently updated its online guidance to add a new section (Section K) about vaccination. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. This is an excellent and comprehensive discussion of how employee vaccination requirements interact with the ADA and Title VII, and it should be consulted by employers looking for a detailed discussion of this topic.

Employees who refuse to take a mandatory vaccination and have no valid medical excuse under the ADA or religious excuse under Title VII may be disciplined or terminated from employment. Refusal to be vaccinated after a vaccine mandate is enacted constitutes failure to abide by the terms and conditions of employment and insubordination. School districts must, of course, ensure compliance with their applicable personnel policies and procedures regarding discipline or termination of employment.

Q4. May school districts require students who are eligible to receive the vaccine to get vaccinated against COVID-19 in order to attend school?

A4. No. N.C. Gen. Stat. §130A-152 requires that every child in North Carolina be immunized against diphtheria, tetanus, whooping cough, poliomyelitis, red measles, and rubella. The same statute provides that the N.C. Commission for Public Health (“Commission”) may require other immunizations upon a determination that they are in the interest of public health. Students may not attend school without proof that they have received the immunizations required by the statute, subject to certain exemptions. See N.C. Gen. Stat. §§130A-155 to -157.

Because the authority to determine which vaccinations are required for school attendance has been delegated to the Commission, a COVID-19 vaccination mandate for school attendance can only be imposed by the Commission or the General Assembly.

Q5. Are there circumstances under which school districts may ask students to provide proof of vaccination?

A5. School districts may seek vaccination information from students on a voluntary basis. For example, if a student contracts COVID-19 or is a close contact with someone who has been diagnosed with COVID-19, prior vaccination information may be relevant in determining when the student is eligible to return to school in-person. Under these circumstances, the student’s submission of vaccination status is voluntary, as it is not being required as a condition of return. Rather, the submission allows the student the benefit of an earlier return if they wish to share that information.

If school districts create and maintain a record of students' voluntarily disclosed COVID-19 vaccination status, then they will need to ensure compliance with the Family Educational Rights and Privacy Act ("FERPA"), a federal law which governs the disclosure of personally identifiable information in students' educational records.

Q6. May schools tell parents whether a specific teacher or employee is vaccinated?

A6. No. An employee's vaccination status is confidential medical information under the ADA and cannot be disclosed to the public. Although employers are not prevented from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (subsection K.4).

Q7. May school districts reply to data requests that ask for aggregated numbers of employees vaccinated against COVID-19?

A7. Yes. If the school district has staff COVID-19 vaccination data, the aggregate data of how many employees in a school or district are currently vaccinated does not violate anyone's privacy.

However, in order to avoid violating the ADA's confidentiality requirements governing employees' medical information, if a school district is preparing summary data, it should make sure the data is not so detailed as to make one or more employee's vaccination status easily identifiable.

COVID-19 TESTING

Q8. May schools mandate COVID-19 testing for employees?

A8. There are no state or federal laws that preclude employers from requiring employees to undergo COVID testing. In fact, OSHA suggests that employers consider adopting policies that require employees to get vaccinated or to undergo regular COVID-19 testing if they remain unvaccinated. See <https://www.osha.gov/coronavirus/safework> (under "Purpose"). In addition, the EEOC has specifically stated that under current circumstances, employers may screen employees periodically to determine whether their presence in the workplace poses a direct threat to others. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (subsection A.6)

Q9. What resources are available to school districts for COVID-19 testing?

A9. In one of its most recent publications, “StrongSchoolsNC Public Health Toolkit (K-12) (“Toolkit”) Frequently Asked Questions” (last updated August 10, 2021), the North Carolina Department of Health and Human Services (“NCDHHS”), like the CDC, recommends schools implement some screening/testing program. See <https://covid19.ncdhhs.gov/media/401/open> (page 6). Students and teachers are not required by NCDHHS to be tested for COVID-19 before coming to school. A school or district may choose to implement a testing program for students, staff, and families, utilizing testing program guidance provided by NCDHHS. See <https://covid19.ncdhhs.gov/media/2242/open>.

Testing is currently free in North Carolina whether or not an individual has insurance. See <https://covid19.ncdhhs.gov/about-covid-19/testing#i-don%E2%80%99t-have-health-insurance-can-i-still-get-tested>. Also, in April 2021, the CDC released funding to states to support screening/testing for the 2021-22 school year. NCDHHS elected to use these funds to provide testing support to K-12 schools throughout the state, on an opt-in basis. Accordingly, schools will be able to choose from three options for their testing program: (1) utilizing a state-contracted vendor, (2) performing the testing independently, or (3) using the funds to hire temporary school health staff. See <https://covid19.ncdhhs.gov/media/401/open> (page 6).

Q10. Once school districts have chosen one of the three options discussed in Q9 for their testing program, how should they notify NCDHHS of their decision and interest in receiving testing support?

A10. School districts interested in receiving state support for their 2021-22 school-year testing programs must fill out the NCDHHS K-12 Testing Program Opt-In Form by the required date of September 13, 2021. This form has been sent to school/district administrators and should be completed once per school/district. Districts (LEAs) should complete the form on behalf of all schools in their district. For more information, review the testing program guidance provided by NCDHHS. See <https://covid19.ncdhhs.gov/media/2242/open>.

REQUESTED COVID-19 ACCOMMODATIONS

Q11. If an employee suffers from significant symptoms or side effects of COVID-19 or has an underlying medical condition that might place the employee at higher risk for severe illness if they get COVID-19 (see <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>), does the ADA require school districts to allow the employee to work from home?

A11. Even though an employee may qualify as an individual with a disability under the ADA, this does not mean that a school district *must* allow the employee to work from home. To

determine whether accommodations are necessary and, if so, what accommodations might be reasonable, employees should be required to provide sufficient medical documentation to the school district to substantiate their disabling condition. The school district should then enter into an interactive process with the employee to determine the most appropriate, reasonable accommodation. NCSBA strongly encourages school districts to closely consult with their board attorney when making these determinations.

An additional resource that may be helpful to school districts that have questions about accommodations under the ADA is the Job Accommodation Network, which offers ADA compliance assistance and practical job accommodation strategies for returning individuals with disabilities to work during the COVID-19 pandemic. See <https://askjan.org/topics/COVID-19.cfm>.