



COVID Safe Campus

To Whom it May Concern:

By way of introduction COVID Safe Campus is a nationwide group of disabled activists and academics with public health and policy expertise advocating for improved COVID protections and disability inclusion in higher education. We are writing in furtherance of our mission to improve COVID safety within higher education and to provide you information to help mitigate risk in classrooms and other educational activities so that all students are granted equitable opportunities to participate.

As the COVID surge continues and the White House projects up to 100 million cases this fall, we urge schools to ensure disabled students have equal access to all educational and campus activities by implementing the necessary layers of COVID protections and appropriate disability accommodations.¹ Because higher education opens doors to significant opportunities, particularly for individuals with disabilities, the provision of safe and accessible academic opportunities is essential to furthering disability rights and economic justice. Many disabled individuals need advanced degrees to obtain careers that can provide equitable and sustainable employment opportunities through the provision of necessary disability accommodations such as working from home and flexible scheduling.

Under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“Section 504”), public and private colleges and universities must provide equal opportunities for students with disabilities by ensuring their programs, services, and activities are accessible to students with disabilities.² This includes providing disabled students equal opportunities to both participate in and benefit from educational activities and programs by facilitating physical access, furnishing appropriate auxiliary aids and services, and making reasonable modifications to policies. Schools must make such modifications unless doing so would result in an undue burden, defined as “significant difficulty or expense” or would “fundamentally alter the nature of the program or activity.” Generally, when determining appropriate accommodations, disabled students’ requests should receive primary consideration when schools are determining how they can most appropriately meet individuals’ access needs in the most integrated setting available. See 28 C.F.R. § 35.160(b)(2).

Reasonable Modifications for Students with Disabilities

Disabled students are entitled to inclusion within higher education. Students with disabilities must have equal opportunities to attain academic success as their non-disabled peers. See 34 C.F.R. § 104.4 (b); see also 28 § 35.130 (b).

In order to guarantee equal opportunities to participate in and benefit from higher education, colleges and universities must make reasonable modifications to policies, practices, or procedures when such modifications are necessary to avoid excluding, segregating, or otherwise discriminating against people with disabilities. See 34 C.F.R. § 104.44; see also 28 C.F.R. § 35.130 (b)(7)(i).

¹ See, Yasmeen Abutaleb and Joel Achenbach. *Coronavirus wave this fall could infect 100 million, administration warns*. Wash. Post. (May 6, 2022), <https://www.washingtonpost.com/health/2022/05/06/fall-winter-coronavirus-wave/>

² Office for Civil Rights, U.S. Dep’t of Educ., *Disability Discrimination Frequently Asked Questions* (Apr. 21, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/disability.html>. (Generally, the disability nondiscrimination standards under Section 504 of the Rehab Act and Title II of the ADA are the same and when a school violates Section 504 they also violate Title II of the ADA. In circumstances when “Title II requirements exceed Section 504 requirements... colleges and universities...must also comply with the Title II of the ADA.”)

Some reasonable modifications that schools might consider to ensure disabled students have equitable educational opportunities amidst the ongoing COVID-19 pandemic include universal masking requirements, universal mandatory testing, physical distancing, hybrid-virtual course formats, and providing adequate ventilation such as using HEPA filters, Corsi-Rosenthal boxes, or opening windows to introduce more outdoor air.³

In order to achieve greater equity and inclusion, it is imperative that disabled individuals' perspectives and needs are incorporated into conversations about overall institutional policies as well as disability accommodations processes. The ADA and Section 504 require schools to engage in an interactive process when granting accommodations and schools must consider each student's unique access needs when determining what amounts to a "reasonable modification."

1. Universal Mask Policies

The consistent and correct use of masks is an important prevention strategy. Universal masking significantly decreases COVID transmission.⁴ Two-way masking is estimated to be five times more effective at reducing COVID transmission when compared to one way masking.⁵ Thus, many courts have found universal masking is a reasonable accommodation to ensure immunocompromised and other high-risk disabled individuals can safely participate in school related programs and activities.⁶

2. Hybrid and Remote Formats

Colleges and universities may not exclude qualified disabled students from participation in, deny the benefits of, or otherwise discriminate against disabled students in "any academic...recreation,.. extracurricular, or other postsecondary education aid, benefits, or services..." 34 C.F.R. §104.43. Thus, schools may also want to consider offering reasonable modifications that allow disabled and high-risk students opportunities to participate through alternate course, activity, and event formats, such as a hybrid-virtual modalities.

Schools Obligations on External Platforms Under the ADA and Section 504

"Ensuring equal access to emerging technology in university and college classrooms is a means to the goal of full integration and equal educational opportunity for...students with disabilities." U.S. Dep't of Educ., Dear Colleague Letter (July 29, 2010). Though, colleges and universities "may not, directly or through contractual, licensing, or other arrangements, deny a qualified individual with a disability the opportunity to participate in or benefit from" an activity, nor utilize "methods of administration that have the effect" of excluding or denying access to disabled individuals from educational programs or

³ See, e.g., Mical Raz, MD, PhD and Doron Dorfman, LLB, JSD, *Bans on COVID-19 Mask Requirements vs Disability Accommodations: A New Conundrum*, 2 JAMA Health Forum (Aug. 6, 2021), doi:10.1001/jamahealthforum.2021.1912.

⁴ Sarah M. Bartsch et al., *Maintaining face mask use before and after achieving different COVID-19 vaccination coverage levels: a modelling study*, 7 The Lancet E356 (Mar. 8, 2022), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(22\)00040-8/fulltext#%20](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(22)00040-8/fulltext#%20) (finding mask mandates led to significant decreases in COVID transmission reducing both economic and social costs, even if 90% of the population were fully vaccinated).

⁵ Lisa M. Brousseau et al., University of Minnesota Center on Infectious Disease Research and Policy, *Commentary: What can masks do? Part 1: The science behind COVID-19 protection* (Oct 14, 2021), <https://www.cidrap.umn.edu/news-perspective/2021/10/commentary-what-can-masks-do-part-1-science-behind-covid-19-protection> (finding a person wearing a non-fit tested N-95 was estimated to be protected from transmission for 6.25 hours when both parties were masked, but only 1.25 hours when only one party was masked).

⁶ See, e.g., *The Arc of Iowa v. Reynolds*, No. 21-3268 (8th Cir. 2022) (holding mask mandates are a reasonable accommodation in public schools); *Seaman v. Virginia*, No. 3:22-CV-00006, 2022 WL 872023 (W.D. Va. Mar. 23, 2022).

activities. 34 C.F.R. §104.4 (b); *see also* 28 § 35.130 (b). Schools' access obligations aren't limited to physical property owned by the school, but extend to virtual platforms used in educational programs and activities.⁷ Furthermore, virtual platforms such as Blackboard, Canvas, Zoom, and other third party software necessary for participation in academic activities and programs must be accessible for students with disabilities and comply with web accessibility standards. *See, e.g., Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729 (9th Cir. 2021); *U.S. v. Miami Univ. et al.*, 2016 WL 8814603, 10 (S.D. Ohio, 2016). Accordingly, schools are responsible for ensuring the software they employ is fully accessible for all learners, especially students with disabilities.

Provision of Auxiliary Aids and Services

Colleges and Universities must furnish necessary auxiliary aids or services for persons with sensory, manual, or speech disabilities in order to afford students an equal opportunity to benefit from higher education programs and activities. *See* 34 C.F.R. § 104.44 (d)(1). Common auxiliary aids and services include, but are not limited to, qualified interpreters; real-time computer-aided transcription services; assistive listening devices; assistive listening systems; open and closed captioning, including real-time captioning; braille materials and displays; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals with disabilities. 34 C.F.R. § 104.44 (d)(2) ; *see also* 28 C.F.R. § 35.104.

In addition, colleges and universities must give “primary consideration” to the requests made by disabled individuals when selecting appropriate auxiliary aids and services, meaning schools must generally honor disabled students' preferences unless they can provide another equally effective means of communication. *See* 28 C.F.R. § 35.160(b)(2); *see also* 28 C.F.R. § 35, App'x. B, Subpart E.

Higher education is an essential milestone in people's lives and careers. College and graduate degrees are often required for disabled individuals to obtain equitable access to economic opportunity. Moreover, exclusion of disabled individuals from higher education causes underrepresentation in vital sectors, such as medicine, public health, law, education, and transportation, maintaining systems of structural oppression. Schools' failures to implement adequate COVID safety shouldn't exclude anyone from having an equal opportunity to obtain the necessary credentials to fully participate in society nor maintain systems that exclude disabled people. We strongly urge schools to take all necessary measures including, individual accommodations and public health protections, to ensure that disabled students are granted equitable access to education and participation in the campus community.

We appreciate your consideration of these issues and we welcome further dialogue. Please write to us at covidsafecampus@gmail.com if you have any questions or otherwise wish to discuss these matters.

Sincerely,
The COVID Safe Campus Team

⁷ U.S. Dep't of Educ., Frequently Asked Questions About the June 29, 2010, Dear Colleague Letter (2011) (“FAQ”) (“all school programs or activities – whether in a ‘brick and mortar,’ online, or other ‘virtual’ context – must be operated in a manner that complies with Federal disability discrimination laws.”).