

Disability Compliance

for Higher Education

Successful Strategies for Accommodating Students and Staff with Disabilities

VOLUME 26, ISSUE 1

AUGUST 2020

HIGHLIGHTS

A BRIEF CONVERSATION WITH ...

Autumn Wilke, Assistant Dean for Disability Resources at Grinnell College, tells how to promote social justice for students with multiple marginalized identities. **Page 2**

STUDENT SUPPORT

Review ways programs for students with ASD provide their services remotely. **Pages 4–5**

MANAGING YOUR OFFICE

Get tips for job hunting if you have a disability, and for providing support to candidates. **Pages 6–7**

LEGAL ROUNDUP

Review agency rulings and court cases related to disability. **Pages 10–15**



2016 Winner

Specialized Information
Publishers Association Awards

Best Newsletter

OF COUNSEL

Mask requirements in the face of uncertain disability rights law

By Michael R. Masinter, Esq.

As schools resume on-campus instruction, many may require students, faculty, and staff to wear masks or face coverings in public areas, classrooms, and residence halls to help limit the spread of COVID-19. Inevitably, some students will object to wearing a mask on disability-related grounds, whether because of respiratory impairments or other physical or psychological impairments. Other students with hearing impairments who rely on lip reading or interpreters may object to instructors and interpreters wearing

Continued on page 3.

STRATEGIC PLANNING

Reflect, plan, and implement actions for disability services during pandemic

By Louise Bedrossian, Ed.S., L.P.C.

The emergence and spread of COVID-19 this year has drastically changed the climate and functioning in higher education, creating great uncertainty. The impending return to on-campus activities requires that disability services providers be prepared to meet unique and varied challenges across their campuses.

New tasks and responsibilities will surface with fewer resources available in an environment of confusion, fear, anxiety, and uncertainty. Disability services providers, facing these concerns themselves, will not only be tasked with the safety and well-being of their students, but possibly with decisions and accommodations for greater numbers of students and employees with COVID-19-related disabilities or autoimmune disorders, even though overall enrollment is expected to decline.

The summer semester's typically lower enrollment may provide time to contemplate the impact of changes, and to plan, fine-tune, and implement processes and updates needed to support an efficient return to on-campus operations. Consider using this time to address the following critical issues:

Continued on page 8.

Continued from page 1

masks that conceal their faces. Schools must decide how to respond and, as of press time, will have to do so without specific guidance from the Department of Justice or the Office for Civil Rights. Should schools exempt students with disabilities from mask requirements? Should schools obtain clear masks for instructors regardless of cost or availability? Can schools remove students who refuse to wear masks? Without clear guidance, what legal issues are likely to arise?

The Centers for Disease Control and Prevention estimates that 35% of people with COVID-19 are asymptomatic or pre-symptomatic, and that while asymptomatic or pre-symptomatic, they can spread the virus through microscopic droplets and aerosols expelled when exhaling, speaking, sneezing, or coughing (see <https://bit.ly/2UNn2NP>, table 1, scenario 5). In response, public health authorities have recommended mask requirements along with other measures to reduce COVID-19 transmission.

Because the principal function of masking is the protection of others, not the mask wearer, schools may argue that exempting a student with a disability from complying with a mask requirement is unreasonable because it would pose a direct threat to the health of others, particularly others who by reason of their health conditions may be at increased risk for a life-threatening COVID-19 infection. Contrarily, a student who for disability reasons objects to wearing a mask may argue that the risk of transmission is remote, that the student can self-monitor and isolate should symptoms appear, and that to deny an exemption is to unlawfully deny the student equal access to the school's educational program.

The Supreme Court has directed the application of current public health science to resolve the direct threat analysis, and that science continues to evolve as more becomes known regarding the virus but currently appears to support mask requirements as part of an array of practices to reduce virus transmission.

Schools should begin by giving every disability-based accommodation request individualized consideration, using the interactive process to explore:

1. What is the scope of the burden masking imposes on the student in light of the duration and circumstance in which it applies.
2. Whether a face shield would be a mutually acceptable and effective alternative to a mask.
3. Whether current public health guidance recognizes alternative and equally effective means of preventing potential transmission.
4. Whether the school can offer alternative methods of instruction that do not fundamentally alter a course or impose an undue administrative or financial burden.
5. Whether the school exempts students, faculty,

or staff for reasons unrelated to disability, potentially giving rise to a disparate treatment discrimination claim.

Some courses, including clinical, performance, and laboratory courses, may require in-person or on-campus instruction. If public health guidance suggests masks should be mandatory, schools likely can show that waiving mask requirements as a disability accommodation would create a direct threat to the health of others and require the student to wear a mask as a condition of attendance or residence. But with the widespread adoption of blended instruction in other courses, schools frequently will be able to offer remote access to students who cannot wear a mask, and when practicable should do so, for remote access can be equal access.

Enforcing mask requirements may sometimes prove difficult, but schools must not single out for harsher treatment students who violate mask requirements for claimed disability-related reasons more than students who violate them for other reasons.

Students with hearing impairments who rely on lip reading or interpreters may object to the use of opaque facial coverings and masks by faculty and staff. Although there are clear-mask manufacturers, the clear masks are in short supply. Schools may wish to explore clear face shields as an alternative, but availability limits may also make their routine provision an undue burden even if they are equally effective. Schools should document efforts to obtain clear masks or face shields should it prove necessary to defend on the basis of an undue burden, and should be wary of relieving faculty and staff from mask requirements lest they undermine their argument that masks are necessary for public health. ■

About the author

Michael R. Masinter, Esq., is a Professor of Law Emeritus at Nova Southeastern University and member of the legal panel of the American Civil Liberties Union of Florida. He teaches, writes about, and litigates disability rights, civil rights, and employment law cases. ■