

# Considering Reasonable Accommodation of Face Covering Requirements 2021-22 School Year



## Disclaimer

This advisory guidance is not legal advice, nor should it be construed as legal advice. This guidance does not establish additional requirements not otherwise imposed by law. The Oregon Department of Education (ODE) encourages districts to consult with their own legal counsel and to consider state and federal guidance and laws when deciding how best to implement face covering requirements.

## Maintaining Continuity of Learning By Maintaining Health And Safety

Children are required to attend school, which is a congregate setting where COVID-19 can spread easily unless schools layer mitigation protocols that prevent spread. Universal and correct use of face coverings is one such mitigation protocol and, as such, supports learning in-person. Two of the most important tools the state has to control COVID-19 are vaccination and masking. However, currently, children under the age of 12 are not eligible to receive the COVID-19 vaccines authorized for emergency use. In order to protect students under age 12, individuals who are not vaccinated, and those with underlying health conditions that make them more susceptible to complications from COVID-19, as well as to minimize the disruption of student education in schools because of exposure to a confirmed or suspected case of COVID-19, requiring universal use of face coverings inside schools is necessary.

For the 2021-22 school year, districts will make decisions with their boards to determine local implementation of most COVID-19 mitigation measures, as laid out in the [Ready Schools, Safe Learners Resiliency Framework for the 2021-22 School Year](#). However, consistent with OAR 333-019-1015, face coverings are required in all indoor school settings, both public and private, for all individuals two years and older, including all students, staff, contractors, volunteers, and visitors.

## Existing Statutory and Regulatory Requirements

As noted in the Resiliency Framework, for the 2021-22 school year, schools and districts will be returning to existing requirements. The following information is intended to serve as a reminder and highlight some of those existing standards that districts need to be aware of as the state transitions away from previous guidance.

- School districts **must identify, locate, and evaluate all children with disabilities** for whom they are responsible, regardless of the severity of the disability, who are in need of early intervention, early childhood special education, or special education services (OAR 581-015-2080).
- School districts **must not discriminate** based on age, disability, national origin, race, color, marital status, religion, sex or sexual orientation (**OAR 581-021-0045 Discrimination Prohibited**).
- School districts **must meet the educational needs** (academic, behavioral, and functional) of all students (**OAR 581-022-0103**) and **ensure access to a free appropriate public education (FAPE)** for students who experience disability (**OAR 581-015-2040, 34 CFR 104.33**).

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- Public entities **must make reasonable modifications in policies, practices, or procedures** when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity (28 CFR § 35.130)

## Suggested Practices for Providing Reasonable Accommodations

School districts must meet the existing statutory or regulatory requirements noted above. In order to comply with relevant laws (e.g., ADA, IDEA, Section 504 of the Rehabilitation Act), school districts may need to utilize existing district processes to determine if accommodations must be made for individuals who experience disability. The following suggestions can guide school districts and teams through the review process.

- Districts should not grant an exception to a group of persons with a common diagnosis or other variable. Adaptation, accommodation, and/or modification of face covering requirements should be considered based on an individual's unique needs and circumstances.
  - For students, districts may grant limited exceptions to requirements related to face coverings through individualized student-specific decisions made within the context of the IEP/IFSP or 504 team. The school district should work through their established IDEA and Section 504 processes to ensure adequate review and appropriate adaptation, accommodation, and/or modification of face covering requirements. Wherever possible, IEP/IFSP and 504 teams should work to support a child's ability to meet these requirements rather than granting exception(s).
  - For staff, this process should be addressed according to established school or district processes. Districts/schools should consult with legal counsel regarding ADA when considering restricting access for staff due to their inability to wear face coverings as required.
- Schools/districts should not deny in-person instruction for students with physician's orders to not wear face coverings due to existing medical conditions or other health related concerns.
- For students protected under ADA/IDEA who abstain from wearing a face covering, or students whose families determine the student will not wear a face covering, the school or district should:
  - Review relevant information, including any information provided by the family, to inform team decision-making. No disability category universally prescribes whether a student will be able to wear a face covering. However, students eligible for certain disability categories are more likely to have difficulty wearing face coverings. These include: Autism Spectrum Disorder, Other Health Impairment, Emotional Behavior Disability, and Orthopedic Impairment. Schools should consider the unique needs that arise from a student's disability in determining how to appropriately support their access to FAPE.
  - To the extent possible, ensure adequate expertise and data are available to teams to accurately determine adaptation, accommodation, and/or modification of face covering requirements. This includes ensuring parent/student participation to the extent

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required by existing statute or rule (e.g., OAR 581-015-2190 Parent Participation – General; OAR 581-015-2195 Additional Parent Participation Requirements for IEP/IFSP and Placement Meetings). It may also include:

- Participation of the school nurse and/or other qualified medical professionals;
  - Participation of, or advisory input from, the Local Public Health Authority (LPHA) or the Oregon Health Authority (OHA),
  - Formal request for additional medical health information;
  - Translation of new information and/or resources into the student’s home language.
- The team should determine whether the student eligible for, or receiving services under a 504/IEP/IFSP, cannot wear a face covering due to the nature of their disability. ODE recommends teams use the practices in the [Determining Relationship to Disability or Medical Circumstances](#) section below to make these determinations.
- Where an IEP/IFSP or 504 team is working with a student and family and determines that requirement(s) related to face coverings cannot be met because of the student’s disability, the IEP/IFSP or 504 team should update the student’s IEP/IFSP or 504 plan (as required by OAR 581-015-2225 Review and Revision of IEP/IFSPs). The school or district should:
    - Ensure the child is not excluded because of their medical condition or disability.
    - Review the 504/IEP/IFSP to ensure continued access to instruction given the inability to wear a face covering. In this scenario, a district may choose to adapt, accommodate, and/or modify the face covering requirements to address the individual student needs that arise from their disability, condition, and/or medical condition, in line with CDC recommendations that [cloth facial coverings should not be worn by anyone who](#) is unable to remove the face covering without assistance or who cannot safely wear a face covering due to a disability.
    - Determine how FAPE can be provided safely, which may require the provision of in-home instructional services; related services; and/or supplementary aids and services, including the provision of accommodations/modifications.
      - When making such adaptations, accommodations, and/or modifications, the IEP/IFSP or 504 team should establish alternate safety requirements consistent with local requirements that mitigate risk to the extent practicable.
      - A review of student needs and mitigation measures should consider both the individual student, the community in which the student is learning, and school or district-wide strategy to prevent spread of infection. As part of this review, consider the individual student’s needs and unique circumstances. Some questions that teams may choose to consider are included in the [Determining Adaptation, Accommodation, or Modification](#) section below.
    - In order to ensure appropriate services and supports, (e.g., specially designed instruction; related services; supplementary aids and services, including accommodations and modifications) are established in relevant student plans to enable the student to receive a free appropriate public education (FAPE), as required, school districts may consider:

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- Revisions to present levels or annual goals to reflect the child’s current circumstances.
- Offering different types of face coverings and face shields that may meet the needs of the student.
- Additional instructional supports to effectively wear a face covering.
- Provision of instruction in smaller cohorts with additional physical space.
- Spaces away from peers while the face covering is removed; students should not be left alone or unsupervised.
- Short periods of the educational day that do not include wearing the face covering, while following the other health strategies to reduce the spread of disease.
- Provision of in-home instruction services, related services, and/or accommodations.
  - Maintain the child’s access to their appropriate least restrictive environment. Though teams can always revisit placement decisions, it is generally not appropriate to make a child’s placement more restrictive due solely to their inability to wear a face covering.
- Where the team determines that a student eligible for, or receiving services under, a 504/IEP/IFSP, is able to wear a face covering but is choosing not to, and that choice is not related to their disability or medical circumstances (see [Determining Relationship to Disability or Medical Circumstances](#) below), that child should be treated in the same manner as a similarly situated general education student without medical concerns who chooses not to wear a face covering.
- If any student requires an accommodation to meet the requirement to wear a face covering, districts and schools should limit the student’s proximity to students and staff to the extent possible to minimize the possibility of exposure. District and school staff may wish to review [OHA’s Guidance for Delivering Specialized Clinical Procedures in the School Setting during COVID-19 Pandemic](#) to support decision-making. Districts and schools may also consider:
  - Additional cleaning and sanitation protocols for equipment and spaces where students who are unable to wear face coverings are being educated.
  - Additional personal protective equipment (PPE) (e.g. gowns, shields, gloves) during activities of instruction or self-care that require close and/or sustained staff to student contact.
- For students not currently served under an IEP/IFSP or 504, districts should consider whether or not student inability to consistently wear a face covering as required is or may be due to a disability. Districts continue to be responsible for child find requirements and ongoing inability to meet this requirement may be evidence of the need for an evaluation to determine eligibility for support under the IDEA or Section 504.
- If a staff member requires an accommodation for the face covering requirements, districts and schools should work to limit the staff member’s proximity to students and staff to the extent possible to minimize the possibility of exposure.

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## Determining Relationship to Disability or Medical Circumstances

A mechanism for determining the relationship between a given behavior and a child's disability already exists under Section 504 and under IDEA. Manifestation Determinations are well established within the 504 and special education processes. As it is most commonly conceptualized, manifestation determinations exist as a process that governs disciplinary removals of more than 10 school days (whether through a pattern of shorter removals or one longer consecutive removal) for students who experience disability. The actual manifestation determination review process is governed by OAR [581-015-2420](#), which reads:

- (1) In determining whether the child's behavior is a manifestation of the child's disability, the school district, the parent, and relevant members of the IEP/IFSP team (as determined by the parent and the district) should review all relevant information in the student's file, including the child's IEP/IFSP, any teacher observations, and any relevant information provided by the parents to determine:
  - (a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
  - (b) If the conduct in question was the direct result of the school district's failure to implement the IEP/IFSP.
- (2) If the school district, the parent, and relevant members of the IEP/IFSP team determine that either subsection (1)(a) or (b) is applicable for the child, the conduct should be determined to be a manifestation of the child's disability.
- (3) If the basis for the team's determination is that the school district did not implement the child's IEP/IFSP, the school district should take immediate steps to remedy those deficiencies.

ODE recommends that IEP/IFSP teams use this same process to determine whether a child is unable to wear a face covering as a result of their disability. Under this process, adapted for this determination, IEP/IFSP, 504, and other appropriate teams, including parent(s)/guardian(s), should:

1. Convene an appropriate IEP/IFSP, 504, or other student support team, ensuring that parents/guardians are afforded the opportunity to meaningfully participate. Parents should also be informed that they may invite additional meeting participants at their discretion. When there is an identified medical concern, the medical professional should provide evaluation/assessment and a written health plan to include any required nursing interventions and/or health services that may allow a face covering to be worn as well as what precautions should be taken to keep child and staff safe.
2. Review and consider all available data which could inform the team's determination. This data may include, but is not limited to, current IEP/IFSP, 504, or other educational support plan; medical statements or input; parent input or information; teacher input or information; educational and/or discipline records; evaluation and diagnostic data and/or results; assessment data; observations of the student; and any other source(s) of information that can inform appropriate decision-making.

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3. Determine, based on the available data, whether inability to wear a face covering is caused by or a result of the child's disability and/or medical circumstances.
4. Update any appropriate plans for the child's education to ensure they are able to access FAPE.
5. Provide Prior Written Notice (PWN) to the parent/guardian if a proposal or refusal to initiate or change the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to that child, is made.

## Determining Adaptation, Accommodation, or Modification

When considering the adaptation, accommodation, or modification that may be appropriate for a student, it is important to consider the individual student, the community in which the student is learning, and planned school or district-wide strategies to prevent spread of infection. Some questions that teams may choose to consider as part of this review include:

- What lived experience(s) does the student have that may be impacting their ability to wear a face covering (e.g., history of abuse/neglect, sexual or physical assault, or adverse childhood experiences)?
- What student needs exist? What individual COVID-19 mitigation efforts should be considered?
- Does the student have a documented disability, chronic condition, intellectual disability, or behavioral challenge that impacts their ability to successfully follow mitigation measures as written?
  - It is important to note that many students with disabilities, chronic conditions, intellectual disabilities, or behavioral challenges can follow mitigation measures, including face coverings and/or physical distancing requirements.
  - It is also important to note that, in limited cases, students without disabilities, chronic conditions, intellectual disabilities, or behavioral challenges may have difficulty following mitigation measures, including face coverings and physical distancing. In those cases, relevant school teams should carefully consider the student's circumstances.
- What additional related services, accommodations, and/or modifications should be provided to ensure adherence to FAPE requirements consistent with state and local requirements?
- What type of related services should be provided to the student (e.g., direct care, personal care, instruction, behavior support)?
- Is there an anticipated risk of exposure to body fluids (e.g., tracheostomy, increased oral secretions, spitting, grabbing) related to the student's disabilities, chronic conditions, intellectual disabilities, and/or behavioral challenges?
- Does the student's behavior and/or cognitive functioning impact their ability to follow mitigation strategies (e.g., handwashing, physical distance, wearing face coverings)?
- Are there phased-in approaches that can lead to alignment with requirements over time?
  - Some accommodations may be temporary as students adjust, such as gradually increasing time in-person, or utilizing designated locations for "face mask and covering breaks."
- What door-to-door needs exist for the student, including transportation, arrival, class time, meal time, and school-sponsored activities?

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- The IEP/IFSP, 504, or alternative care team process should include collaboration with impacted school staff as needed, such as bus drivers, nutrition staff, custodians.
- Anticipate that contracted services (e.g., bus companies) may require measures that differ from agreed-upon accommodations in classroom settings, which may be confusing to students and/or families.
- What protocols should be in place to mitigate risk to people who share educational spaces with students who cannot meet requirements?

## Implementation of the Adaptations, Accommodations, or Modifications

The school district should document any adaptation, accommodation, and/or modification that is determined necessary within the student's IEP/IFSP, 504 plan, Student Health plan, or a Student COVID-19 Mitigation plan. ODE recommends that documentation include the following elements:

- The specific requirement(s) that cannot be met for and/or with this student due to the unique needs that arise from the nature of their disability.
- For each requirement listed, the specific disability-related reasons it cannot be met.
- The reasonable accommodations that have been attempted with this student to meet these requirements.
- Documentation showing the plan has been agreed upon or approved by required parties.
- Process for review and update of COVID-19 adaptations, accommodations, or modifications.