



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 at commencement activities so that all students are granted equitable opportunities to participate. Because graduation marks a significant milestone for graduates and their families, providing safe and accessible commencement programming is an essential step toward creating an inclusive educational environment.

Under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“Section 504”), public and private colleges and universities must ensure that their programs, services, and activities are accessible to students with disabilities as well as any disabled family members.¹ This legal requirement includes ensuring disabled students are provided an equal opportunity to participate in graduation programs.² The ADA and Section 504 require schools to provide physical access, appropriate auxiliary aids and services, and make reasonable modifications to policies, unless the provision of such accommodations would result in an undue burden, defined as “significant difficulty or expense” or would fundamentally alter the nature of the program or activity. Notably, disabled students and attendees requests should be given primary consideration when determining the accommodations that are most appropriate to address their needs. See 28 C.F.R. § 35.160(b)(2).

Reasonable Modifications for Attendees with Disabilities

Colleges and universities must afford individuals with disabilities an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs. See 34 C.F.R. § 104.4 (b); see also 28 § 35.130 (b). In order to afford disabled attendees an equal opportunity to participate in graduation events, colleges and universities must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. See 34 C.F.R. § 104.44; see also 28 C.F.R. § 35.130 (b)(7)(i).

¹ 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.”)

² Equip for equality, *Welcome to Our Graduation: Checklist for Creating Accessible Graduation Ceremonies* (2016), <https://www.equipforequality.org/ada-il/wp-content/uploads/sites/2/2016/07/Graduation-Checklist.pdf>.

Some reasonable modifications that schools might consider to allow disabled students and family members the opportunity to participate in safe, integrated graduation events amidst the ongoing COVID-19 pandemic include universal masking requirements, mandatory testing, physical distancing, and ensuring adequate ventilation such as moving a graduation event to an outdoor venue or using Corsi-Rosenthal boxes.³

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. Alternate Event 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 event formats, such as a hybrid-virtual graduation format.

Provision of Auxiliary Aids and Services for Graduation Activities

Colleges and Universities must furnish necessary auxiliary aids or services for persons with sensory, manual, or speech disabilities in order to afford attendees an equal opportunity to benefit from graduation 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.

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).

In addition, colleges and universities must give “primary consideration” to the requests made by disabled individuals when selecting appropriate auxiliary aids and services, meaning they must provide an opportunity for disabled individuals to request preferred auxiliary aids and services, and they must honor the choice 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.

ADA and Section 504 Obligations at External Graduation Venues

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 otherwise limit a disabled individual’s “enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.” 34 C.F.R. § 104.4 (b); see *also* 28 § 35.130 (b)(1). Furthermore, colleges and universities may not “directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect” of excluding or denying access to disabled individuals in school programs or activities. 34 C.F.R. §104.4 (b)(4); see *also* 28 § 35.130 (b)(7). Thus, the fact that a college or university holds a graduation event at a privately owned venue does not alter their obligations to ensure disabled students have an equal opportunity to participate in and benefit from commencement activities. *Id.* Schools may not deny requests for reasonable modifications nor exclude students from participation merely because an activity is planned to take place at an external venue.⁷

Graduation is an essential milestone in students' lives and schools' failures to implement adequate COVID safety shouldn't exclude anyone from having an equal opportunity to participate in commencement activities. As 3 respiratory diseases (COVID, RSV, and flu) are surging, we urge schools to ensure disabled students have equal access to all graduation activities by implementing all necessary protections.

COVID Safe Campus appreciates schools' attentiveness to the needs of disabled students along with schools' cooperation in making graduation events safe for the entire campus community.

Sincerely,

The COVID Safe Campus Team

⁷ M. Charmatz, Colleges and universities cannot contract away ADA/504 obligations. 26 *Disability Compliance for Higher Education*, 3 (2021). <https://doi.org/10.1002/dhe.31005>.