As we await state guidance, answers to questions on health screening and other reopening protocols

By the New York State Association of School Attorneys

While the COVID-19 pandemic continues to make many aspects of the future uncertain, school leaders across the state are thinking about the fall. Assuming schools reopen, what kinds of health screening and health monitoring should be used for both students and employees? While school districts and BOCES await specific guidance from the governor and State Education Department (SED), there is a body of law that sets some basic parameters. As new guidance is frequently being issued by both state and federal authorities, you should consult with your school attorney before implementing any plans.

May schools routinely take the temperature of employees and/or ask employees if they are experiencing any symptoms associated with COVID-19?

Routine temperature checks and symptom screening appear permissible while COVID-19 is a threat in your community. Typically, employers are restricted under the Americans with Disabilities Act (ADA) from asking employees about medical conditions or taking temperatures unless the employer has objective evidence of a medical condition that may impair the employee's performance of essential functions or poses a direct threat to the employee or others. However, guidance issued by the Equal Employment Opportunity Commission (EEOC) in May stated that the community spread of COVID-19 provides the objective evidence an employer needs to consider the potential for infection to be a direct threat to others.

Regular screening should be conducted consistently, for all like employees, on a non-discriminatory basis. Districts should determine the criteria for exclusion or further assessment of an employee prior to conducting screenings. Any screening practices, including reliance on a list of relevant symptoms, should align with current medical guidance from public health authorities. Districts should continually monitor public health guidance regarding the spread of COVID-19 and take the recommended precautionary measures to address what would be considered a "direct threat."

Must districts keep records of employee screenings?

This is a local decision, provided that districts ensure compliance with any directives issued by state and local governmental agencies. Districts will need to decide whether they will keep records on employee screening or monitoring results, the nature of those records and how they will be stored. Records resulting from employee screening that are identifiable to the employee are confidential health and medical records, and employers must store such records separately from other personnel files. If a district wishes to create a single screening record for multiple employees, the district should ensure such record is maintained in a manner that prevents any individual employee from accessing anything other than their own information.

What information can an employer request from an employee who is displaying symptoms or has been out sick?

The EEOC has confirmed that employers may ask employees whether they are experiencing COVID-19 related symptoms. Districts are advised to consult the terms of any applicable collective bargaining agreement (CBA) which may limit the circumstances under which an employee can be required to produce a doctor's note. In addition, the presence of a direct threat of COVID-19 would make it appropriate to require a medical exam for any employee displaying symptoms of COVID-19 to determine the employee's fitness for work.

What accommodations must employers make for employees upon reopening?

The U.S. Centers for Disease Control and Prevention (CDC) has identified a number of medical conditions that may place individuals at higher risk for serious illness if they contract COVID-19. Some of those medical conditions also may be disabilities under the ADA and Section 504 of the Rehabilitation Act (Section 504). Employees may seek accommodations that may or may not involve modifications of established screening and precautionary measures. If an employee requests accommodations due to a high-risk condition or disability, the district should follow normal ADA procedures and engage in the interactive process to identify potential accommodations.

Under the ADA, an employer does not have to provide a reasonable accommodation if it poses an "undue hardship" which has been interpreted to mean significant difficulty or expense. The EEOC has acknowledged that, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. Additionally, accommodations that may be feasible if the district provides some or all of its instruction remotely may not be feasible once a district returns to full or partial in-person instruction. Therefore, the interactive process for employees requiring accommodations, including those with accommodations pre-dating COVID-19, may need to be repeated as district's operating plans change. In instances involving accommodation requests due to the pandemic, it is recommended that districts consult their school attorneys.

What if an employer is concerned about an employee at high risk from COVID-19, but that employee has not made a request for accommodations?

In planning for reopening, employers need to be mindful that they must adhere to the non-discrimination provisions of state and federal laws including the Age Discrimination in Employment Act (ADEA), ADA and Section 504. While an employer may ask its employees if they anticipate requiring accommodations when schools reopen, employers may not ask about the existence of high-risk conditions or disabilities. Nor should an employer unilaterally impose differing rules for employees based on the employer's concern about their high-risk status or work availability, such as by assigning all employees over a certain age or with medical conditions to work from home. If a district has concerns about the health and safety of an individual employee who has not requested an accommodation, it is recommended that the district consult its school attorney to discuss its options.

What if an employee does not want to return because a household member is at higher risk or they are unable to find childcare?

An employee seeking accommodations because a member of their household is high risk or because of childcare concerns is not entitled to accommodations under the ADA or Section 504. However, the employee remains entitled to any applicable state and federal non-discrimination provisions related to caregiving or family status and association with a person with a disability. Further, such an employee may be entitled to leave under the Family Medical Leave Act (FMLA), the extended paid leave provisions of the Families First Coronavirus Response Act (FFCRA), or existing district policy or applicable CBA. At this time, the provisions of the FFCRA remain in effect until December 31, 2020.

May schools routinely take the temperatures of students and/or ask them if they are experiencing any symptoms associated with COVID-19?

SED guidance issued earlier this year suggested that districts would not be expected to screen students. As of the writing of this article, the state had not issued any updated recommendations for temperature-taking or health screening of students. However, there is no law or regulation specifically forbidding such action.

If screening takes place, the district will have to decide whether it will keep records and the content of those records. If records are created that (1) are identifiable to one or more individual students, and (2) become educational records of those students, they are protected by the Family Educational Rights and Privacy Act (FERPA). If records identifiable to one or more students are stored or transmitted electronically, they are subject to the data privacy protections of Education Law section 2-d.

Who can take students' temperatures or perform health screenings for students?

January 2019 guidance issued by SED advised that trained, unlicensed personnel may monitor and record the vital signs of students, including a student's temperature, if approved by the school nurse or medical director. Districts are advised to involve their medical directors or school nurses in the development of reopening plans to discuss any training or approval requirements for staff who will conduct screenings. Districts also need to remain mindful of potential labor issues, including potential out-of-title work, and/or the duty to bargain when contemplating the use of various staff to perform screenings. Districts are advised to consult their school attorneys with respect to these issues.

When can a district exclude a student and what can a district require from the student upon return?

Education Law section 906 permits districts to exclude students who show symptoms of communicable or infectious diseases. The evaluation and exclusion of a student must be done by the medical director, school nurse, or other health professional. Following any student absence, the school may require a student to present a note from a doctor or health professional. A medical director may examine any student not providing such note. Districts should ensure that existing policies are consistent with any reopening plans.Districts should also plan for continuity of instruction for students who must be excluded due to symptoms of COVID-19 or mandatory or precautionary quarantine. As with plans for distance learning, specific attention may have to be given to students with additional needs, including students with disabilities or English language learners.

Must the district accommodate a student whose parents do not want the student to attend school in person?

To date, the state has not provided any guidance suggesting that parents will have the choice to reject in-person instruction, should it be available, and students remain subject to compulsory education laws. If a district reopens for full or partial instruction in person, students would be required to attend any scheduled in-person instruction unless:

- The absence was excused.
- The student required an accommodation or homebound instruction.
- The district's reopening plan allowed parents to make a choice between in-person or online instruction (assuming such an option is consistent with any forthcoming state guidance).

Parents who do not wish to send their children to school in person may elect to homeschool their children. If parents do so, and their child is eligible for special education services, districts should be aware that the June 1 deadline for requesting special education instruction under Education Law section 3602-c has passed. However, the governor could open a new window for requests for homeschooling by issuing an executive order that sets a new deadline; he has issued 43 executive orders since March 7.

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