

Considering Reasonable Accommodation of Face Covering Requirements for Head Start and Oregon Prekindergarten

2021-22 School Year



Disclaimer

This 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 and Early Intervention/Early Childhood Special Education (EI/ECSE) programs 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.

New Mask Requirements in Head Start Programs

On November 30, 2021, the Children and Families Administration released an [interim final rule with comment](#) (IFC) which adds new provisions to the Head Start Program Performance Standards to mitigate the spread of the coronavirus disease 2019 (COVID-19). This IFC requires universal masking for all individuals two years of age and older, with some noted exceptions.

To support implementation of this requirement, the ODE is providing guidance to programs to make informed decisions about accommodation of face covering requirements for children who experience disabilities and have an Individualized Family Service Plan (IFSP).

Existing Statutory and Regulatory Requirements

As noted in the Resiliency Framework, for the 2021-22 school year: schools, districts and EI/ECSE programs 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 and programs need to be aware of as the state transitions away from previous guidance. Note: EI/ECSE programs providing services to children in community settings follow guidelines from the Early Learning Division with respect to those settings. EI/ECSE services provided in specialized classrooms or homes are subject to the requirements of their ESD or the school district they are operating under.

- School districts and EI/ECSE programs **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 and EI/ECSE programs **must not discriminate** based on age, disability, national origin, race, color, marital status, religion, sex, or sexual orientation (**OAR 581-021-0045 Discrimination Prohibited**).
- EI/ECSE Programs **ensure access to a free appropriate public education (FAPE)** for children who experience disability (**OAR 581-015-2850, 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).
- When special education services are being provided in Community Preschools, Head Start, Preschool Promise locations the following vaccine and mask regulations apply:
 1. Universal masking for all individuals two years of age and older when there are two or more individuals in a vehicle owned, leased, or arranged by the Head Start program; all individuals aged two (2) or older who are using public transportation, including riding a school bus operated by a public or private school; when they are indoors in a setting where Head Start services are provided; and, for those not fully vaccinated, outdoors in crowded settings or during activities that involve close contact with other people effective immediately.
 2. Vaccination for COVID-19 by January 31, 2022, with some noted exemptions, for all Head Start program staff, inclusive of Head Start, Early Head Start, and Early Head Start-Child Care Partnerships, certain contractors, and volunteers in classrooms or working directly with children, and
 3. For those granted an exemption to the requirement specified in (2), at least weekly testing for current COVID-19 infection.

Guiding Principles

Teams should consider the following guiding principles as they are making determinations related to reasonable accommodation of face covering requirements for children two and older:

- **Children need to be evaluated and found eligible for IDEA to be entitled to reasonable accommodation.** If a child is not eligible for IDEA, or otherwise protected under the ADA, they are not entitled to, and cannot be granted, an accommodation for face covering requirements. A values-based belief regarding the use of face coverings is not sufficient reason to grant an accommodation from the face covering requirement.
- **In order to be eligible, a child must meet eligibility criteria based on an appropriately individualized evaluation.** Teams cannot make a child eligible unless the evidence supports eligibility. Medical information often contributes to the evaluation process and eligibility determination, but is not typically sufficient to establish eligibility without additional consideration of the educational impact of medical information. Typically, an educational evaluation is needed to inform that consideration(OAR 581-015-2795(5)(d)(e).
- **Teams should have robust conversations about the need for accommodation in light of the child's circumstances.** The team, including the parents, determines the specific accommodations, including accommodations related to face covering requirements, that are

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required for a child. EI/ECSE programs are not required to provide an accommodation or exemption from face covering requirements because any individual member of the team asks for it. When an accommodation is desired, the appropriate team should meet, consider the child's individual circumstances, and ensure access to a free appropriate public education (FAPE).

- **Every eligible child should receive an accommodation related to face covering requirements, only when it is necessary to avoid discrimination and/or enable the provision of FAPE.** Every child who has a disability or medical related need for an accommodation related to face coverings should have appropriate accommodations provided. For most children, in most cases, that accommodation probably should not be eliminating the requirement to wear a face covering. (OAR 581-015-2815(3)(d))
- **No child should be given an accommodation related to face covering requirements unless it is directly related to the unique needs that arise from their disability.** Accommodations are not a matter of personal, parental, or professional choice or preference. They are not required because a parent has concerns about the efficacy, implications, or potential harm of face covering requirements. Accommodations are required only when necessary to enable access to education and prevent discrimination on the basis of disability. They are a civil rights protection for individuals experiencing disability, and must be reserved for those individuals. (OAR 581-015-2815(3)(d))

Suggested Practices for Providing Reasonable Accommodations

EI/ECSE programs must meet the existing statutory or regulatory requirements noted above as well as regulatory requirements pertinent to community settings as per the ELD. In order to comply with relevant laws (e.g., ADA, IDEA), programs may need to utilize existing processes to determine if accommodations must be made for individuals who experience disability. The following suggestions can guide EI/ECSE programs and teams through the review process:

- Programs 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 children, programs may grant limited exceptions to requirements related to face coverings through individualized child-specific decisions made within the context of the IFSP team. The program should work through their established IDEA processes to ensure adequate review and appropriate adaptation, accommodation, and/or modification of face covering requirements. Wherever possible, IFSP 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 ESD, school or district processes. ESDs/districts/schools should consult with legal counsel regarding

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ADA when considering restricting access for staff due to their inability to wear face coverings as required.

- EI/ECSE programs and community settings should not deny in-person instruction for children with physician's orders to not wear face coverings due to existing medical conditions or other health related concerns. For those children who cannot wear face coverings, programs, school, or districts should adhere to the steps identified below.
- For children protected under ADA/IDEA who abstain from wearing a face covering, or students whose families determine their child will not wear a face covering, the programs, 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 child will be able to wear a face covering. However, children 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 child'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 participation to the extent required by existing statute or rule (e.g., OAR 581-015-2750 Parent Participation – General; OAR 581-015-2155 Additional Parent Participation Requirements for 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 child's home language.
 - The team should determine whether the child is eligible for, or receiving services under an 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 IFSP team is working with a family and determines that requirement(s) related to face coverings cannot be met because of the child's disability, the IFSP team should update the child's IFSP (as required by OARs 581-015-2225 Review and Revision of IEP/IFSPs; 581-015-2810 IFSP Meeting Procedures and Timelines). The EI/ECSE program should:
 - Ensure the child is not excluded because of their medical condition or disability.
 - Review the IFSP to ensure continued access to instruction given the inability to wear a face covering. Programs may choose to adapt, accommodate, and/or modify the face

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covering requirements to address the individual child's 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 IFSP team should establish alternate safety requirements consistent with local requirements, including requirements for community preschools as per the ELD that mitigate risk to the extent practicable.
 - A review of the child's needs and mitigation measures should consider the individual child, the community in which the child is learning, and ESD, ELD, school or district-wide strategy to prevent spread of infection. 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 child plans to enable the child to receive a free appropriate public education (FAPE) and Early Intervention services, as required, programs may consider:
 - 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. It is generally not appropriate to make a child's placement more restrictive due solely to their inability to wear a face covering.

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- Where the team determines that a child eligible for, or receiving services under an 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 child without medical concerns who chooses not to wear a face covering.
- If any child requires an accommodation to meet the requirement to wear a face covering, ESDs, districts, and schools should limit the child's proximity to children and staff to the extent possible to minimize the possibility of exposure. ESD, district, and school staff may wish to review this [Guidance for Delivering Specialized Clinical Procedures in the School Setting during COVID-19 Pandemic](#) to support decision-making. ESDs, districts, and schools may also consider:
 - Additional cleaning and sanitation protocols for equipment and spaces where children 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 child contact.
- For children not currently served under an IFSP, EI/ECSE programs should consider whether or not the child's inability to consistently wear a face covering as required is or may be due to a disability. EI/ECSE programs and 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.
- If a staff member requires an accommodation for the face covering requirements, EI/ECSE programs, districts, and schools should work to limit the staff member's proximity to children and staff to the extent possible to minimize the possibility of exposure.

Determining Relationship to Disability or Medical Circumstances

ODE recommends that IFSP teams use the below 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, IFSP teams, including parent(s)/guardian(s), should:

1. Convene an appropriate IFSP 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 IFSP or other educational support plan; medical statements or input; parent input or information; teacher input or information; educational

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and/or discipline records; evaluation and diagnostic data and/or results; assessment data; observations of the child; and any other source(s) of information that can inform appropriate decision-making.

3. Determine, based on the available data, whether the 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 child, it is important to consider the individual child, the community in which the child is learning, and planned program, 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 child 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 child needs exist? What individual COVID-19 mitigation efforts should be considered?
- Does the child 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 children 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, children 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 child'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 child (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 child's disabilities, chronic conditions, intellectual disabilities, and/or behavioral challenges?

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- Does the child’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 children 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 child, including transportation, arrival, class time, meal time, and school-sponsored activities?
 - The IFSP team process should include collaboration with impacted preschool staff as needed, such as bus drivers, nutrition staff, and custodians.
 - Anticipate that contracted services (e.g., bus companies, community preschools) may require measures that differ from agreed-upon accommodations in classroom settings, which may be confusing to children and/or families.
- What protocols should be in place to mitigate risk to people who share educational spaces with children who cannot meet requirements?

Implementation of the Adaptations, Accommodations, or Modifications

The ESD, school, or district should document any adaptation, accommodation, and/or modification that is determined necessary within the child’s IFSP plan. ODE recommends that documentation include the following elements:

- The specific requirement(s) that cannot be met for and/or with this child due to the unique needs that arise from the nature of their disability.
- For each requirement listed, the specific disability-related reasons it cannot meet.
- The reasonable accommodations that have been attempted with this child 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.