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*via email only*

Mr. Michael Volpe
Assistant Superintendent for
Human Resources, Public Information
and Community Relations
Princeton Public Schools
25 Valley Road
Princeton, New Jersey 08540

**Re: COVID-19-Related Personnel Issues**
**Our File No. 4/72**

Dear Mr. Volpe:

Please accept this correspondence as a letter that you can share with the public regarding personnel situations that may arise from the intersection of the reopening of schools and the ongoing COVID-19 pandemic. As we have previously advised in our August 21, 2020 correspondence to you, it is our opinion that: (1) individuals who seek accommodations because of a family member who is high risk have no entitlement to such accommodations; (2) the Board is not legally required to provide teachers an accommodation to teach remotely when students are in school, because there may be other reasonable accommodations available, and this accommodation would likely impose an undue hardship on the Board; (3) individuals with high-risk family members are not entitled to accommodations; and (4) the Board is not legally required to grant requests for teachers to take intermittent leave due to the impact it would have on the continuity of instruction, but is required to grant certain temporary leaves of absence due to childcare issues.

**1. The ADA and Reasonable Accommodations**

The ADA requires employers to make reasonable accommodations for qualified individuals with disabilities, unless the provision of accommodations would cause the employer undue hardship.[1] A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[2] A "reasonable accommodation" includes "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[3] An employer faces an undue hardship when it encounters "significant difficulty or expense" in providing an accommodation, as determined by a variety of factors, including, but not limited to, the nature and cost of the accommodation needed, the overall financial resources of the District, the number of persons employed in the District (or a particular building), the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the District or the building, and the nature and character of the covered entity's operations.[4]

In general, an employee is entitled to the provision of workplace accommodations when he/she suffers from a "physical or mental impairment that substantially limits one or more of the major life activities" of the employee."[5] A "physical or mental impairment" is essentially any diagnosed medical condition, and the definitions of "major life activities" and "substantially limits" both note that the terms should be considered in a manner which favors expansive coverage.[6]

[1] 42 U.S.C. 12111-12112.
[2] 42 U.S.C. 12111(8).
[3] 42 U.S.C. 12111(9)(B).
[4] 42 U.S.C. 12111(10).
[5] 29 C.F.R. 1630.2(g).
[6] 29 C.F.R. 1630.2(h), (i) and (j).

To identify what, if any, accommodations an employee may be entitled, the employer is charged with the responsibility of initiating an informal, interactive process with the employee seeking accommodations. The purpose of this process is to identify the precise limitations resulting from the disability, as well as the potential reasonable accommodations that could overcome such limitations. This interactive process *does not,* however, dictate that any particular concession be made by the employer. Rather, the interactive process merely requires the employer to make a good-faith effort to explore potential accommodations. An employer can show good faith in a number of ways, including the following: (1) meeting with the employee who requests an accommodation; (2) requesting information about the condition and what limitations the employee has; (3) asking the employee what he or she specifically wants; (4) showing some sign of having considered the employee's request; and (5) offering and discussing available alternatives when the request is too burdensome.

The interactive process should focus on identifying the nature and severity of the employee's apparent condition, including a review of his or her diagnosis, the impact of treatment, the resulting limitations on his or her activities and any recommendations furnished by her treating physician. Next, the parties should evaluate the employee's identified limitations, so as to determine the potential impact on his or her teaching responsibilities. Assuming the employee is able to demonstrate that he or she: (1) is disabled within the meaning of the ADA and/or LAD, and (2) is, with accommodation, otherwise qualified to perform the essential functions of his or her position,[7] the parties should then discuss the requested accommodations, the available accommodations, and determine which of those accommodations are reasonable. Depending upon the additional information obtained through the interactive process, the Board will need to provide the employee with reasonable accommodations. However, the provision of any such accommodations does not relieve the employee from his or her obligation to

[7] This assumes that the employee cannot perform the essential functions of his or her position without accommodation. Not every disability requires an accommodation; many qualified individuals with a disability perform their job functions without accommodations.

perform the essential functions of his or her position, and may not result in the imposition of an undue hardship for the district.

Where an accommodation is reasonable, it should be granted, unless the employer can demonstrate that under the specific circumstances at hand, providing it would cause an undue hardship to its operations. Those can include, among other things, "job restructuring" as referenced above, which the Equal Employment Opportunity Commission ("EEOC") explains includes "reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and altering when and/or how a function, essential or marginal, is performed."[8] Such "job restructuring" accommodations, however, may present potential undue hardships. While the EEOC Guidance contemplates that shifting of marginal responsibilities to other employees is appropriate, it also expressly notes that an employer "may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees' ability to work" or requiring the employer to hire another employee to effectuate the accommodations. Essentially, if the transfer of responsibilities detracts from another employee's ability to compete their regular work on their regular schedule, an undue hardship exists and the accommodation needs not be provided.

In particular, accommodation requests for remote instruction that functionally shift responsibilities such as student supervision to other staff members—and would require the Board to hire a staff member to be in the classroom just for that purpose—would, in our opinion, be disruptive to operations and an undue hardship to the Board in almost all situations.

Critically important is the fact that the employer is *not required to consider only the accommodations proposed by the employee* and is free to offer alternative suggestions. The employer's obligation to provide any reasonable accommodation, not necessarily the employee's preferred reasonable

[8] EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002)* ("EEOC Guidance") (last visited August 21, 2020).

accommodation.[9] Cost and efficacy are pertinent factors here. As the EEOC Guidance states, "If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective," and that "when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation."[10] To that end, if more than one accommodation is effective, while "the preference of the individual with a disability should be given primary consideration … the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[11]

**2. High Risk Individuals**

For the past several months, school districts have had to address concerns from high risk employees who are reluctant to return to in-person instruction because of COVID-19. The Centers for Disease Control currently identify older adults and people with underlying medical conditions as those "at increased risk for severe illness."[12] While the CDC has not precisely defined an age at which an individual becomes high risk,[13] it has listed a number of underlying medical conditions that lead to an individual being high risk: chronic kidney disease, chronic obstructive pulmonary disease, immunocompromised state from organ transplant, obesity (body mass index of thirty or higher), serious heart conditions (such as heart failure, coronary artery disease, or

[9] Similarly, it is important to note that a note or letter from a physician indicating that the individual cannot return to work, or must be accommodated through remote instruction, is not, in and of itself, outcome-determinative. Such a note may establish that the employee has a need for an accommodation, but does note mandate what specific accommodations are required.

[10] EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002)*, Question 9 (last visited August 21, 2020).

[11] *Id.*

[12] Centers for Disease Control and Prevention, *Coronavirus Disease 2019 Who Is at Increased Risk for Severe Illness?* (last visited August 21, 2020).

[13] Centers for Disease Control and Prevention, *Coronavirus Disease 2019 Older Adults* (last visited August 21, 2020).

cardiomyopathies), sickle cell disease, and type two diabetes mellitus.[14] The New Jersey Department of Education's school reopening guidelines include a similar, but not identical, list of individuals who are high risk that defines older adults as those who are sixty-five and older and adds asthma and liver disease to the list of health conditions.[15]

While the Department of Education's guidance notes that school districts "should" provide reasonable accommodations for individuals who fall into one of these high-risk groups, from a legal perspective we must divide the list of high-risk categories into two groups: those at high risk because of age, alone and those at high risk due to a disability. These groups are considered separately because *federal law does not require a reasonable accommodation due to age*. The Equal Employment Opportunity Commission recently highlighted this in its guidance on the interaction of federal employment laws and COVID-19. The EEOC noted that while the Age Discrimination in Employment Act would "prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her age being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19," it "does not include a right to reasonable accommodation for older workers due to age."[16]

The second category of individuals at high risk—those with a pre-existing health condition—may make a request for a reasonable accommodation under the American with Disabilities Act. The ADA generally prohibits employers from discriminating against employees based on their disabilities, and as detailed above, the law obligates the District to provide reasonable accommodations that enable disabled employees to carry out the essential functions of their job.

[14] Centers for Disease Control and Prevention, *Coronavirus Disease 2019 People with Certain Medical Conditions* (last visited August 21, 2020).
[15] N.J. Dep't of Educ., *The Road Back Restart and Recovery Plan for Education* at 18 (June 26, 2020).
[16] U.S. Equal Emp't Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Question H1 (last visited August 21, 2020).

Under the ADA, the burden is on the employee to initiate the process of receiving an accommodation. As the EEOC reminds in its COVID-19 guidance: "An employee—or a third party, such as an employee's doctor—must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition)."[17] The request can be made orally or in writing, and there is no requirement that the employee use the term "reasonable accommodation" or refer to the ADA. A simple request for help, or possibly a request for a leave of absence, triggers the ADA's interactive process.

After the employee (or their representative) communicates the existence of a medical condition that necessitates a change to meet a medical need, the District may ask questions or seek documentation to help determine if the employee has a disability and if there is a reasonable accommodation that can be provided. Depending on the condition and the employee's job duties, reasonable accommodations for an employee who is unable to perform the essential functions of his or her position without accommodation could include providing additional personal protective equipment, extra breaks to allow for more opportunities for hand washing, more frequent cleaning of the employee's work area, change of a work schedule, the erection of a barrier to separate the employee from others, or other similar work environment modifications. These accommodations would permit teachers to instruct and supervise the students physically present in their classrooms without significantly hampering their ability to provide feedback, differentiate instruction, and otherwise effectively engage them.

Finally, if none of these accommodations are possible, the only remaining option may be leave of absence. Such a request will have to be evaluated on a case-by-case basis with the employee seeking the accommodation. As indicated previously, Districts must have a discussion with the employee regarding how the requested accommodation would assist the employee and permit him or her to keep working, explore alternative accommodations that may effectively meet the employee's needs, and request medical

[17] U.S. Equal Emp't Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Question G3 (last visited August 21, 2020).

documentation if needed. And, as we stated previously, while the employee is involved in this process, the employee is not entitled to his or her preferred accommodation, but rather a *reasonable* accommodation. Accommodations which would create an undue hardship on the part of the District (i.e., which would impose a significant difficulty on operations and/or an unreasonable expense) need not be provided.

**3. Individuals with High Risk Family Members**

Compared to an individual at high risk due to a medical condition, an individual who has a high-risk family member has a lesser entitlement to accommodation. In fact, under the ADA, there is no right to an accommodation for an employee who does not have a disability but instead is relying on the disability-related needs of a family member or any other person.[18] One potential option for an employee in this situation may be a leave under the FMLA. Depending on the nature of the reason the family member is at high risk, it may qualify as a serious medical condition. If the family member has a qualifying serious medical condition, and he or she is the employee's spouse, child, or parent, and the employee is providing care to the family member, an FMLA leave could be an option. But if the family member does not have a serious medical condition or the employee is not providing care, then the employee is ineligible for an FMLA leave. Other options potentially include leave pursuant to the Emergency Paid Sick Leave Act, so long as it occurs before December 31, 2020, assuming that the employee is actually be providing care (an employee would not be eligible based only upon concern for an elderly parent who the employee visits occasionally).

**4. Individuals with Childcare Issues**

The potential responses to employees who face childcare issues because a child is not returning to school depends on the reason why the child is not returning to school. If the child cannot return to school or a day care facility

[18] U.S. Equal Emp't Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* at Question D13 (last visited August 21, 2020).

because it is closed due to COVID-19 reasons,[19] the employee may use leave under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act. Under the Emergency Paid Sick Leave Act, the employee may use the ten days of leave if the "employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions."[20] The employee must also provide "a representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes" leave.[21] If these circumstances are met, the employee will be paid two-thirds of the daily salary up to $200 per day for the ten days.

In addition to the ten days available under the Emergency Paid Sick Leave Act, the employee can also take advantage of leave under the Emergency Family and Medical Leave Expansion Act. If the employee has FMLA leave available,[22] the employee may use up to twelve weeks of leave if the "employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency."[23] Of this twelve-week period, the first two weeks can be unpaid while the next ten are paid at two-thirds of salary up to $200 per day. The employee can use the leave provided by the Emergency Paid Sick Leave Act to be paid during the first two

[19] Critical to the use of these leaves is that the child's school or place of care is closed or the childcare provider is unavailable. An employee cannot use these leave entitlements if the child's school or place of care is open but the employee is not comfortable sending the child there because of COVID-19 fears.

[20] Families First Coronavirus Response Act, Pub. L. No. 116-126, § 5102(a)(5), 134 Stat. 178, 195 (2020).

[21] 29 C.F.R. § 826.100.

[22] An employee need not meet the normal 1,250-hour requirement before becoming eligible; instead, an employee must only be employed for thirty days before the leave commences. Families First Coronavirus Response Act, Pub. L. No. 116-126, § 3102, 134 Stat. 178, 189-90 (2020). However, the normal rules for usage of FMLA leave apply, limiting the employee to twelve weeks in a twelve-month period. 29 C.F.R. § 826.70.

[23] Families First Coronavirus Response Act, Pub. L. No. 116-126, § 3102, 134 Stat. 178, 189-90 (2020).

weeks if available. Like all of the leave benefits created by the FFCRA, the entitlement to this new paid FMLA leave expires on December 31, 2020.

Regarding hybrid instruction where a student attends school on certain days with virtual instruction on other days, the Department of Labor provided updated guidance on September 16, 2020, indicating that FFCRA is available for employees whose students are on a hybrid schedule. Although intermittent leave is only permissible when the employer and employee agree, the Department of Labor expressed its interpretation that "each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day," and that an employee "may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that)."[24] Thus, the Department concluded, "intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly."[25] Provided that no one else is available to provide care to the student on days where the only school option is virtual instruction, an employee may thus request to use leave under the FFCRA, even in a hybrid situation.

If you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I remain

Very truly yours,

FOGARTY & HARA

BY: Vittorio S. LaPira
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VSL:tvc

[24] Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57677, 57683 (Sept. 16, 2020).
[25] *Id.*