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Mandating COVID-19 Vaccinations in Independent K-12 Schools: Protecting Students' Well-Being and Minimizing Legal Risks

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On May 10, 2021, the Food and Drug Administration (FDA) [approved](#) the Pfizer-BioNTech vaccine for children ages 12-15, expanding the Emergency Use Authorization (EUA) originally issued on December 11, 2020 for individuals ages 16 and older. This development may require K-12 schools to quickly firm up their position on vaccinations for students for the upcoming 2021-22 school year. (A school's approach to vaccinations for employees requires a different legal and practical analysis, which Saul Ewing Arnstein & Lehr has analyzed in this [blog](#).)

For private schools, whether to require, or simply encourage, the COVID-19 vaccine, includes a consideration of a number of factors, including (1) the EUA status of the vaccine, (2) a school's vaccine policy (if any) and past practices, (3) federal and state regulated exceptions to vaccination requirements for medical, religious, or philosophical reasons, and, finally (4) practical considerations that reflect a school's mission, community and culture. Boarding schools may need to weigh another factor: if they decide to mandate vaccinations because of the public health benefits for students living in close proximity, these same public health imperatives may also be a justification for the denial of certain religious or philosophical exemption requests.

This alert analyzes some of the legal and practical considerations that private K-12 schools must weigh when considering encouraging or mandating COVID-19 vaccines for students.

Emergency Use Authorization (EUA) Status of Vaccines: What Does It Mean for Mandates?

The EUA status of the COVID-19 vaccines means that the FDA has not yet compiled all the information needed to fully approve the vaccines under its usual processes, which normally takes years. As such, the FDA has approved the Pfizer-BioNTech, Moderna, and Johnson & Johnson vaccines for those older than 16 pursuant to Emergency Use Authorizations. The Pfizer-BioNTech vaccine is thus far the only vaccine to have received EUA for children as young as 12. Moderna is likely to submit its request to approve its vaccine for children 12 and above in the next few months. It is not clear how long it may take before vaccines for any age receive full approval under the FDA. Pfizer-BioNTech has submitted for final approval for age 16 and above, and that process is likely to be complete by the end of 2021; the other vaccines will be months behind. Until that occurs, vaccines are legally considered unproven and experimental. However, all of the data to date has shown that the EUA vaccines are highly effective, with side effects consistent with the clinical trial. The vaccines have been strongly recommended by CDC, with few exceptions.

The EUA status is often cited by individuals who are vaccine hesitant or resistant. While schools need to weigh what the EUA status means for its community, federal law does not appear to prohibit a private organization such as an independent school from mandating vaccines for students. Under the Federal Food, Drug & Cosmetic Act, the FDA has statutory authority to set the conditions for the use of EUA vaccines. In one prior example of an EUA vaccine (anthrax), the EUA expressly prohibited adverse actions against those declining to get the vaccine. The FDA has not done so with the COVID-19 vaccines. Absent some other state law restriction, private schools will usually have the discretion to set admissions or enrollment criteria that can include mandatory vaccinations for students. By doing so they are not forcing anyone to be vaccinated, only imposing a consequence or denying a benefit of attending that school. Many private educational institutions have thus taken the position that they have a good faith, reasonable basis to conclude that the FDA has *not* expressly prohibited mandatory COVID-19 vaccine programs under the EUA.

Nevertheless, the absence of clear guidance from the FDA and CDC surrounding the EUA status still presents some legal and practical risks to mandated COVID-19 vaccinations. On the legal side, a student or parent could challenge such a requirement as either a violation of the EUA or public policy. Mandating vaccines in the EUA phase also presents additional risk of injuries from medical

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conditions, medications, or other factors that were not identified during clinical trials. On the practical side, community opposition to the COVID-19 vaccine may bring communication challenges and/or reputational risk.

The other issue private schools need to consider is applicable state laws. Some states have requirements for mandatory vaccination of students that apply to private as well as public schools, and set out particular exemptions. If those laws restrict the ability of private schools to require additional vaccinations, the school will need to consider whether they can require a vaccine that is still in EUA status, or must wait until final approval.

How to Mandate a Vaccine: Through Your Vaccine Policy

Whether or not a school is actively considering a COVID-19 mandate, schools should now either revisit or create a policy on vaccinations to ensure legal compliance and set expectations.

First, vaccine policies in general must reflect state law in terms of what immunizations are required for students in K-12 private schools (for example, tuberculosis vaccines). Some private schools also impose vaccination requirements *beyond* those instituted by state law. In the 2020-21 school year, for example, many private schools required students to receive the influenza vaccine as part of their COVID-19 mitigation strategies. As will be discussed in more detail below, as long as schools' vaccine policies and procedures allow for medical and religious accommodations, private schools are generally free to set admissions criteria and exercise discretion in whom to enroll (as long as they do not violate such federal or state laws). In theory then, going forward, this framework would allow for COVID-19 vaccination requirements in the same way that a private school would be able to mandate an influenza vaccine.

For whichever vaccines a school mandates – either in compliance with state law or in addition to state law – a vaccine policy should include the following:

- First, what are the basic logistical details: *who* is required to be vaccinated, *which* vaccines are acceptable under the policy, and *how* will the school help students access the vaccines? As it relates to COVID-19 vaccines, will schools mandate for students ages 16 and up? Ages 12 and up? Residential life students only?
- Policies should also consider the form and substance of medical, religious, or philosophical accommodations and exemptions in accordance with state law, as applicable. What “proof” will be required? While certain medical accommodations may need to be considered on a case-by-case basis (as discussed below), what does state law say about the degree of documentation allowable for other accommodations?
- Finally, schools with a residential life component should consider whether boarding students who live in close proximity with one another will be held to the same standard regarding vaccination exemptions (medical, religious, or otherwise) as day student counterparts.

Medical and Religious Exemptions

As discussed above, all states legislate certain mandatory vaccinations for private schools, and these requirements vary by state. Some private schools go beyond state law and require additional vaccines under their own policies. Whether or not a school requires the minimum vaccinations legislated by the state, or additional vaccinations (such as the influenza vaccination or, going forward, a COVID-19 vaccination), every state has also legislated that at least some form of *exemption* from vaccine requirements must be available to an individual student. Depending on the state, these exemptions may include medical, religious, or personal/moral exemptions. These may be set forth in the vaccination legislation, under the applicable state or local civil rights laws prohibiting discrimination based on religion and disability for private schools or public accommodations, or both. Private schools receiving federal funds also need to consider Section 504 and Title VI.

For medical exemptions, a school's process for evaluating a student's exemption request will likely mirror its obligations under federal law such as the Americans with Disabilities Act (ADA). Title III of the ADA requires reasonable modifications of policies, procedures, and practices for students (and applicants) with disabilities, which could include a vaccine waiver for medical or disability reasons. A vaccine exemption request for a medical reason, then, would be analyzed under a school's existing medical accommodations process.

For COVID-19 vaccines, medical exemptions may be necessary for those groups for whom the CDC has indicated that the vaccine is not recommended. The most well-known is individuals with a history of severe allergic reactions to ingredients in the vaccine. There is also a temporary waiting period for individuals who have had COVID-19 – but, overall, the CDC's list of those for whom it is not recommended is fairly short. Schools can require documentation that is tied to the CDC recommendations.

Other requirements for vaccination exemptions – religious and moral/philosophical objections – will vary according to state law. As such, a school's vaccine policy must as a baseline allow for exemptions required by applicable state law. But school policy should also consider the *process* for vetting religious or philosophical exemption requests. Will the school merely rubber stamp such requests, or will it require additional procedures and documentation to establish a genuine religious belief in opposition to vaccines? In some

states, a student who asks for an exemption for religious reasons can be denied the exemption if it poses more than a *de minimis* burden. This would mean that schools – particularly boarding schools – could take the position that the public health risks of a non-vaccinated student pose more than a *de minimis* burden, and as such these schools could deny an vaccine exemption request based on religious grounds. Again, a clear understanding and analysis of state law is essential for any vaccine policy, but particularly for the new reality of COVID-19 vaccines.

Practical Considerations: What is Right for Your School?

A school's decision to mandate the COVID-19 vaccine needs to reflect its mission, the age of its population, its culture and the realities of its community's acceptance of the current EUA status of the Pfizer vaccine for 12-15 year-old students. Schools should be aware if a significant portion of the population is vaccine hesitant or opposed to mandatory vaccination. In short, a school should consider whether a mandate would affect enrollment.

Schools will have to plan for many eventualities: if a student receives a medical accommodation, will that student be required to wear a mask? Will students who cannot, or choose not to, receive a vaccine be subject to regular testing? (And who will pay for that testing?) How – and when – will the school communicate its decision about vaccines? Who will be the point person for the many questions from families that are sure to follow any decisions?

All of these factors may lead many private schools to not impose a vaccine mandate at this time, while leaving open the options for spring 2022. Others may choose to follow the lead of public schools, which we do not anticipate until after final FDA approvals, probably for the 2022-23 school year. Schools who choose not to mandate a vaccine may instead want to channel their efforts to an education campaign to encourage parents to vaccinate their children.

Over the past 18 months, schools have had to evaluate, react, and attempt to plan for an evolving series of COVID-related developments. As the 2020-21 school year draws to a close, a proactive approach to the developing status of a COVID-19 vaccine can help schools start the 2021-22 school year with an understanding of the legal and practical issues involved, enabling schools to be both confident and flexible in their approaches.

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