



COMMONWEALTH of VIRGINIA

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April 26, 2021

The Honorable Mark L. Keam
Member, House of Delegates
Post Office Box 1134
Vienna, Virginia 22183

Dear Delegate Keam:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

You have asked whether Virginia's public institutions of higher education, as specified in Title 23.1 of the Code of Virginia, may condition in-person attendance on receipt of an approved COVID-19 vaccine during this time of pandemic.

Background

On March 12, 2020, Virginia declared a state of emergency in response to the COVID-19 pandemic. As of the date of this opinion, that state of emergency continues, despite the recent easing of certain surge mitigation measures that were in place as cases peaked over the winter.¹ More than 650,000 cases of COVID-19 have been reported within the Commonwealth and 10,691 Virginians have died as a result.² The virus readily spreads through respiratory droplets, particularly where individuals are indoors, in close contact, and in congregate settings.³

¹ See Exec. Order No. 51 (March 12, 2020), Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19), [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf); Fifth Amended Exec. Order No. 72 (April 21, 2021), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-FIFTH-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Easing-of-Commonsense-Surge-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-FIFTH-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Easing-of-Commonsense-Surge-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).

² See VIRGINIA DEP'T OF HEALTH, *COVID-19 in Virginia: Summary*, <https://www.vdh.virginia.gov/coronavirus/covid-19-in-virginia/> (last visited Apr. 26, 2021).

³ See VIRGINIA DEP'T OF HEALTH, *Prevention Tips*, <https://www.vdh.virginia.gov/coronavirus/prevention-tips/#spread> (last visited Apr. 22, 2021).

More than 5.8 million doses of the COVID-19 vaccine have already been administered in Virginia, with 28.3% of the population fully vaccinated and 42.5% receiving at least one dose.⁴ Individuals aged sixteen and over are currently eligible to be vaccinated and there is sufficient supply nationwide for those seeking the vaccine to receive it prior to the start of the next academic year.⁵

Discussion and Relevant Laws

1. The Health Commissioner and General Assembly Possess the Power to Impose a Vaccine Requirement for All Residents.

There is no question that the General Assembly could enact a statute requiring the COVID-19 vaccine for in-person school attendance as a valid exercise of the Commonwealth's police powers.⁶ In addition, § 32.1-48 of the Code of Virginia currently grants the Commissioner of Health the power of "requiring immediate immunization of all persons in case of an epidemic of any disease of public health importance for which a vaccine exists other than a person to whose health the administration of a vaccine would be detrimental as certified in writing by a physician licensed to practice medicine in this Commonwealth."⁷ As a previous opinion of this Office explained, the "Health Commissioner has the authority, pursuant to § 32.1-43, 'to require quarantine, vaccination or treatment of any individual when he determines any such measure to be necessary to control the spread of any disease of public health importance.'"⁸ In the absence of such a mandate, your question stems from the need for colleges and universities to protect their students and employees due to the congregate settings of their campuses.

2. Colleges and Universities May Condition the Attendance of Certain In-Person Events on Having Received an Approved COVID-19 Vaccine.

In my opinion, Virginia's colleges and universities may take steps to protect the health and welfare of their students by conditioning attendance in various activities or settings on the receipt of an approved COVID-19 vaccine.

⁴ See VIRGINIA DEP'T OF HEALTH, *COVID-19 Vaccine Summary*, <https://www.vdh.virginia.gov/coronavirus/covid-19-vaccine-summary/> (last visited Apr. 26, 2021).

⁵ See VIRGINIA DEP'T OF HEALTH, *COVID-19 Vaccination Response*, <https://www.vdh.virginia.gov/covid-19-vaccine/> (last visited Apr. 22, 2021); THE WHITE HOUSE, *Fact Sheet: President Biden to Announce All Americans to be Eligible for Vaccinations by May 1, Puts the Nation on a Path to Get Closer to Normal by July 4th* (Mar. 11, 2021) (press release), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/11/fact-sheet-president-biden-to-announce-all-americans-to-be-eligible-for-vaccinations-by-may-1-puts-the-nation-on-a-path-to-get-closer-to-normal-by-july-4th/>.

⁶ See 1959-1960 Op. Va. Att'y Gen. 334 (opining that the enactment of a law mandating vaccination against polio would be a valid exercise of the Commonwealth's police power); see also *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power.").

⁷ VA. CODE ANN. § 32.1-48. This and all other citations to the Code of Virginia herein are from the electronic version of the Code on LexisNexis and are current through the 2021 Regular Session of the General Assembly and Acts 2021 Sp. Sess. I, cc. 55, 56, 78, 82, 110, 117, 118, 171, 216, 220 and 243.

⁸ 2002 Op. Va. Att'y Gen. 202, 204.

- a. No federal law bars Virginia colleges and universities from imposing such a requirement.

With regard to students that attend one of Virginia's state colleges or universities, it remains up to the individual institutions to determine whether requiring students to obtain the COVID-19 vaccination has a real or substantial relation to protecting public health and safety on their campus. Colleges have seen several outbreaks over the course of the pandemic due to the nature of school campuses.⁹ In my opinion, a COVID-19 vaccine mandate by a state college or university would be reasonable to control COVID-19 and prevent a campus outbreak.

Currently, there is no federal guidance on the Emergency Use Authorization (EUA) of the COVID-19 vaccine specifically related to colleges and universities. However, the Equal Employment Opportunity Commission (EEOC) has provided detailed guidance that suggests employers can mandate the vaccine for employees even though the vaccine is currently only under an EUA.¹⁰ Additionally, the COVID-19 tests that many colleges and universities have required were authorized under an EUA.¹¹

- b. An institution's board of visitors may require vaccinations as a condition of in-person attendance.

The General Assembly has vested the various boards of visitors with broad specific and implied discretion in their management of the state's colleges and universities. "[P]arents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm."¹² The Supreme Court of Virginia has recognized that Virginia's higher education institutions have broad authority to implement "rules and regulations includ[ing] policies that promote safety" on their campuses and within residence facilities.¹³

The governing boards of Virginia's higher education institutions are granted the power to set policies and regulations for their respective schools, and are charged with protecting the welfare of their students.¹⁴ In particular, § 23.1-1301(A)(1) grants "[t]he board of visitors of each baccalaureate public

⁹ Lauren Lumpkin, *Rising coronavirus cases at U-Va., VMI and other Virginia colleges spark worry, lead to changes*, WASH. POST (Feb. 19, 2021), https://www.washingtonpost.com/local/education/uva-virginia-colleges-covid-cases/2021/02/19/a1080a66-716e-11eb-93be-c10813e358a2_story.html.

¹⁰ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *What You Should Know About COVID-10 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

¹¹ See U.S. FOOD AND DRUG ADMINISTRATION, *Emergency Use Authorization (EUA) Summary for the Color SARS-CoV-2 RT-LAMP Diagnostic Assay*, <https://www.fda.gov/media/138248/download>. See, e.g., JAMES MADISON UNIVERSITY, *Stop the Spread: Entry Testing FAQ*, <https://www.jmu.edu/stop-the-spread/student-affairs/entry-testing.shtml> (requiring entry testing of students); UNIVERSITY OF VIRGINIA, *Pre-Arrival Testing*, <https://coronavirus.virginia.edu/testing/pre-arrival-testing> (requiring pre-arrival testing of students); VIRGINIA COMMONWEALTH UNIVERSITY, *Testing*, <https://together.vcu.edu/faq/testing/> (requiring entry testing of students).

¹² *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 136 (2011).

¹³ *Id.*

¹⁴ See VA. CODE ANN. § 23.1-1301(A)(1) ("The board of visitors of each baccalaureate public institution of higher education or its designee may . . . [m]ake regulations and policies concerning the institution[.]"); § 23.1-1304(B), (B)(14) ("Educational programs for the governing boards of public institutions of higher education shall include presentations relating to . . . [s]tudent welfare issues, including academic studies; curriculum; residence life; student governance and activities; and the general physical and psychological well-being of undergraduate and graduate students").

institution of higher education or its designee” the power to “[m]ake regulations and policies concerning the institution.”¹⁵ Similarly, §§ 23.1-2904 and -2905 grants all the same duties and powers “of governing boards of public institutions of higher education set forth in Chapter 13 (§ 23.1-1300 et seq.)” to the State Board for Community Colleges. Those powers—like corporate powers—consist not only of the ability to address matters that are expressly enumerated in the statute, but also grants the boards of visitors “the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.”¹⁶

Virginia courts have regularly upheld the General Assembly’s broad grant of discretion to the various boards of visitors.¹⁷ For example, the Supreme Court of Virginia rejected a challenge to the decision of the Board of Visitors at George Mason University to restrict weapons on its campus.¹⁸ The Court found that “the General Assembly established ‘a corporate body composed of the board of visitors of George Mason University’ for the purpose of entrusting to that board the power to direct GMU’s affairs,” and it specifically noted that “[t]he board of visitors is also tasked with safeguarding the university’s property and the people who use it by making ‘all needful rules and regulations concerning the University.’”¹⁹

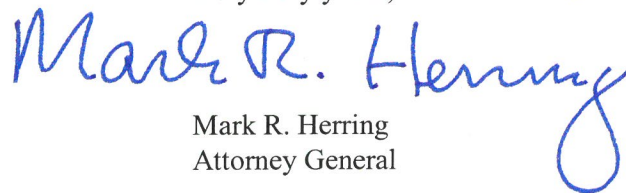
Accordingly, I conclude that Virginia’s state institutions of higher education, as defined in Title 23.1 of the Code of Virginia, may determine that in-person attendance in various activities or settings presents a risk to students or others, and that it may condition attendance upon being vaccinated. While it is my belief that our public colleges and universities may condition in-person attendance on receipt of an approved COVID-19 vaccine during this time of pandemic, it is not without complications and our public colleges and universities should be prepared to provide reasonable accommodations for medical conditions and/or religious objections. Any requirement of an approved COVID-19 vaccine during the pandemic should be formulated to best effectuate the public health and safety of the respective campuses.

Conclusion

Accordingly, for the reasons stated, Virginia’s state institutions of higher education, as defined in Title 23.1 of the Code of Virginia, may condition in-person attendance on receipt of an approved COVID-19 vaccine during this time of pandemic.

With kindest regards I am,

Very truly yours,



Mark R. Herring
Attorney General

¹⁵ Section 23.1-1301 of the Code of Virginia allows a board of visitors to designate its governing powers to another official. Some boards of visitors may have designated various powers to officials like a president. Whether another party within the university has a power, by virtue of a designation or other, is beyond the scope of this opinion.

¹⁶ *Batcheller v. Commonwealth*, 176 Va. 109, 123 (1940) (citing 13 AM. JUR., CORPORATIONS § 740); *see also* *United States v. Bly*, 510 F.3d 453, 462-63 (4th Cir. 2007) (applying *Batcheller*).

¹⁷ *See, e.g., Goodreau v. Rector*, 116 F. Supp. 2d 694, 703 (W.D. Va. 2000) (rejecting the argument that the Board of Visitors of the University of Virginia did not have the power to revoke a degree and finding that the Board’s authority over disciplinary matters carried with it the implied power of degree revocation).

¹⁸ *DiGiacinto*, 281 Va. at 136.

¹⁹ *Id.* (citation omitted).