

Should Universities Mandate the COVID-19 Vaccine?

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Feature Editor's Note:

As the nation recovers from the effects of the unanticipated COVID-19 pandemic, it is clear that some of the changes enacted to lessen the spread of the virus had deleterious effects on many aspects of life that we took for granted, such as on-campus higher education. Many aspects of education have been affected by the long hiatus from the classroom. Now, as students begin returning to campus, universities are looking to balance the needs of students, faculty, and staff with those of campus viability, and ensuring the safety of the student body and the faculty is the top priority. One way to reduce the possibility of transmission of the virus would be to require that any student who wishes to attend in-person classes receive the COVID-19 vaccine.

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INTRODUCTION

At the time this article was written, May 2021, the COVID-19 pandemic had impacted many aspects of life, including higher education, for more than a year. At the start of the pandemic, universities, including professional healthcare programs, were faced with the challenge of adopting virtual learning formats with the expectation of returning to face-to-face delivery in the nearest possible future. Some restrictions, guided by social distancing and masking requirements, have remained in effect long past what was initially anticipated, and virtual instruction remains the predominant delivery method, limiting the opportunities for hands-on instruction. Many aspects of education, including enrollment, fiduciary stability, faculty engagement, assessment options, and technological competence, have been affected by the extended interruption. As universities and programs prepare for the Fall 2021 semester, there is strong advocacy for a return to campus. This is especially desirable in healthcare education as many aspects of these programs benefit from face-to-face engagement, including hands-on skills preparation in the areas of physical exam and therapeutic options and retention strategies. In order to return to predominantly in-person education, steps need to be taken to ensure the safety of the student body and the faculty. One such action that would reduce the possibility of transmission of the virus would be to mandate that all stu-

dents receive the COVID-19 vaccine in order to participate in classroom, in-person instructional delivery. The question is: Can or should the vaccine be mandated?

HISTORY OF VACCINE MANDATES

A lot of debate has centered around the COVID-19 vaccine, focusing on the efficacy, long-term side effects, and the lack of full US Food and Drug Administration (FDA) approval. Hence, the question around whether the COVID-19 vaccine can or should be mandated is complex. Public opinion surrounding mandates is mixed. Currently, the Federal Government's ability to mandate a vaccine is unclear and has not been tested in the courts.¹ The Public Health Service Act, under the Commerce Clause of the US Constitution, authorizes the Health and Human Services Secretary to enact measures to stop the spread of communicable disease between states. The act does not specifically mention the use of federal vaccine mandates, and efforts at this point have focused on quarantine and isolation. Vaccine mandates are generally under the purview of state and local governments. The US Supreme Court upheld a state vaccine mandate over a century ago in a case affirming the legal test still applied today. In the 1905 case, *Jacobson v Massachusetts*, the court upheld a city mandate under State Law to require all those over the age of 21 to be vaccinated against smallpox.¹ States have broad authority known as police power that supersedes an individual's rights in order to "protect the general health, safety, morals, and welfare of society as a whole."¹ The legislature concluded that the vaccine was safe and effective in controlling the spread of the disease, and the court concluded that a community has the right to protect itself against an epidemic. The Court noted that individual constitutional rights are not absolute in all circumstances but instead are subject to "manifold restraints to which every person is necessarily subject for the common good."¹

Today, all states have vaccine mandates for children in school. A 1922 case, *Zucht v King*, referenced the *Jacobson* case and the existence of the states' police power as a means for compulsory vaccination. Compulsory vaccination of school children has been credited with playing a major role in controlling vaccine preventable disease in the United States.² The application of compulsory vaccines for adults, however, has generally focused on health care workers and patients in healthcare facilities rather than on the general public or institutions of higher education. For example, 18 states have flu vaccine requirements to either offer the vaccine to health-care employees or report the vaccine status of employees to the state.³ In the private sector, some industries may require vaccines for employment, such as a flu vaccine for health care workers at a facility. Some states may prohibit mandates as a condition of employment and instead require that

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employees have the choice to opt out via religious or philosophical belief exemptions.¹ In its December 2020 guidance, the Equal Employment Opportunity Commission stated that employers may require employees to provide proof of COVID-19 vaccination without implicating the Americans with Disabilities Act.¹ Employers can mandate vaccinations; however, they are subject to the general policy of reasonable accommodations under the Americans with Disabilities Act. If an employee poses a direct threat of substantial risk or harm to their own or others' health or safety, which includes exposure to the COVID-19 virus by an unvaccinated individual, and the direct threat can't be mitigated or reasonable accommodations met, the employer can exclude the employee from physically entering the workplace.¹

CAN UNIVERSITIES MANDATE THE COVID-19 VACCINE?

Universities would likely enjoy several benefits from a COVID-19 vaccine mandate, including increased safety for students, faculty, and staff; increased on-campus activities without reliance on testing and tracing, and the possibility of mitigation of any litigation and damages from the transition to online learning.⁴ A recent survey by Maguire Associates, which assists colleges with admissions, found that the majority of students would comply with a vaccine mandate; 85% of prospective students and 78.6% of their parents would support a mandated vaccine policy.⁵ The survey also reported that most of the students said they were comfortable with receiving the vaccine. The majority of survey participants were opposed to a completely online delivery option, indicating that the majority of the student body, one way or another, wants to get back to an on-campus learning environment. A growing number of colleges and universities have already decided to mandate the COVID-19 vaccine prior to returning to on-campus learning in the fall of 2021. At the writing of this article, 80 colleges had instituted a vaccine mandate.⁶ In support of a vaccine mandate, a recent case of note, the 2020 decision for the University of California in *Kiel et al v The Regents of the University of California et al* upheld the then university president's executive order to require that all UC students, faculty, and staff living, learning, or working at any UC location receive the flu vaccine by November 1, 2020, subject to exemptions and accommodations.⁷ Under the university's bylaws and guided by state legislative authority, the executive order restricted campus access for unvaccinated students, faculty, and staff and was not a condition of enrollment, attendance, or employment. The court ruled that the order was narrowly tailored and was critically important to reduce burdens on an already overburdened health care system and to reduce the risk of individuals contracting and transmitting the flu during the COVID-19 pandemic.⁷ In addition, the court noted that it was "unaware of any case in which a court has struck down a mandatory immunization imposed as a condition of attending school or college, as a condition of access to property for the purpose of employment, or as violating bodily autonomy."⁷

While there have also been cases that have upheld vaccination requirements for students as a condition of enrollment and for employees of health care settings, there are still questions specific to mandating the COVID-19 vaccine and a risk for potential litigation for universities that decide to institute a mandate.

Challenges to a COVID-19 Vaccine Mandate

As of May 2021, all of the available COVID-19 vaccine options are not fully approved by the FDA and are only approved for emergency use, putting a mandate in a legal gray area.⁸ To date, there is no precedent or settled legislation on whether a vaccine that only has emergency use authorization (EUA) can be mandated. The EUA statute provides that individuals must be informed "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks."¹ This clause provides for interpretation that a vaccine subject to an EUA cannot be required as the statute provides the right of refusal. As well, there are ethical considerations as a vaccine subject to an EUA also has less stringent requirements regarding safety and efficacy than a fully approved vaccine — basically making the assumption that the benefits are perceived to outweigh the risk. This question raised by the current EUA may be a moot point in the near future as the Pfizer and Moderna vaccines now have approximately 6 months of data to support the efficacy of the vaccine, and the respective manufacturers are expected to apply for full approval soon.⁶ Some colleges are making their policies contingent on the vaccines receiving full FDA approval or using a personal declination form as a means to "opt out" of receiving the vaccine.⁶ An interesting note is that the COVID-19 tests that have been required and used by colleges regularly for the past year are approved under the same emergency use authorization.⁸

A second point is that in order to reliably support a vaccine mandate, there has to be an adequate supply of the vaccine for recipients to comply with the mandate. Before a university can enforce a vaccine mandate, they must make sure that whoever wants a vaccine will be able to get one. Supply of the COVID-19 vaccine has improved along with relaxed requirements for recipient criteria. The pause in production of the Johnson & Johnson vaccine disrupted some colleges' vaccination plans; however, the CDC rescinded the pause and resumed its recommendation on use of the vaccine.

One major obstacle to the imposition of a vaccine mandate is state legislators who are working to block colleges from mandating the COVID-19 vaccine. The governors of Texas, Florida, and Utah have all signed legislation barring the requirement of proof of COVID-19 vaccination, along with a New Jersey legislator who introduced a bill to block a vaccine mandate at Rutgers University or the use of "vaccine passports."⁸ In response, colleges and universities in these states may utilize an "opt-out" policy to comply with the legislation. Of note, all states are required to accommodate a student who has medical reasons to not receive the vaccine as well as religious or philosophical exemptions if the state recognizes them.⁸

CONCLUSION

Support for the COVID-19 vaccine continues to gain momentum as the general population's desire to return to relative normalcy increases. A survey by the Kaiser Family Foundation in March of 2021 found that 6 out of 10 adults had gotten at least one dose of the vaccine or would get it as soon as they could.⁹ The numbers of those who will "wait and see" is dropping; however, the numbers of those who will only get the

vaccine if it is required for work or school remains steady.⁹ It is clear that both universities/programs and students would benefit from in-person, on-campus learning in the fall of 2021. Of paramount importance is the safety and well-being of the student body, faculty, and staff. Federal agencies, including the Equal Employment Opportunity Commission and the Department of Education, have already permitted employers and school districts to require employees to get a COVID-19 vaccine, and attorneys argue that colleges should also have the right to mandate vaccines.⁸ As further data become available on the safety and effectiveness of the vaccines, their impact on healthcare systems, and their efficacy against the COVID variants, and pending the full approval by the FDA, the use of vaccine mandates and their legal standing will have greater clarity. In the interim, if considering a vaccine mandate, universities should use their state legislation for guidance, narrowly tailor and root their policy in scientific and medical evidence of the safety and efficacy of the vaccine, and support their stance with statements from relevant experts and health policy agencies such as the CDC.⁸ If not all, the majority of students, faculty, and staff want to get back on campus. If the uncertainties of a mandate and the associated legal risk are too great a burden to bear, vaccines should strongly be encouraged along with continued use of enhanced testing and tracing.

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