Letter Re: COVID-19 Vaccination Requirement at Virginia Public Universities

June 17, 2021

Dear Virginia Public University President,

This letter is to inform you of several legal and ethical issues implicated by your recent policy to mandate COVID-19 vaccinations for all students. While there exists a continuous need to promote the safety and well-being of your students and staff, there remains a paramount duty to comply with both state and federal laws and to respect students’ fundamental rights. For this reason, we are urging you to make all COVID-19 vaccinations merely optional for your students.

As a threshold matter, the Code of Virginia does not authorize colleges and universities to require a vaccination for COVID-19. Specifically, Va. Code § 23.1-800 limits public universities to requiring only certain enumerated vaccinations, and only according to the following express terms:

- Mandatory pre-enrollment immunization\(^1\) of students by vaccine against *diphtheria, tetanus, poliomyelitis, measles (rubeola), German measles (rubella), and mumps*.
- Optional vaccination of students against *meningococcal disease and hepatitis B*, with students able to decline them by signing a waiver certifying they understand the risks.
- Exemptions afforded to students from all listed vaccinations either for religious or medical reasons.

The General Assembly specifically enumerated the diseases against which public universities may require its students to be vaccinated. By clear inference, any disease not on that list is not one that can justify a mandatory vaccination. Therefore, in requiring its students to receive a COVID-19 vaccination as a condition for continued education, a public university exceeds its lawful grant of authority prescribed in Va. Code § 23.1-800. Moreover, § 23.1-800(D) expressly accounts for the special circumstances in which “the Board of Health has declared an emergency or epidemic of disease,” but this reference is expressly limited to vaccines only for those diseases “set forth in subsections B and C” – hence, not for COVID-19.\(^2\)

On April 26, 2021, Attorney General Mark Herring published an advisory opinion (No. 21-030) addressing the question of whether Virginia’s public colleges and universities “may condition in-person attendance on receipt of an approved COVID-19 vaccine during this time of pandemic.”\(^3\) While Herring did opine that Virginia’s colleges and universities can condition in-person attendance “on the receipt of an

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2. Also note, the Virginia Board of Health has never voted to declare an emergency or epidemic of disease regarding COVID-19, despite having had several meetings over the past year.
3. Very tellingly, the advisory opinion never so much as references Va. Code § 23.1-800.
approved COVID-19 vaccine” (emphasis added), the opinion admits that no COVID-19 vaccine is currently FDA-approved. As of now, all COVID-19 vaccines are still operating under an Emergency Use Authorization (EUA). For that fact alone, Herring’s advisory opinion cannot be relied upon by universities as a basis for requiring COVID-19 vaccinations.

Neither does Herring’s opinion support a university policy to deny a student’s initial or continued enrollment for not receiving this vaccination (for any reason) – it specifically targets “in-person” attendance only. Finally, Herring’s conclusion in his advisory opinion appears to rest entirely on the thinnest possible legal veneer by pointing out that university boards of visitors may “[m]ake regulations and policies concerning the institution” (§ 23.1-1301), which is listed among four other baseline general powers in subsection A (before then enumerating 11 specific powers of the board in subsection B); and also tacking on a reference to § 23.1-1304(B), which merely lists what kinds of general presentations should be periodically presented to university boards of visitors.

Obviously, public university governing boards have the power to make regulations and policies concerning the institution. Equally as obvious, those governing boards do not thereby possess unlimited powers to dictate any policy for any topic – including the forcing of all students to be injected with experimental drugs. In this case, Va. Code § 23.1-800 already explicitly addresses the parameters of their powers with regard to mandatory vaccinations, so no plausible reading of § 23.1-1301 could justify Herring’s opinion.

Additionally, federal law prohibits the COVID-19 vaccines from being mandated on anybody while they are designated as EUA. According to 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III), EUA medical products require that a person be put on notice 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.” Considering this statute is explicitly addressing the use of EUA medical products in times of emergency, the “consequences” here refer to any reasonably foreseeable health effects of a student refusing the vaccine, such as the potential symptoms if they contract COVID-19. They do not refer to the artificially constructed consequences of a student refusing the vaccine and being denied re-entry to campus to continue his or her education in-person.

This federal statute exists for use of EUA medical products because, by definition, these products are experimental. As such, courts have never recognized the right of the government to mandate experimental drugs, and in fact have held precisely the opposite. In Doe #1 v. Rumsfeld, 297 F.Supp.2d 119 (2003), a federal court struck down a governmental mandate on military service members to get an EUA anthrax vaccine. In its opinion, the court concluded that the “United States cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs.” Id. at 135. If our service members abroad are afforded such protection, does it not stand to reason that college students at home – who have not signed up at the cost of their lives – deserve at least the same protection?

Furthermore, the Nuremberg Code states that “voluntary consent of the human subject is absolutely essential” when conducting a medical experiment on them. It is clear that the widespread administration of experimental vaccines with no longitudinal studies showing any long-term effects constitutes one of the largest medical experiments in history. As such, everyone reserves the right to refuse participation in this medical experiment without retribution.

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4 Note, again, the well-established fact that the COVID-19 vaccines do not claim to prevent contracting COVID-19.
5 Or, if having received an exemption, to be required to wear a stigmatizing face mask at all times or to be regularly subjected to medical testing for COVID-19, in contrast to other students.
This is especially pertinent in regard to college students who are mostly young adults, since early indicators have shown the vaccines may be more harmful to young healthy people than COVID-19 itself. It is well-established that young people are at very low risk of dying from COVID-19. According to CDC statistics, COVID-19 deaths for Americans aged 0-24 represent less than 0.2% of total deaths, despite representing roughly 33% of the total population. Furthermore, of the 1,192 Americans aged 0-24 that have died as of June 12th, 1,174 of those had on average four additional conditions or causes other than COVID-19. Thus, over the entirety of this pandemic, **there have only been 18 deaths among healthy Americans under the age of 25 attributed solely to COVID-19.**

By contrast, as of May 12th, the Johnson & Johnson vaccine has already been linked to at least 28 cases of severe blood clots in women ranging from ages 18 to 59, which has already caused three deaths. And as of May 31st, the FDA has identified 275 cases of myocarditis (heart inflammation) within young men aged 16-24. This number already far exceeds CDC estimates, which projected incidences of myocarditis to be between 10 and 102. This investigation comes on the heels of an Israeli study that found myocarditis to be occurring in their vaccinated young males at a rate 25x higher than normal. The data that continues to come to light daily is pointing to the reality that requiring young adult college students to receive a COVID-19 vaccination will likely cause more harm than good.

It is with all of this in mind that we strongly urge you to comply with state and federal law, heed the scientific and statistical data, respect the fundamental rights of students, and end your mandatory vaccination policy immediately.

Respectfully,

Josh Hetzler, Esq., Legal Counsel
Founding Freedoms Law Center

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10 “CDC says 28 blood clot cases, 3 deaths may be linked to J&J Covid vaccine.” https://www.cnbc.com/2021/05/12/cdc-says-28-blood-clot-cases-3-deaths-may-be-linked-to-jj-covid-vaccine.html
11 Vaccines and Related Biological Products Advisory Committee June 10, 2021 Meeting Presentation. https://www.fda.gov/media/150054/download
12 “CDC says heart inflammation cases were higher than expected in 16- to 24-year-olds after second Covid vaccine shot, but still rare.” https://www.cnbc.com/2021/06/10/covid-vaccine-cdc-says-heart-inflammation-cases-in-16-to-24-year-olds-higher-than-expected-after-second-shot.html