



National Governors Association

Continued
Vaccine/Testing Legal
Considerations in
Educational Settings

Emergency Use Authorization

Both all available COVID-19 tests and all current available vaccines are EUA.

EUA use must be voluntary. 21 USC sec. 360bbb-3 states: Individuals to whom product is administered must be informed “of 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”

Smallpox (Jacobson v. Massachusetts, 197 U.S. 11 (1905), limited by Roman Catholic Diocese v. Cuomo, 141 S.Ct. 63 (2020)) v. **Anthrax** (Doe v. Rumsfeld, 297 F.Supp.2d 119 (D.D.C. 2003))

Graduated
Difficulty of
Mandatory
Policy
Implementatio
n

Mandatory Testing of Faculty
and Staff

Mandatory Testing of Students

Mandatory Vaccination of
Faculty and Staff

Mandatory Vaccination of
Students



Policy Note re School Safety and Returning to In-Person Learning

Mandatory Testing

2 Types of Testing

- *Diagnostic: 1) Develop symptoms at school or 2) Exposure to someone confirmed with COVID-19*
- *Screening: asymptomatic testing*

2 Types of Tests

- *Polymerase Chain Reaction (PCR) COVID test - more accurate; takes longer for results*
- *antigen - less accurate, faster*

Mandatory Testing for Faculty and Staff

A. Regulatory Requirements for Onsite Testing

- *Sufficient staff and training for specimen collection*
- *Schools that use antigen testing must apply for and receive a Clinical Laboratory Improvement Amendments (CLIA) certificate of waiver, and report test results to state or local public health departments as mandated by the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136).*
- *State and Local regulatory requirements*
- *Informing affected community about test results while complying with:*
 - HIPPA
 - ADA - prohibits medical examinations unless they are job-related and consistent with business necessity **but no problem as long as compliant with CDC**
 - Antibody tests do not satisfy CDC guidelines
 - CDC Guidelines
 - Diagnostic testing at all community transmission levels
 - Screening teachers and staff
 - Ethical Consideration - informed consent

B. Union Contract



Mandatory Testing for Students

- A. Most of the above
- B. Tiered Screening based on community transmission
 - *Random percentage*
 - *Pooled*

Legal Theories Challenging Mandatory Screening of Students

(**Aviles v. Blasio** (NY) [on appeal to 2d Circuit] and **McClure v. Saunders** (Utah) [dropped due to Utah legislation])

- *Substantive Due Process*

- 1) denial of education **but reasonably related to a legitimate state objective** or
- 2) parental liberty

- *Procedural due process*

- 1) deprivation of education **but no property interest in particular type of education** or
- 2) appeal right

- *Equal Protection - Separate and Unequal*

- *4th Amendment - 1) Search and Seizure or 2) Privacy*

- *State law incorporating Nuremberg Code human rights*

Mandatory Vaccinations for Faculty and Staff

- EUA informed consent
- CDC does not list mandatory vaccination as a recommendation
- EEOC December 2020 Guidance allows mandatory vaccination, with exceptions religion and disability
- Worker's Comp for adverse reaction to vaccination (possible)
- Incentives v. Mandates

Legal Theories Challenging Mandatory Vaccine Faculty and Staff

- (California Educators for Medical Freedom v. Los Angeles Unified School District, 2021 WL 1034618 (C.D.Cal.)
 - Due Process
 - Medical experimentation – human rights theory (Nuremberg Code) and state law theory
- *Title VII (religion, race, sex)*

Mandatory Vaccinations for Students

- Assumptions:
 - *Vaccine will receive EUA for children under 16*
 - *Vaccine effective for preventing serious illness from variants prevalent in the fall*
 - *Vaccine will inhibit transmission of variants prevalent in the fall*
- Most issues relevant to mandatory vaccination of faculty and staff
- World Health Organization–April 13th Guidance - “mandates for routine pediatric vaccines are distinct from vaccines authorized for emergency use in many respects, including the relatively limited and evolving evidence for COVID19 vaccines in addition to uncertainty regarding herd immunity and new SARS-CoV-2 variants in the context of COVID-19.”*
- Equity

* World Health Organization, *COVID-19 and Mandatory Vaccination: Ethical considerations and caveats*, Policy Brief, 13 April 2021.

Policy Consideration



To what extent are safety measures driven
by a pre-pandemic vision of school?



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Education Rights Center



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