



COMMONWEALTH of VIRGINIA

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The Honorable Glenn A. Youngkin
Governor of Virginia
Office of the Governor
1111 East Broad Street
Richmond, Virginia 23219

Dear Governor Youngkin:

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

Issue Presented

You have asked whether Virginia's public institutions of higher education may require students to receive vaccinations (including booster shots) against COVID-19 as a general condition of enrollment or in-person attendance.

Applicable Law and Discussion

Virginia's public institutions of higher education are public corporations. As such, they are afforded separate corporate status but remain under control of the General Assembly and may only exercise such powers as the General Assembly has expressly conferred or necessarily implied.¹

In Chapter 13 of Title 23.1 of the Code of Virginia, the General Assembly has conferred a number of general powers to the boards of visitors of public institutions of higher education. Such boards are granted general authority to, among other things, "make regulations and policies concerning" their respective institutions.² Courts have held that the General Assembly has granted broad discretion to boards

¹ 1981-1982 Op. Va. Att'y Gen. 66, 67 (citing *Batcheller v. Commonwealth*, 176 Va. 109 (1940); 1961-1962 Op. Va. Att'y Gen. 241, 242).

² See VA. CODE ANN. § 23.1-1301 (2021) (enumerating powers to, among other things, manage institutional funds and make a budget, appoint the chief executive officer for the institution, appoint professors, fix tuition and fees, and other functions).

of visitors, including “the implied power to do what is reasonably necessary to effectuate the powers expressly granted.”³

The General Assembly has also enacted statutes governing specific aspects of university operations such as student health and campus safety, financial assistance, and academic policies. With regard to immunizations, the General Assembly has made clear the immunizations that are required for a student to enroll in an institution of higher education. Under § 23.1-800 of the Code of Virginia, “each student shall be immunized by vaccine against diphtheria, tetanus, poliomyelitis, measles (rubeola), German measles (rubella), and mumps” prior to enrollment “for the first time in any baccalaureate public institution of higher education.”⁴ Students may not register for a second semester or quarter until they have furnished “documented evidence, provided by a licensed health professional or health facility, of the diseases for which [they] ha[ve] been immunized.”⁵

Under long-established law, “[w]hen faced with a choice between a specific and general statute, the former is controlling.”⁶ Thus, when determining what immunizations a university may require its students to receive, § 23.1-800, as the more specific statute governing student vaccination, takes precedence over the more general authority provided to boards under § 23.1-1301.⁷

A prior Opinion of this office, written to Delegate Keam on April 26, 2021, concluded that the “broad specific and implied discretion” granted to institutions of higher education in § 23.1-1301 and other statutes contained in Chapter 13 of Title 23.1 permitted public institutions of higher education to condition in-person attendance on receipt of an approved COVID-19 vaccine. That Opinion, however, failed to consider § 23.1-800.⁸

³ *Batcheller v. Commonwealth*, 176 Va. 109, 123 (1940); *see also DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 136-38 (2011) (holding that the Board of Visitors of George Mason University could promulgate a regulation to restrict the possession of weapons on campus as part of its general powers to make rules and regulations pertaining to the University).

⁴ VA. CODE ANN. § 23.1-800(B) (2021). Subsection C of the statute further provides that “prior to enrollment for the first time in any baccalaureate public institution of higher education, each full-time student shall be vaccinated against meningococcal disease and hepatitis B unless the student or, if the student is a minor, the student’s parent or legal guardian signs a written waiver stating that he has received and reviewed detailed information on the risks associated with meningococcal disease and hepatitis B and the availability and effectiveness of any vaccine and has chosen not to be or not to have the student vaccinated.”

⁵ VA. CODE ANN. § 23.1-800(A).

⁶ 2007 Op. Va. Att’y Gen. 100, 101; *see also, e.g.*, 2001 Op. Va. Att’y Gen. 59, 60 (citing *City of Roanoke v. Land*, 137 Va. 89 (1923); 1989 Op. Va. Att’y Gen at 187, 188; 1985-1986 Op. Va. Att’y Gen at 291, 292 n.2; 1981-1982 Op. Att’y Gen. at 240, 241).

⁷ Moreover, the State Health Commissioner may require immunization (as well as other measures) “of any individual or group of individuals when he determines any such measure to be necessary to control the spread of any disease of public health importance . . .” VA. CODE ANN. § 32.1-43 (2018). The Commissioner may also “requir[e] immediate immunization of all persons in case of an epidemic of any disease of public health importance.” VA. CODE ANN. § 32.1-48(A) (2018).

⁸ The Opinion relied in part on *DiGiacinto*, 281 Va. at 136, which reliance is misplaced. In that case, the Virginia Supreme Court upheld the authority of the Board of Visitors to regulate the possession of weapons on campus by virtue of its general authority to “safeguard[] the university’s property and the people who use it”; no statute limited this authority or delegated its exercise to another entity. In contrast, the General Assembly has itself identified the essential immunizations for students and has made clear the authority of the Commissioner of Health to require vaccinations under limited circumstances.

Further, while the prior Opinion notes the existence of a state of emergency and references the impact of that emergency on institutions of higher education, states of emergency do not constitute a general grant or implication of expanded powers for entities that are expressly subject to the control of the General Assembly. Notably, the authority to require immunization during a public health emergency belongs to the State Health Commissioner.⁹

As recognized in the prior Opinion, “[t]here is no question that the General Assembly could enact a statute requiring the COVID-19 vaccine for in-person school attendance.”¹⁰ As of this writing, it has not done so. Over the course of the COVID-19 pandemic, the General Assembly has amended other statutes to address pandemic-related issues. For example, it amended the Virginia Freedom of Information Act to broaden the purposes for which public bodies may hold electronic meetings without a quorum physically assembled at one location.¹¹ Although the General Assembly specifically authorized public institutions of higher education to assist the Department of Health and local health departments in the administration of the COVID-19 vaccine, the legislation did not grant such institutions power to impose vaccine requirements.¹² To date, the General Assembly has not amended the specific immunizations enumerated in § 23.1-800 to include immunization for COVID-19, and boards of visitors may not exercise an implied power to require a certain vaccine when a specific statute governing vaccination excludes it.

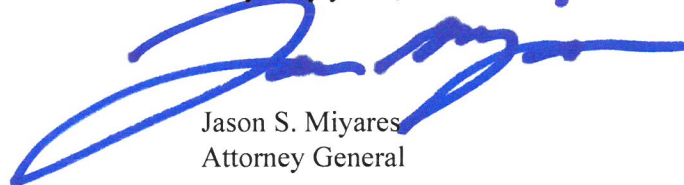
To the extent the Opinion concluded that Virginia’s state institutions of higher education could condition in-person attendance on receipt of an approved COVID-19 vaccine, that Opinion is superseded.

Conclusion

For the reasons stated herein, I conclude that, absent specific authority conferred by the General Assembly, public institutions of higher education in Virginia may not require vaccination against COVID-19 as a general condition of students’ enrollment or in-person attendance.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

⁹ VA. CODE ANN. § 32.1-48(A).

¹⁰ 2021 Op. Va. Att’y Gen. No. 21-030, at 2, available at <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1917-2021-official-opinions#april>.

¹¹ VA. CODE ANN. § 2.2-3708.2(A)(3) (Supp. 2021). Prior to this amendment, boards could hold fully electronic meetings during a state of emergency only for the purpose of addressing the emergency itself.

¹² 2021 Va. Acts ch. 1.