

Nevada System of Higher Education



MEMORANDUM

To: Melody Rose, Ph.D., Chancellor
Fr: Joe Reynolds, Chief General Counsel
Office of General Counsel
Dt: August 1, 2021
Re: Legal Opinion on Mandating COVID-19 Vaccine for NSHE Students
Cc: Board of Regents
NSHE Presidents

QUESTION

Do the Board of Regents have the independent legal authority to require that NSHE students receive a COVID-19 vaccine?

SHORT ANSWER

While the Board of Regents have the authority to encourage and promote the COVID-19 vaccine, the legal authority to *mandate* a COVID-19 vaccine for NSHE students falls within the jurisdiction of the State Board of Health. If the State Board of Health issues an emergency order or regulation requiring NSHE students to receive a COVID-19 vaccination, the Board of Regents would be obligated by law to both implement and enforce it.

OPINION

Issues involving the legal authority of the Board of Regents to impose a COVID-19 vaccine mandate for NSHE students requires analysis under federal and Nevada law. Each will be discussed below.

FEDERAL LAW

On December 11, 2020, the United States Food and Drug Administration (FDA) granted the first Emergency Use Authorization (EUA) for administration and use of a COVID-19 vaccine to a member of the public. Several COVID-19 vaccines throughout with winter and spring of 2021 have received a EUA authorization by the FDA for use. Yet, legal uncertainty has remained regarding the authority of public and private entities to mandate the vaccine under federal law.

More specifically, Title 21 U.S.C. 564, Section 360bbb-3(e)(1)(A)(ii)(III) of the Food, Drug and Cosmetics Act provided that an individual has “the option to accept or refuse administration” of a product authorized by the FDA pursuant to an EUA. Because the available COVID-19 vaccines were only granted an EUA status, the above-referenced regulatory provision has been widely interpreted as a federal prohibition on a vaccine mandate.

In response to the legal uncertainty under federal law, on July 6, 2021, the Office of Legal Counsel of U.S. Department of Justice issued a formal legal opinion to the President of the United States that provided an interpretation and guidance on the applicability of Title 21 U.S.C. 564 to the COVID-19 vaccine.¹ In its new opinion, the U.S. Department of Justice recognized that federal law was “less than clear,”² and concluded that regulatory provision only required that notice to the COVID-19 vaccine recipient:

We conclude that section 564(e)(1)(A)(ii)(III) ***concerns only the provision of information to potential vaccine recipients*** and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs. By its terms, the provision directs only that potential vaccine recipients be “informed” of certain information, including “the option to accept or refuse administration of the product.” (Emphasis added).

Importantly, the FDA agrees with the above interpretation by the U.S. Department of Justice,³ and legal deference is presumptively afforded by federal courts to an agency’s interpretation of its own regulations.⁴ Based upon the recently-issued opinion by the U.S. Department of Justice, I submit that the EUA designation of COVID-19 vaccines is not a legal impediment to a vaccine mandate under federal law.

NEVADA LAW

Under Nevada law,⁵ the State Board of Health is “supreme in all nonadministrative health matters . . . relating to the preservation of the health and lives of citizens of this State.” *See* NRS 439.150(1).

¹ Office of Legal Counsel of the U.S. Department of Justice, Memorandum Opinion for the Deputy Counsel to the President, *Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* (July 6, 2021), at 14.

² *Id.* at 7.

³ *Id.* at 13.

⁴ *Kisor v. Wilkie*, ___ U.S. ___, ___, 139 S.Ct. 2400, 2408 (2019) (holding that “[a]gency deference retains an important role in construing an agency’s regulations”).

⁵ The Nevada Supreme Court has held that [t]he Legislature has inherent authority, under the general police power of the state, to enact laws for the promotion of the health, safety, and welfare of the people, and its arm cannot be stayed when exercised for these purposes.” *In re Boyce*, 27 Nev. 299, 299, 75 P. 1, 1 (1904).

It is statutorily authorized and has legal jurisdiction pursuant to NRS 439.200(1)(a) to “adopt, amend, and enforce reasonable regulations . . . [t]o define and control dangerous communicable diseases.”⁶

More specifically, NRS 439.200 sets forth the authority of the State Board of Health in pertinent part as follows:

1. The State Board of Health may by affirmative vote of a majority of its members adopt, amend and enforce reasonable regulations consistent with law:

(a) To define and control dangerous communicable diseases.

. . . .

(e) To govern and define the powers and duties of local boards of health and health officers, except with respect to the provisions of NRS 444.440 to 444.620, inclusive, 444.650, 445A.170 to 445A.955, inclusive, and chapter 445B of NRS.

(f) To protect and promote the public health generally.

(g) To carry out all other purposes of this chapter.

2. Except as otherwise provided in NRS 444.650, ***those regulations have the effect of law and supersede all local ordinances and regulations*** inconsistent therewith, except those local ordinances and regulations which are more stringent than the regulations provided for in this section. (Emphasis added).

With respect to higher education institutions in Nevada, and pursuant to its own statutory authority, the State Board of Health enacted NAC 441A.755. That regulation mandates that, except for *bona fide* religious belief or medical condition, all university freshman in Nevada must show proof of having received vaccines for certain diseases as a condition of admission.⁷

Additionally, the Supreme Court of the United States has recognized that the government has the authority to order “the compulsory vaccination of children.” *See Lawton v. Steele*, 152 U.S. 133, 136, 14 S.Ct. 499, 501 (1894).

⁶ Nowhere in the Board of Regents’ enabling statutes within NRS Chapter 396 or its own bylaws, policies, and procedures is the authority to unilaterally mandate a vaccine prescribed.

⁷ *See* NAC 441A.755(1). Those diseases are the following: tetanus, diphtheria, measles, mumps, and rubella. Freshman students who are less than 23 years old must also be vaccinated for *Neisseria meningitidis*. *See* NAC 441A.755(2).

Importantly, NAC 441A.755(1) expressly authorizes the State Board of Health to mandate student vaccines for “any other disease” it chooses to specify, and contemplates that “additional requirements of immunity” may be imposed by the State Board of Health even “after a student has been enrolled.” *See* NAC 441A.755(7).

The logical public policy of placing authority to consider and impose vaccine requirements for higher education students with the State Board of Health is that it places the decision-making process in the hands of qualified medical, scientific, and subject-matter experts, and outside of any political or financial considerations.

If the Nevada State Board of Health were to issue an emergency order or regulation (or another type of legal designation) adding the COVID-19 vaccine under the “any other disease” category contemplated by NAC 441A.755, it would have the force and effect of law. Accordingly, I submit that the Board of Regents would lack the authority to either augment or contravene such a COVID-19 vaccine mandate. In other words, the Board of Regents would be obligated to both implement and enforce it as a binding public health and safety law, and would be required to deny admissions or exclude any NSHE student who failed to comply.

Given that the plain language of NAC 441A.755 expressly applies only to NSHE university students, an emergency order or regulation issued by the State Board of Health mandating a COVID-19 vaccine would ideally include language clarifying that it also applied to students attending NSHE’s state and community colleges.

Finally, it is noteworthy that the United States Supreme Court has held as a matter of bedrock jurisprudence for nearly 100 years that vaccine requirements to attend public schools are undoubtedly constitutional and enforceable as valid exercises of government police powers that are necessary to protect public health and safety.⁸ Any argument to the contrary is misplaced. Indeed, the existence of vaccine mandates for Nevada school students is not new.⁹ As discussed above, Nevada law *already* requires NSHE university students to be vaccinated against certain dangerous communicable diseases. What should be properly before the State Board of Health is whether to add COVID-19 to the list.

CONCLUSION

For the reasons discussed above, the authority to mandate a COVID-19 vaccine for NSHE students resides with the State Board of Health, not the Board of Regents. If the State Board of Health issues an emergency order or regulation mandating the vaccine, the Board of Regents would be required by law to implement and enforce it.

⁸ *See Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24 (1922) (holding that an ordinance mandating that no child may attend public school without a certificate of vaccination did not violate the United States Constitution); *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S.Ct. 358 (1905) (holding that a state may constitutionally impose compulsory vaccinations).

⁹ *See also* NRS 432A.230 (requiring that a child enrolled in a Nevada child care facility “must” submit proof of vaccination) and NRS 392.435 (requiring that a child enrolled in a Nevada public school “must” submit proof of vaccination).