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August 9, 2021

The Honorable Jim Rosapepe  
Maryland Senate  
101 James Senate Office Building  
Annapolis, Maryland 21401  
Via email

Dear Senator Rosapepe:

You asked for advice whether a local education agency (“LEA”) may require COVID-19 vaccines for its employees and for students. Current guidance from the Maryland Department of Health (“MDH”) and the Maryland State Department of Education (“MSDE”) allows LEAs to set their own COVID-19 “policies and procedures for their schools, students/children, teachers and staff.”<sup>1</sup> It is my view that the LEA may require its employees and students to be vaccinated so long as it is following the recommendations or requirements of the State or local health department.

Generally, employers may require their employees to be vaccinated against COVID-19.<sup>2</sup> An employer who wishes to impose a vaccination requirement will likely have to show that it is job-related and consistent with business necessity. That is, the employer must have a reasonable belief, based on objective evidence, that an employee

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<sup>1</sup> See MDH and MSDE “K-12 School and Childcare COVID-19 Guidance,” Revised July 23, 2021, [07.23.2021 MDH MSDE School Childcare Guidance FINAL.pdf \(maryland.gov\)](https://www.maryland.gov/msde/07.23.2021-MDH-MSDE-School-Childcare-Guidance-FINAL.pdf) (hereinafter “July 23 Guidance”).

<sup>2</sup> Some have argued that because the COVID-19 vaccines have been approved for Emergency Use Authorization (“EUA”), the vaccines cannot be mandated. Nevertheless, no court has accepted this argument and the U.S. Department of Justice advised that “the Food, Drug, and Cosmetic Act concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an emergency use authorization.” Opinion DOJ Office of Legal Counsel (July 6, 2021).

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who refuses to receive a COVID-19 vaccination will pose a direct threat to the health or safety of that employee or others.

Some employees, however, may have a right under the Americans with Disabilities Act (“ADA”) or Title VII, due to a sincerely held religious belief, to refuse a vaccination and, depending on the workplace and/or work done by the employee, the employer may be obligated to accommodate the employee’s request. In addition, there would have to be confirmation that no applicable collective bargaining agreement or other employment contract prohibits mandatory vaccinations.

With regard to your specific question, like any other employer, there is an argument that a LEA may require its employees to be administered a COVID-19 vaccine. LEAs, however, are subject to oversight by MSDE. Article VIII of the Maryland Constitution assigns to the General Assembly the duty to “establish throughout the State a thorough and efficient System of Free Public Schools” and to “provide by taxation, or otherwise, for their maintenance.” Md. Const., Art. VIII, § 1. Fulfilling that constitutional directive, “the General Assembly has created a structure for the operation and maintenance of public schools that weaves together State and local responsibilities.” *Building Materials Corp. of America v. Board of Educ. of Baltimore County*, 428 Md. 572, 576 (2012).

Under State law, “educational matters that affect the counties shall be under the control of a county board of education in each county.” Education Article (“ED”), § 4-101(a). “Each county board shall: . . . [s]ubject to [the Education] article and to the applicable bylaws, rules, and regulations of the State Board, determine, with the advice of the county superintendent, the educational policies of the county school system.” ED § 4-108(3).

The State Board of Education and the State Superintendent of Schools set the overall educational policy of the State and provide general direction and supervisory authority over the system, but, subject to that State direction and authority, it is predominantly the school boards and school superintendents in each of the 23 counties and Baltimore City that operate the public schools.

*Maryland State Bd. of Educ. v. Bradford*, 387 Md. 353, 359 (2005).

Current statutory provisions do not directly require school employees or students in public and private schools to be immunized to attend school, including immunization against COVID-19. Section 7-403(a)(2) of the Education Article directs MDH, in cooperation with the State Board of Education and the Statewide Advisory Commission on Immunizations, to issue rules and regulations regarding “immunizations required of children entering schools.” In addition, the Secretary of Health is authorized to issue rules and regulations regarding infectious and contagious diseases. Health-General

Article (“HG”), § 18-102. Pursuant to authority granted in HG § 18-102, MDH has adopted regulations requiring that all students be immunized. COMAR 10.06.04.03A.

The General Assembly has provided, however, that:

Unless the Secretary declares an emergency or disease epidemic, the Department may not require the immunization of an individual if:

- (1) The individual objects to immunization because it conflicts with the individual's bona fide religious beliefs and practices; or
- (2) The individual is a minor and the individual's parent or guardian objects to immunization because it conflicts with the parent or guardian's bona fide religious beliefs and practices.

HG § 18-403(a).<sup>3</sup> *See also* ED § 7-403(b)(1).

With regard to conducting in-person instruction in the classroom during the current COVID-19 pandemic, the State Board, local school systems, and nonpublic schools are all subject to public health directives from the Governor, the Secretary of Health, and local health officials.<sup>4</sup> In addition, the Secretary of Health and local health officers are authorized to issue directives to public and nonpublic schools related to COVID-19. As mentioned previously, under HG § 18-102(b), the Secretary has the responsibility to investigate diseases believed to endanger the public health and to “[a]ct properly to prevent the spread of the disease.” HG § 18-208(b)(1) imposes a similar responsibility on local health officers to “act immediately to prevent the spread of” infectious diseases in the county. Moreover, HG § 18-208(a)(1)(ii)2 requires a local health officer with the approval of the local board of health to “[a]ct properly to prevent the spread of the disease.”

Further, COMAR 10.06.01.06A provides that the Secretary or health officer shall:

- (1) Take any action or measure necessary to prevent the spread of communicable disease or to control a reportable disease and condition; and
- (2) Issue, when necessary, special instructions for control of a disease or condition.

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<sup>3</sup> While this provision authorizes the Secretary to declare a disease epidemic and suspend the statutorily granted religious exemption, I cannot rule out the possibility that an individual could nevertheless successfully pursue a religious accommodation under the First Amendment.

<sup>4</sup> On March 5, 2020, the Governor declared by proclamation that a state of emergency and a catastrophic health emergency exists in the entire State due to an outbreak of COVID-19. Given the ongoing pandemic, the Governor has re-issued the proclamation several times, most recently on July 12, 2021.

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Additionally, the Secretary or health officer may order cessation of operation of a business or facility determined or suspected to be a threat to public health until the public health threat is determined by the health officer to have ceased. COMAR 10.06.01.06C. And COMAR 10.06.01.06F states that persons in charge of any school "shall comply with a measure or special instruction issued by the Secretary or health officer under Regulation .06A of this chapter." As a result, even if MSDE and MDH objected, or the LEA refused, a local board of health could require vaccinations.

Consistent with the foregoing, MDH and MSDE together have been issuing joint guidance since June 2020 for LEAs regarding COVID-19, including the July 23 Guidance "to provide assistance to local school systems, nonpublic schools, and child care programs to respond to the COVID-19 pandemic." The July 23 Guidance explicitly states that "[e]ach local school system, nonpublic school, and child care program may set their own policies and procedures for their schools, students/children, teachers and staff." Although the July 23 Guidance also states that "[w]hile vaccination is one of the most critical strategies to help schools resume regular operations, decisions about in-person education should not be based on the level of vaccination of teachers, staff, or eligible students/children," it appears that MSDE has directed LEAs to follow guidance and directives from public health authorities, including the Centers for Disease Control, MDH and local health departments. As a result, it is my view that MSDE has given LEAs flexibility regarding in-person instruction operations. Nevertheless, if the Secretary of Health or local health officer mandated vaccinations, the LEA would be required to follow such directives.

Sincerely,



Sandra Benson Brantley  
Counsel to the General Assembly