



STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

STEVE MARSHALL
ATTORNEY GENERAL

501 WASHINGTON AVENUE
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.ALABAMA.GOV

Published August 3, 2021

PUBLIC NOTICE

FROM: Steve Marshall, Alabama Attorney General

SUBJECT: COVID-19 Vaccinations, Act 2021-493, and Educational Institutions

Last week, in response to numerous legal questions related to the COVID-19 vaccination, this Office issued general guidance regarding vaccination requirements and Alabama law. Since then, the Office has received additional questions related to Act 2021-493's application to educational institutions. This public notice provides additional guidance related to several questions that have arisen in the education context, including questions regarding schools requiring proof of vaccination as a condition for (1) entering campus, (2) avoiding new burdens on attending school, and (3) participating in additional activities the school offers in conjunction with third parties that require proof of vaccination.

After briefly summarizing Act 2021-493, we provide analysis related to each of these three categories. **Violations of the Act may expose educational institutions and their administrators to litigation from students denied their rights under the Act.**

Act 2021-493

As outlined more fully in this Office's July 26, 2021 guidance, the Governor recently signed into law Senate Bill 267 (now Act 2021-493), which generally (1) prohibits state or local governments from issuing or requiring the publication or sharing of immunization records not otherwise required by law; (2) prohibits state or local entities from requiring vaccination or proof thereof as a condition for receiving government services or for entry into a government building, unless the vaccination is otherwise required by Alabama law;¹ and (3) likewise prohibits private businesses from requiring vaccination or proof thereof as a condition for purchasing goods or service or obtaining admission to a private building.

The Act provides an exception in subsection (c), which allows institutions of education to continue to require a student to prove vaccination status as a

¹ Chapter 30 of Title 16 of the Alabama Code allows the State to impose some vaccination requirements for children as a condition of attending school in Alabama.

condition of attendance, but only for the specific vaccines that were already required by the institution as of January 1, 2021.²

Thus, the Act applies broadly to public and private educational institutions alike. In the words of the Act, a public school “may not require an individual to receive an immunization or present documentation of an immunization as a condition for receiving any government service or for entry into a government building,” except for those immunizations already required by law for school children or for specific immunizations the institution required as of January 1, 2021. *See* Act 2021-493, §§ 1(b)-(c). Similarly, a private school “may not refuse to provide any goods or services, or refuse to allow admission, to a customer”—including a student—“based on the customer’s immunization status or lack of documentation that the customer has received an immunization,” with the exception that the institution may require a vaccine that it required as a condition attendance on or before January 1, 2021. *Id.* § 1(c)-(d).

Application

The Office has received reports of policies that educational institutions across the State have announced in recent weeks that may implicate Act 2021-493. These examples are discussed below.

1. Proof of Vaccination Status as Condition of Admittance to Campus

We have received reports of an educational institution requiring each student to submit documentation showing that he or she has received a COVID-19 vaccination before the student is permitted to return to campus for the Fall 2021 semester. Such a policy is a clear violation of Act 2021-493, whether implemented by a private or public institution. Even if the school permits students who do not submit proof of vaccination to attend classes virtually, the school is still “refus[ing] to provide” educational “services” and “refus[ing] to allow admission” to its premises based on “immunization status or lack of documentation” of status in direct violation of the Act. *See* Act 2021-493 § 1(d).

2. Proof of Vaccination Status as Condition for Avoiding New Burdens on Attendance

We have also received reports of educational institutions allowing all students to access campus regardless of vaccination status, but imposing costs and restrictions on students that are lifted if a student proves he or she is vaccinated. The question, then, is whether an exemption from burdensome policies for those that prove their vaccination status is in effect a mandate to be vaccinated and to provide proof thereof. Put another way, has the college discouraged or deterred students from exercising a statutory right to withhold their vaccination status by offering a significant benefit only to those who choose to forgo this right, thereby

² The law’s new protections are in addition to existing medical or religious-based exemptions from immunizations. Nothing in the Act negates these preexisting protections for individuals.

penalizing those who assert it?³ Would the college's actions deter a person of ordinary firmness from the exercise of the statutory right to withhold their vaccination status?⁴ We will analyze some of these policies below.

Policy 1: A school charges all students several hundred dollars in new fees, ostensibly to offset regular testing for COVID-19 and costs of quarantining. But students who prove they have been vaccinated are reimbursed this otherwise mandatory fee.

Analysis: Does the burden of paying the fee rise to the level of constructively requiring proof of vaccination? Would a fine of comparable scale deter an ordinary person from withholding his or her vaccination status? **Yes. The school is refusing to provide services or allow admission unless the student either proves vaccination status or pays a fee of several hundred dollars. The policy would likely deter an ordinary person from withholding his or her vaccination status.**

Policy 2: Only unvaccinated students are subject to quarantine upon returning from travel or if "contact tracers" find them to be exposed to the virus.

Analysis: Because a school cannot require proof of vaccination, it is unclear how this policy could be lawfully and effectively implemented. If the school forced students into quarantine, but then released students from quarantine early if they showed proof of immunization, **that policy would violate the Act.** Although potentially impractical, a school likely could impose such a policy consistent with the Act if the school accepted only verbal representations of the student without influence or penalty.

Policy 3: Professors will be notified if their respective classes are 100% vaccinated. If the class is not 100% vaccinated, professors, at their discretion may require that 100% of the class wears a mask.

Analysis: Would the increased likelihood of mask-wearing rise to the level of deterring an ordinary person from withholding his or her vaccination status or refusing the person goods, services, or

³ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) ("While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to produce a result which the State could not command directly. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.") (internal citations and quotations omitted); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

⁴ *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005) ("A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.")

admission to the school? **Probably not due to the minimal nature of the burden.** In this situation, a student’s decision to provide his or her vaccination status would likely be deemed voluntary and not coerced.

Policy 4: Student-athletes who do not prove they are vaccinated are subject to multiple COVID-19 tests per week.

Analysis: Some schools have indicated that they will subject student-athletes to regular COVID-19 tests if the students have not offered proof of vaccination. Though additional testing may be an inconvenience for students, **it likely does not violate the Act.** Providing vaccine status is not a “condition of attendance,” and the student may still access the goods and services offered by the school, including admission to campus facilities.

3. Proof of Vaccination Status Required By Third-Party Partners of an Education Institution

In addition to classes and extracurricular activities offered by schools directly, many schools partner with third parties to provide additional opportunities for students. For example, medical schools may partner with hospitals or other healthcare professionals to offer training to medical students, or colleges may partner with other schools or organizations to offer study abroad opportunities. If the third party is not covered by the Act—for example, because it is not located in Alabama—the third party may have the legal right to require proof of vaccinations of students who desire to work with the organization or participate in the offering it makes jointly with the school. Depending on the facts, it may be that it is a third party—and not the school—implementing a requirement that a student prove vaccination status as a condition of accessing a particular good or service. In such a scenario, the school likely would not be in violation of the Act.

The school, however, should work to accommodate students with regard to additional opportunities the school provides in conjunction with third parties. Thus, just as a school would be expected to work with a student who is not vaccinated because of a religious or medical exception to ensure the student access to suitable educational opportunities with third parties, the school should work to accommodate students who assert their rights under the Act. For example, if a medical school were aware of opportunities for a student who has not provided vaccination status to obtain experience with a third-party healthcare provider comparable to that of other students who have provided their vaccination status, the Act would require the school to allow the student access to this educational opportunity.