



**Town of Arlington  
Legal Department**

Douglas W. Heim  
Town Counsel

50 Pleasant Street  
Arlington, MA 02476  
Phone: 781.316.3150  
Fax: 781.316.3159  
E-mail: [dheim@town.arlington.ma.us](mailto:dheim@town.arlington.ma.us)  
Website: [www.arlingtonma.gov](http://www.arlingtonma.gov)

To: Policy Subcommittee of the Arlington School Committee

Cc: Dr. Elizabeth Homan, Superintendent; Christine Bongiorno, Director of Health and Human Services

From: Douglas W. Heim, Town Counsel

Date: March 21, 2022

Re: Assessment of Vaccine Requirements for Non-Compulsory Extracurricular Activities

---

Members of the Policy Committee, I write in response to your inquiry regarding the School District's authority to enact a policy requiring COVID-19 vaccination for Arlington Public Schools students ages 16 and over participating in extra-curricular activities. In summary, the school district can establish reasonable, non-discriminatory conditions on participation in optional school-sponsored extra-curricular activities, including a vaccine requirement. Municipalities hold broad "police powers" to protect the public health which by both statute and under constitutional jurisprudence include compulsory vaccination for public school students to attend and benefit from essential school functions. Thus, Arlington Public Schools can in good

faith apply a more narrowly-tailored vaccine requirement for optional extra-curricular activity participation in order to prevent the transmission of a dangerous disease.<sup>1</sup> In doing so however, it would be prudent to consult local public health officials to ensure that your policy is responsive to public health conditions and customized as possible.

### **Legal Background for General Vaccination Requirements**

As you know, there is a strong basis for compulsory vaccination in public schools in the Commonwealth generally. G.L. c. 76 sec. 15 provides as follows:

#### **Section 15: Vaccination and immunization**

Section 15. No child shall, except as hereinafter provided, be admitted to school except upon presentation of a physician's certificate that the child has been successfully immunized against diphtheria, pertussis, tetanus, measles and poliomyelitis *and such other communicable diseases as may be specified from time to time by the department of public health.*

A child shall be admitted to school upon certification by a physician that he has personally examined such child and that in his opinion the physical condition of the child is such that his health would be endangered by such vaccination or by any of such immunizations. Such certification shall be submitted at the beginning of each school year to the physician in charge of the school health program. If the physician in charge of the school health program does not agree with the opinion of the child's physician, the matter shall be referred to the department of public health, whose decision will be final.

*In the absence of an emergency or epidemic of disease declared by the department of public health, no child whose parent or guardian states in writing that vaccination or immunization conflicts with his sincere religious beliefs shall be required to present said physician's certificate in order to be admitted to school.*

(emphasis added). Section 15 is further fleshed out in 220 CMR 500, which provides for immunization schedules as recommended by the Centers for Disease Control as follows:

---

<sup>1</sup> This Office well appreciates the value and importance of extracurricular arts, athletics, and other student activities to students, families, and broader school communities. Such activities are not however compulsory or required facets of public education for all students.

No student shall attend a preschool, elementary school or secondary school program without a certificate of immunization documenting that the child has been successfully immunized in accordance with current Department required immunization schedules, developed in accordance with the recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention,<sup>2</sup> or any successor committee serving a comparable function.

(B) Immunizations. (Reserved).

(C) The requirements in 105 CMR 220.500(A) shall not apply where: (1) the student, or the student's parent or guardian if the student is a minor, provides written documentation that he or she meets the standards for medical or religious exemption set forth in M.G.L. c. 76, § 15; (2) the student, or the student's parent or guardian if the student is a minor, provides appropriate documentation, including a copy of a school immunization record, indicating receipt of the required immunizations; or (3) the student provides written documentation that he or she is immune, as defined in Department guidelines.

However it is also noteworthy that the authority Massachusetts' statewide compulsory vaccinations laws rest upon the constitutional considerations first litigated relative to a local regulation requiring small-pox vaccination in Cambridge in the matter of *Jacobson v. Commonwealth of Massachusetts*.

In brief, in the early 1900s City of Cambridge enacted a regulation which required all residents of the city to be vaccinated against smallpox with limited exceptions. *Jacobson v. Massachusetts*, 197 U.S. 11, 25, (1905). In weighing individual liberties against local governments' ability to enact and enforce laws to protect the public health, the Court affirmed the right to exercise the so-called "police power" in imposing quarantines and other reasonable restrictions to protect the public health, including specifically to limit the spread of a highly infectious and dangerous disease. *Id.* While the vaccine requirement in *Jacobson* was not relative to schooling (or school appurtenant activities), it bears noting that in reaching its decision in

---

<sup>2</sup> Germane to this discussion, to this Office's understanding, the Advisory Committee currently recommends vaccination for children older than 5 years of age, especially for high-risk sports and extra-curricular activities. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

*Jacobson*, the Supreme Court relied heavily on a series of other cases requiring vaccination of children as a predicate for school attendance. In other words, in upholding local vaccine ordinance applied to the entirety of the general public, the Supreme Court cited a host of state court decisions regarding vaccine mandates in schools:

For decisions of state courts involving vaccination laws which have mainly been decided upon statutes relating to the exclusion of children from the public schools *see Bissell v. Davison*, 65 Connecticut, 183; *Abell v. Clark*, 84 California, 226; *State v. Zimmerman*, 86 Minnesota, 353; *Osborn v. Russell*, 64 Kansas, 507; *Potts v. Breem*, 167 Illinois, 67; *Duffield v. Williamsport School District*, 162 Pa. St. 476; *State v. Burdge*, 95 Wisconsin, 390; *Re Rebenack*, 62 Mo. App. 8; *Blue v. Beach*, 155 Indiana, 121...

None of these cases are as extreme as the decision in the case at bar and the laws providing that unvaccinated children shall not attend the public schools are widely variant from laws compelling the vaccination of adult citizens.”

*Jacobson* 197 U.S. 11 at 22 (1905)

Following *Jacobson*, the Supreme Court in 1922 revisited and directly addressed the constitutionality of childhood vaccination requirements in schools in *Zucht v. King*. In *Zucht*, the Court denied a due process, Fourteenth Amendment challenge to the constitutionality of San Antonio local ordinances which excluded children from school attendance for failure to present a certificate of vaccination holding that “these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.” 260 U.S. 174, 176, (1922). In the century that followed, these cases continued to serve as the backbone for both state and local governments’ authority to combat epidemics through the exercise of their police powers<sup>3</sup>.

Indeed as recently as two weeks ago, the United States District Court of Massachusetts cited both *Jacobson* and *Zucht*, in rejecting a preliminary injunction request by employees of the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority seeking to block an employee COVID-19 vaccine requirement. *Brox v. The Woods Hole*, No. 22-10242-RGS, 2022

---

<sup>3</sup> The majority of subsequent developments further detailed the limited exceptions to such requirements based upon religious or medical grounds, which are recognized and codified in both Massachusetts State Law and a local policies.

U.S. Dist. LEXIS 42447, at \*12-13 (D. Mass. Mar. 10, 2022). In assessing the plaintiffs' arguments, the District Court reiterated the century-old rationale of the Supreme Court:

Plaintiffs point to the Court's statement those fundamental liberties under the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." From that language, they conflate the right to marry (which implicates no public or personal risk) with the right to refuse vaccination (which does). Plaintiffs ignore the Court's earlier teaching that "[h]istory and tradition," which "guide and discipline [the] inquiry" into whether a personal interest implicates a fundamental right, essentially foreclose the recognition of vaccine aversion as a fundamental liberty interest. *Id.*; see also *Jacobson*, 197 U.S. at 31-32 ("[T]he principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools."); *Zucht v. King*, 260 U.S. 174, 176, (1922) ("[I]t is within the police power of a state to provide for compulsory vaccination."); *Klaassen*, 7 F.4th at 593 ("[V]accination requirements, like other public-health measures, have been common in this nation.").

*Id.* (internal citations omitted).

Based on the foregoing, there is little doubt that vaccine requirements may be imposed by local and state authorities, including within the context of the public school students accessing the basic, fundamental public education to which they are entitled.

### **School District Policy for Extra-Curricular Activities**

Having established that general vaccine requirements may be imposed as a condition for public school attendance, and therefore that Fourteenth Amendment consideration (and other constitutional principles) do not prohibit vaccine requirements generally, the next question is whether or not the School District has the authority to enact the policy under consideration. Under Massachusetts law, the School Committee is charged with establishing educational goals and policies for the schools in the district, consistent with the requirements of law and the statewide goals and standards established by the Board of Education. G.L. c. 71 sec. 37. To that

end, the Committee has codified an extensive list of School District policies on a wide range of subjects related to student health, safety, and wellness, including an immunization policy for school *admission*, which reads as follows:

File: JLCB - IMMUNIZATION OF STUDENTS

Students entering school for the first time, whether at kindergarten or through transfer from another school system, will be required to present a physician's certificate attesting to immunization against communicable diseases as may be specified from time to time by the Department of Public Health. The only exception to these requirements will be made on receipt of a written statement from a doctor that immunization would not be in the best interests of the child, or by the student's parent or guardian stating that vaccination or immunization is contrary to the religious beliefs of the student or parent.

LEGAL REF.: M.G.L. 76:15

CROSS REF.: JF, School Admissions

Your policy suggests school-wide vaccine requirements should at least be informed by state or local public health officials' determination that a COVID-19 vaccine is required for general school attendance.

Here however, the Policy Committee is considering vaccine requirements only for voluntary activities which are not required to access the school curriculum.<sup>4</sup> As such, you are afforded substantially more discretion. In the interests of crafting the soundest and fairest policy, it is strongly advised that the Committee:

- Consult local public health officials for the record;<sup>5</sup>
- Take care to describe the public health goal of the extra-curricular vaccination policy;

---

<sup>4</sup> Similar assessments of the public health and legal landscapes likely informed Cambridge Public Schools decision to enact similar requirements for school-sponsored before and after school activities.

<sup>5</sup> The Committee may have already so consulted Arlington Public Health personnel and officials.

- Emphasize the policy applies to voluntary, school-sponsored activities provided directly by the School Department, its partners, or vendors outside of learning time;
- Codify exemptions consistent with c. 76 sec. 15 and 220 CMR 500 for sincerely held religious beliefs and medical conditions; and
- Ensure the policy is non-discriminatory (relative to protected classes of persons as defined by the law)<sup>6</sup>

This Office understands there is disagreement on many issues related to the policy proposal before the Committee. It may be possible for reasonable persons to disagree on the costs and benefits of the risk management and mitigation contemplated by the Committee. Nonetheless, the authority to make policy and decisions, especially relative to discretionary programs of the School District remains clear.

---

<sup>6</sup> For example, as defined in G.L. c. 151B or the Article II Art 9 sec. 2(C) of the Arlington Town Bylaws.