



New Hampshire

Department of Education

Technical
Assistance

Subject: COVID-19 Vaccination Requirements in New Hampshire Schools

Legal Reference: RSA 141-C:20 through 141-C:20-f

This Technical Advisory provides guidance regarding school reopening plans for the 2021-2022 school year and the appropriateness of tethering certain student privileges to vaccination status.

The New Hampshire Department of Education (the “Department”) recognizes the extraordinary challenges New Hampshire schools have faced in conducting their programs safely and effectively in the midst of the COVID-19 global pandemic. While many are understandably optimistic that the 2021-22 school year will in many ways represent a return to pre-pandemic “normalcy,” the Department acknowledges that some operational modifications may continue to be a necessary.

Unlike the previous two COVID-19-impacted school years, the 2021-22 school year will almost certainly open with a COVID-19 vaccine(s) available to some portion of New Hampshire school-aged children, albeit almost certainly only on an emergency use authorization from the U.S. Food and Drug Administration. Given this important development, the Department issues this guidance to inform NH schools of the significant limitations on their discretion in factoring in the availability of the vaccine(s) in their 2021-22 school year plans.

May a school require COVID-19 vaccination for attendance?

No. The legislature has designated immunization against certain diseases as a required condition for enrollment in public and private schools (subject to certain exemptions) and has delegated to the Commissioner of the Department of Health and Human Services the authority to add additional required immunizations, through the rule-making process, to the list set forth in the statute. See RSA 141-C:20-a and 141-C:20-c. The statutory framework also provides a process for the DHHS Commissioner, not the local school, to decide whether non-vaccinated students can be excluded from attendance during an outbreak. See RSA 141-C:20-d. Where, as here, the state has adopted a comprehensive regulatory framework “any local law on the subject is preempted, regardless of whether the terms of the local and State law conflict.” North Country Environmental Services, Inc. v. Town of Bethlehem, 150 N.H. 606, 612 (2004). Thus, a local LEA does not have the authority to mandate a COVID-19 vaccination for students, as the state has pre-empted the regulatory field regarding required vaccinations.

May a school require that students who have not received a COVID-19 vaccine wear a mask (when others are not required to do so) or that they occupy different physical spaces than vaccinated students?

No. Tethering specific privileges to vaccination status—such as not wearing a mask or granting access to specific areas of the building—is functionally the same as requiring the vaccination for attendance. It is a “back door” mechanism for exercising the authority that the legislature has retained for itself and for DHHS, namely, requiring what vaccinations are required for school attendance.



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Additional Considerations

Schools should be aware there is uncertainty as to what the COVID-19 conditions in New Hampshire will be in the fall of 2021. Given that reality, schools should plan to revisit their mitigation strategies in August when there is more information available, including the possibility of updated CDC school guidance. Also, in planning their mitigation strategies, schools should be mindful of additional considerations, such as potential religious and/or disability discrimination, stigmatization, bullying, social-emotional wellness of students, and FERPA compliance issues.

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