

August 16, 2021

President Davie Jane Gilmour
Pennsylvania College of Technology
One College Avenue
Williamsport, PA 17701

RE: Fall 2021 Semester Rules regarding EUA approved only devices

Dear President Gilmour:

I have been forwarded an email sent by you to an incoming student regarding the upcoming Fall semester and the use of masks and an illegal request of information related to the student's vaccination status. As you are aware, face masks have only been approved by the FDA for Emergency Use Authorization under 21 U.S. Code §360bbb-3. As you should also be aware, no college or university can mandate the use of EUA approved masks. Please refer to (E)(1)(A)(ii)(III) of the statute, which states, "the option to accept or refuse administration of the [product](#), of the consequences, if any, of refusing administration of the [product](#), and of the alternatives to the [product](#) that are available and of their benefits and risks."

21 U.S. Code §360bbb-3 also requires Pennsylvania College of Technology to provide every student with informed consent before requiring them to wear masks. According to my client, his grandchild has not received any such informed consent. Rather they have simply received emails from you and the College telling them that they must wear a mask if they are not vaccinated. This request for private medical information brings me to my next point.

You may not demand that students provide proof of whether they have had an EUA approved only medical treatment. Your demand that students advise the College of whether they have received an EUA approved only vaccine clearly violates HIPAA and FERPA.

The Right to Medical Privacy per HIPAA and FERPA

Even if an EUA injectable, recombinant vaccine or test were to become fully licensed or authorized in the future, any discrimination or double standards applied to those who do or cannot have the products would create inadvertent disclosure of private medical information to that person's community. This would result in *de facto* violation of Health Insurance Portability and Accountability Act ("HIPAA") and, in the public-school setting, Federal Educational Rights and Privacy Act ("FERPA") law.

Under FERPA, schools may only share medical records of their students if it is necessary to meet a “legitimate educational interest.” See 20 U.S.C. Section 1232g (b)(1) and 34 C.F.R. Section 99.31 (a)(1)(i)(A). FERPA does not allow for the release of personally identifiable information in a student’s confidential health records, as Pennsylvania College of Technology’s Policies appear to mandate. Case law is clear that mandates that involve releasing immunization records of students, even to a state Health Department, unequivocally violate federal law. To wit, in a case involving the Alabama Department of Education, the State Health Officer took a position that schools in his state were allowed to share “information with [DPH] regarding immunizations” because HIPAA allowed for it. The U.S. Department of Education disagreed, clarifying that immunization records “are subject to FERPA” and that **“HIPAA neither authorizes nor permits the disclosure of these [immunization] records.”** The Department also clarified that “vaccination” is not an “emergency” that would allow for data mining of student’s records under FERPA, and that there is **“no exception to FERPA’s prior consent rule that would permit a school subject to FERPA to disclose health or other immunization records to a state health agency such as DPH.”**¹ Indeed, the only exception noted by the federal government was a “very limited” one that would allow for disclosure without prior consent only “in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons,” and that such conditions were required by law to be “strictly construed”:

On the other hand, a blanket exception for “health or safety” could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. **It is expected that he will strictly limit the applicability of this exception.**²

The United States Department of Education further stated that “this Office has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community” and noted that any release must be “narrowly tailored” because the exception **“will not allow for a blanket release[.]”**³ Other cases hold similarly, noting that the release of vaccine information derived from a **“student’s education records to meet ... health reporting requirements” is unlawful** unless the school has made “a specific, **case-by-case determination** that a health or safety emergency exists.”⁴

¹ <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/alhippaa.html> (emphasis added).

² Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489, Dec. 13, 1974 (emphasis added).

³ *Ibid.* (emphasis added)

⁴ See U.S. Department of Education, Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004 (emphasis added).

Presently, the Pennsylvania Senate voted 30 to 20 to end Governor Wolf's emergency declaration in May 2021. Therefore, the Commonwealth of Pennsylvania is not currently in an "emergency." As such, the College would need to make a case-by-case finding that there existed a health or safety emergency for each student to fit within the very narrow exception created by FERPA.

CONCLUSION

In sum, we hereby demand that Pennsylvania College of Technology:

- (1) immediately cease and desist with the policies, emails, statements, or other expressions related to the above-cited vaccine, testing, and mask mandates;
- (2) issue an immediate written letter to *all* faculty, staff, students, and parents sent by e-mail and regular mail
 - (i) retracting all such statements,
 - (ii) explaining that no educational classes, graduations, certificates, units, or any other privileges will be withheld based on vaccination status,
 - (iii) explaining that Pennsylvania College of Technology is not requiring the wearing of masks to be present on campus, to attend classes, activities, or any other College-related event, and
 - (iii) giving notice that Pennsylvania College of Technology will comply with the EUA, *Health & Safety Code*, and other applicable law, and not mandate any experimental protocols, whether that be COVID vaccination, PCR testing, or the use of face masks or coverings to contain viral transmission.

I have advised my client that if these policies are not immediately revised by the College that he may proceed with further action such as the filing of a declaratory judgment action to have a court issue an order declaring that you are in violation of the Food and Drug Administration regulations and the United States Code.

We thank you for your attention to the above and request a response to this letter no later than August 31, 2021.

Sincerely,

Gregory A. Stapp

GAS: