



THE DEMOCRACY FUND

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**Re: Residence Vaccination Booster Mandate**

We represent a group of students and parents concerned about the recent implementation of the COVID-19 booster mandate (“the Booster Mandate”) by the University of Toronto (“the University”). It is the view of The Democracy Fund (“TDF”) that this Booster Mandate is legally problematic, morally improper and medically unnecessary.

**The Booster Mandate**

The Province of Ontario removed its COVID-19 vaccine mandate for post-secondary educational institutions on or about March 1, 2022. Many universities subsequently paused or removed their vaccine mandates, including the University of Toronto, which removed its mandate on or about May 1, 2022.

However, the University has now implemented the Booster Mandate for staff and students living in university residences.<sup>1</sup> The University is requiring students and staff living in residence to submit to a COVID-19 booster shot. It is our understanding that the University is the first and only post-secondary institution to require such a COVID-19 booster.

**Problems with the Booster Mandate**

TDF has identified a number of serious problems with the Booster Mandate, set out below.

We note that most University acceptance letters have been delivered, enrollment confirmed and that fall-winter session fee billing (September to April) started on July 18, 2022. Thus, students will have enrolled for the fall-winter semester, paid fees and made plans to move into residence. At this late date, should it be necessary, it will be extremely difficult, if not impossible, for

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<sup>1</sup><https://www.utoronto.ca/utogether/vaccines>

non-boosted students to obtain alternative housing, given the limited number of rental units available in the area around campus or via public transit.

We also note that the provincial vaccine certification system is no longer operating. It appears that the University has created its own COVID-19 vaccine monitoring program “UCheck” that requires students and staff to upload required medical documentation. UCheck, however, arguably lacks the security and authority associated with government-administered systems.

Furthermore, Dr. Kieran Moore, Ontario’s Chief Medical Officer, has stated that, with respect to COVID-19 boosters: “While we’re making this option available, it is important to note that healthy currently vaccinated individuals continue to have significant persistent protection against severe disease even six months after the last dose.”<sup>2</sup> Thus, it does not seem the Booster Mandate is medically necessary for the vast majority of University students living in residence.

Most importantly, we note that the University does not appear to have undertaken a risk-benefit analysis of the Booster Mandate for young adults, increased protection offered by a COVID-19 booster set against the possible adverse effects of the COVID-19 booster or the prevalence and efficacy of natural immunity. Crucially, the University does not appear to have established that a population of vaccine-boosted students in residence will possess a measurably lower rate of viral transmission relative to a population of unboosted students in residence. Thus, the Booster Mandate is not defensible given the minimal justification provided by the University.

Of course, TDF recognizes the University has the responsibility and right to adopt a policy governing the health and safety of its staff and students. Such a policy and its implementation, however, is subject to, and must be consistent with, the *Canadian Charter of Rights and Freedoms*<sup>3</sup> (“the *Charter*”), the *Ontario Human Rights Code*<sup>4</sup> (“the *Code*”) and contract law.

### **Human Rights and *Charter* Obligations**

The University is legally obligated to follow human rights law, and to accommodate the creedal and medical exemptions pursuant to the *Code*. Students in residence must be accommodated if they submit a valid medical or creedal exemption.

In this regard, we note also that the University has facilities that allow for self-isolation/quarantine accommodation. This includes a room with a private washroom, three meals delivered daily, regular health checks, and residence life support and programming.<sup>5</sup>

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<sup>2</sup> Dr. Kieran Moore, quoted in

<https://www.stcatharinesstandard.ca/ts/politics/provincial/2022/07/13/fourth-covid-shots-will-be-available-to-all-ontario-adults-as-of-thursday.html>

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, s.7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>4</sup> *Human Rights Code*, R.S.O. 1990, c. H.19

<sup>5</sup> <https://www.vicereprovoststudents.utoronto.ca/covid-19/> “Information on Quarantine Accommodation”



## Educational Contract and Breach

We note also that there exists a contract for the provision of education between students accepted to live in residence and the University, which contract requires the University to act in good faith in the exercise of its discretion under contract.<sup>6</sup>

Although the University, under the terms of this contract, has discretion in delivering educational services, the exercise of this discretion must be done in good faith. In this context, unilaterally changing the residence requirement by implementing a Booster Mandate little more than a month before the fall/winter semester, is improper and a breach by the University of its duty of good faith.<sup>7</sup> A court finding against the University for such a breach may attract a substantial award of damages.

## Charter Rights Obligations

The implementation of a policy or program that is “governmental in nature” by the University attracts *Charter* scrutiny<sup>8</sup>:

If the act is truly “governmental” in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

Under the *Charter*, the University must provide unboosted students in residence equal treatment and benefit under the law in its application of the government-like mandate.<sup>9</sup>

When a party attempts to limit a *Charter* right, the court will apply the *Oakes* test to ascertain if the limit is reasonable and demonstrably justifiable.<sup>10</sup>

It is the view of TDF that, as per the *Oakes* test, the implementation of the Booster Mandate does not impair the right “no more than is reasonably necessary to accomplish the objective”: there are less impairing ways to limit the right — for example, rapid testing of students in residence and quarantine in separate facilities — that accomplish the objective. Thus, the University cannot show that there are no less rights-impairing means of achieving the objective “in a real and substantial manner.”

In addition, the emerging science on COVID-19 vaccines indicate that vaccination does not significantly reduce infection by, or transmission of, the COVID-19 virus — particularly with respect to the increasingly prevalent omicron variant of the virus. Since there is little difference in transmission or infection between vaccinated, unvaccinated and boosted students, the implementation of the Booster Mandate is not rationally related to the public health objective.

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<sup>6</sup> *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, 454 DLR (4th) 1

<sup>7</sup> *Ibid*

<sup>8</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 44.

<sup>9</sup> *Supra*, note 3, *Charter* s.15

<sup>10</sup> *R v Oakes*, [1986] 1 SCR 103, 1986 CanLii 46

Thus, by implementing the Booster Mandate, the University risks violating the *Charter* rights of its unboosted students in residence.

In view of the above, TDF suggests that, in place of the ill-advised Booster Mandate, for unboosted students in residence the University should:

- 1) Offer period rapid-testing;
- 2) Exempt those who prove their immunity to the COVID-19 virus;
- 3) Offer accommodation in separate facilities available for on-campus quarantine; or
- 4) Rescind the Booster Mandate.

The aforementioned alternatives are legally and morally superior to imposing the Booster Mandate, which mandate will effectively punish unboosted students in residence, invite lawsuits for contractual breach and infringement of human and *Charter* rights, and damage the international reputation of the University. We, therefore, urge the University to reconsider and modify the Booster Mandate.

Yours very truly,

**THE DEMOCRACY FUND**

Mark A. Joseph

