



THE DEMOCRACY FUND

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[REDACTED]
Western University
University Legal Counsel
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Dear [REDACTED]

Re: Vaccination Booster Mandate

We represent a group of students and parents concerned about the recently updated COVID-19 vaccination policy (“the Booster Mandate”) by Western University (“the University”). It is the view of The Democracy Fund (“TDF”) that, like the recent University of Toronto residence booster mandate, this Policy 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 Western University, which removed its mandate on or about May 1, 2022.

However, on or about August 22, 2022, the University re-instituted a vaccination requirement and, additionally, mandated one booster dose for all students, employees or volunteers who attend campus.¹

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 started on the first day of August, 2022.² Thus, students will

¹https://www.uwo.ca/univsec/pdf/policies_procedures/section3/mapp311_covid19.pdf

²https://registrar.uwo.ca/student_finances/fees_refunds/index.html

have enrolled for the fall-winter semester, paid fees and made plans to move into their accommodations. Students will have made significant financial commitments to attend the University, including entering into lease agreements which, if breached, may result in legal action against student tenants. Incoming residence students are also now in jeopardy of losing their residence eligibility, which will cause students to scramble for last-minute accommodations and possibly result in homelessness. Furthermore, these students are confronted with the loss of their academic year.

We also note that the provincial vaccine certification system is no longer operating. It appears that the University is using its own MyHR platform as a COVID-19 vaccine monitoring program. This platform requires students to upload required medical documentation. We note that the University, however, has suffered digital security breaches in the past. Thus, the MyHR 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."³ Thus, it does not seem the Booster Mandate is medically necessary for the vast majority of University students.

We note that Brescia College has notified its staff, students and faculty that it "will not prevent students from accessing our residence, services or classrooms". In its delivery of educational services, Brescia College is functionally identical to Western University. However, the two institutions reached different conclusions as to the medical necessity of the Booster Mandate. This is an indication that the medical information upon which these decisions are made is not stable or settled. This undermines the rational basis used to prohibit unboosted students from Western campus.

Most importantly, and related to this, we note that the University does not appear to have undertaken a proper 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 will possess a measurably lower rate of viral transmission relative to a population of unboosted students.

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*⁴ ("the *Charter*"), the *Ontario Human Rights Code*⁵ ("the *Code*") and contract law.

³ 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>

⁴ *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.

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 must be accommodated if they submit a valid medical or creedal exemption.

In this regard, we note that the University has a Rapid Antigen Testing Program available.⁶ The University also offers COVID-19 symptom screening to individuals attending campus medical or legal clinics.⁷ Finally, we note that the University makes allowances for international students who cannot comply with the Booster Mandate.⁸ It is, thus, possible for the University to arrange for students who are unable or unwilling to comply with the Booster Mandate to perform rapid testing or symptom screening in satisfaction of the health and safety concerns of the University.

Educational Contract and Breach

We note also that there exists a contract for the provision of educational services between students and the University, which requires the University to act in good faith in the exercise of its discretion under contract.⁹

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. Acceptance letters and fee payments establishing the educational contract would have occurred before the Booster Mandate was updated on or about August 22, 2022. In this context, unilaterally changing the vaccination requirement by implementing a Booster Mandate little more than three weeks before the fall/winter semester, and inflexibly applying it, is improper and a breach by the University of its duty of good faith.¹⁰ 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* scrutiny¹¹:

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 equal treatment and benefit under the law in its application of the government-like mandate.¹²

⁵ *Human Rights Code*, R.S.O. 1990, c. H.19

⁶ <https://www.uwo.ca/coronavirus/rapid-testing.html>

⁷ https://www.uwo.ca/univsec/pdf/policies_procedures/section3/mapp311_procedure_visitors.pdf

⁸ <https://iesc.uwo.ca/vaccine-faq/>

⁹ *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, 454 DLR (4th) 1

¹⁰ *Ibid*

¹¹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 44.

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.¹³

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, symptom screening of students, or offering online courses (all of which are available to the University) — 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.

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

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

- 1) Offer periodic rapid-testing pursuant to its Rapid Antigen Testing Program;
- 2) Offer COVID-19 symptom screening similar to that offered to individuals attending campus medical or legal clinics;
- 3) Exempt those who prove their immunity to the COVID-19 virus;
- 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, 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 modify or rescind the Booster Mandate.

Yours very truly,

THE DEMOCRACY FUND

Mark A. Joseph




¹² *Supra*, note 4, *Charter* s.15

¹³ *R v Oakes*, [1986] 1 SCR 103, 1986 CanLii 46