



I, Iona Holsted, of Wellington, Secretary for Education, solemnly and sincerely affirm:

### **Introduction**

1. I am Te Tumu Whakarae mō te Mātauranga (Secretary for Education) and Chief Executive of the Ministry of Education (Ministry). I began my role at the Ministry on 8 December 2016. Prior to that, I was the Chief Executive of the Education Review Office from July 2014.
2. I understand the applicants are challenging the decisions to give provisional consent and roll out the COVID-19 vaccine developed by Pfizer Inc for 5 – 11-year-olds (Paediatric Vaccine). I am also aware that the applicants seek interim relief to prevent the respondents from taking action pursuant to these decisions.
3. The purpose of this affidavit is to address certain concerns expressed by the applicants regarding the implications of the vaccine rollout for access to education and related activities. I understand that the applicants are concerned that the rollout of the paediatric vaccine will be accompanied by restrictions on access to education premises and services to unvaccinated children or parents.

### **Ensuring Access to Education**

4. Throughout the Government's response to COVID-19, it has been mindful to ensure the continued provision of education (and related opportunities) to New Zealand children through a time that has been incredibly disruptive to students' learning.
5. The Government recognises that minimising the risk of transmission of COVID-19 to children is an important mechanism to keep schools open. Various official guidance is available to schools and other education providers on how to minimise the risk of transmission to children (and staff), including guidance on basic hygiene, contact tracing, ventilation and additional mitigation practices at each step of the COVID-19



Msf.

Protection Framework.<sup>1</sup> Another safeguard is that staff and support people had until 1 January 2022 to be fully vaccinated in order to have contact with children and students at licensed early childhood services, registered schools or hostels.<sup>2</sup>

6. However, the vaccination requirements do not extend to students and parents accessing education services. In light of the importance of the right to education to support children's ongoing development and long-term success, the Government made the decision to ensure that children and students can continue to access education irrespective of their vaccination status.
7. Under the COVID-19 Public Health Response (Protection Framework) Order 2021 (Order) access to education services cannot be denied based on a child's vaccination status. Children seeking to access education, and their parents, cannot be denied entry nor access to education services based on vaccination grounds.<sup>3</sup>
8. These rules apply to "designated education and care premises," which cover licensed early childhood services, registered schools, Out of School Care and Recreation programmes and school hostels.<sup>4</sup>
9. I am not aware of any plans to amend the Order in so far as it ensures access to education services irrespective of vaccination status.
10. In fact, the Minister for COVID-19 Response recently agreed to expand the definition of designated education and care premises to be able to include external organisations providing curriculum-related services to a school who opt in, in certain conditions.

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<sup>1</sup> <https://assets.education.govt.nz/public/Documents/COVID19-files/Schools/CPF-guidance-table-Schools-and-Kura-19-01-22.pdf>;

<sup>2</sup> COVID-19 Public Health Response (Vaccinations) Order 2021, cl 7 and 8, sch 1 cl 7, sch 2 pt 9.

<sup>3</sup> COVID-19 Public Health Response (Protection Framework) Order 2021, cl 31(2) and 32(2) (Order). Although designated education and care premises may require people to be CVC compliant at a visitor-inclusive event.

<sup>4</sup> Order, cl 5.



11. This would cover what is known as “education outside the classroom”. This would include things such as visits to swimming pools, museums, and school camps. Annexed and marked “IH-1” is a copy of the briefing paper prepared by the Ministry to seek the Minister’s approval.

**AFFIRMED**

at Wellington this <sup>25<sup>th</sup></sup> day of  
*January*  
before me:

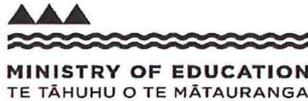
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Iona Holsted

**A Solicitor of the High Court of New Zealand**

*Max Clarke-Parker*

**Max Lawrence Clarke-Parker**  
Barrister and Solicitor of the High Court of New Zealand

"IH-1"



This is the exhibit marked "IH-1" referred to in the annexed Affidavit of IONA HOLSTED affirmed at Wellington this 25th day of January 2022 before me:

*Max Lawrence Clarke*  
Max Lawrence Clarke  
Barrister and Solicitor of the High Court of New Zealand  
Solicitor of the High Court of New Zealand



## Education Report: COVID-19 Vaccination certificates: Children accessing EOTC settings

To:	Hon Chris Hipkins, Minister for COVID-19 Response		
Cc:	Hon Kelvin Davis, Associate Minister of Education Hon Jan Tinetti, Associate Minister of Education		
Date:	17 January 2022	Priority:	High
Security Level:	In Confidence	METIS No:	1280080
Drafter / Key contact:	Tony Clark, Policy Director	DDI:	021 239 2388
Messaging seen by Communications team:	Yes	Round Robin:	No

### Purpose of Report

This report proposes an approach under the COVID-19 Protection Framework (CPF) to help address barriers for unvaccinated school students to participate in curriculum-related activities outside a designated education and care premise i.e. Education Outside the Classroom (EOTC). It creates an option for EOTC providers to follow CPF rules for designated education and care premises. This issue has been raised by the education sector.

### Summary

1. Schools cannot deny enrolled students access to education on the basis of their vaccination status. However, student access issues can arise when schools take students off-site as part of their education programmes.
2. Our current guidance (based on the CPF) is that when taking students offsite to another venue for EOTC (school camps, adventure activities, pools, museums etc) schools need to follow the relevant general rules and guidance for the venue / provider. This may include vaccine pass requirements and/or capacity limits.
3. Under the COVID-19 Protection Framework (CPF) education providers outside of school settings are strongly incentivised to require vaccine passes of their clients or are facing restrictions in numbers or activity.
4. As a result, some schools are reported to be cancelling EOTC activities, or unvaccinated students are unable to participate alongside vaccinated classmates.
5. Feedback from parents, organisations, and businesses raises concerns about whether these settings are restricting unvaccinated students' access to curriculum-related activities, and therefore education, because of where it is taking place.
6. To address this issue we recommend expanding the definition of *designated education and care premises* under the COVID-19 Public Health Response (Protection Framework) Order 2021 (the Order) to include EOTC providers when they are providing

a service to a school under certain conditions. If they choose to exercise this option then they would be required to follow rules consistent with those for designated education and care premises when supporting curriculum-related activities for schools.

7. If you agree to the proposed approach, this decision can be reflected in an amendment to the Order.
8. The Ministry of Education has also considered concerns raised by some schools that operate hostels, where vaccinated and unvaccinated students are likely to reside in close contact with one another, and we recommend no changes to current settings.

## Recommended Actions

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The Ministry of Education recommends that you:

- a. **note** that vaccination requirements are prohibited in *designated education and care premises*  
**Noted**
- b. **note** that current settings do not prohibit the use of vaccine requirements by EOTC providers when schools take students off-site as part of their education programmes and this is impinging on some students' access to education  
**Noted**
- c. **agree** that the definition of *designated education and care premises* is expanded under the Order so that businesses or services choosing to provide EOTC under certain conditions are required to follow rules consistent with those for designated education and care premises when supporting curriculum-related activities for schools  
 **Agree**  **Disagree**
- d. **note** that we have consulted with the following agencies in the development of this proposal: Ministry of Business Innovation and Employment, Ministry of Culture and Heritage, Department of Internal Affairs, Department of Prime Minister and Cabinet, Ministry of Health, and Crown Law Office  
**Noted**
- e. **note** that some schools have raised concerns about unvaccinated learners residing in hostels, and have asked if hostels can introduce a vaccination mandate  
**Noted**
- f. **note** that, due to their role in providing access to education, we consider that hostels should continue operating as they have been and not be able to deny access to unvaccinated students  
**Noted**
- g. **agree** to consult with the Minister of Health, the Minister of Justice and the Prime Minister on the contents of this briefing  
 **Agree**  **Disagree**

## Proactive Release Recommendation

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- h. **agree** that the Ministry of Education release this briefing in full once it has been considered by you.

**Agree**  **Disagree**



Ben O'Meara  
Group Manager  
Te Puna Kaupapahere - Policy  
17/01/2022



Hon Chris Hipkins  
Minister for COVID-19 Response

17 /01/ 2022

## Background

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1. Cabinet, delegated ministers, and you have taken a number of decisions on the application of COVID-19 Vaccination Certificates (CVCs) and the settings in which their use is prohibited, including certain education settings.
2. Limiting access to certain settings to those who are vaccinated (using CVCs as evidence) is a tool to help support the broader public health response to COVID-19 [CAB-21-MIN-0421], [DPMC-2021/22-621], [CAB-21-MIN-0438].
3. On 11 November 2021 [DPMC-2021/22-701], you agreed the application and scope of *prohibitions* for the use of vaccine requirements in order to protect people's access to life preserving services.
4. You also agreed that prohibitions apply to specific education services, given the importance of the right to education to support children's ongoing development and future success. Under the Order these CVC prohibited education settings are *designated education and care premises* including:
  - a. a licensed early childhood service;
  - b. a registered school;
  - c. an OSCAR programme;
  - d. a school hostel.

### **However, current settings do not prohibit use of vaccine requirements by EOTC providers when schools take students off-site as part of their education programmes**

5. The current approach does not prohibit EOTC providers from requiring proof of vaccine for students 12 years-old and over to engage in curriculum-related activities off-site. Any other premises are required to follow the relevant general rules under the CPF to reflect that activities held off-site are generally outside the control of the education entity and may have increased risks of transmission for attendees.
6. Our current guidance (based on the legal framework) is that when taking students offsite to another venue for EOTC (school camps, pools, museums etc) schools need to follow the general rules and guidance for the venue/provider. This may include vaccine pass requirements and/or capacity limits.
7. EOTC providers can choose whether or not to require MVPs, but under the CPF they are strongly incentivised to require vaccine passes of their clients to reduce risk for their staff and/or face restrictions in numbers or activity.
8. For example, under current CPF settings, EOTC providers wanting to serve larger groups of students (i.e. over 50 people at Orange, and up to 100 at Red based on physical distancing limits) need to require MVPs, however unvaccinated students are unable to participate in offsite curriculum-related activities.
9. Alternatively, EOTC providers can choose not to require MVPs, but face limits to group sizes (i.e. up to 50 people at Orange and up to 25 people at Red based on physical distancing limits), this means that some activities are not able to go ahead, such as school camps.

**Sector feedback is that the incentives for EOTC operators to require MVPs are limiting students' access to education**

10. Feedback from parents, organisations, and businesses, and other conversations around EOTC are focusing on whether the settings are restricting students' access to curriculum-related activities, and therefore education, because of where it is taking place.
11. Schools are not permitted to discriminate on the basis of vaccination status and so face a challenge when planning education activities delivered by an outside provider. As a result, some schools are choosing to cancel their EOTC plans, with some providers losing much (or all) of their business.

**Officials recommend an approach where businesses or services *choosing* to provide curriculum-related EOTC under certain conditions come under an expanded definition of *designated education and care premises***

12. To address this access issue officials recommend expanding the definition of *designated education and care premises* in the Order. Under this approach, businesses or services choosing to provide curriculum-related EOTC under certain conditions would be required to follow rules consistent with those for designated education and care premises.
13. Using this approach an EOTC business/service could choose to come under the definition if it met conditions such as:
  - a. is working with a registered school to deliver curriculum-related activities; and
  - b. the activity is in a defined space (sole use of part or all of a setting/venue for the period the service is provided); and
  - c. staff delivering the service are vaccinated.
14. Then the business/provider would follow the rules for designated education and care premises for the duration of that EOTC use. For example:
  - a. vaccine requirements are prohibited for students;
  - b. other education CPF settings consistent with traffic lights framework including guidance on gathering sizes.
15. From a health risk management perspective, our rationale is that under this option, where a EOTC provider is (1) facilitating the delivery of curriculum related activities and (2) the education entity has sole use of the premise - they are effectively operating like a designated education premise (i.e. school site). There is no more risk than that managed by designated education and care premises on-site.
16. For example - a camp facility that a school has sole use of for EOTC or where the school hires a public pool for swimming for a period of time.
17. However, if the activity was not curriculum-related and the education entity did not have sole use of a part or all of a premise, as members of the public may be present the health risk is not mitigated. This could not be classed as a designated education and care premise. We note there may be a number of public facilities where it may be difficult to create a defined space, such as overlapping changing rooms and toilets.
18. There may therefore still be EOTC providers that choose not to offer EOTC under these rules even if they feasibly could, but that is likely an unavoidable outcome no matter what approach is taken. Early indications are that many councils which have a MVP requirement for their facilities may choose not to make the facility available to EOTC

groups if this would mean making an exception to their MVP policy. Therefore, even with a clearer pathway legislated, there will continue to be inconsistencies across the sector in the reception of unvaccinated children in public facilities.

19. If you decide to approve this approach, then clear guidance from agencies will still need to sit alongside the change in the Order, particularly where the education entity does not have sole use of the entire premise. Guidance will also include information about what protocols need to be followed between uses of a premise. We anticipate that advice for schools will be in place by the end of January to allow them to effectively plan and update their EOTC programme for Term 1 2022.

### **Public Health advice**

21. The Ministry of Health (Office of the Director of Public Health) supports this approach and consider it consistent with the risk management thinking to date.

### **Next steps**

22. If you agree to the proposed approach, this decision can be reflected in an amendment to the Order.

### **Unvaccinated students residing in school hostels**

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23. The Ministry of Education has also considered concerns that have been raised by some schools that operate hostels where vaccinated and unvaccinated students (both domestic and international) are likely to reside in close contact with one another. Schools are concerned that this close contact between vaccinated and unvaccinated students could increase the risk of transmission of COVID-19 amongst the students at the hostel.
24. We also anticipate concerns when new international students are able to commence education in New Zealand. To enter the country, international students will need to be fully vaccinated. As a result, their parents may be concerned about their potential exposure to unvaccinated students in hostels, and request schools with hostels to place vaccination requirements on domestic students in hostels.
25. We recommend that hostels continue operating without restrictions on unvaccinated students. As attendance at school is not restricted by vaccination status, vaccinated and unvaccinated students will spend large parts of the day together during the course of their school activities. Therefore, stopping unvaccinated students from residing in hostels will not prevent contact with vaccinated students.
26. Any changes to the status quo could result in discrimination against unvaccinated students. This includes breaches of student privacy, which could result in discrimination and potential human rights issues, such as changes to the way hostels are run, and the risk of stigmatising unvaccinated students. It is also not appropriate to discriminate against unvaccinated learners when the choice to be vaccinated is often not their own.
27. Earlier Ministerial decisions on prohibited settings for CVCs were based on the principle that "vaccination requirements should not restrict children and young people's access to learning". Private providers and hostels were included as prohibited settings to ensure that all children and young people could access education regardless of whether the educational facility is public or private. The Ministry considers that the current settings should continue to apply to all registered schools, including state, state-integrated, and

private schools. It would be inequitable and discriminatory to operate a school system that supports different levels of access to schooling settings based on vaccination status.

28. Hostels should adopt the safety guidelines issued by the Ministry of Education for school hostels at each level of the COVID-19 Protection Framework (CPF) to ensure the safety of all students residing there, regardless of their vaccination status.
29. We also note that a significant proportion of international students reside with host families rather than in hostels. The COVID-19 Public Health Response (Vaccinations) Order for mandatory vaccinations in the education sector requires the person or people a school contracts to provide homestay accommodation service or boarding to international students to be vaccinated.
30. While this requirement does not extend to the whole household residing at the homestay, schools may want to work with these providers to seek assurances on behalf of the parents of international students that others in the household who can be vaccinated will be, as part of their health and safety obligations to the student. However, it is important to acknowledge that the possibility of contact with unvaccinated students at school still remains.
31. The Ministry of Education will work with Education New Zealand to ensure that international students and their families have accurate information on New Zealand's vaccination policy for domestic students when making decisions regarding residential options for their children while in New Zealand.