

March 17, 2015

MICHIGAN VACCINE EXEMPTION PROCEDURE  
LEGAL ANALYSIS

*Note: This document is not to be construed as offering legal advice.*

I. Michigan Department of Community Health (DCH), Immunization Waiver Form<sup>1</sup>

A. Michigan parents are required to have their children vaccinated, Mich. Comp. Laws § 333.9205, and to present a Certificate of Immunization when enrolling children in school or daycare, §§ 333.9206 and 333.9211. Michigan parents report being told that in order to exercise an exemption to immunizations required for school and daycare, they must complete the DCH Immunization Waiver Form and view educational material about immunizations. However, the statutory exemption language clearly states that “[a] child is exempt” if the parent “presents a written statement to the administrator of the child’s school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objection to immunization.” Mich. Comp. Laws § 333.9215(2). Respectfully, the department of health does not have authority to require a procedure in place of the statutory procedure; it may at most offer only an alternative procedure. So, if parents are being required to use the DCH form only, that Department is overstepping its legal authority. The legal authority supporting this assertion is contained in numerous legal precedent cases. E.g., in *Mccormick v Carrier*, 487 Mich. 180. 795 N.W.2d 517, the court stated Michigan’s plain language meaning rule: “[I]f the language [of the statute] is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted.” *Id.* at 524. There is nothing ambiguous about the language of § 333.91215(2). Accordingly, parents may opt out of immunizations by following the statutory procedure, and cannot be required to use the DCH form or view educational materials.

Unfortunately, this matter has been clouded by a 2007 MI Attorney General Opinion that appears to have completely missed the above analysis.<sup>2</sup> While an Attorney General’s Opinion is not the rule of law, public officials will generally follow such opinions unless there is a change in the law (court ruling or revision of the statutes that clarifies the matter further), or a subsequent AG Opinion revising the prior Opinion. While it’s possible that a parents’ local attorney’s written legal opinion could persuade a given school to allow a parent to use only the statutory procedure, there’s no guarantee of that. But if a parent got their state representative to request that the Attorney General’s office review the 2007 opinion in light of the above analysis, it may be possible to get that Office to revise the 2007 Opinion without a parent having to file a lawsuit to ask a judge

<sup>1</sup> Department of Community Health, IMMUNIZATION WAIVER FORM, [http://www.mcir.org/forms/SS\\_Imm\\_Waiver.pdf](http://www.mcir.org/forms/SS_Imm_Waiver.pdf)

<sup>2</sup> <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10281.htm>

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to rule on the matter, or persuade the legislature to clarify the matter with changes in the wording of the current law.

B. Regarding the DCH form, in order to exercise the exemption, the form requires parents to agree with alleged facts with which many parents exercising the exemption do not agree. For example, the form states: “By signing this waiver, you acknowledge that you are placing your child and others at risk of serious illness should he or she contract a disease that could have been prevented through proper vaccination.” In so stating, this form violates parents’ Constitutional free speech rights. The U.S. Supreme Court has held that the right to free speech includes the right to be free from being compelled to speak. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977). By requiring parents to agree with the state’s views on vaccination, parents are being compelled to speak.

As a purely practical matter, this particular assertion also happens to contradict mainstream medicine, and is, therefore, misleading. The widely accepted “herd immunity” theory tells us that all are protected so long as most are vaccinated, which is why states enact non-medical exemptions in the first place. But the veracity of the assertion is not the main issue (however, the falsity of the assertion suggests a potential conflict of interest concern). The issue is simply that the government, by requiring parents to agree with its views, is compelling parents to speak, and thus violating their Constitutional rights. The matter could be resolved easily, if the form language were changed to require only that parents understand the state’s views rather than requiring parents to agree with those views.

This precise matter was addressed previously in Vermont with regard to the Vermont health department’s vaccine exemption form. A group of parents and an attorney brought the matter to the attention of the state health department, and the department revised their form so that it no longer requires parents to agree with the department’s views on immunization and infectious disease.<sup>3</sup> This is another matter that could potentially be addressed by the State Attorney General’s Office, since prior attempts to bring this matter to the attention of the MI health department have failed, if a request was made to that Office by a proper entity, which usually must be a state official (state agency, state representative, etc.).

II. Parents exercising an exemption are now being required to go through a vaccine educational process before being given a form for the exercise of the exemption. This raises two distinct Constitutional concerns:

A. With respect to those parents whose objections are religious in nature, the First Amendment’s “free exercise” clause protects religious beliefs that are religious in nature and sincerely held. *See, e.g., Sherr and Levy vs. Northport East-Northport Union Free School District*, 672 F. Supp. 81, 98 (E.D.N.Y., 1987). Since federal law supersedes state law, U.S. Const. art. VI, § 2, cl. 2,<sup>4</sup> the state is without authority to impose further substantive restrictions on parents’ right to refuse vaccines on religious grounds beyond

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<sup>3</sup> “First Amendment Rights Cited in Objection to New Vaccine Exemption Form; Lawyer Warns Parents Might Sue State,” <http://vtdigger.org/2012/10/19/andrews-vaccinedoh-story/>

<sup>4</sup> The Supremacy Clause: “This Constitution, and the Laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. VI, § 2, cl. 2.

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requiring that parents have a sincerely held religious belief. Therefore, parents with religious objections must be excluded from any required “educational” requirement. This is also an obvious common sense matter; the state’s view of the science of vaccination is irrelevant to parents’ religious beliefs, and amounts to the state challenging parents’ religious beliefs, as if attempting to persuade parents to violate those beliefs which, by definition, do not concern the state’s alleged scientific or medical concerns. This is offensive not only to those parents with religious objections to vaccines, but to the First Amendment of the U.S. Constitution.

B. With respect to all Michigan parents: All parents have a 14<sup>th</sup> Amendment due process Constitutional right to parent their children, and this right includes the right to make medical decisions. In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court states:

The Fourteenth Amendment's Due Process Clause has a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests,” *Washington v. Glucksberg*, 521 U.S. 702, 720, including parents’ fundamental right to make decisions concerning the care, custody, and control of their children, see, e. g., *Stanley v. Illinois*, 405 U.S. 645, 651. Pp. 63-66.

The *Troxel* Court further explains:

There is a presumption that fit parents act in their children's best interests, *Parham v. J. R.*, 442 U.S. 584, 602; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children, see, e. g., *Reno v. Flores*, 507 U.S. 292, 304.

The *Troxel* “fit parents” presumption may be rebutted by a showing that a parent is unfit, but such showing is necessarily one that must be addressed on a case-by-case basis. When the state requires all parents to see educational material as a prerequisite to exercising the exemption, the state is presuming that all such parents are unfit to make the decision, without the required showing. On that basis, an educational requirement is unconstitutional and must be removed.

The violation of parents’ 14 Amendment Constitutional due process rights is not counterbalanced by the state’s public health needs, as state legislatures are free to remove non-medical exemption options altogether. Furthermore, state health departments around the U.S., who design these educational materials do so in partnership with the pharmaceutical industry. These partnerships create, by definition and in practice, conflicts of interest that result in information that is substantially biased in favor of a pharmaceutically motivated profit agenda. For instance, these educational materials do not mention the fact that the federal government has paid out, annually on average over the past 25 years, over \$110 million for vaccine injuries and deaths,<sup>5</sup> nor does it mention that the pharmaceutical industry is the biggest defrauder of the federal government under the

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<sup>5</sup> U.S. DHHS, HRSA, National Vaccine Injury Compensation Program, Data and Statistics, <http://www.hrsa.gov/vaccinecompensation/data.html>

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False Claims Act.<sup>6</sup> In 8 years (2004-2012), there were twenty settlements in the \$345 million to \$3 billion range.<sup>7</sup> Criminal fines in the \$100's of millions are common, and have, so far, topped out at \$1 billion (Pfizer 2009, GlaxoSmithKline 2012). In the last 5 years, \$19.2 billion were returned to taxpayers from attempts to defraud federal health programs, more than double that of the previous 5 years (as of February 2014).<sup>8</sup> The State should not be partnering with an industry that routinely engages in massive criminal behavior, and, in the simplest of terms:

*No one should ever be required, or even encouraged,  
to take a product from an industry that routinely  
engages in massive criminal behavior.*

Given the pharmaceutical criminal reality, should the State wish to offer educational information to parents about vaccines, that would only be appropriate if the information was first reviewed and approved by independent medical, legal, and other professionals, and other informed, interested parties with no ties to the pharmaceutical industry; and such information should include the critical reality of vaccine injuries and deaths, and information about pharmaceutical interests and behavioral history. That is, if Michigan truly wishes to support child health, industry interests must be revealed or even removed from the equation altogether, so that objective, balanced information is made available, and parents given the right to make truly informed choices.

Respectfully Submitted,



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<sup>6</sup> "Public Citizen Study: Pharmaceutical Industry Is Biggest Defrauder of the Federal Government Under the False Claims Act," Dec. 20, 2010, <http://www.pharmpro.com/news/2010/12/public-citizen-study-pharmaceutical-industry-biggest-defrauder-federal-government-under-false-claims-act>

<sup>7</sup> List of largest pharmaceutical settlements (2004 – 2012), Wikipedia, [http://en.wikipedia.org/wiki/List\\_of\\_largest\\_pharmaceutical\\_settlements](http://en.wikipedia.org/wiki/List_of_largest_pharmaceutical_settlements)

<sup>8</sup> False Claims Act Whistleblowing Blog, February 2014 archive, <http://www.fraudwhistleblowersblog.com/2014/02/>