MEMORANDUM

DATE: MAY 17, 2013

TO: THE NORTH CAROLINA STATE LEGISLATURE

FROM: ALAN G. PHILLIPS, ESQ.
600 MERRIMON AVE., STE. 1D
ASHEVILLE, NC 28804

RE: N.C. GEN. STAT. § 90-21.5. MINOR'S CONSENT SUFFICIENT FOR CERTAIN MEDICAL HEALTH SERVICES

ISSUES

1. Does N.C. Gen. Stat. § 90-21.5(a) violate the U.S. Constitution?
2. Does N.C. Gen. Stat. § 90-21.5(a) violate federal statutory law?
3. Does N.C. Gen. Stat. § 90-21.5(a) violate the North Carolina Constitution?
4. Did the enactment of § 90-21.5 violate supporting North Carolina legislators' General Assembly membership oath?
5. Does N.C. Gen. Stat. § 90-21.5(a) violate other North Carolina statutory law?
6. Can § 90-21.5(a)'s underlying concerns be addressed by other means? (public policy considerations)

INTRODUCTION

The North Carolina statutory subsection in question is:

> § 90-21.5. Minor's consent sufficient for certain medical health services
>
> (a) Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance.

This law was reportedly intended to enable a minor step-daughter who was raped by her step-father to get medical care without the step-father having to be involved. However, it is profoundly overreaching, and in the process, violates at least two U.S. Constitutional provisions, two North Carolina State Constitutional provisions, one federal statutory law, and three North Carolina State statutes. It also encourages healthcare providers to violate federal law and state ethical rules. Moreover, the underlying concerns are already addressed by other state law, but if there is any lack of clarity in the preexisting law, the confusion could easily be addressed with much more narrow language that doesn't violate any other state or federal laws. Finally, § 90-21.5 is also bad policy, for reasons explained below. For all of these reasons, § 90-21.5 should be repealed or substantially amended.

ANALYSIS

Introduction

The state statutory subsection in question is:

> N.C. Gen. Stat. § 90-21.5. Minor's consent sufficient for certain medical health services
>
> (a) Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance.

N.C. Gen. Stat. § 90-21.5(a)'s overly broad wording creates unnecessary conflicts with state and federal law that are both general and specific in nature. The general concern pertains to the broader arena of parents' Constitutional right to decision-making authority over their children's medical needs, and North Carolina State law that deems juveniles to be subject to parental control. § 90-21.5(a) amounts to a sweeping removal of parental rights from all North Carolina parents to address the concerns related to a small minority of unfit parents.

A more specific concern pertains to § 90-21.5(a)'s reference to the prevention of venereal disease and other reportable diseases. Insofar as this prevention includes the administering of vaccines, there are conflicts between a minor child's right to consent to a vaccine and parents' state and federal rights to exercise vaccine exemptions, and healthcare provider's obligation under federal law to provide

parents with information about vaccines and the federal compensation program prior to the administration of a vaccine to a minor child.

Finally, the underlying policy concerns that led to the enactment of § 90-21.5 are already addressed in other state law, which suggests an ulterior motive for the enactment of this section. Regardless, if there is any lack of clarity in other law regarding those underlying policy concerns, that lack of clarity can and must be addressed with more narrow language that does not violate state and federal law.

1. Does N.C. Gen. Stat. § 90-21.5(a) violate the U.S. Constitution?

Yes, both the 14th Amendment's due process clause and the First Amendment's "free exercise" clause. First, the U.S. Supreme Court has addressed parental authority in child medical decision-making under the 14th Amendment. A concise historical summary presented in *Parham v. J.R.*, 442 U.S. 584 (1979) notably ends with: "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 602. The Court further clarified: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id.* at 603. As between parents and children, then, it is clear that the Constitution prohibits the State from giving the medical decision-making authority of parents to children. As for the needs intended to be addressed

by § 90-21.5, North Carolina has already properly given authority to physicians to treat minors in emergencies in N.C. Gen. Stat. §§ 90-21.1 and 7B-3600, and Child Protective Services can remove a child from an abusive home the same day the abuse is reported under N.C. Gen. Stat. § 7B-302, and the State may assume and apply medical-decision making authority in any such situation. But the State of North Carolina cannot lawfully give medical decision-making authority directly to minors in any event, except in very limited circumstances discussed below.

The State may not even give parental decision-making authority to healthcare professionals, outside of an emergency. 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 absent that showing, *Troxel* makes it clear that under the due process

clause of the 14th Amendment, parents are presumed to be fit, and parents' right to parent their child must be respected by the State accordingly.

The fit parents presumption doesn't provide a "free pass" for abusive parents to abuse their children. The Court's use of the phrase "normally no reason" clearly implies exceptions. Indeed, N.C. Gen. Stat. §§ 90-21.1 and 7B-3600 provide for the medical treatment of children without parental consent in an emergency, and abused children can be immediately brought into state custody where the state can exercise medical care for a minor without parental consent. In situations where there are no emergency healthcare needs, the parents can be brought before the court, and if adjudicated to be unfit, medical decision-making for the child given to the State or another competent adult (but in no event to the child directly). So, the State has no need to resort to violating all North Carolina parents' Constitutional rights to ensure that a few abused and neglected children get necessary medical treatment.

§ 90-21.5(a) has, in effect, declared all parents in the State to be unfit to the extent that authority is given to minors to consent to their own medical care. Worse, by giving authority for medical decision-making to minors, the State is making the preposterous assumption that minors are fit to make decisions that the parents they have declared to be unfit can't make. Minors are, by legal and medical definition, incompetent and developmentally immature, and therefore not capable

of making such decisions. This is why minors are prohibited from entering into contracts, smoking cigarettes, drinking, voting, etc.—why there is law distinguishing "minors" from adults in the first place. Furthermore, minors are not merely ill-equipped to make important medical judgments for themselves, they are particularly susceptible to misjudgment and to influence by adults who have a stake in the minor's healthcare decision. As a matter of law, minors are, by definition, presumed *not* to have the maturity to make adult judgments and decisions, which necessarily includes important medical decisions.

Next, § 90-21.5(a)(i)'s reference to the prevention of venereal disease and other reportable diseases, to the extent that such prevention means or includes vaccinations, violates parents' First Amendment "free exercise" right to refuse immunizations for their children for religious reasons pursuant to N.C. Gen. Stat. § 130A-157, since only parents may exercise a vaccine religious exemption for a minor child. There may also be a violation of parents' Constitutional right to exercise a medical exemption for their children under N.C. Gen. Stat. § 130A-156. Such a right is implied by the Supreme Court in *Jacobson v. Mass.*, 197 U.S. 11, 39 (1905):

> [W]e are not inclined to hold that the [Massachusetts] statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then

> condition, would seriously impair his health or probably cause his death.

So, there is a clear conflict between § 90-21.5(a) and North Carolina parents' Constitutional right to exercise a religious or medical exemption to immunizations for their children.

2. Does N.C. Gen. Stat. § 90-21.5(a) violate federal statutory law?

Yes. 42 U.S.C. § 300aa-26 of the National Vaccine Injury Compensation Program requires "each healthcare provider who administers a vaccine" to "provide to the legal representatives of any child" a copy of information "prior to the administration of the vaccine" that includes "(1) a concise description of the benefits of the vaccine, (2) a concise description of the risks associated with the vaccine, (3) a statement of the availability of the National Vaccine Injury Compensation Program, and (4) such other relevant information as may be determined by the Secretary." Therefore, § 90-21.5(a)'s reference to the prevention of venereal disease and other reportable diseases violates this federal statute. A minor can't consent to a vaccine if the provider is required under federal law to provide vaccine information to the child's parent prior to administering the vaccine.

In the unlikely event that a health care provider administering a vaccine to a minor under § 90-21.5(a) were to also comply with 42 U.S.C. § 300aa-26, the provider's doing so risks putting a parent's right to exercise an exemption for the child

in conflict with the minor's choice to get the vaccine. In that event, which state law would prevail? A court would have to make that deicision if there were not agreement by the parties involved. But any time a healthcare professional vaccinates a child under § 90-21.5(a) without providing the required information to the child's parent, they are violating federal law, and in the process, North Carolina Medical Board ethical rules. Indeed, ethical rules may be violated at least in spirit every time a healthcare professional treats a child under § 90-21.5(a), since doing so violate the Constitution.

3. Does N.C. Gen. Stat. § 90-21.5(a) violate the North Carolina State Constitution?

Yes. First, given the above-cited violations of the United States Constitution, § 90-21.5(a), accordingly, has no "binding force" under North Carolina State Constitution N.C. Const. art. I, § 5, which states:

> **Sec. 5. Allegiance to the United States.**
> Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

Second, insofar as § 90-21.5(a)'s reference to the prevention of venereal and other reportable diseases means or includes vaccines, it violates the North Carolina

Constitution's religious liberty clause, which protects parents' right to exercise a vaccine religious exemption for their children pursuant to § 130A-157:

> N.C. Const. art. I, § 13. Religious liberty.
> All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

4. Did the enactment of § 90-21.5 violate supporting North Carolina legislators' General Assembly membership oath?

Yes. The North Carolina Constitution states:

> Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives.

N.C. CONST. art. II, § 12. Given the above-cited state and federal Constitutional violations and federal statutory violations of § 90-21.5, supporting legislative members violated their oath when voting for the bill that resulted in the enactment of this section. If they did so unknowingly, they should be forgiven and excused, but now that this point has been raised, no future vote should be made on these same points in violation of state and federal Constitutions.

5. Does N.C. Gen. Stat. § 90-21.5(a) violate other North Carolina statutory law?

Yes. First, it violates N.C. Gen. Stat. § 7B-3400, which states that "any juvenile under 18 years of age . . . shall be subject to the supervision and control of

the juvenile's parents." The only exceptions apply to minors who are married, emancipated, or serving in the Armed Forces (§§ 3402 and 3403).

Next, insofar as § 90-21.5(a)'s reference to the prevention of venereal and other reportable diseases includes vaccines, it violates parents' right to exercise medical and religious exemptions to vaccinations on behalf of their minor children pursuant to N.C. Gen. Stat. §§ 130A-156 and 157 respectively, as minors may not exercise vaccine exemptions for themselves.

6. Can the concerns underlying the enactment of § 90-21.5(a) be addressed by other means?

Yes. First, as to concerns involving a child's need for emergency medical treatment or a child needing medical treatment following abuse, healthcare professionals may treat children without parental consent in an emergency under N.C. Gen. Stat. §§ 90-21.1 and 7B-3600, and Child Protective Services can take immediate custody of abused and neglected minors and authorize proper medical treatment for those children. If a child's medical concerns do not rise to a level triggering a doctor's right to treat without parental consent or for CPS workers to assume custody, but the child is still not getting proper *non*-emergency medical care, the parents can be brought into court to determine whether or not they are fit, and if found to be unfit, the State or another competent adult(s) can be given custody and

medical decision-making authority for the child. If there is no emergency, abuse, or neglect, the State need not—and cannot, legally—intervene.

Other North Carolina statutes support the proposition that the State may not grant sweeping authority to children for their own medical decision-making. First, § 90-21.5(b) provides for an emancipated minor to consent to his own treatment or that of his child. Similarly, § 90-21.7 allows an unemancipated minor to obtain an abortion without parental or guardian consent in certain circumstances. In each of these situations, *judicial scrutiny is required* to determine if the minor in question is sufficiently mature to be granted adult decision-making authority for him- or herself despite not having yet reached the age of majority. By the same reasoning, the State of North Carolina should require judicial scrutiny before any minor can be allowed to consent to his own medical treatment. The State cannot lawfully give, but also need not give, sweeping decision-making authority to "Any minor" (as stated in § 90-21.5(a)) to consent to their own medical treatment.

Next, the concern that some teenagers with fit parents may not seek medical treatment for sexually transmitted diseases if their parents have to be informed cannot withstand scrutiny. The State should encourage non-abused teenagers and fit parents to work together on important non-emergency health matters, rather than encourage teens to be secretive and avoid their parents, thereby promoting family division and disunity. A minor child's desire to be secretive is itself a dis-

play of immaturity that the State should not endorse outside of abuse and neglect cases. The better policy is one that promotes family cohesion and unity.

Finally, how are minors to become aware of this law? If they are not informed, it may not help them; but if they are informed, that amounts to the State endorsing sexual promiscuity and unsafe sex on the part of minors. The state is saying, in effect: "Hey kids, it's OK to have sex, because if you get a disease, you can go to the doctor on your own and get treatment without telling your parents, and the State will pay for it!" The far better policy would be for the State to endorse healthy behavior by supporting parents and educators in raising and educating children in a manner that promotes healthy, mature, age-appropriate sexual awareness and behavior, and that promotes family unity by encouraging children to work with their parents on their medical needs, rather than against them. But again, the bottom line is that other NC law already provides the means for children in an emergency to get medical treatment without their parents' knowledge and consent, and outside of the few situations detailed above, it is unlawful for the State to allow children to consent to medical care. If the State definition of "abuse" needs to be tweaked so that State social workers may clearly intervene when necessary, that may be an option for those still concerned about treatment for minors to consider.

CONCLUSION

N.C. Gen. Stat. § 90-21.5(a) violates the United States and North Carolina Constitutions, the federal National Vaccine Injury Compensation Act, North Carolina's vaccine medical and religious exemption statutes, and the State's statutory directive that minor children be subject to the supervision and control of their parents. It also encourages and allows medical providers to violate other state and federal laws, and in the process, state board ethical rules. Finally, laws and procedures are already in place for the treatment of minors' medical emergencies; for the State to take custody and authorize medical treatment for abused minors; and to provide for minors' medical needs when parents are unfit. Accordingly, § 90-21.5 is very bad law, either severely misguided in its intent, or worse, enacted on a false pretense to enable healthcare providers to take potentially inappropriate advantage of vulnerable children at State cost for a broad variety of non-emergency needs.

If there are any legitimate concerns underlying the enactment of § 90-21.5(a) that are not addressed in other law, § 90-21.5 should be amended accordingly or replaced altogether with specific, narrow language designed to address those needs without violating state and federal law. But in no instance should a minor child make important medical decisions for herself unless the child has first been adjudged sufficiently mature to make such decisions, and in no instance should all

parents' Constitutional rights be violated due to the misdeeds of a small minority of unfit parents. This is unnecessary, and blatantly unconstitutional.

As to public policy more generally, the current law endorses inappropriate sexual behavior and promotes family disunity by broadly endorsing secrecy between children and parents. The better policy would be to address the underlying concerns through education, to support children in making informed, healthier sexual behavior decisions; and to encourage children with non-emergency medical needs to seek the support of their parents, in order to reduce the incidence of childhood STDs while promoting strong, family cohesion and unification. Where parents fail to take proper care of children with medical needs, those parents' fitness can and should be promptly challenged so that all children's medical needs are adequately addressed. If better enforcement of existing laws is an issue, that issue should be addressed as such, and not through the enactment of bad law.

For all of the above reasons, § 90-21.5 should be repealed; or, if clearly justified, it should be substantially amended to address any concerns underlying its enactment that are not already addressed in other law, but only in such narrow and specific manner as to avoid the unnecessary legal conflicts discussed above.

Respectfully Submitted,

Alan G. Phillips, Esq.
600 Merrimon Ave. Ste. 1D
Asheville, NC 28804
828-575-2622