

MEMORANDUM

DATE: JUNE 5, 2014

TO: THE NEW YORK STATE LEGISLATURE

FROM: ALAN G. PHILLIPS, ESQ.
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ASHEVILLE, NC 828-575-2622

RE: A497, sSpecifically, the administering of vaccines for sexually trans-
missible diseases to minors without parents' or guardians'
consent.

ISSUES

1. Does A497 violate the U.S. Constitution?
2. Do A497 violate the New York Constitution?
3. Given the answers to questions 1 and 2 above, would voting for A497 violate a New York legislator's oath?
4. Does A497 violate federal statutory law?
5. Is A497 needed to address the underlying policy concerns?

ANALYSIS

In relevant part, A497 states:

A health care practitioner may diagnose, treat or prescribe treatment for a sexually transmitted disease for a person under the age of eighteen years without the consent or knowledge of the parents or guardians of said person, where such person is infected with a sexually transmitted disease, or has been exposed to infection with a sexually transmitted disease.

1. Does A479 violate the U.S. Constitution?

Yes, both the 14th Amendment's due process clause and the First Amendment's "free exercise" clause.

A. 14th Amendment Violation

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 this governing assertion: "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 their children, then, it is clear that the Constitution prohibits the State from taking medical decision-making authority away from parents and giving it to their minor children.

The State may not even give parental decision-making authority to adult 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, parents are presumed to be fit under the due process clause of the 14th Amendment. Parents’ right to parent their child must be respected by the State, accordingly. Given the *Troxel* presumption, A479 effectively declares all parents in the State of New York to be unfit to make vaccine decisions for their children with respect to sexually transmitted diseases. Worse, by giving this authority to minors, the State is presuming, preposterously, that minors are fit to make the very decisions that the State, in passing this bill, presumes their parents are being declared unfit to make. Minors are, by both legal and medical definitions, incompetent and developmentally immature, and correspondingly incapable of making medical decisions for themselves. They are prohibited from entering into contracts, smoking cigarettes, drinking, voting, etc. Their immaturity renders

them particularly susceptible to misjudgment, and to influence by adults who may have a financial stake or other interest in the minor's vaccine decision.

To be clear, the Constitution could not be, and is not, inconsistent with medical science, in this instance, for two reasons:

- 1) The administering of a vaccine upon the contraction of a sexually transmitted disease will not, of course, prevent the disease already contracted. Nor can the administering of a vaccine following exposure to a sexually transmitted disease prevent the exposed person from contracting the disease to which she was exposed, as the development of protective antigens from a vaccine is a process that takes the human body a period of several days to weeks to complete. Assuming, *arguendo*, that a given vaccine for a sexually transmitted disease is safe and effective, its benefit is available only when administered in advance of exposure to the disease; and
- 2) The fact that some courts have adjudged it Constitutional to allow older teenagers to consent to having an abortion or to access pregnancy-preventive care does not equate to the administering of vaccines to minors for sexually transmitted diseases. The Immunization decision is much more serious, as immunizations, which cause children more adverse reactions than any other drug,¹ come with a risk

¹ Adverse Drug Reactions of Spontaneous Reports in Shanghai Pediatric Population, U.S. National Library of Medicine, National Institutes of Health, PLOS, February 24, 2014, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3933652/>

of injury and death. The National Vaccine Injury Compensation Program (NVICP) documents hundreds of federal government payments to persons and families of HPV and Hepatitis B vaccines (with hundreds of cases still pending)². The federal Vaccine Adverse Event Reporting System (VAERS) documents over 3400 reports of suspected HPV vaccine injuries and deaths in the U.S. for 2013 alone, and officials from the FDA and CDC have stated that *only 1 to 10% of serious adverse events are reported*.^{3,4} The NVICP pays out about \$100,000,000 (one hundred million dollars) annually for vaccine injury and death, but that figure may represent from \$1 billion to \$10 billion with respect to the serious vaccine adverse events actually occurring. One survey found that only 2.5% of pediatricians report suspected vaccine injuries and deaths,⁵ despite a federal law requiring all of them to do so.⁶

B. First Amendment Violation

² U.S. Department of Health and Human Resources, Health Resources and Services Administration (HRSA), Statistics April 2, 2014, <http://www.hrsa.gov/vaccinecompensation/statisticsreport.pdf>.

³ Statement of the National Vaccine Information Center (NVIC), Hearing of the House Subcommittee on Criminal Justice, Drug Policy and Human Resources, "Compensating Vaccine Injuries: Are Reforms Needed?" September 28, 1999. Less than 1%, according to Barbara Fisher, citing former FDA Commissioner David Kessler, 1993, JAMA. Less than 10%, according to KM Severyn, R.Ph., Ph.D. in the Dayton Daily News, May 28, 1993.

⁴ American Association of Physicians and Surgeons (AAPS), Fact Sheet on Mandatory Vaccines at <http://www.aapsonline.org/>.

⁵ National Vaccine Information Center (NVIC), 512 Maple Ave. W. #206, Vienna, VA 22180, 703-938-0342; "Investigative Report on the Vaccine Adverse Event Reporting System."

⁶ 42 U.S.C.S. § 300aa-25(b)(1)(A),(B).

A479 violates parents' First Amendment "free exercise" right to refuse immunizations for their children on religious grounds under N.Y. Pub. Health Law § 2164(9), since only parents may exercise a vaccine religious exemption for a minor child, but not minor children for themselves. A minor's religious beliefs, for legal purposes, are deemed to be that of their parents. There is also be a violation of parents' Constitutional right to exercise a medical exemption for their children under N.Y. Pub. Health Law § 2164(8). The Supreme Court stated in *Jacobson v. Mass.*, 197 U.S. 11 (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.

Id. at 39. As with religious exemptions to immunizations, the right to exercise a medical exemption for a child is that of the parent, and not the child. And again, as with religious exemptions, where the child's and parent's position on the matter of a medical exemption differ, which person's right should prevail? And with A479, how are healthcare providers to know if there is such a conflict in the first place?

2. Does A479 violate the New York Constitution?

Yes. N.Y. CONST. art. I, § 3, Freedom of worship; religious liberty, states in relevant part: "The free exercise and enjoyment of religious profession and wor-

ship, without discrimination or preference, shall forever be allowed in this state to all humankind...” This section protects parents’ right to exercise a vaccine religious exemption for their children pursuant to N.Y. Pub. Health Law § 2164(9), and would and supersede a child’s statutory to consent to a vaccine directly.

3. Would voting for A479 violate a New York legislator’s oath?

Yes. N.Y. Const. art. 13, § 1 requires members of the legislature to take an oath to “support the constitution of the United States, and the constitution of the State of New York” before performing the duties of their offices. Since A479 violates the U.S. and New York Constitutions as explained above, a legislators may be violating their oaths if they voted for these bills.

4. Do A479 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” [emphases added] 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.” A minor can’t consent to a vaccine under state law if the provider is required under federal law to provide vaccine infor-

mation to the child's parent prior to administering the vaccine, because federal law, the higher legal authority, supersedes state law in the event of a conflict between the two.⁷

5. Is A479 needed to address its presumed underlying policy concerns?

No. There is neither need nor authority under the Constitution to bypass parental decision-making except in very limited situations. For example, New York already provides for medical care to be administered to children in an emergency:

Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.

N.Y. Pub. Health Law § 2504(4). If there is an emergency need to administer a vaccine that meets the conditions of this section, healthcare providers may do so.

Absent an emergency, such intervention is unwarranted. Similarly, if a child is being abused or neglected, the state may intervene and, if necessary, assume custody and provide the needed "parental" consent to the vaccination. New York provides other limited exceptions in which minors may consent to their own healthcare treatment, e.g., when they are married or are themselves parents. N.Y. Pub. Health

⁷ "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.

Law § 2504(1). In these situations, the State is effectively declaring that such persons are emancipated—that they are no longer minors—with respect to medical decision-making. But outside of emancipation and emergency, there is neither need nor Constitutional authority to give medical decision-making to minors. The State must pursue other means of addressing the spread of sexually transmitted diseases, such as providing appropriate and necessary education to minors, and educating parents about the availability of vaccines for their children generally.


CONCLUSION

A479 violates the United States and New York Constitutions, the National Vaccine Injury Compensation Act (NVICP), and New York’s vaccine medical and religious exemption statutes. Furthermore, by administering a vaccine based on a child’s consent, medical providers may be violating state board ethical rules as well. A497 is also redundant. Laws and procedures are already in place for the treatment of minors’ medical emergencies, and for the emancipation of minors in certain situations. Absent an emergency or emancipation, there is no need to delegate parental authority to anyone else—let alone minors—who by legal and medical definitions are not qualified to exercise such authority. Finally, this bill does not explain how a healthcare provider is to determine whether or not a child has the capacity to consent to the care. Who gets to decide that? On the basis of what

criteria? Subject to what supervision or scrutiny? These are questions that require a combination of therapeutic and legal expertise to answer that few administering vaccines possess.

For all of the above reasons, A479 should be withdrawn, in recognition and affirmation of its many conflicts with New York and federal Constitutional and statutory authority, and the long-term, well-established tradition of Constitutionally-sanctioned parental authority in the United States.

Respectfully Submitted at the request of,
and on behalf of, concerned citizens
of the Great State of New York,

A handwritten signature in cursive script, appearing to read "Alan G. Phillips". The signature is written in dark ink on a light-colored background.

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