MEMORANDUM

DATE: MARCH 1, 2012 (REVISED APRIL 13, 2012)

TO: THE NORTH CAROLINA STATE LEGISLATURE

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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 more narrow language that doesn't violate any other state and 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 For all of these reasons, § 90-21.5 should be repealed or substantially amended.

BRIEF ANSWER

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

Yes. N.C. Gen. Stat. § 90-21.5(a) violates parents' Constitutional 14th Amendment due process right to rear their children. The U.S. Supreme Court has stated that 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." *Parham v. J.R.*, 442 U.S. 584 (1979). In blatant violation of this tradition, § 90-21.5 essentially declares *all* parents in the State unfit with regard to the authority it grants to children, for the sake of problems with a tiny minority of unfit parents. It also does this unnecessarily, since doctors can treat minors without parental consent in emergencies under 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.

Next, to the extent that § 90-21.5(a)'s reference to the prevention of diseases includes vaccinations, it violates parents' First Amendment Constitutional right to claim an exemption to vaccinations for their children due to the parent's religious beliefs pursuant to N.C. Gen. Stat. § 130A-157.

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

Yes. Insofar as § 90-21.5(a) allows a child to consent to the administration of a vaccine, it conflicts with the National Vaccine Injury Compensation Program's

requirement that health care providers administering vaccines to a child to provide the child's legal representatives printed information about the vaccine's benefits and risks and the existence of the National Vaccine Injury Compensation Program *prior to the administration of the vaccine*.

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

Yes. Given the federal Constitutional violations cited above and below, § 90-21.5(a) has "no binding effect" under the North Carolina State Constitution N.C. Const. art. I, § 5. Allegiance to the United States. Also, parents' right to exercise a religious exemption to immunizations under § 130A-157, which is circumvented by § 90-21.5(a), is supported by the North Carolina Constitution's religious liberty clause. Children cannot exercise the exemption for themselves.

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

Yes. General Assembly members take an oath to support the Constitution and laws of the United States and the Constitution of the State of North Carolina. § 90-21.5 violates state and federal constitutional provisions, and federal law. Therefore, assembly members who supported this law violated their oath, even if inadvertently.

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

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." Next, insofar as § 90-21.5(a) concerns vaccines, it violates N.C. Gen. Stat. §§ 130A-156 and 157, which allow parents to exercise medical and religious exemptions to vaccines for their children. Children may not exercise vaccine exemptions for themselves.

6. Can § 90-21.5(a)'s underlying concerns be addressed by other means?

Yes. § 90-21.5(a)'s underlying concerns are addressed by other North Carolina law. Doctors can treat minors in an emergency without parental consent under N.C. Gen. Stat. §§ 90-21.1 and 7B-3600, and Child Protective Services can remove a child from an abusive home immediately under § 7B-302 and give custody to the State or another qualified adult who can make medical decisions for the child. If there are any other concerns underlying the enactment of § 90-21.5(a) not addressed herein, they can and must be addressed with narrow language that does not violate other state and federal law.

As to some more general concerns, if a child needs non-emergency medical treatment that a parent is not addressing, the parent can be reported for neglect, and procedures under current law utilized to ensure the child gets any necessary treatment. Finally, regarding the concern that non-abused teens with venereal disease won't seek treatment if their parents must be involved, § 90-21.5 amounts to State endorsement of sexually promiscuous behavior and divided families through teen secrecy. The better policy is to trust parents and educators with the job of educat-

ing teenagers about the risks of sexual behavior, and to encourage teenagers and fit parents to work together on important teen health matters, thereby supporting teen health and family unity. The bottom line is that Constitutional and other limitations on State intervention need not prevent any child from getting proper medical care under preexisting State law.

Brief Conclusion:

§ 90-21.5(a) is substantially and unnecessarily broad, violates numerous State and federal Constitutional and statutory provisions, and is bad public policy. For all of these reasons, § 90-21.5(a) should be repealed or substantially modified. The underlying concerns are already addressed by other law, but if there are any gaps in preexisting law, those gaps can and must be addressed without creating all of the state and federal law conflicts discussed herein.

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 parents' medical decision-making authority 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 assume medical-decision making authority. But the State of North Carolina cannot give medical decision-making authority directly to minors in any event, except by court order to individual children 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 child neglect cases where there are non-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. So, the State needn't resort to violating the Constitution to ensure that 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. 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 may have a stake in the minor's decision. Exceptions, discussed below, pertain to individual minors, and require a court to review evidence to determine if an individual minor possesses adult maturity for specific purposes. Absent such showing, minors are, by definition, presumed not to have the maturity to make adult judgments and decisions, including 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, and not a minor children for themselves. 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.

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 (attached) 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, to the extent that § 90-21.5(a)'s reference to the prevention of venereal disease and other reportable diseases means or includes vaccines, § 90-21.5(a) 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 potential choice 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? Whose decision is the healthcare provider to follow? The more likely scenario may be that health care providers vaccinating a minor under § 90-21.5(a) would simply fail to comply with 42 U.S.C. § 300aa-26

at all, as the intent behind § 90-21.5(a) appears to be to take parents out of the equation altogether. In doing so, the provider would be violating federal law, and in violating federal law, the provider would also be violating state board ethical rules.

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.

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 minors and authorize proper medical treatment of the abused children. If a child's medical concern does not involve abuse or does not constitute a medical emergency needing immediate medical intervention, but a 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 medical decision-making authority for the child. If there is no emergency, abuse, or neglect, the State need not and cannot, legally, intervene. If there is any situation not covered by these categories, § 90-21.5(a) could be amended to define narrowly and precisely those specific situations concerned as constituting a 'medical emergency', without violating the Constitution and other laws as it currently does.

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 both instances, 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 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" to consent to their own medical treatment.

Second, 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. First, 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 display 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.

Next, 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 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 with medical needs to work with their parents rather than against them.

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 directive that minor children be subject to the supervision and control of their parents. It also encourages medical providers to violate state and federal law, 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 of abused minors, in which case the State may authorize medical treatment for the abused minors; and for the State to intervene as needed to address non-emergency neglect situations, and to provide for minors' medical and other needs if the parents are found to be unfit. Accordingly, § 90-21.5 is bad law, either severely misguided in its intent, or a pretense for an agenda that seeks to take inappropriate advantage of its overly broad, unlawful language.

If there are any legitimate concerns underlying the enactment of § 90-21.5(a) that are not addressed in other law, § 90-21.5 could be modified accordingly with specific, narrow language to address those needs without violating state and federal law. But in no instance should a minor child make important medical decisions for himself 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. It is unnecessary, and blatantly unconstitutional.

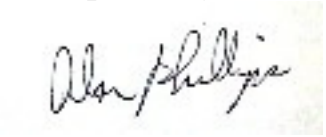
As to public policy generally, the current law endorses inappropriate sexual behavior and promotes family disunity by endorsing secrecy between children and parents. The better policy would be to address the underlying concerns through education, to support children in making informed, healthier sexual behavior decisions; and to encourage children with non-emergency medical needs to seek the support of their parents, to reduce the incidence of child venereal disease 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. But the broad, unlawful language of § 90-21.5(a) is not needed.

For all of the above reasons, § 90-21.5 should be repealed; or, if clearly justified, 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.

NOTE: Repeal of this section may render HB 347 moot and require its withdrawal.

Respectfully Submitted,



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