

MEMORANDUM

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TO: Whom It May Concern

FROM: Alan Phillips, J.D.
P.O. Box 3473
Chapel Hill, NC 27515-3473
www.vaccinerights.com

RE: The State of North Carolina's Obligation to Provide an Education for Children Excluded from School During Infectious Disease Outbreaks, Due to Their Parent's Exercise of a Vaccine Religious Exemptions

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ISSUES

- I. When the state requires children who are not immunized to stay out of school during a local outbreak, does the state still have to provide those children an education during their exclusion from school, when their unvaccinated status is due to their parents' exercise of a lawful religious exemption?
- II. If so, how far does the state have to go (e.g., provide an alternate school site, a tutor, lessons for parents or others to use at home, etc.)?
- III. Is chicken pox potentially a unique case that should be handled differently (for the reasons discussed below)?

ANALYSIS

- I. Background
 - A. Current State Policy and Law

In North Carolina, like most if not all other states, children who are not vaccinated due to their parents' exercise of a lawful immunization exemption may be excluded from school during a local outbreak, for a period of time equal to the incubation period of the

particular infectious disease in question. [cite] In North Carolina, this could occur due to the child having a religious or medical exemption. N.C. Gen. Stat. §§ 130A-156 and 157. E.g., chicken pox has an incubation period of 21 days. The result is that exempt families are substantially inconvenienced. They are abruptly faced with having to arrange childcare for an extended period, are left to fend for themselves with regard to keeping their children current on their school work, and are sometimes told that the children's absences will be unexcused.¹ With chicken pox, these inconveniences can be multiplied, as chicken pox can occur and recur several times within a short period of time, resulting in a substantial loss of time from school. These consequences are the direct result of the parents' religious beliefs and their exercise of a valid legal option, the exercise of a vaccine religious exemption. This raises a number of questions of law, policy, and practicality with regard to how far the state's obligation extends, or should extent, to provide children an education. That is, should the state provide children an education for non-vaccinated children during their exclusion from school due to a local outbreak (when their non-vaccinated status is due to their parents' religious beliefs and exercise of a lawful religious exemption) that is substantially equivalent to the education provided immunized children who are not excluded from school?

II. The Right To Education

- A. "The right to education encompasses also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality." A Human Rights-Based Approach to Education for All, UNESCO and UNICEF, 2007, pp.7. It is affirmed in the Universal Declaration of Human Rights, Article 26; and the International Covenant on Economic, Social and Cultural Rights, Article 24.
- B. North Carolina's Constitution addresses the right to education in detail. Relevant sections include:
 1. Article I: Declaration of Rights
Sec. 15. Education. The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.
 2. Article IX: Education
Sec. 2. Uniform system of schools. (1) General and uniform system: term.

¹ In the experience of the author.

The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

Sec. 3. School attendance. The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

Each of these sections raises a question with regard to the issue at hand, to wit:

(a). With regard to Article I section 15: is the state neglecting its duty to “guard and maintain” the “right to the privilege of education” for non-vaccinated students if it doesn’t not provide them a substantially similar education while they are excluded from school during an outbreak due to their parents’ exercise of a lawful religious belief? Clearly, the children excluded due to their parents’ exercise of a lawful right, when not offered an alternative educational facility and tutor or substitute teacher do not have the same right or privilege as their vaccinated counterparts. These children are being punished for their parents’ exercise of a valid federal Constitutional right. Surely, then, this cannot be justified under this section of North Carolina’s Constitution.

(b). With regard to Article IX, section 2: Does the state’s exclusion of non-vaccinated students from school during a local outbreak due to the children’s parents’ exercise of a lawful religious exemption to immunizations amount to a failure of the state to provide “equal opportunities . . . for all students”, when the state makes no effort to provide alternative educational facilities or to provide a tutor or substitute teacher for the excluded children? Clearly the children of law-abiding exempt parents do not have an “equal opportunity” to and education that this section of the North Carolina Constitution requires “for all students”.

(c). With regard to Article IX, section 3: Does the state’s exclusion of non-vaccinated students from school during a local outbreak due to the children’s parents’ exercise of a lawful religious exemption to immunizations amount to a failure of the state to provide “every child of appropriate age and of sufficient mental and physical ability” the right to “attend the public schools, unless educated by other means”? The excluded children in this instance are clearly of “appropriate age and of sufficient mental and physical ability”, so they have the right to “attend the public schools, unless educated by other means,”

even if that means that the state must provide a temporary, alternate educational facility and teacher during the exclusion period.

C. Federal Constitutional Concerns

1. While the legal consensus appears to be that the Constitution doesn't require states to offer a vaccine religious exemption,² once the state does, the due process clause of the Fourteenth Amendment requires the application of the fundamental rights of the Bill of Rights to apply to state and local governments. Since parents of the excluded children are treated differently from their non-exempt counterparts, and since the exclusion results from the parents' exercise of a valid legal option in state law with Constitutional rights, questions arise as to whether or not the state's failure to provide suitable accommodations (alternative educational facility and teacher) constitutes a violation of the First Amendment's "free exercise" of religion and/or "establishment" clauses.³
2. In addition, questions are raised as to whether or not the condition presented amounts to a state violation of the Fourteenth Amendment's "privileges and immunities" clause,⁴ and/or the "due process" clause,⁵ and/or the equal protection clause.⁶

D. Legal Precedent

In 2004, the North Carolina Supreme Court stated: "We read Leandro and our state Constitution . . . as according the right at issue [the right to an opportunity to receive a sound basic education in the public schools] to all children of North Carolina, regardless of their respective ages or needs." Hoke County Bd. Of Educ. v. State, 358 NC 605, 620, 599 S.E.2d 365, 379 (2004). This suggests that the excluded children in question have the right to attend school, provided by the state, even if excluded from their usual classroom due to their parents' exercise of a valid, legal right to a vaccine religious exemption.

E. Other Considerations

² See e.g., Prince v. Com. of Mass., 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (stating in dicta that the "right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.")

³ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

⁴ No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

⁵ nor shall any State deprive any person of life, liberty, or property, without due process of law;

⁶ nor deny to any person within its jurisdiction the equal protection of the laws.

By excluding non-vaccinated children from school during local outbreaks, the state may be following CDC recommendations, but in so doing it has created and enforced conflicting state laws. Can the state offer a religious exemption to immunizations on the one hand and at the same time penalize those families who choose to exercise that right, by depriving the children continuity in their education, and a place to receive that education?

III. Chicken Pox: A Special Case?

Chicken pox and the chicken pox vaccine are distinct from other childhood infectious diseases, and may warrant different treatment with regard to the issue of excluding unvaccinated children from school. Consider the following:

- A. Unlike typical outbreaks of other childhood infectious diseases (which are rare to non-existent these days), chicken pox outbreaks may occur frequently within a short period of time in a single location, resulting in unvaccinated children being excluded from school for substantial periods of time during a single school year.
- B. The primary rationale for the development and use of the chicken pox vaccine was financial—to enable parents to avoid having to miss work to stay home when their child has the chicken pox, and not because chicken pox poses a significant health risk—it has a 99.99% or better recovery rate followed by lifetime immunity.
- C. Since chicken pox is far more of a threat to adults than children (death, while still quite rare, is 20 times more likely), and since the vaccine's effectiveness wears off with time (unlike the disease, which imparts life-long immunity), vaccinated children are actually at greater risk as adults for having avoided chicken pox, for the convenience of their parents, as children. Because of this, mothers vaccinated as children have no maternal antibodies to pass on to their infants as those who contracted the disease as children do, so their infants are at risk of contracting chicken pox early in life when the risk of complications is much higher.
- D. Children vaccinated with the chicken pox vaccine have a greater incidence of shingles in childhood, a side-effect of the vaccine.
- E. If vaccines work, vaccinated children have nothing to fear from unvaccinated children.

Because of these factors, many parents would actually prefer to expose their children to another child who has chicken pox than get the vaccine. In any event, since the chicken pox vaccine is used primarily for the convenience of parents, exclusion of unvaccinated children due to a single case of chicken pox is rather silly and unwarranted. Unvaccinated children's

parent should be informed of a local outbreak, and given the option to keep their children out of school if they so choose, but not required to do so. Unvaccinated children pose no threat to vaccinated children if the vaccines work; and those children with medical exemptions should either be required to stay home to avoid risk of harm from the disease (assuming a greater risk due to their medical condition) or informed about the outbreak and allowed to choose, if the child's medical condition poses no greater risk of harm from the disease than that which other children have.

CONCLUSION

When the state forces law abiding parents' children to stay home from school, due to the parents' exercise of a state law with U.S. Constitutional rights, and the state does not provide a an education for the children, the state may be in violation of the parents' state and/or federal Constitutional rights. A separate matter, then, is about how far the state has to go. Does the state have to provide a substantially similar or equivalent education for these excluded children during the periods of exclusion? Hoke County Board of Educ. suggests that it does.

Nevertheless, there exists a range of possibilities. Children could be sent to the next closest school not experiencing an outbreak, and lessons provided from the child's teachers via mail, Internet, email, or other convenience means. College students pursuing educational degrees could be given college credit for supervising and instructing these children; or substitute teachers utilized. The cost to the state needn't be significant. In no event should such exclusions be considered unexcused, or be used, in and of themselves, to penalize the children academically in any way. And the state's obligation in this regard would not apply, of course, to private schools, but given the unique situation with chicken pox—non threatening disease and potential repeat occurrence—perhaps they could, or should, take reasonable steps to accommodate exemption parents and children as well.

Given the unique circumstances with chicken pox discussed above, there is really not compelling reason to require exclusion of exempt children in the event of a local outbreak (but perhaps exempt children's parents should be informed of the outbreak and given the option to keep their children out of school). If the chicken pox vaccine works, unimmunized children pose no threat to immunized children; and if unimmunized children have the option of staying out of school during a chicken pox outbreak, the threat to unvaccinated children (minimal though it is in any event) is adequately controlled.