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### MANDATORY IMMUNIZATIONS: LEGAL AND POLICY ISSUES

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## Overview

In recent years the subject of childhood immunizations against vaccine-preventable diseases has generated a heated debate in communities across this country—often producing a number of perplexing legal and policy issues having a direct impact on local school board policy. Some parents refuse to have their school-aged children immunized complaining that their children often receive too many immunizations (more often than not administered at the same time). Other parents object because they suspect a link between contents in the immunization vaccines and certain disabilities (*e.g.*, autism spectrum disorders). On the other side of the debate are parents who claim that because their children are being exposed to other children in school who have not been immunized (including children entering school from other countries), their children are being needlessly placed at risk to dangerously infectious, contagious, and sometimes fatal diseases (*e.g.*, exposure to whooping cough, measles, mumps).

At the same time, individual states are insisting on strict enforcement of statutes requiring parents (as defined in state statutory law - *e.g.*, natural, adoptive, custodial, surrogate, guardian, court appointed special advocate) to present documentary proof (*e.g.*, certificate of immunizations) of their child's immunizations for vaccine-preventable diseases as a precondition of enrollment in, and attendance at, school. From time-to-time these statutes are challenged by parents and parent advocates and find their way into court. When the controversy is before the court, the competing interests involved are: state law, local school board policy, parent rights, and the best interests of the child.

*Police Power of Government.* The *police power* of government is often misunderstood. Individuals seeing or hearing the term often take a narrow view and associate the reference solely with “the police” and law enforcement activities—preserving order, preventing crime, protecting public safety. While that particular interpretation is not incorrect and does represent an important aspect of government, it is limited in scope. As BLACK’S tells us, *police power* represents “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” (BLACK’S, 1999)

As specifically applied in public school law, and by virtue of application of the Tenth Amendment, a state’s police power constitutionally and legally vests in state government (*parens patriae*)—with direct implementation resting with local school boards. Examples include required compulsory attendance, immunizations of students to protect them from preventable diseases, and the mandatory reporting of suspected child abuse and neglect. Undergirded by *the best interests of the child* (health, welfare, and education) *doctrine*, each of these examples represents a valid exercise of state police power and, as a general rule, can override parental rights and subject noncompliant parents to possible prosecution as law breakers. (Vacca and Bosher, 2012)

*Statutory Exemptions.* More often than not in the forty-plus years post-Wisconsin v. Yoder (1972), parental objections to enforcement of mandatory compulsory attendance and childhood immunization statutes have been premised on religious beliefs and convictions, combined with allegations of due process violations—and, more recently, on concerns for the health (medical exemption) of children. While early courts tended to strictly enforce state law, in recent years, in an effort to create a balance with parental rights and prerogatives, state legislatures have gradually placed in law the possibility of parental exemptions from such mandates. However, when resulting in court action where the primary goal is to protect the *best interests of the child*, the onus more often than not falls on

objecting parents to establish sincere, bona fide, and substantiated reasons (*e.g.*, religious, medical) for requesting an exemption. For example, as one court held in a Virginia compulsory attendance case, “parents seeking a religious exemption from compulsory attendance must show that their beliefs constitute a bona fide religion and not merely sociological, philosophical, political, or personal beliefs.” Johnson v. Prince William County (Va. 1981) For a decision involving a parental challenge, on religious grounds, to a state law requiring that their child be subjected to immunization, see Lynch v. Clarkstown Central School District (N.Y. Sup. Ct. 1992)

Recently I came across a decision (involving a consolidation of cases) from the United States Court of Appeals for the Second Circuit. In this case the issues were spawned by parental challenges to a state law mandate that all children receive certain immunizations as a precondition of attending public school. In my view the court’s rationale is both instructive and generalizable to similar situations that might spring up in other jurisdictions.

***Phillips v. City of New York Department of Education* (2<sup>nd</sup> Cir. 2015)**

*Facts.* A New York State statute requires that students in the public schools be immunized against certain vaccine-preventable diseases. More specifically, the law mandates that no child shall be admitted to or attend school “in excess of fourteen days” without a certificate of immunization. *N.Y. Pub. Health Law*, 2164 (7)(a) Two exemptions are contained in the statute and these are:

- 1) a medical exemption—supported by certification from a state licensed physician of possible harm to a child’s health, *N.Y.P.H.L.* 2164 (8), and
- 2) a religious exemption—available for “children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practice herein required. *N.Y.P.H.L.* 2164 (9).

The law provides that parents whose exemption request is denied have access to an appeals process.

In one set of facts, parents had received religious exemptions for their children. However, subsequent to an in-school situation where a fellow student was diagnosed with chicken pox, their children were temporarily excluded from school attendance (first in November 2011, and again in January 2012). The exclusion was based on a New York State regulation that stated: “in the event of an outbreak of a vaccine-preventable disease in a school, the commissioner, or his or her designee, may order the appropriate school officials to exclude from attendance” students who have received exemptions from required immunizations. *10 N.Y.C.R.R 66-1.10*

In a second set of facts a parent had applied for a religious exemption for her daughter but the request was denied by school system (DOE) officials. School officials stated that the parent’s reason for the request was not based on “sincere religious beliefs.” This parent went into court asking for preliminary injunction to compel school officials to permit her child to attend school.

In explaining her reasons for her request the parent testified that as a Catholic she treats her daughter’s health and wellbeing as “strictly by the word of God.” She also testified that she believed that the immunizations would also be harmful to her daughter’s health. However, because a Magistrate Judge could not connect the parent’s objections to immunizations to any tenets of the Catholic faith, a

recommendation was made that the request for a preliminary injunction be denied. The federal district court adopted the Magistrate Judge's report and recommendation and denied the request. This case and the fact sketch discussed above were subsequently consolidated and plaintiffs jointly filed an amended complaint.

*District Court Decision.* In their amended complaint plaintiff parents alleged that the State of New York mandatory vaccination requirement and the accompanying regulation that allowed for children who were exempt from the requirement to be temporarily excluded from school during a disease outbreak violated the First Amendment's Free Exercise Clause, substantive due process and equal protection under the Fourteenth Amendment, the Ninth Amendment, and relevant state and local law. Subsequently the district court granted motions to dismiss and summary judgment to defendant state and local defendants. Phillips v. New York City, 27 F. Supp.3d 310 (E.D.N.Y. 2014) Also, plaintiffs' motion to reconsider was denied and they filed an appeal.

### **Second Circuit Court Rationale and Decision.**

*Rational.* In its *de novo* review of the district court's decision to grant a motion to dismiss, accepting all facts alleged in the complaint as true, and drawing all reasonable inferences in favor of plaintiffs, the appellate court first looked at the issue of substantive due process. Citing the United States Supreme Court's decisions in Jacobson v. Commonwealth of Massachusetts (1905) and Zucht v. King (1922), where the high court held that compulsory vaccination was within the State's police power and that the State's judgment was in the interests of the population as a whole, and that it is a determination of the legislature not individual objectors, the Second Circuit did not see the substantive due process violation allegations of plaintiffs as being more compelling than the ones put forth in Jacobson (1905).

Turning to plaintiff's free exercise of religion argument, the Second Circuit did not see Jacobson as controlling. However, relying on reasoning from Jacobson (1905), Prince v. Massachusetts (1944), and other case law on point, especially Workman v. Mingo County Board of Education (4<sup>th</sup> Cir. 2011) (unpublished), the Second Circuit held, that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause of the First Amendment. In the opinion of the Court the "limited exclusion" of children during an outbreak of a vaccine-preventable disease is clearly constitutional.

The Second Circuit also found no merit in plaintiffs' equal protection claim—that they were being discriminated against as Catholics. Because plaintiffs involved in the case before the Court could not show that their objections to vaccines were based on "sincere religious beliefs" of their faith, their equal protection claims failed.

Finally, plaintiffs' claim of Ninth Amendment violations and their motions for reconsideration also failed.

*Decision:* The order of the district court is affirmed.

### **Policy Implications**

In recent years, articles in the national media and in professional journals have reported a number of incidents involving a reappearance of certain communicable diseases (e.g., rubella, mumps, whooping

cough) once brought under control by virtue of the universal administration of new and effective vaccines. While it is not within my professional training or expertise to venture a litany of reasons why, it is nonetheless important and appropriate for me to offer an opinion. As parents and advocates continue to challenge required immunization statutes and policies, and as local public school districts in this nation experience a growing immigrant population of children and parents, many of whom do not speak English and are from countries where health care and disease prevention protocols are either lacking or nonexistent, receiving valid certificates of immunizations by the first day of school will be a disconcerting struggle. However, implications for policy can be gleaned from the Second Circuit's opinion and decision in Phillips (2015). School district policies must make it clear that:

- In the best interests of the children and all employees in this school district, it is the intent of the Board and administration to enforce and implement all laws, state regulations, and policies governing required immunizations of all children registering for, entering, and attending schools in the school district.
- Requests for exemptions from immunizations specified and provided for in state law, accompanied by appropriate documentation, must be presented to an official designee of the Board for consideration, and a final decision must be made on that request, prior to a child registering for, enrolling, and attending a district public school.
- All state and school system immunization requirements and all registration materials and procedures (including the location of the office where materials may be obtained) shall be widely publicized and made available to all parents and prospective parents of school-age children residing within the boundaries of the school system.
- The board seeks the cooperation and involvement of community agencies, both public and private, including faith-based groups, to help in the distribution and interpretation of immunization requirements and procedures, especially to parents and prospective parents whose native language is not English.

### **Final Comment**

Providing a healthy and safe school environment is a necessary foundation on which to build and maintain a viable learning environment—a learning environment where teachers can teach and students can learn. At the same time parents expect that school officials and personnel will do what they can to keep their children safe when they are at school and in attendance at school sponsored and sanctioned activities. In my view, while the enforcement and implementation of state mandated vaccine-preventable disease immunizations through local school board policies and practices accomplishes both goals, it is time to reexamine currently in-force state-imposed statutes and regulations as local community and school system demographics are rapidly changing.

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**Note:** The views expressed in this commentary are those of the author.

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