

MEMORANDUM

DATE: MARCH 10, 2012 (REV. APRIL 13, 2012)

TO: THE CALIFORNIA STATE LEGISLATURE

FROM: ALAN G. PHILLIPS, ESQ.
P.O. BOX 3473
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RE: AB 2109 AN ACT TO AMEND SECTION 120365 OF THE
HEALTH AND SAFETY CODE, RELATING TO
COMMUNICABLE DISEASE

ISSUES

Does AB 2109 violate the federal Constitution? Are there other significant concerns weighing against its enactment?

BRIEF ANSWER

Yes, to both questions. § 120365 of the California Health and Safety Code exempts minors from state-mandated immunizations due to a parent's contrary beliefs. AB 2109 proposes to add two requirements to the exercise of the exemption:

1) That parents provide a form signed by a healthcare provider stating that the provider has given the parent information about immunizations, and

2) A redundant letter or affidavit from the parent stating that the parent has received the requisite information from the provider.

While California does not provide a religious exemption to immunizations *per se*, California's statutory construction rules applied to § 120365 make clear that § 120365 encompasses personal religious beliefs as a basis for the exercise of the exemption. Federal courts have held that First Amendment protection for religious objections to immunizations requires only that the applicant hold a sincere belief that is religious in nature. Thus, AB 2109's additional requirements involving healthcare providers, as they pertain to those persons exercising the exemption due to personal religious beliefs opposed to immunizations, violates the First Amendment of the U.S. Constitution. AB 2109 also raises other serious concerns that are practical, financial and ethical in nature, as explained below. For all of these reasons, AB 2109 should not be enacted into law.

ANALYSIS

California's pending AB 2109 (Appendix A) would add requirements for parents exercising a non-medical vaccine exemption for their children pursuant to § 120365 (Appendix B). If enacted, parents would have to 1) get a health care provider's signature on a form signifying the doctor has given the parent vaccine risk-benefit information, and 2) provide a separate, redundant letter or affidavit

signed by the parent saying that the parent received the provider's information. Current exemption procedure does not require the involvement of a healthcare provider.

Problems with AB 2109's additional requirements are many and include:

1. The additional requirements are not merely a minor inconvenience of new procedural steps for parents. The practical reality is that many doctors will refuse to sign the forms or charge a high fee for doing so, to prevent or discourage the exercise of the exemption, rather than providing information in a neutral manner so that parents may make an informed choice about the available legal options. This concern is supported by the growing, documented, national policy of pediatricians' increasingly refusing to allow exempt children into their practices at all.¹ Ironically, this policy is not supported by medical science, since non-immune vaccinated children far outnumber exempt children, according to the CDC and JAMA.² Therefore, this bullying behavior by pediatricians represents a disturbing trend that is clearly based primarily on something other than public health policy.

Parents should not be subjected to mistreatment by healthcare professionals

¹ More Doctors 'Fire' Vaccine Refusers, The Wall Street Journal, Health and Wellness, February 15, 2012.

² According to the CDC, 5% - 15% of vaccinated children are not immune (Centers for Disease Control and Prevention, Vaccines and Immunizations, Misconception #2. The majority of people who get disease have been vaccinated, <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm>), while according to JAMA, exempt children make up 1% - 2.5% of children (Non-medical Exemptions to School Immunization Requirements, The Journal of the American Medical Association, <http://jama.ama-assn.org/content/296/14/1757.full>).

seeking to further a non-public health agenda through the suppression of a legal right.

2. Non-medical exemptions are substantially based on non-medical concerns to which the medical information from providers would be irrelevant; e.g.:

A. Philosophical exemption concerns include the fact that vaccines cause permanent disability and death. Doctors cannot determine in advance which vaccine recipients are likely to become permanently disabled or killed; and

B. Religious exemptions concern beliefs about a higher being not subject to medical opinion.

Information from providers about the risks and benefits of vaccines are immaterial to these philosophical and religious objections to immunizations, and so can't be weighed against them. AB 2109 would, therefore, put providers in the highly inappropriate and awkward position of trying to convince parents to violate their religious beliefs or to take the unquantifiable risk of permanent disability or death for their child from a vaccine, matters that cannot be weighed against a provider's or the state's opinion about the risks and benefits of vaccination. Thus, provider-parent discussions, however well intended, are a prescription for unproductive provider-parent conflict. Appointing medical professionals as gatekeepers for non-medical exemptions is both illogical and unethical.

3. Assuming an exempting parent can find a healthcare provider who will sign the form and can afford to hire the provider to do so, a parent's signature on the parent statement could potentially be later misconstrued as an admission from the parent that the parent exercised bad judgment in the care of their child, in the likely event that the provider's information favors vaccination. However, this would be mistaken as a matter of law, since the state legislature would not have given parents the exemption option if exercising the right would pose a significant health risk to anyone, and therefore, there is a legislative presumption that the exercise of an exemption does not pose a significant health risk to anyone.

4. Assuming a parent can find a healthcare provider who will sign the form and can afford to hire the provider to do so, the additional requirements will impose a significant cost barrier to parents exercising the exemption, and to the State for exempting parents whose children are on Medicaid.

5. Healthcare providers have a conflict of interest with being appointed gatekeepers for non-medical exemptions. If a parent exercises the exemption, the provider loses the financial benefit of providing ongoing mandatory and recommended immunizations to the parent's child(ren).

6. Provider-parent discussions would put behind closed doors discussions about vaccines that should be part of an open, ongoing public discourse, so that true, accurate and complete information about the risks and benefits of vaccines

may be had with transparency, in a fashion necessary and appropriate to our free speech, democratic state and nation, for the benefit of all concerned. AB 2109 seeks to continue the long history of suppression of this sorely needed public debate.

AB 2109 also violates the Constitution. First, California's exemption law, which makes no explicit reference to religious objections, nevertheless allows a person whose objections to immunizations are based solely on religious beliefs to refuse vaccines for their children. To explain, California's exemption statute, § 120365, states in relevant part:

Immunization of a person shall not be required for admission to a school or other institution listed in Section 120335 if the parent or guardian or adult who has assumed responsibility for his or her care and custody in the case of a minor, or the person seeking admission if an emancipated minor, files with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs.

As noted above, AB 2109 doesn't propose to change the underlying substance of this language, only to add additional requirements. Regarding the current language, the California Court of Appeals recently stated, in reference to state statutory interpretation: "If the language is clear and a literal construction would not result in absurd consequences that the Legislature did not intend, we presume that the Legislature meant what it said and the plain meaning governs." *Vitkievich v. Valverde*, 202 Cal.App.4th 1306, 1311 (2012). Since the state legislature used the

word ‘beliefs’ without qualification and the statute is not ambiguous, the statute’s plain language meaning would necessarily govern and is inclusive of all beliefs, religious and otherwise. The legislature has also told us “it is the intent of the legislature to provide . . . Exemptions from immunization for medical reasons or because of personal beliefs.” § 120325(c). Again, the phrase, “personal beliefs” is unqualified and unambiguous, and since interpreting the phrase as inclusive of personal religious beliefs is not an absurd result contrary to the stated legislative intent, § 120265 necessarily includes personal religious beliefs.

Federal courts have established that personal religious beliefs qualify for a vaccine religious exemption. *Sherr and Levy vs. Northport East-Northport Union Free School District*, 672 F. Supp. 81, 99 (E.D.N.Y., 1987) held that the “limitation of the availability of a religiously-based exemption from immunization to ‘bona fide members of a recognized religious organization’ whose doctrines oppose such vaccinations violates both the establishment and free exercise clauses of the First Amendment to the United States Constitution,” and that the state “must offer the exemption to all persons who sincerely hold religious beliefs.” *Id.* at 98. *Farina v. The Board of Education*, 116 F. Supp.2d 503, 507 (S.D.N.Y. 2000) held that “the beliefs need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization.” (*citing Sherr*, 672 F. Supp. at 91). The Supreme Court has held that religion need

not “be founded upon a belief in the fundamental premise of a ‘God’ as commonly understood in Western Theology.” *Sherr*, F. Supp. at 98 (E.D.N.Y. 1987) (*quoting Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961)). In addition, the Court has said that “the test of belief ‘in relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God,” *id.* (*quoting United States v. Seeger*, 380 U.S. 163, 165-66, 85 S.Ct. 850, 854, 13 L.Ed.2d 733 (1965)), and that religion involves “the ‘ultimate concerns’ of individuals.” *Id.* (*quoting Seeger*, 380 U.S. at 187, 85 S.Ct. at 865). So, clearly the First Amendment protects personal religious beliefs. Therefore, § 120365’s “personal beliefs,” again, necessarily encompasses personal religious beliefs.

State law cannot exceed the boundaries of the higher federal Constitutional authority. California may not require more of those with religious objections to immunizations, in the exercise of an exemption based on religious objections, than that which is required under the First Amendment (unless California offers no exemption at all to those with religious objections, as states are not required to offer a religious exemption. *See, e.g., Workman v. Mingo County Board of Education*, No. 09-2352 (FED4). But once they do, Constitutional boundaries apply). Therefore, AB 2109’s proposed additional requirements involving the participation of a healthcare provider for the exercise of non-medical exemptions,

as it would pertain to persons whose primary reason for exercising it is their personal religious beliefs opposed to immunizations, is unconstitutional.

A separate legal issue concerns the fact that the enactment of an exemption statute carries with it the legal presumption that the exercise of an exemption does not pose a significant health risk to anyone. That is, if exercising the exemption would pose a significant health risk, the legislature would not have enacted the exemption law in the first place. This presumption is fully supported by the herd immunity theory (in essence, that so long as most are immune, all are protected), a widely accepted scientific theory. But most healthcare providers would tell parents that their failure to vaccinate their children will put many at risk, in direct contradiction to this legal presumption and scientific theory. For this reason as well, healthcare providers should not be appointed as gatekeepers for non-medical vaccine exemptions.

CONCLUSION

In sum, AB 2109 is problematic for reasons that are:

1) Practical, concerning healthcare providers' conflicts of interest with the exercise of non-medical exemptions; and their potential opposition to, non-cooperation with, and active prevention of, parents' exercise of the exemption;

2) Financial, as it concerns the cost burden it would impose on parents and the State in the exercise the exemption,

3) Ethical, as it concerns the appointing of healthcare providers gatekeepers of non-medical exemptions generally and their growing professional abuse by healthcare providers of parents exercising or attempting to exercise their legal right to refuse vaccines as allowed by law, and

4) Legal, as the enactment of AB 2109 would impose an unconstitutional restriction on the free exercise of religion, and put healthcare providers in the position of attacking parents by arguing against a legislative presumption that supports exempting parents.

For all of these reasons, AB 2109 should be withdrawn and not supported or enacted into law by state legislators.

Respectfully Submitted,

A handwritten signature in black ink that reads "Alan Phillips". The signature is written in a cursive style and is positioned above a light-colored rectangular stamp or background.

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APPENDIX A

BILL NUMBER: AB 2109 INTRODUCED
BILL TEXT

INTRODUCED BY Assembly Member Pan
 (Principal coauthor: Senator Wolk)
 (Coauthor: Assembly Member Fuentes)

FEBRUARY 23, 2012

An act to amend Section 120365 of the Health and Safety Code,
relating to communicable disease.

LEGISLATIVE COUNSEL'S DIGEST

AB 2109, as introduced, Pan. Communicable disease: immunization exemption.

Existing law prohibits the governing authority of a school or other institution from unconditionally admitting any person as a pupil of any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, unless prior to his or her first admission to that institution he or she has been fully immunized against various diseases, as specified. Existing law prohibits admission or advancement of a pupil to the 7th grade level without a full immunization against hepatitis B.

Existing law exempts a person from the above-described immunization requirement if the parent or guardian or other specified persons file with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs. However, whenever there is good cause to believe that the person has been exposed to one of the diseases, a person may be temporarily excluded from the school or institution, as specified.

This bill would require, on and after July 1, 2013, the above-described letter or affidavit to be accompanied by a form prescribed by the State Department of Public Health that includes a written statement signed by a health care practitioner, as defined, that indicates that the health care practitioner provided the parent or guardian of the person, or the person, if an emancipated minor, who is subject to the immunization requirements with information regarding the benefits and risks of the immunization and the health risks of specified communicable diseases. The bill would also require

the form to include a written statement by the parent, guardian, or person, if an emancipated minor, that indicates that he or she received the information from the health care practitioner.

By imposing new duties upon local officials, this bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 120365 of the Health and Safety Code is amended

to read:

120365. (a) Immunization of a person shall not be required for admission to a school or other institution listed in Section 120335 if the parent or guardian or adult who has assumed responsibility for his or her care and custody in the case of a minor, or the person seeking admission if an emancipated minor, files with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs. ~~However, whenever there~~

(b) On and after July 1, 2013, a separate form prescribed by the State Department of Public Health shall accompany the letter or affidavit filed pursuant to subdivision (a). The form shall include both of the following:

(1) A written statement signed by a health care practitioner that indicates that the health care practitioner provided the parent or guardian of the person, or the person if an emancipated minor, who is subject to the immunization requirements of this chapter with information regarding the benefits and risks of the immunization and the health risks of the communicable diseases listed in Section 120335 to the person and to the community. This statement shall be signed not more than six months from the date when the person subject to the immunization requirements is first admitted to the school. If the person was admitted to the school prior to entering the 7th grade and is about to enter the 7th grade, then an additional letter or affidavit shall be filed with the written statement signed by the

health care practitioner not more than six months from the first day of school for a person about to enter the 7th grade.

(2) A written statement signed by the parent or guardian of the person, or the person if an emancipated minor, who is subject to the immunization requirements of this chapter that indicates that the signor has received the information provided by the health care practitioner described in paragraph (1). This statement shall be signed not more than six months from the date when the person subject to the immunization requirements is first admitted to the school. If the person was admitted to the school prior to entering the 7th grade and is about to enter the 7th grade, then an additional letter or affidavit shall be filed with the written statement signed by the parent not more than six months from the first day of school for a person about to enter the 7th grade.

~~—(b)—~~

(c) When there is good cause to believe that the person has been exposed to one of the communicable diseases listed in subdivision (a) of Section 120325, that person may be temporarily excluded from the school or

institution until the local health officer is satisfied that the person is no longer at risk of developing the disease.

(d) A copy of the signed written statement shall be accepted in lieu of the original form. A signed letter from the health care practitioner that references the person's name shall be accepted in lieu of a statement on the original form.

(e) For purposes of this section, "health care practitioner" means a physician and surgeon, licensed pursuant to Section 2050 of the Business and Professions Code, a nurse practitioner who is authorized to furnish drugs pursuant to Section 2836.1 of the Business and Professions Code, or a physician assistant who is authorized to administer or provide medication pursuant to Section 3502.1 of the Business and Professions Code.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

APPENDIX B

CALIFORNIA CODES

CALIFORNIA HEALTH AND SAFETY CODE

Division 105. COMMUNICABLE DISEASE PREVENTION AND CONTROL

Part 2. IMMUNIZATIONS

Chapter 1. EDUCATIONAL AND CHILD CARE FACILITY IMMUNIZATION REQUIREMENTS

Current through the 2011 Legislative Session

§ 120365.

Immunization of a person shall not be required for admission to a school or other institution listed in Section 120335 if the parent or guardian or adult who has assumed responsibility for his or her care and custody in the case of a minor, or the person seeking admission if an emancipated minor, files with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs. However, whenever there is good cause to believe that the person has been exposed to one of the communicable diseases listed in subdivision (a) of Section 120325, that person may be temporarily excluded from the school or institution until the local health officer is satisfied that the person is no longer at risk of developing the disease.