

## MEMORANDUM

DATE: APRIL 13, 2012

TO: THE NEW YORK STATE LEGISLATURE

FROM: ALAN G. PHILLIPS, ESQ.  
P.O. BOX 3473  
CHAPEL HILL, NC 27515-3473  
919-960-5172

RE: A343 and S384, Treatment for sexually transmissible diseases to minors without parent's or guardian's consent.

### ISSUES

1. Do A343 and S384 violate the U.S. Constitution?
2. Do A343 and S384 violate the New York Constitution?
3. Would voting for A343 and S384 violate New York legislators' member oath?
4. Do A343 and S384 violate federal statutory law?
5. Are A343 and S384 needed to address their underlying policy concerns?

## ANALYSIS

In relevant part, A343 and S384 state:

(B) A HEALTH CARE PRACTITIONER MAY PROVIDE HEALTH CARE RELATED TO THE PREVENTION OF A SEXUALLY TRANSMISSIBLE DISEASE, INCLUDING ADMINISTERING VACCINES, TO A PERSON UNDER THE AGE OF EIGHTEEN YEARS WITHOUT THE CONSENT OR KNOWLEDGE OF THE PARENTS OR GUARDIANS OF SUCH PERSON, PROVIDED THAT THE PERSON HAS CAPACITY TO CONSENT TO THE CARE, WITHOUT REGARD TO THE PERSON'S AGE, AND THE PERSON CONSENTS.

1. Do A343 and S384 violate the U.S. Constitution?

Yes, both the 14<sup>th</sup> 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 14<sup>th</sup> 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 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 14<sup>th</sup> Amendment. Parents’ right to parent their child must be respected by the State accordingly. Given the *Troxel* presumption, A343 and S384 effectively declare all parents in the State of New York to be unfit with regard to the authority given to minors to consent to vaccines, which procedure that carries a risk of injury and death. Worse, by giving this authority to minors, the State is pre-

suming, preposterously, that minors are fit to make the very decisions that their parents are simultaneously 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 or other stake in the minor's vaccine decision.

Next, A343 and S384 violate parents' First Amendment "free exercise" right to refuse immunizations for their children for religious reasons under N.Y. Pub. Health Law § 2164(9), since only parents may exercise a vaccine religious exemption for a minor child, and not minor children for themselves. Also, a consenting child may not know or agree with their parent's exemption decision, so cannot be relied on to make a decision consistent with their parent's potentially contrary exemption decision and right (and where the child and parent disagree on this point, which person's right prevails?). There may also be a violation of parents' Constitutional right to exercise a medical exemption for their children under N.Y. Pub. Health Law § 2164(8). 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.

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 how are healthcare providers to know if there is such a conflict in the first place?

2. Do A343 and S384 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 worship, 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).

3. Would voting for A343 and S384 violate New York legislators' member 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 A343 and S384

violate the U.S. and New York Constitutions as explained above, legislators would be violating their oath if they voted for these bills.

4. Do A343 and S384 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 without parental consent under state law if the provider is required under federal law (a higher legal authority than state law) to provide vaccine information to the child’s parent prior to administering the vaccine.

5. Are A343 and S384 needed to address their presumed underlying policy concerns?

No. There is no need to bypass parental decision-making except in emergency situations. New York already provides for this in N.Y. Pub. Health Law § 2504(4):

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.

If there is an emergency need to administer a vaccine that meets the conditions of this section, healthcare providers already have authority to do so. Absent an emergency, there is no need for such intervention. 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 also provides 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 Law § 2504(1). In these situations, the State is effectively declaring such persons emancipated with regard to medical decision-making. But outside of emancipation and emergency, there is neither need nor 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; educating parents about the availability of vaccines for their children generally; and possibly defining by statute, if necessary and appropriate, specific conditions in which relevant concerns may legitimately constitute a medical emergency and trigger authority on the part of physicians to exercise judgment on behalf of the parent.

## CONCLUSION

A343 and S384 violate the United States and New York Constitutions, the National Vaccine Injury Compensation Act (NVICP), and New York's vaccine medical and religious exemption statutes. They also invite medical providers to violate the NVICP, and in so doing, state board ethical rules as well. Furthermore, laws and procedures are already in place for the treatment of minors' medical emergencies. Absent an emergency, 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 even if it could be properly given to them. Finally, these bills do 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; physicians are not qualified to make the assessment, especially given the hurried environments in which most of them work.

For all of the above reasons, A343 and S384 should be withdrawn and not become law.



Respectfully Submitted, on behalf of  
Citizens of the State of New York,

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

Alan G. Phillips, Esq.  
P.O. Box 3473  
Chapel Hill, NC 27515  
N.C. State Bar No. 30436  
attorney@vaccinerights.com