MEMORANDUM

DATE: JANUARY 27, 2012

TO: THE NORTH CAROLINA STATE LEGISLATURE

FROM: ALAN G. PHILLIPS, ESQ.
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RE: N.C. GEN. STAT. § 90-21.5. MINOR'S CONSENT SUFFICIENT FOR CERTAIN MEDICAL HEALTH SERVICES: STATE AND FEDERAL CONSTITUTIONAL, STATUTORY AND REGULATORY CONFLICTS

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 any federal statutes?
3. Does N.C. Gen. Stat. § 90-21.5(a) violate the North Carolina Constitution?
4. Does N.C. Gen. Stat. § 90-21.5(a) violate other North Carolina statutes?
5. Assuming that the answer to any of the above questions is 'yes', can the concerns underlying the enactment of § 90-21.5(a) be addressed by other means?

BRIEF ANSWER

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.

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: "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." [emphasis added] *Parham v. J.R.*, 442 U.S. 584 (1979). In addition, to the extent that § 90-21.5(a)'s reference to the prevention of venereal and other reportable diseases means or includes vaccinations, parents have a First Amendment Constitutional right to refuse vaccines for religious reasons under N.C. Gen. Stat. § 130A-157, and a Constitutional right to refuse vaccines for qualifying medical conditions N.C. Gen. Stat. § 130A-156.

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

Yes. The National Vaccine Injury Compensation Program requires health care providers administering vaccines to children to provide the children's legal representatives with printed information about the vaccine's benefits and risks, and

about the existence of the National Vaccine Information Injury Compensation Program, prior to the administration of the vaccine. Therefore, to the extent that § 90-21.5(a)'s reference to the prevention of venereal and other reportable diseases means or includes vaccinations, § 90-21.5(a), on its face, circumvents, and therefore violates, this federal statutory law.

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

Yes. First, given the federal Constitutional violations cited above, § 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 under § 130A-157 is supported by the North Carolina Constitution's religious liberty clause. Accordingly, § 90-21.5(a) violates parents' State Constitutional rights.

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

Yes. First, N.C. Gen. Stat. § 7B-3400 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. Next, to the extent that § 90-21.5(a)'s reference to the prevention of venereal and other reportable diseases means or includes vaccinations, and since parents, but not children, may exercise medical and religious exemptions to vaccinations on behalf of their children pursuant to N.C.

Gen. Stat. §§ 130A-156 and 157 respectively, § 90-21.5(a) conflicts with and therefore violates these state exemption statutes.

5. Assuming that the answer to any of the above questions is 'yes', can the concerns underlying the enactment of § 90-21.5(a) be addressed by other means?

Yes. There is no compelling need for the State to usurp the rights of all of North Carolina's parents in order to address the lack of proper parental judgment of a few. Laws already exist to protect children from unfit parents. There are Child Protective Services agencies throughout the State; any who witnesses or suspect neglect or abuse must report their concerns to these agencies and may do so with anonymity. Also, healthcare professionals may already provide emergency services to children without parental consent pursuant to N.C. Gen. Stat. §§ 90-21.1 and 7B-3600.

Brief Conclusion: § 90-21.5(a) violates State and Federal Constitutional and statutory law. For these reasons, § 90-21.5(a) should be repealed.

ANALYSIS

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.

This subsection raises two fundamental legal concerns: 1) The rights of parents with regard to medical decision-making for their children, and 2) Insofar as § 90-21.5(a)'s reference to the prevention of venereal and other reportable diseases means or includes the administering of vaccines, the conflict between a child's right to consent to a vaccine and a parent's right to exercise a medical or religious exemption to immunizations under N.C. Gen. Stat. §§ 130A-156 and 157 respectively.

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 spoken directly to parental authority in child medical decision-making under the 14th Amendment, to wit:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters* , 268 U.S. 510, 535 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity,

> experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190. As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children," as was stated in *Bartley v. Kremens,* 402 F.Supp. 1039, 1047-1048 (ED Pa.1975), *vacated and remanded,* 431 U.S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. *See* Rolfe & MacClintock 348-349. <u>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</u> [emphasis added].

Parham v. J.R., 442 U.S. 584, 602 (1979). The Court in *Parham* 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. <u>Parents can and must make those judgments</u>." [emphasis added]. *Id.* at 603. As between parents and children, then, it is clear that the State may not give the medical decision-making authority of parents to their children. Indeed, the State may not even give this authority to healthcare professionals. 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 any given 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 their right to parent their child must be respected by the State accordingly. The Court's use of the phrase "normally no reason" implies that exceptions may occur, e.g., in emergency situations where it is impractical to obtain parental consent before applying life-saving medical treatment to a child. North Carolina has already addressed this need statutorily in N.C. Gen. Stat. §§ 90-21.1 and 7B-3600, which allows the medical treatment of children without parental consent in an emergency. But as to routine, non-emergency medical care, the 14th Amendment protects parental authority unless and until such time that parents are adjudicated to be unfit, and their authority is then assigned to another appropriate adult. Therefore, § 90-21.5(a), in effect, has declared all parents in the State to be unfit to the extent that authority is given to children to consent to their own medical care. To say that a child whose parents have been deemed statutorily to be unfit is himself fit to

make those decisions in place of the unfit parent is, respectfully, ludicrous. Minors, by definition, are legally incompetent and developmentally immature. This is why minors are prohibited from entering into contracts, smoking cigarettes, drinking, and all the other things minors can't do that adults can by virtue of having reached the age of majority. Similarly, minors are ill-equipped to make important medical decisions for themselves, and are particularly vulnerable to misjudgment and to being swayed by non-parent adults who may have a financial or other stake in the minor's decision.

Next, § 90-21.5(a)(i)'s reference to the prevention of venereal and other reportable diseases specifically, to the extent that such prevention means or includes vaccinations, violates parents' First Amendment "free exercise" right to exercise a religious exemption to immunizations pursuant to N.C. Gen. Stat. § 130A-157, since parents, but not children, may exercise that right. Additionally, qualifying children's parents, but not children, may have a Constitutional right to exercise a medical exemption to vaccines under N.C. Gen. Stat. § 130A-156, as implied by the Supreme Court in what is often referred to as the "seminal vaccine case," *Jacobson v. Mass.*, 197 U.S. 11 (1905), to wit:

> [W]e are not inclined to hold that the 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.

Id. at 39.

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

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" 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 the prevention of venereal and other reportable diseases referred to in § 90-21.5(a) means or includes vaccines, § 90-21.5(a) conflicts with this federal statute. Furthermore, in the unlikely event that health care providers administering a vaccine to a child under § 90-21.5(a) were to also comply with 42 U.S.C. § 300aa-26, their doing so risks putting a parent's potential choice to exercise an exemption for the child at odds with their child's potential contrary choice to get the vaccine. In that event, which state law should prevail? It is not clear, and unnecessary family discord may well result from this confusion in the law. The more likely scenario, however, may be that health care providers vaccinating a child under § 90-21.5(a) would 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. But in any event, healthcare providers, when vaccinating children without parental consent, if failing to first provide the information required under 42 U.S.C. § 300aa-26, would be violating federal law, and in so doing, therefore and necessarily also violating state medical or nursing board ethical rules that require adherence to state and federal laws.

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:

> **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, to wit:

> 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.

For these reasons, § 90-21.5(a) violates the North Carolina State Constitution.

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

Yes. Since parents have the right to exercise religious and medical exemptions to immunizations for their children pursuant to N.C. Gen. Stat. §§ 130A-156 and 157 respectively, but children do not have the authority to exercise vaccine exemptions for themselves, § 90-21.5(a) violates these state statutory parental rights.

5. Assuming that the answer to any of the above questions is 'yes', can the concerns underlying the enactment of § 90-21.5(a) be addressed by other means?

Yes. Presumably, the reason for enacting § 90-21.5(a) concerns the small percentage of parents who do not provide adequate medical care for their children. However, the State not only can't lawfully circumvent the parental authority of all parents in the State in order to address a minority of alleged parental problems as explained above, it needn't do so, either. First, healthcare professionals may treat children without parental consent in an emergency as set forth in N.C. Gen. Stat. §§ 90-21.1 and 7B-3600. Second, there are Child Protective Services agencies throughout the state to address the needs of neglected and abused minors. If a child's medical concern does not rise to the level of neglect or abuse, or otherwise constitute an emergency needing immediate medical intervention, then by definition, authority to make the decision lawfully must, and reasonably should,

remain solely within the discretion of the parent. In other words, if a child's medical concern isn't important enough to qualify for lawful State intervention, the State shouldn't and needn't concern itself with the matter at all. The role of the State is to provide a safety net to catch the most severe and important needs; not to impose on all citizens its representatives' or lobbyists' personal preferences in non-emergency, discretionary matters. § 90-21.5(a) represents an overreach of State authority into the private lives of citizens, and possibly an overreach of the pharmaceutical and medical lobbyists who stand to benefit unfairly from excessive imposition of unnecessary medical products and services resulting from the overreach.

§ 90-21.5(b) (as opposed to subsection (a) discussed above) provides for an emancipated minor to consent to his own treatment or that of his child. As emancipation requires a judicial proceeding, the court has had the opportunity to review each emancipation applicant's maturity, to see whether or not the applicant is prepared to take on an adult role prior to reaching the age of majority. See N.C. Gen. Stat. § 3500 *et seq*. Similarly, § 90-21.7 requires a court proceeding before an unemancipated minor may obtain an abortion without parental or guardian consent. In both situations, judicial discretion is required to determine if there is cause to give a minor, who is presumed to be legally incompetent, some adult rights despite not having achieved them automatically by virtue of having reached the age of

majority. Similarly, the State of North Carolina must require judicial scrutiny before a child can be allowed to consent to medical treatment. The State cannot lawfully give, but also need not give, sweeping consent to all minors, or even other adults, by statute, to avoid effectively declaring all parents in the State "unfit" with regard to the specific decision-making authority given to anyone else.

CONCLUSION

For the reasons cited above, N.C. Gen. Stat. § 90-21.5(a) violates the United States and North Carolina Constitutions, the National Vaccine Injury Compensation Act, and North Carolina's vaccine medical and religious exemption statutes. Medical decision-making for minors in non-emergency circumstances can and must remain solely with parents, unless and until a parent is adjudicated to be unfit; and in which case, the authority should be transferred to another qualified adult, unless the child in question is adjudicated sufficiently mature to make such decisions for himself. For all of these reasons, § 90-21.5(a) should be repealed, or substantially amended to remove all conflicts with state and federal law.

Respectfully Submitted,

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