

MEMORANDUM

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TO: Whom It May Concern

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RE: The Constitutionality of State Vaccine Religious Exemption Laws That Require Membership in an Organized Religion With Tenets Opposed to Immunizations and Related Issues

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ISSUES

1. Is a state vaccine religious exemption law that requires membership in an organized religion with tenets in opposition to the immunization requirements Constitutional, and if not, should it be amended to remove this requirement?
2. Is there other law supporting the proposition that religious exemption laws requiring membership in an organized religion should be amended?
3. Would amending these religious exemption laws raise any significant health concerns?
4. Does the state need to retain authority to scrutinize religious exemption claims?
5. Does the state need to notify citizens of the exemption option?

ANALYSIS

I. Background

While the legal consensus appears to be that the Constitution doesn't require states to offer a vaccine religious exemption,¹ forty-eight states presently do (all but Mississippi and West Virginia)—a strong testament to the value we as a society place on

¹ 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.")

religious freedom, especially considering the prevailing belief that mandatory vaccination is both necessary and effective.² Despite states' right not to enact vaccine religious exemption laws, once a state does, fundamental Constitutional rights apply, due to the Fourteenth Amendment's due process clause. These fundamental rights include the First Amendment's free exercise and establishment clauses. Accordingly, each of the 48 state vaccine religious exemption laws is potentially subject to Constitutional scrutiny.

In recent decades, state and federal courts have scrutinized the Constitutionality of vaccine religious exemption statutes requiring membership in an organized religion with tenets opposed to the immunization requirements in Arkansas, Maryland, Massachusetts, Mississippi, and New York. In each instance, the court held that the statute in question violated the Constitution. Still other states have made changes in law or procedure without being prompted by litigation, in seeming response to the more recent federal court rulings. Each of these is discussed below.

II. State Court Rulings

Religious exemption statutes were challenged and struck down in state courts after being held to be unconstitutional and severable in Massachusetts in 1971,³ Mississippi in 1979,⁴ and Maryland in 1982.⁵ In Massachusetts and Maryland, this was due to requirements involving membership in an organized religion. These two states have since passed revised religious exemption statutes that do not require membership in an organized religion. See, e.g., Md. Educ. Code § 7-403, and Mass. Gen. Laws ch. 76 § 76:15. Vaccination and immunization. The Mississippi court ruled that a vaccine religious exemption violates the 14th Amendment by discriminating "against the vast majority of children whose parents have no such religious convictions," which ruling has since left Mississippi without the ability to have a vaccine religious exemption option at

² However, since an average of about 90% of infectious disease decline in the 1900's preceded vaccines, and diseases without vaccines declined along with those with vaccines; some diseases actually increased following the introduction of vaccines, the widespread belief that mandatory vaccination is necessary is not absolutely clear. In addition, experts continue to debate the safety and effectiveness of vaccines despite the consistent reassurance of government authorities. See, e.g., "Dispelling Vaccination Myths: An Introduction to the Contradictions Between Medical Science and Vaccination Policy" at <http://vaccinerights.com/pdf/DispellingVaccinationMythsx.pdf>

³ Dalli v. Board of Education, 358 Mass. 753, 267 N.E.2d 219 (1971).

⁴ Brown v. Stone, 378 So.2d 219 (Miss. 1979).

⁵ Davis v. State, 294 Md. 370, 451 A.2d 107 (1982).

all. However, this ruling remains an anomaly to this day; no subsequent state or federal court ruling has concurred with this ruling.

III. Federal Court Rulings

In 1976, the court in Kleid v. Board of Educ., 406 F.Supp. 902 (W.D. Ky. 1976), held that Kentucky's exemption requirement that applicants be members of a "nationally recognized and established church or religious denomination" did not violate the First Amendment's Establishment Clause. However, Kentucky later modified its religious exemption statute, which modification made it consistent with subsequent federal court rulings discussed below.

In Sherr v. Northport-East Northport U. Free, 672 F. Supp. 81, 98 (E.D.N.Y. 1987) the court held that the state must offer the exemption to all persons who sincerely hold religious beliefs," id. at 98, and that New York's law requiring membership in a "recognized religious organization" violated "both the establishment and free exercise clauses of the First Amendment to the United States Constitution," id. at 99. The following year, the Second Circuit held that it "is sufficient if the belief 'occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.'" Mason v. General Brown Cent. School Dist., 851 F.2d 47 (2nd Cir. 1988) (quoting United States v. Seeger, 380 U.S. 163, 166, 85 S.Ct. 850, 854 (1965)). In 1989, the court in Lewis v. Sobel, 710 F. Supp. 506 (S.D.N.Y. 1989) upheld a religious exemption for a child whose parents' personal religious beliefs sprung from their past membership in a community of people from the Chumash, Navaho and Hopi tribes. Id. at 508. Lewis explained that the plaintiffs' not being "members of an organized religion does not preclude them from protection under the Free Exercise clause if their beliefs are in fact religious." The court in Lewis also found that the parents' First Amendment rights had been violated and awarded money damages. In a later case involving Jewish parents, Berg v. Glen Cove City School Dist., 853 F. Supp. 651 (E.D.N.Y. 1994), the court upheld the religious exemption for two Jewish children, noting that the basis for the parents' opposition to immunization was their own interpretation of passages from certain Hebrew scripture; the court was not persuaded by the defendant's witness' testimony that "there is nothing in the teaching of the Jewish religion that would proscribe immunization for children . . ." Id. at 655. More recently, the court in Farina v. The Board of Education, 116 F. Supp.2d

503, 507 (S.D.N.Y. 2000) held that “[t]he 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).

In 2002, an Arkansas federal district court ruled that state’s religious exemption clause requiring membership in an organized religion with tenets in opposition to the immunization requirements violated the First and Fourteenth Amendments. McCarthy v. Boozman, 212 F.Supp.2d 945 (W.D.Ark. 2002). Shortly afterwards, the Arkansas legislature rendered moot an appeal of that decision to the Eighth Circuit by enacting both a philosophical exemption and a revised religious exemption to immunizations for Arkansas citizens.

IV. Other State Responses

In apparent response to the more recent federal court rulings cited above, some states have changed their laws and/or their exemption procedures. E.g., Kentucky changed its vaccine religious exemption law in 2005, removing a prior requirement of membership in an organized religion (despite the prior federal court ruling in Kentucky supporting the prior statute noted above). Ky. Rev. Stat. Ann. § 214.036. Exceptions to testing or immunization requirement. The Iowa Department of Public Health designed a form for exercising a vaccine religious exemption that does not require the applicant to state their beliefs or name their religion,⁶ despite a statutory requirement that applicants provide an affidavit “stating that the immunization conflicts with the tenets and practices of a recognized religious denomination of which the applicant is an adherent or member.” Iowa Code § 139A.8. Immunization of children.

V. Other Support for Statutory Reform: Religious Freedom Restoration Acts

In 1993, Congress enacted the Religious Freedom Restoration Act, intended to prevent laws that substantially burden a person’s free exercise of religion. 40 U.S.C. § 2000bb et seq. When the U.S. Supreme Court ruled that the Act did not apply to the states,⁷ many states responded by enacting their own state Religious Freedom

⁶ http://www.idph.state.ia.us/ADPER/common/pdf/immunization/products/cert_of_immunization.pdf

⁷ City of Boerne v. Flores, 521 U.S. 507 (1997)

Restoration Acts or comparable legislation. The language in these state acts may be inconsistent with state religious exemption laws that require membership in an organized religion. E.g., in 2000, Oklahoma enacted the Oklahoma Religious Freedom Act, which reads as follows:

Oklahoma Religious Freedom Act

§ 253. Government Burden on Religious Freedom.

A. Except as provided in subsection B of this section, no governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.

B. No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:

1. Essential to further a compelling governmental interest; and
2. The least restrictive means of furthering that compelling governmental interest.

The “least restrictive means” clause is consistent with the more lenient state vaccine religious exemption statutes and the more recent federal legal precedent that allow the exemption for applicants with sincerely held religious beliefs opposed to the immunization requirements, whether or not they are members or an organized religion, and regardless of which church they belong to if they are.

States that do not have a Religious Freedom Restoration Act may wish to consider the merits of enacting such legislation, and in the meantime, the rights and interests these laws are designed to offer and protect, when considering enforcement or modification of present vaccine religious exemption laws that require membership in an organized religion. The “least restrictive means” of limiting the exercise of a vaccine religious exemption while still meeting the state’s compelling state interest to protect its citizens from infectious diseases may be to allow exemptions for all applicants who have sincerely held religious beliefs, and by removing (and perhaps not enforcing in the meantime) requirements that applicants be members of an organized religion with tenets in opposition to the immunization requirements.

VI. Revised Vaccine Religious Exemption Laws Do Not Pose a Significant Health Risk

Since most if not all states have laws that enable the state to require immunizations of exempt persons in times of local outbreaks or declared emergencies, the enactment of broad exemption laws, religious or philosophical, does not present any significant health concerns, even though they may raise the hypothetical prospect of increased numbers of exempt persons, during such events. Under routine circumstances, the exercise of exemptions poses no significant health risk, because:

A. Medically: The widely accepted herd immunity theory tells us that as long as most are vaccinated, all need not be vaccinated for the “herd” to be protected. Historically, exemptions have, presumably, been tolerated due to the overall small percentage of persons exercising exemptions. However, increases in the numbers of exempt persons may not be a concern, either, as it pertains to the herd immunity theory. A recent outbreak of mumps in New York occurred despite a nearly 80% vaccination rate.⁸ Measles, mumps, small pox, pertussis, polio and Hib outbreaks have all occurred in vaccinated populations.⁹ The CDC even reported a measles outbreak in a documented 100% vaccinated population.¹⁰ A study examining this phenomenon concluded, “The apparent paradox is that as measles immunization rates rise to high levels in a population, measles becomes a disease of immunized persons.”¹¹ So while

⁸ <http://articles.mercola.com/sites/articles/archive/2010/03/06/vaccine-failure--over-1000-get-mumps-in-ny-in-last-six-months.aspx>

⁹ (a) Measles vaccine failures: lack of sustained measles specific immunoglobulin G responses in revaccinated adolescents and young adults. Department of Pediatrics, Georgetown University Medical Center, Washington, DC 20007. *Pediatric Infectious Disease Journal*. 13(1):34-8, 1994 Jan.;

(b) Measles outbreak in 31 schools: risk factors for vaccine failure and evaluation of a selective revaccination strategy. Department of Preventive Medicine and Biostatistics, University of Toronto, Ont. *Canadian Medical Association Journal*. 150(7):1093-8, 1994 Apr 1;

(c) Haemophilus b disease after vaccination with Haemophilus b polysaccharide or conjugate vaccine. Institution Division of Bacterial Products, Center for Biologics Evaluation and Research, Food and Drug Administration, Bethesda, Md 20892. *American Journal of Diseases of Children*. 145(12):1379-82, 1991 Dec.;

(d) Sustained transmission of mumps in a highly vaccinated population: assessment of primary vaccine failure and waning vaccine-induced immunity. Division of Field Epidemiology, Centers for Disease Control and Prevention, Atlanta, Georgia. *Journal of Infectious Diseases*. 169(1):77-82, 1994 Jan. 1;

(e) Secondary measles vaccine failure in healthcare workers exposed to infected patients. Department of Pediatrics, Children's Hospital of Philadelphia, PA 19104. *Infection Control & Hospital Epidemiology*. 14(2):81-6, 1993 Feb.;

(f) MMWR (Morbidity and Mortality Weekly Report) 38 (8-9), 12/29/89.

¹⁰ MMWR. 33(24),6/22/84.

¹¹ Failure to reach the goal of measles elimination. Apparent paradox of measles infections in immunized persons. Review article: 50 REFS. Dept. of Internal Medicine, Mayo Vaccine Research Group, Mayo Clinic and Foundation, Rochester, MN. *Archives of Internal Medicine*. 154(16):1815-20, 1994 Aug 22.

contemporary herd immunity theory suggests that states need to have a majority of citizens vaccinated at all times, the benefit and need for mass immunization with regard to that theory are not scientifically clear,¹² and

B. Legally, there is a legislative presumption that the exercise of an exemption will not create a significant health risk, for if exercising an exemption would create a significant health risk, state legislatures would not have enacted the exemption statutes in the first place. Furthermore, given the “back-up” procedures that provide for immunization or quarantine of non-immunized persons in emergency situations, states have the means of preventing exempt persons from creating a significant health risk in the future.¹³

VII. Does the State Need to Retain Authority to Scrutinize Vaccine Religious Exemption Claims?

Under the precedent from the New York federal district courts and the Second Circuit, the only requirements for a vaccine religious exemption are that beliefs opposed to immunization requirements be religious and sincerely held. Whether or not the state can scrutinize a vaccine religious exemption claim is a separate matter that varies from state to state depending on the specific wording of the statutes. E.g., in Florida and Wyoming, state appellate courts held that based on the plain language of the exemption law, the state could not scrutinize the exemption claim. Department of Health v. Curry, 722 So.2d 874 (Fla.App. 1 Dist. 1998), LePage v. State, 2001 WY 26, 18 P.3d 1177 (2001). Other states do retain the right to scrutinize; e.g., New York reportedly has some school districts that require religious exemption applicants to submit to an interview in which parents are strongly discouraged from exercising the exemption. However, given state laws that can require vaccination of exempt persons in emergencies, and the potential for improper entanglement of government in religion in the act of scrutinizing religious exemptions beliefs, many states have wisely opted for statutory language that does not to allow the state to engage in such analyses. This may also be a prudent financial decision for states as well.

¹² Or, put another way, if vaccines work, how does an unvaccinated person pose a risk to a vaccinated one?

¹³ This authority stems from Jacobson v Massachusetts, 197 U.S. 11 (1905), a U.S. Supreme Court case considered to be the seminal vaccine case.

VII. Should the State be Required to Notify Citizens of Exemption Options?

Few states have laws requiring the state to notify citizens of vaccine exemption options when, e.g., schools inform parents that their children's immunizations have to be up to date by a certain time or the children will be excluded from school; and it is likely that few school nurses and administrators mention exemptions to parents unless asked. While the intent is honorable—maximize immunization rates for the protection of the community—failure to mention exemption options amounts to the state endorsing one of two or more legal options. The state should be neutral with regard to its citizens exercise of legal rights. Therefore, exemption laws should be accompanied by statutory provisions requiring the state to refer to the exemption options any time it refers to the immunization requirements. See, e.g., Wis. Stat. § 252.04 (Appendix).

CONCLUSION

The majority of courts that have assessed the Constitutionality of vaccine religious exemption statutes requiring membership in an organized religion with tenets opposed to the immunization requirements have held such laws to be unconstitutional. Some states have, without litigation, modified their religious exemption statutes and/or procedures to be consistent with the majority view. The more recent federal legal precedent is consistent with state and federal Religious Freedom Restoration Acts and the majority of states' vaccine religious exemption laws, and this provides an additional basis for the modification of vaccine religious exemption laws requiring church membership. Finally, since current state laws provide for the potential immunization or quarantine of exempt persons during outbreaks and emergencies, states already have an effective means of addressing any infectious disease concerns that broader exemption laws may raise. These facts support the need to reform the remaining minority of state vaccine religious exemption laws that still require membership in an organized religion with tenets in opposition to the immunization requirements, to remove the requirement church membership requirement.

States should also require that whenever notifying residents of vaccine requirements, the state also notify residents of the exemption rights and options, to avoid

the state being in the biased position of endorsing only one of two or more legal options for its citizens.

The attached APPENDIX provides examples of current state laws that do not require membership in an organized religion with tenets in opposition to the immunization requirements.

APPENDIX

Excerpts from state statutes that do not require membership in an organize religion:

FLORIDA

Title XLVIII. K-20 EDUCATION CODE

Chapter 1003. PUBLIC K-12 EDUCATION

Part II. SCHOOL ATTENDANCE

§ 1003.22. School-entry health examinations; immunization against communicable diseases; exemptions; duties of Department of Health.

. . .

(5) The provisions of this section shall not apply if:

(a) The parent of the child objects in writing that the administration of immunizing agents conflicts with his or her religious tenets or practices;

KENTUCKY

Title 18. PUBLIC HEALTH

Chapter 214. DISEASES

General Provisions

§ 214.036.Exceptions to testing or immunization requirement

Nothing contained in KRS 158.035, KRS 214.010, KRS 214.020, KRS 214.032 to KRS 214.036, and KRS 214.990 shall be construed to require the testing for tuberculosis or the immunization of any child at a time when, in the written opinion of his attending physician, such testing or immunization would be injurious to the child's health. Nor shall KRS 158.035, KRS 214.010, KRS 214.020, KRS 214.032 to KRS 214.036, and KRS 214.990 be construed to require the immunization of any child whose parents are opposed to medical immunization against disease, and who object by a written sworn statement to the immunization of such child on religious grounds. Provided, however, that in the event of an epidemic in a given area, the Cabinet for Health and Family Services may, by emergency regulation, require the immunization of all persons within the area of epidemic, against the disease responsible for such epidemic.

History. Effective: June 20, 2005

NEW MEXICO

Chapter 24. Health and Safety

Article 5. Immunization

§ 24-5-3. Exemption from immunization.

A. Any minor child through his parent or guardian may file with the health authority charged with the duty of enforcing the immunization laws:

...

(3) affidavits or written affirmation from his parent or legal guardian that his religious beliefs, held either individually or jointly with others, do not permit the administration of vaccine or other immunizing agent.

NEW YORK

Public Health

Article 21. CONTROL OF ACUTE COMMUNICABLE DISEASES

Title 6. POLIOMYELITIS AND OTHER DISEASES

§ 2164. Definitions; immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus

...

9. This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.

NORTH CAROLINA

Chapter 130A. Public Health

Article 6. Communicable Diseases

Part 2. Immunization

§ 130A-157. Religious exemption

If the bona fide religious beliefs of an adult or the parent, guardian or person in loco parentis of a child are contrary to the immunization requirements contained in this Chapter, the adult or the child shall be exempt from the requirements. Upon submission of a written statement of the bona fide religious beliefs and opposition to the immunization requirements, the person may attend the college, university, school or facility without presenting a certificate of immunization.

History. Amended by [2002-179](#), [s. 17](#), eff. 10/1/2002.

WISCONSIN

Chapter 252. Communicable diseases

§ 252.04. Immunization program.

. . .

(3) The immunization requirement is waived if the student, if an adult, or the student's parent, guardian or legal custodian submits a written statement to the school, day care center or nursery school objecting to the immunization for reasons of health, religion or personal conviction. At the time any school, day care center or nursery school notifies a student, parent, guardian or legal custodian of the immunization requirements, it shall inform the person in writing of the person's right to a waiver under this subsection.

[emphasis added]

WYOMING

Title 21. EDUCATION

Chapter 4. PUPILS

Article 3. RIGHT TO ATTEND SCHOOL

§ 21-4-309. Mandatory immunizations for children attending schools; exceptions

(a) Any person attending, full or part time, any public or private school, kindergarten through twelfth grade, shall . . .

. . . Waivers shall be authorized by the state or county health officer upon submission of written evidence of religious objection or medical contraindication to the administration of any vaccine. In the presence of an outbreak of vaccine preventable disease as determined by the state or county health authority, school children for whom a waiver has been issued and who are not immunized against the occurring vaccine preventable disease shall be excluded from school attendance for a period of time determined by the state or county health authority, but not suspended . . .