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MEMORANDUM

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RE: The Authority of the Massachusetts Department of Public Health to Require
Immunization as a Condition for Entry into Schools and to Require Exclusion of
Infectious or Susceptible Students Under Isolation and Quarantine Regulations

INTRODUCTION

This memorandum explains the legal underpinnings of the authority of the Massachusetts Department of Public Health (“DPH”) to require immunization and quarantine in a school setting. After more than a century of favorable case law, it is clear that the DPH has the duty and authority to protect the health and safety of the public and that both immunization and quarantine in the school context are reasonable means by which to achieve that goal. The existing statutes and DPH regulations accommodate families’ religious beliefs relating to immunization to the extent possible, while at the same time recognizing that the rights of all individuals, including

those with sincere religious beliefs, must at times defer to society's interest in protecting the public against the spread of disease.

DISCUSSION

The authority of the DPH to require school immunization and quarantine in a school context arises from the “police power” all states possess to regulate individuals and private interests for the good of the public health. This power has been defined as:

The inherent authority of the state (and, through delegation, local government) to enact laws...to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests, [i.e.] personal interests in autonomy, privacy, association, and liberty.¹

The Massachusetts legislature has granted the DPH and local boards of health wide discretion to determine what activities they consider injurious or unhealthful and the manner in which to address these concerns, so long as any actions or regulations are consistent with state and federal constitutional principles. See M.G.L. c. 111, §§ 5, 6 and 7. Police powers in the context of public health include all laws and regulations directly or indirectly intended to improve morbidity and mortality status in the community, including immunization and quarantine statutes.²

The United States legal system has long recognized that the prevention of disease is one of the most important goals of government and an appropriate subject of the state’s police powers. In Jacobsen v. Massachusetts, the U.S. Supreme Court first identified mandatory vaccination of the general public as within the police power of the state. 197 U.S. 11 (1905). The plaintiff brought equal protection and due process claims in asserting that a citywide smallpox vaccination requirement violated his liberty interests of bodily integrity and decisional privacy. *Id.* at 25. The Court found that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members” consistent with the state’s traditional police powers. *Id.* at 27. Further, individual liberty “does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.” *Id.* at 26.

While the Court in Jacobsen refused to fully delineate the authority encompassed by the police power, it established some judicial considerations of the constitutional limits of state public health regulation. First, the law must be premised upon a true public health necessity in order to prevent the state from acting, or mandating public action, “in an arbitrary, unreasonable manner.” *Id.* at 28. Second, the methods adopted to achieve the public health goal must have a “real or substantial relation” to protection of the public health, and cannot be “a plain, palpable invasion of rights.” *Id.* at 31. Third, a court may intervene if a regulation is so oppressive that the intervention is gratuitously onerous or unfair. *Id.* at 38-39. Finally, the measure itself should

¹ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint*, 48 (California/Milbank Series, 2000).

² Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 *Health Matrix* 265, 284-285 (2001).

not pose a health risk to the subject, because such knowing harm would be “cruel and inhumane.” *Id.* at 39-40.

This legal standard is highly deferential, indicating that the Court would support any reasonable state regulatory measure that is not irrational, indiscriminate or enacted in bad faith.³ While the Supreme Court acknowledged its duty to “give effect to the Constitution,” it noted that it was not the function of a court to determine which of many strategies would be the most effective for the protection of the public health against disease. *Id.* at 36. Rather, it was for the legislature to determine “in the light of all the information it had or could obtain,” having balanced public and private interests, which method would most properly guard the public health and safety. *Id.* As stated above, the Massachusetts legislature has delegated considerable authority to the Department of Public Health, whose actions would be measured by these standards..

A. The Massachusetts Legislature and DPH have the Authority to Require Immunization as a Condition for Entry into Massachusetts Schools

State immunization requirements have been around for almost 200 years, and have consistently been upheld by the courts. Massachusetts created the first school vaccination law in 1827.⁴ Currently, every state across the country requires school immunization as a reasonable means to protect the health of the public from the spread of disease,⁵ and courts at state and federal levels have consistently upheld the validity of compulsory school vaccination laws.

MGL c. 76, §15 currently provides that no child shall be admitted to school except upon presentation of a physician’s certificate that the child has been successfully immunized against diphtheria, pertussis, tetanus, measles, polio and such communicable diseases as specified by the Department of Public Health. The statute contains exceptions where a physician certifies that the child would be endangered by such vaccination, or where, in the absence of an emergency or epidemic, the parent states in writing that the vaccination would conflict with sincere religious beliefs. In its regulations, at 105 CMR 220.000, DPH has created an exception for students who can provide medical documentation of immunity.

The DPH bases its regulations upon a finding that the prevention of the spread of communicable diseases is a public health necessity in light of the debilitating effects such contagious diseases can have on children, immunosuppressed individuals and the community at large, as well as the risk of transmission of such diseases in school settings. This finding is consistent with recommendations from the Federal Centers for Disease Control.⁶ In addition, the DPH has determined that childhood vaccination for particular diseases is highly effective, with relatively few side effects, so that mandatory immunization is substantially and reasonably related to the goal of preventing the spread of disease. Further, the exemption for individuals with a verifiable history of a particular disease protects against unnecessary vaccination. Finally, the statute and

³ See *Id.*

⁴ John Duffy, *School Vaccination: The Precursor to School Medical Inspection*, 33 *J. Hist. Med.* 344, 345 (1977).

⁵ As of 2002, all states in the nation require a set of immunizations for entry into public schools including measles, rubella, diphtheria and tetanus. The vast majority, with limited exceptions, also requires pertussis, mumps and polio. Thirty states, including Massachusetts, require the varicella vaccination.

⁶ “Prevention of Varicella: Recommendations of the Advisory Committee on Immunization Practices,” *MMWR*, 45(RR11);1-25, July 12, 1996.

related regulations allow exemptions to immunization if a child can provide a doctor's note indicating the presence of a medical contraindication, thereby avoiding potential harm to the child. 105 CMR 220.000. Therefore, the underlying justification of the DPH regulations appears highly likely to meet the Jacobsen test as an appropriate exercise of the police power.

The U.S. Supreme Court has long recognized that a state may require public and private school children to be immunized as a condition of school entrance. In an early case, the Supreme Court rejected the notion that school vaccination laws are discriminatory because they mandate vaccination among children, but not others. Adams v. Milwaukee, 228 U.S. 572 (1913). The Court found that lawmakers have the discretion to apply vaccination and immunization laws against selected groups, like school children, without violating the equal protection clause, so long as protected classes, such as race and religious affiliation, are not implicated. *Id.*

In Spofford v. Carleton, the Massachusetts Supreme Judicial Court ("SJC") evaluated the reasonableness of a school regulation implementing a precursor Massachusetts statute that required immunization before admission to school unless the child could present a doctor's note indicating he or she was medically unfit for vaccination. 238 Mass. 528, 530, 131 N.E. 314 (1921). Recognizing the "common knowledge" notion that "a public school composed of pupils from all sections of the city may become at any moment a source of danger to the public health unless the laws relating to vaccination are strictly enforced," the Court found that regulations could make school attendance contingent upon receipt of preventive immunization. *Id.* at 532. Therefore, the requirement of either immunization or a doctor's note indicating contraindication was not unreasonable, arbitrary or discriminatory. *Id.* This decision indicates that action taken in the school context to prevent an epidemic that does not currently exist is equally as reasonable as immunization to prevent the spread of an existing epidemic in the community.

The U.S. Supreme Court shortly thereafter adopted the rationale of the Spofford decision. In Zucht v. King, the Court found that a city ordinance making a certificate of vaccination a pre-condition for school attendance did not violate the 14th amendment due process or equal protection rights of a child excluded from school for failing to comply with immunization requirements. 260 U.S. 174, 176-77 (1922). The Court based its reasoning upon many well-settled principles, including the Jacobsen decision, *supra*, indicating that compulsory vaccination is within the police power. The Court also noted that municipalities may delegate broad discretion to local officials in matters relating to the creation and enforcement of health laws. Finally, citing Adams, *supra*, the Court found that establishing immunization requirements aimed solely at students did not violate the equal protection clause. Based on this precedent, such ordinances "confer not arbitrary power, but only that broad discretion required for the protection of the public health." *Id.* at 176-177.

B. Immunization Requirements are not an Unconstitutional Burden on Religious Freedom

The First Amendment of the United States Constitution states "Congress shall make no law [1] respecting an establishment of a religion or [2] prohibiting the free exercise thereof..." . The first clause, the Establishment Clause, forbids governments from passing laws that favor any particular religious preference, and the second clause, the Free Exercise Clause, permits

individuals to practice their religion freely without interference from government entities.⁷ Parents who oppose immunization regulations have argued that requiring a student to submit to immunization that is inconsistent with his or her religious practices is counter to the Free Exercise Clause.

Nonetheless, requesting a child to submit to immunization, even if counter to the child's or parents' religious beliefs, is "generally viewed as constitutional."⁸ Long before statutorily established religious exemptions to school immunization requirements existed, the Massachusetts SJC and the Supreme Court recognized that religious beliefs must sometimes yield to regulations that protect the general health of the public.

Analyzing a precursor immunization statute that did not yet contain a religious exemption for school immunization, the Massachusetts SJC found that a defendant father was properly convicted and penalized for failing to send his child to school due to his refusal to vaccinate his children (a condition for attendance), notwithstanding his religious beliefs concerning vaccination. Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101 (1929). The court found that the defendant's religious views did not entitle him to an exception to the otherwise valid statute, citing Jacobsen and Spofford, *supra*.

In the case of Prince v. Massachusetts, the United States Supreme Court adopted the prevailing precedent that parents' religious freedom must give way to the state's interest in protecting the health of the public and individual children. In Prince, the defendant mother argued that a child labor law restricting her ability to allow her child to sell religious materials on the street was a violation of her 1st amendment right to free exercise of religion. 321 U.S. 158, 64 S. Ct. 438 (1944). The Court noted that had only secular interests been involved, the regulation designed to protect the health and welfare of children would have been concededly valid. *Id.* at 165. Although the Court acknowledged the competing interests at stake, it found 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" through violation of either compulsory vaccination laws or child labor laws such as these. 321 U.S. 158, 166-67 (1944). While recognizing the private realm of family life, the Court concluded that "neither rights of religion nor rights of parenthood are beyond limitation." *Id.* 166-167. See also Cavielzel v. Great Neck Public Schools, 739 F. Supp. 2d 273 (2010) ("the Court finds that the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York's compulsory inoculation law"). Such legal precedent provides a clear basis for concluding that the right to free exercise of religion can at times be subordinated to society's interest in protecting the public against the spread of disease via mandatory school immunization.

The Massachusetts school immunization statute, however, along with almost every like statute in the nation, contains an exemption on religious grounds from the immunization requirement, out of respect for the religious practices of families in the Commonwealth. While not constitutionally obligated to do so, the existing statute, allowing an exemption for "sincere

⁷ See Erwin Chemerinsky, *Constitutional Law*, 967-68 (1997).

⁸ Lawrence Gostin, et. al., *School Vaccination Requirements: Historical, Social and Legal Perspectives*, 90 Ky. L.J. 831, notes 196, 198, 199 (2001/2002) (noting state supreme court decisions from Mississippi, Arkansas, and New York upholding mandatory immunization, notwithstanding religious objection).

religious beliefs,” recognizes individuals’ free exercise of religion without unconstitutionally favoring particular religious preferences. This clause has been upheld against first amendment and equal protection claims in other jurisdictions. See e.g. Farina v. Board of Educ. of City of New York, 116 F. Supp. 2d 503, 148 Ed. Law Rep. 168 (S.D.N.Y. 2000) (finding that a religious exemption to the school immunization requirement for those whose opposition stems from “genuine and sincere religious beliefs” is valid); Turner v. Liverpool Cent. School, 186 F. Supp. 2d 187, 162 Ed. Law Rep. 256 (N.D. N.Y. 2002) (religious exemption did not violate the establishment clause because it promoted no particular religious point of view, did not have the primary effect of advancing or inhibiting religion, and did not require the state to assess validity of students’ religious beliefs in a manner that would cause excessive entanglement of church and state).

C. School Immunization Requirements are to be Enforced by Refusing to Admit Non-compliant Students

M.G.L. c. 76, s. 15 and DPH regulations, at 105 CMR 220.000, in establishing immunization requirements, also provide that a student may not be admitted to school unless he or she meets these immunization requirements. The U.S. Supreme Court and the Massachusetts SJC have upheld the authority of a local board of health to prevent a child from entering school if he or she is neither vaccinated nor qualified for an exemption. See Zucht, Spofford, *supra*.

The highest courts of several states across the nation have also ruled that such action is well within the authority of local public health officials. The Supreme Court of Mississippi, for example, has stated that “the protection of the great body of school children... against the horrors of crippling and death resulting from poliomyelitis or smallpox or from one of the other diseases against which means of immunization are known and have long been practiced successfully, demand that children who have not been immunized should be excluded from the school community until immunization has been accomplished.” Brown v. Stone, 378 So. 2d 218, 223 (1979). The highest court of Minnesota has stated that “the welfare of the many is superior to that of the few” and since “the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools.” State v. Zimmerman, 90 N.W. 783 (Minn. 1902). Similarly, the Supreme Court of North Carolina has noted, regarding an unvaccinated plaintiff, there “is no reason that the children of the public school should be exposed to like risk of infection, through her, or others in like case. Though the school children are vaccinated, there are always some whose vaccination is imperfect, and danger to them should not be increased by admitting those not vaccinated at all.” Hutchins v. Durham, 137 N.C. 68, 71 (1904). Finally, the Supreme Court of Texas noted that its ruling allowing the exclusion of unvaccinated children from school “[was] simply to deny these minors the privileges of the schools until they comply with the ordinance passed for their own protection and for the protection of their families, along with all others residing in the community.” New Braunfels v. Waldschmidt, 207 S.W. 303, 311 (Tex. 1918). See also Workman v. Mingo County Schools, Slip Copy, 2011 WL 1042330 (C.A. S.C.).

Although Massachusetts statutes and regulations do not dictate procedures for enforcing exclusion from schools, it is a long-established legal precedent that courts will defer to the

decisions of local authorities on questions involving the local health of a community. See Laurel Hill Cemetery v. San Francisco, 216 US 358 (1910); Friedman v. Clarkstown Central School District, 75 Fed. App. 815 (2003); Zucht v. King, *supra*. Given this doctrine, it follows that municipalities have broad discretion relating to the enforcement mechanisms they choose in upholding school immunization requirements.

D. Schools are to Exclude Unimmunized Students When Necessary to Protect the Public Health, as Specified in Department Regulations

The vast majority of children are vaccinated. As previously noted, however, the state has made a policy decision to allow admission of specified groups of students into schools without immunization. Students who are not immunized against particular contagious diseases are regarded as susceptible to those diseases. In order to prevent the spread of such communicable diseases among and through such students, DPH and local officials have long interpreted the provisions on admission to school as operating independently from those governing isolation and quarantine. That is, admission of unimmunized students to school under an exemption would not preclude a school, local board of health, or the DPH from subsequently excluding those same students where their presence poses a risk to the public health.

Massachusetts law, at c. 111, ss. 5, 6, 7, 95 and 104, and DPH regulations, at 105 CMR 300.00, authorize the DPH and local boards of health to initiate isolation and quarantine procedures upon the report of a case or a suspected case of specified reportable disease. The standards are to be applied to all individuals, regardless of religious or other beliefs, who have not met immunization requirements and therefore are regarded as susceptible to a particular disease. The standards include a requirement for exclusion of students from schools under specified conditions.

Courts have found that such isolation and quarantine restrictions violate neither the Establishment Clause nor the Free Exercise Clause of the Constitution. Courts have long upheld the authority of the state to isolate and quarantine individuals posing a threat to the public health. Although courts recognize that such restriction may interfere with the liberty interests of individuals, “[t]he notion that the liberty of the individual must sometimes be restricted for the good of the community is one that cannot be seriously questioned.”⁹ Given judicial recognition of the state’s authority to mandate immunization of the general public (Jacobsen) and to require immunization as a condition for school attendance (Zucht), combined with the authority granted by statute to the DPH and local boards of health to employ isolation and quarantine to prevent the spread of disease, it appears that the isolation and quarantine regulations, including their application within a school context, represent a reasonable and permissible means of protecting the public health.

Hence, the Massachusetts SJC has upheld the power of the school board, pursuant to its own regulations, to suspend children from school who refused to be vaccinated during a smallpox outbreak in the area. Hammond v. Hyde Park, 195 Mass. 29, 30 (1907). The court found that the reasonable regulation of the school board to temporarily exclude unvaccinated students was in the best interest of the pupils and all of the people of the town. *Id.* In so ruling, the Court

⁹ Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 Hofstra L. Rev. 53 (1985).

expressly overturned the opinion of the lower court judge that once a student had been admitted under a statutory exemption for medical contraindication, the school committee lacked the authority to subsequently exclude the child, even during an outbreak of disease. *Id.* at 31-32. See also Spofford, *supra*.

It should be noted that along with schools, local boards of health and the MDPH have authority to order the exclusion of students upon report of an outbreak, or a case or suspected case, of a dangerous disease. As noted earlier, the MDPH has authority under c. 111, s. 6 to define diseases dangerous to the public health and to adopt regulations for the control and prevention of such diseases. Pursuant to c. 111, s.7, if such a disease exists or is likely to exist, the Department is to investigate, including the means of preventing the spread of the disease. According to the statute, it “shall have co-ordinate powers as a board of health, in every town, with the board of health thereof”. In turn, c. 111, s. 95 gives the local board of health authority to isolate or quarantine if there is an infected individual or an outbreak of a dangerous disease.

To implement these statutes, the MDPH has established regulations governing reportable diseases, surveillance and isolation and quarantine, 105 CMR 300.000. The provisions establishing isolation and quarantine requirements, 105 CMR 300.200, provide that “(upon) the report of a case or suspected case of a disease declared dangerous to the public health, the local board of health and the Department are authorized to implement and enforce the requirements outlined in 105 CMR 300.200.” In turn, the regulations specify those instances under which a suspect case must be placed under quarantine, including exclusion from school. The regulations further provide that “(depending) on the specific circumstances related to the exposure, case, and/or contact...additional control measures may be required.” Such measures would be determined by the local board of health or the MDPH.

In sum, the courts long have recognized the compelling interest of the state in preventing the spread of dangerous diseases, particularly with respect to school children. Toward that end, isolation or quarantine of susceptible individuals is a well targeted intervention that is not barred on religious grounds, and exclusion of an unimmunized student from school – with no other limitations on the liberty of the student -- is a reasonable and effective means to prevent the spread of disease through the school system and greater community.¹⁰ Therefore, it appears highly likely that the courts, applying the tests first articulated in Jacobsen, *supra*, would continue to uphold the quarantine of susceptible students, including exclusion from school, in accordance with the requirements of the DPH regulations.

¹⁰ See Gostin, *supra*. Gostin argues that isolation or quarantine that deprives persons of their liberty will only pass constitutional muster if the state can substantiate its actions to a higher degree than that required for general police powers. Therefore, the actions of the state must not only be reasonable, but the need for the action must be compelling and there must be a tight nexus between the need and the action taken, here exclusion from school.