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Mandatory Vaccinations: Precedent and Current Laws

Kathleen S. Swendiman
Legislative Attorney
American Law Division

Summary

This report provides an overview of the legal precedent for mandatory vaccination laws, and of state laws that require certain individuals or populations to be vaccinated against various communicable diseases. The role of both the federal and state governments with respect to public health emergency powers, including requiring the use of mandatory vaccines, is discussed. This report will be updated as warranted.

History and Precedent

Historically, the preservation of the public health has been the primary responsibility of state and local governments, and the authority to enact laws relevant to the protection of the public health derives from the state's general police powers.¹ With respect to the preservation of the public health in cases of communicable disease outbreaks, these powers may include the institution of measures such as quarantine and isolation² or the enactment of mandatory vaccination laws.³ Mandatory vaccination laws were first enacted in the early nineteenth century, beginning with Massachusetts' smallpox vaccination law in 1809.⁴

*Jacobson v. Massachusetts*⁵ is the seminal case regarding a state's or municipality's authority to institute a mandatory vaccination program as an exercise of its police powers. In *Jacobson*, the Supreme Court upheld a Massachusetts law that gave municipal boards

¹ See *The People v. Robertson*, 134 N.E. 815, 817 (1922).

² For more information on state and federal quarantine authority, see CRS Report RL33201, *Federal and State Quarantine and Isolation Authority*, by Kathleen S. Swendiman.

³ Starting with the smallpox vaccine, vaccines have been used to halt the spread of disease for over 200 years. Donald A. Henderson & Bernard Moss, *Smallpox and Vaccinia*, in *VACCINES* 74, 75 (Stanley A. Plotkin & Walter A. Orenstein eds., 3d ed. 1999).

⁴ LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT*, 181 and n. 27 (2000).

⁵ 197 U.S. 11 (1905).

of health the authority to require the vaccination of persons over the age of 21 against smallpox, and determined that the vaccination program instituted in the city of Cambridge had “a real and substantial relation to the protection of the public health and safety.”⁶ In upholding the law, the Court noted that “the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”⁷ The Court added that such laws were within the full discretion of the state, and that federal powers with respect to such laws extended only to ensure that the state laws did not “contravene the Constitution of the United States or infringe any right granted or secured by that instrument.”⁸

The Court addressed constitutional concerns raised by the petitioner in *Jacobson*, but remained unconvinced that his rights were “contravened” by the mandatory vaccination program. The petitioner argued that “a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.”⁹ The Court rejected the petitioner’s constitutional challenge and noted that “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person, to be, at all times and in all circumstances wholly free from restraint.”¹⁰ However, the Court did acknowledge limits to the state’s power to protect the public health and set forth a reasonableness test for public health measures:¹¹

[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an

⁶ *Id.* at 31. The Massachusetts statute in question reads as follows: “Boards of health, if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants of their towns, and shall provide them with the means of free vaccination. Whoever refuses or neglects to comply with such requirement shall forfeit five dollars.” M.G.L.A. c. 111, § 181 (2004).

⁷ *Id.* at 25.

⁸ *Id.*

⁹ *Id.* at 26.

¹⁰ *Id.* In *Adams v. Milwaukee*, 228 U.S. 572, 581-82 (1913), the Supreme Court reaffirmed *Jacobson*’s holding that states may delegate the power to order vaccinations to local municipalities for the enforcement of public health regulations. See also, *Zucht v. King*, 260 U.S. 174, 176 (1922), holding that vaccination laws do not discriminate against schoolchildren to the exclusion of others similarly situated, i.e., children not enrolled in school.

¹¹ *Id.* at 28. Smallpox vaccinations are no longer administered since smallpox has been eradicated worldwide as of 1980. See World Health Organization, *Smallpox Fact Sheet*, at [<http://www.who.int/mediacentre/factsheets/smallpox/en/>]. One author has suggested that while Mr. Jacobson might be successful in his refusal to be vaccinated against smallpox today since smallpox has been eradicated, the threat of terrorists using smallpox as a weapon might make the use of the vaccine a reasonable measure yet again. Andrew Zoltan, *JACOBSON revisited: Mandatory Polio Vaccination as an Unconstitutional Condition*, 13 GEO. MASON L. REV. 735, 747-752 (2005). See also CRS Report RS21288, *Smallpox: Technical Background on the Disease and Its Potential Role in Terrorism*, by Frank Grottron.

arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

State Mandatory Vaccination Laws

School Vaccination Requirements. Every state has a law requiring children to be vaccinated before they enroll in a public or private school.¹² Early statutes required vaccination against smallpox and were amended as new vaccines were introduced.¹³ Many modern school vaccination laws are the result of measles outbreaks in the 1960s and 1970s.¹⁴ Generally, states use the Centers for Disease Control and Prevention’s schedule of immunizations as a guide, and require children to be vaccinated against a number of diseases on the schedule, including diphtheria, measles, rubella, and polio.¹⁵

Despite the wide-spread imposition of school vaccination requirements, many states provide exemptions for medical, religious, or philosophical reasons. These provisions vary state by state, with medical exemptions for children who may suffer adverse effects from the vaccine being the most common. Thus, all states allow medical exemptions for those whose immune systems are compromised, who are allergic to vaccines, are ill at the time of vaccination, or have other medical contraindications to vaccines.¹⁶ Generally, for a medical exemption, parents or guardians must provide documentation from a physician. Nearly all states grant exemptions for persons who oppose immunizations for religious reasons.¹⁷ Exemptions based on philosophical or moral convictions in opposition to immunization are less common but are provided by twenty states.¹⁸ States may specify

¹² James G. Hodge, Jr. and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L. J. 831, 868-73 (2001/2002).

¹³ *Id.* at 867.

¹⁴ *Id.* at 868.

¹⁵ *Id.* See *id.* at 869 for a complete list of state laws regarding school vaccination requirements. See also *Zucht v. King*, 260 U.S. 174 (1922), upholding a Texas mandatory vaccination statute requiring that school children submit to vaccination in order to attend public or private school.

¹⁶ National Conference of State Legislatures, *Exemptions for Childhood Immunizations*, LEGISBRIEF, Vol. 14, No. 30, June/July 2006. For example, in Colorado, an exemption from the vaccination requirements may be obtained by submitting to the school a certification from a licensed physician that “the physical condition of the student is such that one or more specified immunizations would endanger his or her life or health or is medically contradicted due to other medical conditions.” COLO. REV. STAT. § 25-4-903(2)(a) (2004).

¹⁷ According to the Institute for Vaccine Safety only two states, Mississippi and West Virginia, do not provide for an exemption based on religious beliefs. See state chart at [<http://www.vaccinesafety.edu/cc-exem.htm>]. The Mississippi Supreme Court has held that religious exemptions to mandatory vaccination violate equal protection rights under the Fourteenth Amendment because the exemptions “require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute.” *Brown v. Stone*, 378 So.2d 218, 233 (Sup. Ct. Miss. 1979).

¹⁸ See footnote 16. According to NCSL’s LEGISBRIEF, the twenty states that allow philosophical (continued...)

that religious or philosophical beliefs be “sincere” or “conscientiously held.”¹⁹ The statutes allowing religious exemptions vary, with some requiring only a statement of dissent from the student, parent, or guardian, and others requiring a more specific statement regarding the child’s membership in a religious denomination that opposes immunizations.²⁰

Compulsory vaccination laws as a prerequisite for school enrollment have been the subject of numerous court cases.²¹ By and large, the Supreme Court, and most lower courts, have upheld such laws, granting considerable deference to states’ police power to require immunizations to protect the public health.²² Still, some courts have held that a state’s right to require vaccinations is not absolute, resulting in liberal interpretations of waiver exemptions.²³

Vaccination Orders During a Public Health Emergency. Many states also have laws providing for mandatory vaccinations during a public health emergency or outbreak of a communicable disease. Generally, the power to order such actions rests with the governor of the state or with a state health officer. For example a governor may have the power to supplement the state’s existing compulsory vaccination programs and institute additional programs in the event of a civil defense emergency period.²⁴ Or, a

¹⁸ (...continued)

exemptions for persons who object to immunizations because of personal, moral or other nonreligious beliefs are Arizona, Arkansas, California, Colorado, Idaho, Louisiana, Maine, Michigan, Minnesota, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, Washington, and Wisconsin.

¹⁹ See e.g., MASS. G.L.A. c. 76, § 15 (2004); MINN. STAT. ANN. § 121A.15 (2003).

²⁰ See e.g., LA. REV. STAT. ANN. § 17:170(E) (2004); KAN. STAT. ANN. § 72-5209(b)(2) (2003). In *Galinsky v. Board of Education of New York*, 312 F.3d 636 (2d Cir. 2000), the circuit court upheld the district court’s finding that the parents’ claim for a religious exemption was motivated by their personal fears for their daughters’ well being, and not by religious beliefs.

²¹ Steve P. Calandrillo, *Vanishing Vaccinations: Why are So Many Americans Opting Out of Vaccinating Their Children?*, 37 Mich. J.L. Reform 353, 385-388 (2004).

²² *Id.* at 387-388. See, eg., cases cited at footnote 10; also, *Seubold v. Fort Smith Special Sch. Dist.*, 237 S.W.2d 884, 887 (Ark. 1951) (mandatory school vaccination does not deprive individuals of liberty and property interests without due process of law); *McCartney v. Austin*, 293 N.Y.S.2d 188, 200 (N.Y. 1968) (New York vaccination law does not interfere with freedom to worship since Roman Catholic faith does not proscribe vaccination).

²³ See *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 654-55 (E.D.N.Y. 1994) (holding that a Jewish parent’s “sincere religious belief” may support an opposition to immunizations, even though the Jewish religion does not prohibit vaccinations); *Jones ex rel. Jones v. State, Dep’t of Health*, 18 P.3d 1189, 1195 (Wyo. 2001) (health department may not require that a student provide a medical reason for seeking a waiver from immunization); *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001) (holding that a health department may not inquire into the sincerity of a parent’s religious objection to immunizations).

²⁴ HAW. REV. STAT. § 128-8 (2003). In Arizona, the Governor, during a state of emergency or state of war emergency in which there is an occurrence or the imminent threat of smallpox or other highly contagious and highly fatal disease, may “issue orders that mandate treatment or vaccination of persons who are diagnosed with illness resulting from exposure or who are
(continued...)

state health officer may, upon declaration of a public health emergency, order an individual to be vaccinated “for communicable diseases that have significant morbidity or mortality and present a severe danger to public health.”²⁵ In addition, exemptions may be provided for medical reasons or where objections are based on religion or conscience.²⁶ However, if a person refuses to be vaccinated, he or she may be quarantined during the public health emergency giving rise to the vaccination order.

Model State Emergency Health Powers Act. In addition to the current laws, many states have considered the provisions set forth in the Model State Emergency Health Powers Act (Model Act). The Model Act was drafted by The Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities.²⁷ It seeks to “grant public health powers to state and local public health authorities to ensure strong, effective, and timely planning, prevention, and response mechanisms to public health emergencies (including bioterrorism) while also respecting individual rights.”²⁸ It is important to note that this is intended to be a model for states to use in evaluating their emergency response plans; passage of the Model Act in its entirety is not required, so state legislatures may select the entire Act, parts of it, or none at all. Many states have used sections of the Model Act while tailoring their statutes and regulations to respond to unique situations that may arise in their jurisdiction.²⁹

The Model State Emergency Health Powers Act addresses a number of issues likely to arise during a public health emergency and offers guidelines for states with respect to what powers may be necessary during such an emergency. With respect to vaccinations, the Model Act includes provisions similar to the current laws discussed above. Under the Model Act, during a public health emergency, the appropriate public health authority would be authorized to “vaccinate persons as protection against infectious disease and to prevent the spread of contagious or possibly contagious disease.”³⁰ The Model Act requires that the vaccine be administered by a qualified person authorized by the public health authority, and that the vaccine “not be such as is reasonably likely to lead to serious harm to the affected individual.”³¹ The act recognizes that individuals may be unable or unwilling to undergo vaccination “for reasons of health, religion, or conscience,” and

²⁴ (...continued)

reasonably believed to have been exposed or who may reasonably be expected to be exposed.” ARIZ. REV. STAT. § 36-787 (2004).

²⁵ FLA. STAT. § 381.00315 (2004).

²⁶ See, eg., CONN. GEN. STAT. § 19a-222 (2003) (exemption for physician’s determination of sickness); VA. CODE ANN. § 32.1-48 (2004) (vaccination waived if detrimental to person’s health, as certified by a physician); WIS. STAT. § 252.041 (2004) (vaccination may be refused for reasons of religion or conscience).

²⁷ The text of the Center’s Model State Emergency Health Powers Act from 2001 is available at [<http://www.publichealthlaw.net/Resources/Modellaws.htm>].

²⁸ *Id.*

²⁹ The Center for Law and the Public’s Health tracks state legislative activity relating to the Model Act at [<http://www.publichealthlaw.net/Resources/Modellaws.htm#MSEHPA>].

³⁰ Model State Emergency Health Powers Act, Article VI, Sec. 603.

³¹ *Id.*

provides that such individuals may be subject to quarantine to prevent the spread of a contagious or possibly contagious disease.³²

Role of the Federal Government

Federal jurisdiction over public health matters derives from the Commerce Clause, which states that Congress shall have the power “(t)o regulate Commerce with foreign Nations, and among the several States...”³³ Thus, under the Public Health Service Act, the Secretary of the Department of Health and Human Services has authority to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”³⁴ While this language appears to confer broad authority to promulgate regulations necessary to prevent the spread of disease, current regulations deal primarily with the use of quarantine measures to halt the spread of certain communicable diseases.³⁵ The Public Health Service Act does not specifically authorize any mandatory vaccination programs, nor do there appear to be any regulations regarding the implementation of a mandatory vaccination program at the federal level during a public health emergency.³⁶

As noted above, state and local governments have the primary responsibility for protecting the public health, and this has been reflected in the enactment of the various state laws requiring that school children be vaccinated against certain diseases before enrolling in school, and authorizing mandatory vaccination procedures during a public health emergency. Any federal mandatory vaccination program applicable to the general public would likely be limited to areas of existing federal jurisdiction, i.e., interstate and foreign commerce, similar to the federal quarantine authority.³⁷ This limitation on federal jurisdiction acknowledges that states have the primary responsibility for protecting the public health, but that under certain circumstances, federal intervention may be necessary.

³² *Id.* See Section 604 of the Model Act for provisions relating to quarantine.

³³ U.S. CONST. art. I, § 8.

³⁴ 42 U.S.C. 264(a). Originally, the statute conferred this authority on the Surgeon General; however, pursuant to Reorganization Plan No. 3 of 1966, all statutory powers and functions of the Surgeon General were transferred to the Secretary.

³⁵ See 42 C.F.R. Parts 70 (interstate matters) and 71 (foreign arrivals).

³⁶ For more information on federal vaccination policy, see CRS Report RL31694, *Smallpox Vaccine Stockpile and Vaccination Policy*, by Judith Johnson.

³⁷ See *supra* footnote 2. It has been suggested that in the case of a serious outbreak of a communicable disease, the federal government might enact policies to encourage vaccinations or place restrictions on those who refuse. Bureau of Justice Assistance, U.S. Department of Justice, *The Role of Law Enforcement in Public Health Emergencies*, September, 2006) at 19.