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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

DEVON TORREY LOVE; S.L.; ALISON HEATHER GRACE GATES; M.M.; K.M.; A.M.; COURTNEY BARROW; A.B.; MARGARET SARGENT; M.S.; W.S.; and A VOICE FOR CHOICE, INC. on behalf of its members,

Plaintiffs,

v.

STATE OF CALIFORNIA, DEPARTMENT OF EDUCATION; STATE OF CALIFORNIA, BOARD OF EDUCATION; TOM TORLAKSON, in his official capacity as Superintendent of the Department of Education; STATE OF CALIFORNIA, DEPARTMENT OF PUBLIC HEALTH; DR. KAREN SMITH, in her official capacity as Director of the Department of Public Health,

Defendants.

Case No.: SCV0039311

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER TO PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: **June 20, 2017**
Time: **8:30 a.m.**
Dept.: **40**
Judge: **TBD**
Action Filed: **April 4, 2017**

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Plaintiffs submit this Opposition to Defendants' (CALIFORNIA DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION, TOM TORLAKSON, in his official capacity as Superintendent of Public Instruction, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, and KAREN SMITH, M.D., in her official capacity as Director of the California Department of Public Health) (collectively, "Defendants") Demurrer to Plaintiffs' Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Can an ever-growing state-government leviathan, under the premise that it knows better than a child's parents, dictate which medications that child must take before accessing public K-12 schools, a fundamental right in California? This is the issue before the Court, and it is one of first impression. Defendants try to tell the Court to "move along," that there is "nothing to see here." Yet tellingly, Defendants did not cite their first California case until page fourteen of their Demurrer. And the few cases Defendants cite are dated, and not synthesized with legal developments in recent decades. Defendants could not cite relevant precedent because no California court has ruled on this issue after the landmark *Serrano* cases in the 1970s[1] first declared public K-12 education to be a fundamental right in the State of California.

Part of the reason why no court has had to rule on this specific issue, is because no legislature before California's in 2015 has passed a vaccination requirement as broad and sweeping as this one. Health & Safety Code Section 120325 *et seq*[2] requires the vaccination of kindergarteners for things like Hepatitis B, a disease that is almost always sexually transmitted, and one whose primary risk is liver cancer decades later. It requires the vaccination for Tetanus, while very rarely serious to an individual, is not even communicable. It requires the vaccination for Varicella (chicken pox), the risk of perishing from which has always been about equal to the proverbial "getting struck by lightning."[3]

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1 5 Cal.3d 584 (1971); 18 Cal.3d 728 (1976); and 20 Cal.3d 25 (1977).

2 Henceforth, simply "Section 120325."

3 *See* http://www.rightdiagnosis.com/c/chickenpox/stats.htm; then *cf.* http://www.lightningsafety.noaa.gov/odds.shtml

If the government, during a period of non-crisis, can mandate discretionary medical treatments for non-communicable diseases, then where does this power logically end? If Defendants are correct in their formulation of the law, then the government could also mandate condom use and other forms of birth control for high-school students, and it could refuse admission to students who associate with an HIV-positive relative.[4]

This overreach cannot stand. California provides a right of privacy to students, which prevents the government from demanding their medical information. This same right protects students from having to disclose potentially embarrassing details, like the fact they (or a family member) has a disease or syndrome that prevents their ability from being safely administered a vaccination. California precedent further dictates that the state cannot burden public education the way it has. A free, public, K-12 education is a fundamental right in California – and California was a pioneer in declaring it so. These reasons are why a federal judge, hearing a similar case, all but invited the plaintiffs in that suit to re-file their claims in California state court. And these reasons most certainly meet the threshold of stating facts, which applied to the law, constitute causes of action in this matter of first impression. Whether viewed through the prism of the right to privacy, or the right to an education, or the right to bodily autonomy, or the right to direct the upbringing of one's children – the Plaintiffs' complaint states causes of action and raises important issues that must be vetted by trial. The Court must deny Defendants' Demurrer.

II. PLAINTIFFS HAVE STATED FACTS SUFFICIENT TO CONSTITUTE CAUSES OF ACTION.

A complaint is invulnerable to a general demurrer if on any theory, regardless of the title under which the factual basis for relief is stated, the complaint states a cause of action. *Johnson v. Clark,* 7 Cal.2d 529, 536 (1936); *Quelimane Co., Inc. v. Stewart Title Guaranty Co.* 19 Cal.4th 26, 38 (1998). A general demurrer may be upheld "only if the complaint fails to state a cause of action under *any possible legal theory.*" *Sheehan v. San Francisco 49ers,* 45 Cal.4th 992, 998

4 Is denying grandpa his government benefits if he fails to take his aspirin (to prevent heart disease) far behind?

(2009) (emphasis added). All that is required to survive a demurrer is that the pleadings have stated facts showing that a plaintiff may be entitled to some relief. *Richard H. v. Larry D.,* 198 Cal.App.3d 591 (1988).

Section 120325, on its face, along with the extensive factual details in the Plaintiffs' complaint, create triable issues of fact and raise important questions of law that merit a thorough vetting. Section 120325 has infringed the Plaintiffs' right to privacy, a comprehensive, well-developed right that is stronger in California than anywhere else (and which includes the right to bodily autonomy). Section 120325 improperly burdens the Plaintiffs' right to a free, public, K-12 education, which is fundamental in California. By forcing Plaintiffs to choose between fundamental rights, Section 120325 creates an unconstitutional condition. Section 120325 infringes on the right to direct the upbringing of one's children. And Defendants have grossly overstated the applicability of certain precedent, all of which is readily distinguishable.

A. Section 120325 Infringes the Plaintiffs' Rights to Privacy.

The right to privacy in California is strong, unique, and specifically enumerated. "The California Constitution provides that all individuals have a right of privacy. (Cal. Const., art. I, § 1.) This express right is broader than the implied federal right to privacy." *Williams v. Superior Court,* 236 Cal.App.4th 1151 [187 Cal.Rptr.3d 321, 327] (2015), *superseded on other grounds, Williams v. S.C.,* 191 Cal.Rptr.3d 497 (2015). The right to privacy applies to minors too. "There can be no question but that minors, as well as adults, possess a constitutional right of privacy under the California Constitution." *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 334 (1997). The California Constitution therefore guarantees minors the right to privacy.

This right covers medical history and medical records. "It is settled that a person's medical history, including . . . records, falls within the zone of informational privacy protected" by the California Constitution. *People v. Martinez*, 88 Cal. App. 4th 465, 474–75 (2001). This right applies in matters concerning "the preservation of . . . personal health" and matters involving "retaining personal control over the integrity of [one's] own body." *Am. Acad. of Pediatrics*, at 332–33. With respect to medical information, this right is special. The "right to control

circulation" of personal medical information is "fundamental" and "reaches beyond the interests protected by the common law right of privacy." *Pettus v. Cole*, 49 Cal. App. 4th 402, 440 (1996) (citations omitted). This higher degree of protection exists because "[a] person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Bd. of Med. Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678 (1979). Thus, California affords a person's medical history the highest degree of privacy protections.

Section 120325 is unconstitutional because it requires a child to reveal intimate medical-history details before attending school (which is itself a protected fundamental right.) "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Willard v. AT & T Commc'ns of Cal., Inc.*, 204 Cal. App. 4th 53, 62 (2012) (citations omitted). Here, there can be no doubt that a minor's intimate health records are legally protected.

With respect to prong 2 of the *Willard* test, it is reasonable that a perfectly healthy student, during a period of non-crisis, could expect to keep his or her medical records private. The opposite premise offends our concepts of freedom. Key, although not necessarily essential to this conclusion, is the additional fact that attending public K-12 schools is also a fundamental right in California. It would be unreasonable to expect a student seeking to exercise the simple and fundamental right to attend school, to reveal medical history as a condition thereof. It would also be unreasonable (and deeply humiliating invasion of privacy under the third prong of the *Willard* test) for a student, seeking to attend school, to have to reveal that he or she has a medical exemption under Section 120325, a revelation which is telling and doubtlessly a cause for stigma, because such exemptions are only granted for certain conditions, diseases, dire familial histories, or congenital syndromes.

Plaintiffs have stated sufficient facts to constitute a valid cause of action. For example, the Sargent family plaintiffs, a military family, do not wish to forego their privacy rights by being

forced to disclose their family's personal, medical information to government officials, preferring their intimate decisions to remain private. Like any family, they wish to maintain certain details of their medical history as private. *See Compl.* ¶ 9. They have been clearly harmed, not just economically, but also by the state's "give up your right to privacy or homeschool your children" policy. *Id.* And furthermore, Plaintiff A Voice for Choice Inc. represents thousands of families affected by this law, including *inter alia,* families with a history of congenital diseases and/or elder siblings who reacted adversely to vaccines.

Applying the law to these facts, Plaintiffs have clearly stated a cause of action. Just as it is unreasonable to expect a person to reveal his or her medical history before exercising other protected rights, like the right to assemble freely or to petition one's government, it is absolutely unreasonable to expect the same before someone exercises the right to attend school.[5]

B. Section 120325 Infringes on the Right to an Education.

A public K-12 education is a fundamental right in California, and laws and policies infringing on classroom instruction are subject to strict scrutiny. *Hartzell v. Connell*, 35 Cal.3d 899 (1984); *Serrano v. Priest*, 18 Cal. 3d 778 (1976); *Slayton v. Pomona USD*, 161 Cal.App.3d 538, 548 (1984). A public education develops the mind, provides a path to future employment and an irreplaceable way for children to socialize with their peers. *See Phipps v. Saddleback Valley USD*, 204 Cal.App.3d 1110, 1114 (1988) (child with AIDS forced to homeschool suffered "irreparable harm and damage by not being given the education and enjoying the educational facilities uniquely available at his . . . school"). And for parents, school provides daytime supervision to their children, and thereby the chance to be productive members of society.

Slayton is particularly insightful. There, the court considered whether making parents swear a loyalty oath to a school district, as a condition of their children enrolling, impermissibly

5 If the state can demand proof of vaccination before a child enters a school – in the name of disease prevention at places where large numbers of people congregate, then the government can also demand proof of vaccination before someone enters City Hall or the statehouse to petition their government. This is plainly overreaching when viewed in the context of these hoary and ancient federal rights. Yet if the fundamental constitutional right to a public education means anything in California, it must be afforded the same respect. The people of the state of California have determined that entering a school is as valuable a right as visiting City Hall.

burdened the families' fundamental right to an education. After the parents prevailed at trial, the Court of Appeal approved the ruling, and further authorized attorneys' fees for the parents, holding that the trial court had properly determined that the school district's requirements improperly infringed on the significant and fundamental right to a public K-12 education. *See id., passim.*

Here, Plaintiffs have doubtlessly suffered grave harm and the loss of their right to a public education, and it is manifest that the facts in the complaint state a cause of action. For example, the Gates family wants their children to attend Placer County's excellent public schools, which is their right under the Constitution. *See Compl.* ¶ 4. But for the family to do so, they would have to relinquish other rights – their right to privacy, their right to direct their children's upbringing, and their right to medical autonomy. Like the loyalty-oath requirement in *Slayton,* this situation infringes on their right to a public, K-12 education.

C. Section 120325 Infringes on the Rights of Parent Plaintiffs to Direct the Upbringing of Their Children.

California recognizes the right for parents to direct the upbringing of their children. Again, California's scope of this right is expansive and requires the government meet a tough evidentiary standard. "[W]here particularly important individual interests or rights are at stake," and after considering the "gravity of the consequences resulting from an erroneous determination," "any infringement on a custodial parent's right to direct her child's upbringing" is generally unconstitutional "absent clear and convincing evidence." *Ian J. v. Peter M.* 213 Cal.App.4th 189, 206 (2013).

Defendants' Demurrer doesn't even begin to address this standard, much less meet it, or even pay lip service to it. Here, it is manifest that important individual rights are at stake, such as the right to determine what goes in one's own body. Some vaccines are made from fetal cells, and it is reasonable that certain individuals might wish to decline medications made therefrom, which is their constitutional right.[6] The gravity of the consequences are of course, substantial.

6 For example, the cell line in one such vaccine was developed from lung tissue extracted from a three-months-old aborted fetus. *See* https://catalog.coriell.org/0/Sections/Search/Sample_Detail.aspx?Ref=AG06814-N&PgId=166

For those with certain undiagnosed or unknown congenital diseases, compromised immune systems, or certain genetics, the reaction to a vaccine can mean brain damage or death[7].

It is therefore appropriate that parents, not the state, make these determinations for a child. Of course, the state can try to show with clear and convincing evidence that its mandates are constitutional – but it hasn't done that here. Defendants haven't even mentioned nor addressed the California test and standard. In light of the foregoing, the court should not sustain its Demurrer.

D. Section 120325 Creates an Unconstitutional Condition.

The interplay of rights is key to evaluating the reasonableness and therefore the constitutionality of Section 120325. All states and the federal government prohibit the conditioning of one constitutional right on another. In every other case where jurisdictions have considered dichotomies like the ones involved in this case, the conditions have been struck down. *See, e.g., Bourgeois v. Peters,* 387 F.3d 1303, 1324 (11th Cir. 2004) (striking down law conditioning the right to peaceably protest on individuals relinquishing their right to be free from unreasonable searches) ("This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right . . . not merely to receive a discretionary benefit but to exercise two other fundamental rights.")

Beyond just conditioning the right to education on relinquishing privacy rights, Section 120325 also forces students to relinquish their rights to bodily autonomy if they wish to attend school. Remember, California's stronger "constitutional right of privacy [also] guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity." *Bartling v. Sup. Ct.*, 163 Cal.App.3d 186, 195 (1984). Here, to vaccinate for the ten diseases and syndromes in Section 120325, a child must receive at least twenty-seven different doses of medication and fifteen different injections – just to enter kindergarten. Not only can this

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7 This is according to the Centers for Disease Control. *See, e.g.,* https://www.cdc.gov/mmwr/pdf/rr/rr4512.pdf pp. 11-12.

cost money, but it can take large amounts of time and effort.[8] Thus, a student's right to attend school is actually conditioned on whether the student willingly subjects him-or herself to dozens of bodily intrusions that the student otherwise has the constitutionally protected right to reject.

The California prohibition on this conditioning is particularly strict, even when the government merely makes the provision of a *benefit* dependent on the relinquishing of a right. "When receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation. The [government] . . . must establish that there are no available alternative means." *Robbins v. Superior Court*, 38 Cal. 3d 199, 213 (1985) (citations omitted). Therefore, even if education was not a fundamental right and was merely just a "public benefit," (like accessing a park, or receiving food-purchase assistance), Section 120325 would still be unconstitutional because the state cannot satisfy the *Robbins* test.

This is because there are several "available alternative means" to accomplishing the state's goal of higher vaccination rights without using the public benefit of free K-12 education as the chokepoint. For example, the government could have tried a massive education effort on why it feels vaccines are helpful, focusing on the counties where vaccination rates are lowest. The state could have distributed medication *gratis*, in an effort to eliminate the co-pays for needy families. It could have incentivized vaccination, by offering giveaways, coupons, or tax incentives for those who follow the government's diktats. It was permissible for the government to try any of these alternative means, along with countless others, but instead the government here chose the most burdensome and infringing path. Because there were and are available alternative means of accomplishing its goals – without infringing on a long list of constitutional rights – Section 120325 cannot stand.

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8 *See, Hartzell v. Connell*, 35 Cal.3d 899, 911 (1984) ("A school which conditions a student's participation in educational activities upon the payment of a fee clearly is not a 'free school.'")

E. Defendants Overstate Their Case, with Citations to Inapt Precedent.

Although not addressing the issues above with any specificity, Defendants do make many overstated claims, in an attempt to distract and deflect. For example, Defendants claim that the authority of the legislature to mandate vaccines, writ-large, "is firmly embedded in our jurisprudence." (Demurrer, 13:7-10). This has two problems. First, it doesn't specify what vaccines and under what conditions. Could the government mandate a vaccine that doesn't work, if for example, lobbyists simply asked it to? Could it mandate vaccination against an exceedingly rare and never deadly disease? Could it mandate other prophylactic medical treatments if it simply called any prophylactic a "vaccine?"[9] Could it mandate that someone must be vaccinated before attending a church service (where, like schools, people congregate in close quarters)? After analyzing the Defendant's over-broad statements thusly, it is clear their statements are exaggerated and of little probative value.

The second problem with the Defendants' statement is that it is also simply not true. In every recent landmark case from other jurisdictions, courts have limited the ability of states to pass overreaching vaccination mandates. For example, in *Boone v. Boozeman*, 217 F.Supp.2d 938 (E.D. Ark. 2002), a case which the Defendants' rely, the federal district court explicitly stated its ruling would be different if public education was a fundamental right in that jurisdiction. *See id.* at 957. The year before that, in *In re LePage*, 18 P.3d 1177 (Wyo. 2001), the Wyoming Supreme Court reformed a broad vaccine mandate to engraft on it a personal-beliefs waiver. Construing the statute in the most generous manner possible to keep it on the books, the court stated it did "not believe that the legislature, through its adoption of [its vaccine mandate] . . . authorized a broad investigation into an individual's belief system in an effort to discern the merit of a request for exemption," *id.* at 1181 – and the court read into the law the ability for certain families (which always are a small number) to quietly state their objections with no penalty, even though the legislature had not provided this ability in the statute. In addition to several other different forms of relief, the Court could simply do the same here.

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9 Contrary to popular belief, there are many different types of "vaccines" besides injected ones. There are eyedrops, oral vaccines, and suppositories. If the Defendants' formulation of the law is correct, the government would have incredibly wide latitude to mandate prophylactic drugs, simply by calling them, "vaccines."

The Defendants similarly overstate the applicability of the precedent they cite. Almost all of the cases they cite are from the *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) line or its progeny. Those cases stand for the unremarkable premise that before any states had declared public education to be a fundamental right; a state or self-contained township could mandate one (or a small handful of) shot(s); for a highly contagious disease; during a true crisis outbreak of the same; during an era pre-dating widespread travel that made such mandates less efficacious. In other words, the cases Defendants cite have vastly different facts, are not binding here anyway, and California precedent provides a different bundle of rights to its residents.

Similarly, the defendants hold up another ancient case as a talisman, with little analysis or acknowledgment of supervening precedent. *French v. Davidson,* 143 Cal. 658, 661 (1904), on which the Defendants heavily rely, must of course, like any other case, be synthesized with subsequent, relevant Supreme Court holdings that have since issued – here, most notably the *Serrano* decisions, *supra*. Since the *Serrano* holdings and subsequent precedents have clarified the fundamental right to a free K-12 public education in California, and clarified the tests the government must meet for burdening constitutional rights (also *supra*), it's not too insightful for the Defendants to simply state that the Plaintiffs can exercise their right if they give up others. That is a logical fallacy, stemming from an unrefined citation to dated, unsynthesized precedent. The Court should not fall for Defendants' red herrings, and as such, Defendants' Demurrer should be denied by this Court.

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III. CONCLUSION

Plaintiffs respectfully request that Defendants' Demurrer to Plaintiffs' Complaint be overruled, or alternatively, Plaintiff be granted leave to amend if the Court finds any defect in the Complaint. [10]

Dated: June 6, 2017

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10 *See. Seidler v. Municipal County For The Judicial District Of Los Angeles County* 12 Cal.App.4th 1229, 1233 (1993) ("a demurrer should not be sustained without leave to amend if the complaint states a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment.")