



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 14, 2015

Sent Via Electronic Mail

Rep. Heather Scott
HScott@house.idaho.gov

Re: Questions Regarding Immunization Exemption Forms

Dear Rep. Scott:

This letter is in response to your October 8, 2015, questions following up on my September 9, 2015, letter to you concerning the Idaho Department of Health and Welfare's Certificate of Immunization Exemption form. Your new questions are followed by my individual responses:

1. **Given that the first paragraph of Idaho's immunization exemption form states "The Idaho Department of Health and Welfare also recognizes that individuals have the right to make decisions whether or not to vaccinate their children," is this form informational only?**

No, the form is not informational only, it provides parents and schools a method to document compliance with the requirements of Idaho Code § 39-4802 and IDAPA 16.02.15.110.02. Those provisions require that parents submit a signed statement to school officials stating that they are exempt from the immunization requirements on religious or other grounds and that schools possess that documentation.

2. **What is the specific reason for IDAPA 16.02.15.110.02 since Idaho Code 39-4802 states clearly that a statement from the parent or legal guardian is sufficient for qualifying for an exemption to vaccine requirements?**

It appears that IDAPA 16.02.15.110.02 was promulgated by the Department and enacted by the legislature to give schools a method for documenting parents' choices to exempt their children from the immunization requirement set out in Idaho Code § 39-4802(2).

- 3. Your previous response to the question as to whether or not a parent can simply satisfy the law in Idaho by submitting a statement pursuant to I.C. 39-4802 indicated that the new state form per IDAPA 16.02.15.110.02 supersedes state law. This is of grave concern that an agency's rule-making authority can supersede state law. Is this correct?**

Administrative rules and regulations “may be given the force and effect of law but they do not rise to the level of statutory law. Only the legislature can make law.” *Mead v. Arnell*, 117 Idaho 660, 664 (1990). Thus, an administrative rule that conflicts with a statute is preempted by the statute. Idaho Code § 39-4802(2) allows for a parent to submit a signed statement objecting on religious or **other grounds** to be exempt from Chapter 48 of Title 39. It is based upon this principle of law that my September 9, 2015, correspondence to you advised that a parent may write practically anything on the exemption form under the philosophical exemption section or even strike through the word “Philosophical” and write “other.” The form is not required to use the statutory language. It is understood that “philosophical” may create confusion because it is not as broad a word as “other.” If you or other legislators would like to discuss whether this form should be amended to more closely mirror the statute, then you should contact the Department directly.

- 4. Can schools or daycares legally reject a parent's right to an exemption from the vaccine requirements if they choose to not fill out the form completely, cross out sections or alter it to clarify their reasons for claiming an exemption?**

Most likely not, provided the parents provide some sort of signed statement as required by Idaho Code § 39-4802(2).

- 5. In response to your last comment regarding Jacobson vs. Massachusetts; and the fact that the IDHW has documented infectious diseases such as pertussis, influenza and chickenpox in fully vaccinated children, how is this action (removing the unvaccinated from school) protecting the public from infectious diseases when it may be the vaccinated who are the ones causing the outbreak?**

This question is not a legal question and therefore this office cannot provide a response to it. This is a medical and policy question that should be directed to the relevant experts.

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I hope you find the content of this letter helpful. If you would like to discuss this issue in greater detail, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "McKay", written in a cursive style.

NICOLE MCKAY
Deputy Attorney General
Chief, Division of Health & Human Services

NM/plm