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- Can schools request that you complete a religious exemption form?
- Can schools request annual updates of religious statements?
- Are you entitled to a written acceptance letter by the school?
- What action constitutes compliance with the law?
- Who decides to grant the waiver: the schools or the DoH?
- Must you or third parties sign pledges or furnish endorsements?

Dear Parents,

I will address these common questions which arise often, possibly because officials may consider them gray areas of the law. They are not, in my view.

I cannot furnish legal advice in this monograph to guide you in your individual situation. So consider the following general arguments of law as I interpret the law and rules governing religious exemptions.

### **Exemption Forms**

The DoH's own regulation requires a statement. Nothing about a form. 10 NYCRR Section 66-1.3(d), reads in full:

A written and signed statement from the parent, parents or guardian of such child, stating that the parent, parents or guardian objects to their child's immunization due to sincere and genuine religious beliefs which prohibit the immunization of their child, in which case the Principal or person in charge of the school may require supporting documents.

If your school is requesting "supporting documents", then it must be based on *only questions which remain* after reading, and based upon, the written statement. Not on a preprinted boilerplate form. That is a rule set forth by the NYSED commissioner:

<http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/fieldmemoreligiouseximmunprocedures.html>

Parenthetically, NYSED publishes a form. The origin of that form had accompanied legal guidance (prompted by the state Board or Regents), contained in a 2006 field memo from the Deputy Commissioner of Education, James Butterworth. (See the link above.) The field memo was intended to make the rules governing the religious exemption process more uniform across school districts.

That 4-page NYSED religious exemption affidavit form—which is not too different from other forms issued by some schools—is a pro forma, boilerplate published over 10 years ago in conjunction with the aforementioned field memo. However, Student Support Services of NYSED in Albany say that what was important was the 3 questions it placed in it for parents to address. It was thought that those questions would help render the process more uniform. Not the form per se. Most school systems don't require affidavit forms. Notarized written statements are essentially affidavits consistent with 10 NYCRR, §66-1.3(d).

It is also consistent with the state's requirement that religious statements be drafted solely in the *parent's own words*. That means a parent must be free to express her beliefs in her *own free form narrative*, and not be forced to enter in long-hand, in only the spaces provided on a form, answers to questions. In other words, for 10 NYCRR, §66-1.3(d), the paper upon which a statement is made (form vs. written) is of no relevance. Rather, what matters is the ideas it's conveying.

Any school that insists that a written statement be penciled in on a form literally exalts form over substance. Religious beliefs that are entered on that 4-page NYSED affidavit form cannot be considered a "written statement" merely because it's entered on a preprinted form, but rather because its content records the probative remarks applicable to the proceeding. In other words, style should not trump substance.

If a school insists that you complete a form, just reference your written statement in the form. Do not try to fit its text into the form, or portions of it, as a summary.

### **Updates of Religious Statements**

First, what exactly is a religious statement? It's a testimonial to your religious beliefs as it relates to vaccines or vaccination as a medical practice.

That affidavit stands as a formal statement of your beliefs *for as long as you hold them*. The law doesn't assign expiration dates for statements, nor requires you to update them each year or each month.

And since that statement is about the *parent's* understanding of her religious teachings, and not her children's, then it's *prima facie* that religious exemption status is conferred upon the parent. Not upon each individual child of that parent.

Put another way, a school would be hard-pressed to explain to a judge why it would grant the waiver for one sibling, yet deny it for the other, *based upon the same religious affidavit!* Similarly, there's no logical rationale for updating statements. What possible reason would lead an institution to deem a religious statement worthy of a waiver, yet deem the same statement *unworthy* a year later?!

If you think about it, the only reason a new affidavit would be required is if the school might want to posit that it constitutes a re-application for the waiver. Disregarding the fact that such re-applications are not required by law or regulation, why would you want to needlessly expose yourself to a possible denial decision that would necessitate litigation?

### ***About Acceptance Letters***

Therefore, all parents must obtain written acceptance letters on school stationery if the waiver is granted. A new principal will not take your word that her predecessor granted it. A formal document of acceptance is a due process right, since without it, you may be forced to endure a new evaluation process for the same school that had previously accepted your exemption application, all because the previous administrator withheld a written acknowledgment of its decision.

A formal acceptance in writing affords the school protection as well. A routine audit of student medical records by DoH might show an unvaccinated student in class without a formal acceptance of a waiver, thereby risking costly fines.

The point is that this is a serious process mandated by state law. In each step, parties to the proceeding must document all transactions in writing in case third parties become involved—such as DoH, truant officers, children's services, family court, NYSED 310 Administrative hearings, etc. When children are excluded from schools, third parties are mandated to learn who's responsible and how it happened.

Bottom line on 'updates': There's no provision in either NY CLS Pub Health §2164(9) or 10 NYCRR §66-1.3(d) that requires parents to update or otherwise reaffirm their religious statements on an annual basis. Or on *any* basis. If there were, there would be specific guidelines as to what exactly constitutes an 'update.' Is it a reiteration of the previous statement? An exact copy of it? A summation? If some staff person at DoH is telling a school there must be updates, I'll bet it's not a written and signed document. And I can assure you, administrative codes are not issued casually, through verbal communication.

There's absolutely nothing that the parent or guardian is directed to do, as read in 10 NYCRR, §66-1.3(d), following the submission of the written statement, and responding to a possible 'supporting documents' request, and the approval of the waiver. Once the written statement is submitted, there are no additional actions, stated in the regulation, which the parent must perform.

It's logically implied in the Butterworth field memo. Commissioner Butterworth writes that it's the *school* that must give a specific reason for denying the waiver. The *school* must request supporting documents, only when questions remain. It follows that if a school requests an update, then it should have a specific reason for it, besides wanting a current date and notary stamp on the statement. Thus, for example, if the school sees your child eating nonkosher food, contrary to that which you represented in your statement, then the school is justified in seeking supporting documents, or an update—or whatever they wish to call it—to explain the apparent inconsistency. But not arbitrarily, in the absence of such valid reasons, are “updates” warranted.

Regardless of whether we're talking about approval letters or denial letters, this proceeding is serious enough to warrant formal and official written transactions. State authorities have an interest in the welfare of children, and some form of accountability would eventually have to be presented to agencies of government (NYSED, Children's Services, etc.) that explains why a child is not attending school.

### **Who Decides?**

Some schools express concern that exemption applications may not appear adequate to the DoH when it audits student medical files. So the question of who determines whether statements warrant a religious waiver deserves to be addressed.

Broadly speaking, the school is chartered by the state as an educational institution. That means that they're under the jurisdiction of NYS Education Department, and for appellate level proceedings, NYSED's Office of the Commissioner. The school's cafeteria, gymnasium, bathroom facilities, and the like, might be under direct jurisdiction on NYS DoH. But not religious exemptions. Don't confuse the dual jurisdictions of these agencies.

With respect to religious exemptions, many non-public schools seem to be bullied into allowing NYC DoH to evaluate religious statements. But schools should stand their ground and not back down. While NYSED and NYS DoH have joint jurisdictions with respect to school vaccination requirements under NY CLS Pub Health §2164, it is the building principal, and/or higher administrative authorities, who have sole authority to judge which parents are granted religious exemption from those requirements, under §2164(9).

That decision by the school district is reviewable by the Commissioner of Education, under Section 310 of the Education Law. Not by the Health Commissioner. The authority is found in the statute itself—§2164. For example, §2164(7)(b) provides that a decision prohibiting a child from attending school may be reviewed by the “commissioner of education.”

The 5 additional instances in which “the commissioner” is mentioned in the statute refers to the Commissioner of Education, by way of context. That statutory interpretation was reinforced later in the 2005 Field Memo to all NYS school districts from the Deputy Commissioner of Education, James Butterworth, in which “building principals” have sole jurisdiction in determining who is granted religious waivers (See same link above).

As NYSED Office of the Commissioner maintains, schools are the legal gatekeepers with respect to religious waivers. The DoH only has general oversight to ensure all students are in compliance, by way of auditing of student medical records. Students with religious waivers, which by law, are determined by the school, are by statutory definition, in compliance with NY CLS Pub Health §2164—just like vaccinated students are—and should not be the targets of special requirements or be issued special demands that are *ultra vires* of statute and regulations.

### **What Action Constitutes Compliance?**

Can a student be permitted to attend school *upon submission* of the written statement. The answer is ‘yes.’

Read 10 NYCRR, §66-1.3(d) (which is quoted above).

As you can see, the regulation requires nothing else for the parent to do following submission of the statement. The parent is therefore in a state of compliance until the *school* acts next—either by granting or denying the waiver, or else requesting supporting documents.

In other words, the state legislature had intended the threat of exclusion from class to be a measure to motivate parents to expedite compliance by way of getting vaccinated, or by way of submitting an application for one of the two legal exemption provisions. Hence, the school can’t logically justify implementing the threat of exclusion while the clock for the party to act is ticking on the *school*, instead of the parent!

NYC Department of Education is a good example. It receives hundreds of religious statements per semester. I’m told that a verdict on the matter, or a request for an interview, can take anywhere from 2 weeks to 5 months. During

that waiting period, the student is allowed to attend class, because the student is deemed in provisional compliance with NY CLS Pub Health §2164(9) upon submission of the statement. They're not going to exclude that student for several months, just because the school can't render a decision on the statement any sooner!

If an interview is requested, then consistent with NY CLS Pub Health §2164(7)(a), NYC will wait no longer than 14 calendar days (2 weeks) for the parent to call to arrange for an appointment to be interviewed by the Borough Field Support Center (BFSC) Health Director. Such an interview can take place as much as a month or more later.

The bottom line is that NYC DoE understands the 14 day grace period for parents, and also understands that parents should not be penalized when it is up to school administration to act next.

### **About Signing Agreements and Third Party Endorsements**

Some schools require applicants or third parties to sign various declarations, or to agree to certain conditions, before they would grant a religious waiver. Like most of these kinds of demands, such burdens would ordinarily require statutory or regulatory authorization. In the absence of such authority, it is facially arbitrary and capricious. The argument can end there. But perhaps an explanation as to *why* state authorities refrained from establishing these requirements would be enlightening.

#### ***Endorsement from Clergy***

This appears to be the most common requirement by some school systems. I believe the reason for that may be a misreading of the aforementioned Butterworth Field Memo. In it, Butterworth lists various kinds of documents as examples that might reinforce an applicant's request for exemption. What some schools may not notice is that those examples are listed *in the context of a supporting documents phase* of the proceeding. [see: 10 NYCRR §66-1.3(d)]

In other words, a request for a letter from a minister, priest, or rabbi (etc.) in support of the applicant, or supporting the beliefs of the applicant to abstain from vaccines, is both optional, and conditional on assertions made in the written statement. The request would be warranted, for example, if the applicant wrote that her religious institution, or some members therein, supported her religious interpretations with respect to vaccination.

The reason school administrators are constrained in this manner is because NY CLS Pub Health §2164(9) was amended in 1989—to make dispositive solely what the *applicant* believes on her own terms, and not what different rabbis,

ministers, or the Dalai Lama might believe. This stemmed from Judge Wexler's 1987 decision that the prior statute—which had granted preferences solely to religions whose tenets are specifically opposed to vaccination—was unconstitutional.

That prior statute essentially authorized a school, under the aegis of government authority, to judge the correct and valid interpretation of ecclesiastical questions. Wexler concluded that such government approval of religious interpretations of, for example, one minister over another, had exceeded the Establishment Clause of the First Amendment. See: *Sherr and Levy v. Northport East-Northport Union Free School District*, 672 F. Supp. 81 (E.D.N.Y. 1987).

### ***Acknowledgment From a Physician***

This occurs less often, but some schools want to obtain a written acknowledgment from the parent, or the parent's pediatrician, that withholding vaccines can be detrimental to the child's health.

The NYS legislature had considered a bill that made that a requirement, but it was never enacted. If that's not enough, the provision would have violated the applicant's First and Fifth Amendment rights.

The right against self-incrimination is obvious, especially as it might pertain to criminal allegations. Children's Services or a family court judge would rightfully want to know why a parent admitted, in writing, to willfully withholding vaccines for purportedly "vaccine-preventable diseases"! A school's requirement that parents must agree that vaccines provide all benefits, with no mention of serious medical risks, places parents in legal jeopardy, should they become entangled (for any reason) with Children's Services or family courts.

The Supreme Court has continuously upheld the rights of speech and conscience, which included the right *not to be compelled* to believe certain things, or to speak certain words against one's will. Holding a person's freedom of religion hostage unless and until certain words are spoken is unconstitutional.

In what way? The applicant might believe that vaccines have questionable efficacy. Many doctors privately dissent from the orthodox view that vaccines are efficacious, which would be a problem if a school wants the applicant's doctor to certify statements of unqualified support for vaccination. We do not even know how many doctors might oppose vaccination, because state medical licensing boards enforce standard medicine, and many doctors have had their licenses suspended for straying from that practice. In some instances, charged with insurance fraud if they accept health insurance in their practice.

If that's not enough, this requirement directly contravenes the rules governing this process. Parents are expressly forbidden from advancing medical reasons for

abstaining from vaccines, let alone having medical opinions about vaccination at all. Written statements must provide solely *religious* reasons. It therefore follows that schools are prohibited from forcing parents to opine on the medical merits of vaccination, which these acknowledgement statements require them to do. Most parents don't have the requisite scientific knowledge to competently opine on it, and would merely have knowledge of the *religious* efficacy of vaccines.

In other words, school administrators are required to act as adjudicators in determining whether or not to grant a religious waiver, based upon information applicants are instructed to furnish administrators—which is entirely and exclusively related to religion, and not medical or public health. Consequently, an administrator's decision must weigh the merits of the *religious* information that applicants are required to supply, and not medical or public health information that is neither supplied, nor required.

Put simply, the law provides a legal waiver based upon *religion*. Applicants are required to submit solely *religious-based* explanations. Schools are required to assess those beliefs on their *religious* merits, and no other equities.

### **Concluding Remarks**

Local governments or school districts cannot venture unilaterally into public policy areas where the state has already tread. Similarly, schools and local health departments cannot unilaterally issue rules and requirements that, in effect, amend state law or regulations—whether they be annual updates of exemptions previously granted, or completing forms—in place of written statements—that are superfluous to the process.

Indeed, one reason a court placed a permanent injunction on NYC's flu vaccine mandate for preschools in December 2015 was because state vaccine mandates had already covered preschools in the state. Not long ago, the state wouldn't even allow NYC to establish a separate tax to fund preschools, since the state already had a tax that funds it.

I believe my interpretations of these regulations are sound and reasonable. Whether these issues are gray areas of regulations or not, it doesn't mean that schools can establish policies with unlimited discretion. So if the administration of your school disagrees with my views, ask them to explain how they arrived at a different interpretation.

That would be the only way to judge the efficacy of their policies—are they reasonable and logical policies consistent with the regulation's intent.

Charles Nicholas

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