

Squaring State Child Vaccine Policy With Individual Rights Under the Individuals With Disabilities Education Act: Questions Raised in California

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In response to the 2015 Disneyland measles epidemic, California implemented a law, known as Senate Bill 277 (SB277), that eliminated the availability of nonmedical religious or personal belief exemptions from public and private school and day care vaccination requirements. This law made California only the third state (along with Mississippi and West Virginia) to limit its vaccine exemption to medical grounds.¹ As the American Academy of Pediatrics recognizes, the effectiveness of a state's vaccination policy in preventing vaccine-preventable diseases relies heavily on the stringency of the policy's exemption² and the use of implementation and enforcement authority granted to the health departments, and the schools and day care centers into which these children enroll. Nonetheless, pro-exemption advocates have successfully convinced many state legislatures to expand or maintain broad vaccine exemptions; more than one-third of states permit parents to use a practically unlimited range of justifications to opt their children out of vaccine requirements.³ Furthermore, advocates continue to challenge state vaccination laws and enforcement authority in court (although generally unsuccessfully), bringing costly legal actions against states, health departments, departments of education, schools, and local school districts.⁴

Early assessments of SB277's elimination of nonmedical exemptions indicate that it is contributing to a reduction in the number of California parents who choose to exempt their children from school immunization requirements.⁵ However, the law also raises questions for states attempting to balance public health protections with other important public interests. As described in detail later in this article, a section of SB277, as well as guidance provided by the state health department, appears to establish a new way for students receiving school-based services under the federal Individuals With Disabilities Education Act (IDEA) potentially to have their own form of exemption from state vaccination requirements.

SB277 was, unsurprisingly, challenged in court in *Whitlow v California*.⁶ The case raised novel legal and policy implementation questions about how to balance state authority to protect the public's health against the federal IDEA law, which guarantees children with disabilities the right to a Free and Appropriate Public Education (FAPE) in the least restrictive environment. The plaintiffs claimed that California's new vaccine mandate gives schools the right to prevent children who receive special education from enrolling in public school altogether, denying their right to receive FAPE in the least restrictive environment, in violation of the IDEA.³ Furthermore, the plaintiffs claimed that the varying approaches adopted by school districts in response to California's law resulted in the disparate treatment of children with disabilities across communities, also in violation of the IDEA.

The plaintiffs in *Whitlow* voluntarily dismissed their case after the judge refused to issue a preliminary injunction stopping the implementation of SB277. Although the judge never reached the question of whether this federal law overrides state vaccine policy,⁴ if the new IDEA-based exemption were interpreted broadly and pursued vigorously by qualified families, it could offer a novel form of vaccine exemption to as many as 1 of every 9 California students, as well as substantial variation in infectious disease control and protections from one school district to the next. If advocates for broader vaccine exemptions⁷ are able to convince legislators and

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similarly situated families in other states that this form of exemption is viable, these challenges could be pursued more broadly and end up affecting public health programs, school districts, and millions of children nationwide.

The California Law

Each student who qualifies for services under the IDEA has a uniquely tailored individual education plan (IEP) that identifies what services the child will receive and the educational setting in which he or she will receive those services. SB277 states that it “does not prohibit” students who qualify for an IEP “from accessing any special education and related services required” by the IEP,⁸ and the California Department of Public Health added that “students who have an . . . IEP should continue to receive all necessary services identified in their IEP regardless of their vaccination status.”⁹ The district court, in its denial of the preliminary injunction, describes this provision as an exemption for children with IEPs from the school vaccination requirements.⁶

However, these declarations by the state and the court do not fully settle the matter in California. The language of SB277 is ambiguous and does not reference exemption in the same way it does for those with medical reasons for noncompliance. As a result, school districts in California vary in their interpretation of these provisions. The Los Angeles County school district determined that it would not require students with IEPs to demonstrate adherence with the vaccination mandate,¹⁰ whereas the neighboring Orange County school district stated that it would enforce the vaccine mandate for all students not receiving a medical exemption, irrespective of whether the student had an IEP.¹¹

California has the right to provide any services to special education students that it chooses as long as these services do not fall below the level mandated in the IDEA and all procedural requirements are followed.^{12,13} Although California may, as the statement by the California Department of Public Health suggests, ultimately choose to admit unvaccinated students with disabilities into its public schools, the question remains whether it is required to do so by the IDEA.

The Application of FAPE to Mandatory Vaccination Laws

The IDEA was passed in 1990, building on earlier education laws enacted in response to a long history of exclusion of children with disabilities from public schools. The centerpiece of the statute is its requirement that schools provide FAPE to this population in the least restrictive environment, a legal obligation that exists even when students are unable to attend school for medical reasons, are expelled, or are imprisoned. Nevertheless, the exact parameters of FAPE are unclear. Some courts have reasoned that FAPE focuses primarily on the ability of children with disabilities to participate in public education rather than guaranteeing any particular substantive benefits once in school. A 2017

decision by the Supreme Court suggests a potentially broader interpretation; the court holds that schools must provide an IEP that is reasonably calculated to enable the student with disabilities to make appropriate progress in light of his or her circumstances.¹² Regardless of whether this new standard will result in substantively different outcomes, experts agree that much of the protection of the IDEA is found in its procedural guarantees. Parents have the right to participate in the IEP process and are provided with due-process rights through mediation and litigation when disagreements arise. In most cases, school officials may not change the services that a child receives in school or the location in which they are provided without holding an IEP meeting with parents. If parents dispute the changes, school officials in most cases must allow the child to “stay put” in his or her current classroom setting until the dispute is resolved by a third party.

Despite IDEA’s strong emphasis on providing access to services in public schools, it is unlikely that Congress intended the FAPE requirement to preempt categorically a state’s ability to apply its otherwise enforceable laws equally to children with disabilities. Although there is little precedent on this issue, the Office of Special Education Programs, a division of the US Department of Education, has indicated it has no authority to interpret state laws, even when they are used as the basis on which to deny services under the IDEA.¹⁴ There also is no evidence that California’s childhood vaccine law was intended to discriminate against students with disabilities, that it is more difficult for this population to comply with its provisions, or that the law will have a disparate impact on these students. Children with disabilities and those without disabilities are similarly situated and are treated equally by the state for all purposes relating to the vaccination law. In such circumstances, parental choice to forego vaccination, rather than school district refusal to comply with the IDEA, is the proximate cause of the denial of FAPE and the requirements of access.¹⁵

The IDEA explicitly gives parents the right to withhold consent to services and to revoke consent once services have started. Some courts have even inferred the absence of consent based on questionable parental behavior when seeking services. Parental insistence that a state meet conditions that are not required by the IDEA¹⁶ and refusal to cooperate with a district’s process to receive services¹⁷ have both been found to be sufficient to relieve districts of the obligation to provide FAPE because of a lack of consent. Parents who insist on the waiver of otherwise enforceable vaccination laws before accepting or continuing services would seem to fall into both categories.

The position taken by the US Department of Education’s Office of Civil Rights on state vouchers for students with disabilities further supports this interpretation.¹⁸ Several states offer money to students with disabilities to attend private schools subject to waiver of their right to FAPE. The Office of Civil Rights found that when a parent voluntarily chooses to accept a voucher, the child is “parentally placed” for purposes of the IDEA, such that the waiver of federal

rights is permissible.¹⁹ Because the parent rather than the school district acts as the key decision maker, FAPE no longer applies unless and until the student chooses to return to public school. By the same logic, we would argue that because parents are the key decision makers on whether or not to vaccinate their children, they rather than the school district are the causal agent in placement.

It seems likely that opponents of vaccination laws would claim that parents have not consented to the termination of services in any respect. However, when parents are provided with full information about vaccination requirements and the consequences of noncompliance, we believe this argument is weak. Parents have the ability to consent to vaccination, the condition precedent to admission, which will lead to the provision of FAPE. In light of this knowledge, choosing not to vaccinate is the equivalent of choosing to waive their child's right to FAPE. That their freely elected choice leads to undesirable consequences does not transform the decision into an involuntary one, or one unilaterally made by the school district.

Because children with disabilities may be excluded from public schools if this interpretation is adopted, we believe it is imperative that districts proceed carefully and follow the procedures outlined in the IDEA for revocation of consent or, if necessary, for a change in the location of service delivery (eg, when schools choose to provide services at the child's home rather than at school). A revocation of services under the IDEA must be fully informed and in writing to be actionable. Schools should make "reasonable efforts" to obtain a written revocation even if the failure to comply with vaccination laws may reasonably be construed as waiver under the IDEA.²⁰ The IDEA also requires that schools provide written notice to the parents that explains the changes in the child's educational program that will result from revocation and provide a reasonable amount of time for parents to fully consider the consequences before schools discontinue special education and related services.²¹ If parents object to revocation and seek a formal resolution of the dispute, we believe the school should permit the child to stay put in the school until the dispute is resolved unless he or she can be shown to present a threat of contagion to others.

It is also important to recognize that the IDEA remains in effect for children who are voluntarily placed by their parents somewhere other than a public school. The law does not require a district to provide FAPE to these students but still must consider the needs of each student individually. The district does retain the option not to provide services once it has engaged in meaningful consultation with parents.^{22,23}

Policy Implications

Federal precedent suggests that the IDEA does not require California or any other state to waive its mandatory vaccination law for students with disabilities. A more difficult question is whether California should waive the law for these students. On the one hand, if a substantial number of children covered by the IDEA were to choose to forego vaccination,

the ability of state vaccination law to achieve its intended public health effect (ie, herd immunity against vaccine-preventable diseases) might be in doubt. That said, research indicating that IDEA-qualified children seek out exemptions at a higher rate than do other children is scarce. To exclude a handful of vulnerable children from public school and needed services on the small chance that their immunity status will lead to an outbreak appears both heavy-handed and unnecessarily harsh in the absence of strong evidence of substantial increased public risk, such as data indicating unexpected dramatic increases, or large clusters, of families with children with IEPs taking up this new form of exemption.

However, this case does raise several additional potential policy concerns. As noted previously, state policy makers in California, including the legislature and the state public health and education departments, appear to be deferring to local education and health authorities on the question of whether or not to enforce vaccination requirements with IDEA-eligible students in their communities. Although exemption rates are known to vary by community, this deference could undermine efforts to maintain herd immunity within school systems and communities by resulting in substantial variation in exemption rates by district. It will also increase the complexity of reporting and tracking vaccination rates in schools and infectious disease outbreak response. Finally, it raises important questions about equitable access among school districts to a reasonable level of educational services for a vulnerable population of students as guaranteed under federal and state law.

More policy questions need to be considered for the majority of states that offer religious exemptions to vaccinations but not the broader personal belief or philosophical exemptions to vaccinations. (In states with broad philosophical exemptions, the only substantial obstacles to parents acquiring such exemptions are bureaucratic.) Few children qualify for medical exemptions,^{24,25} and access to IDEA-based services does not form a ground for a religion-based exemption. It is foreseeable, therefore, that parents in other states might try to raise similar legal challenges to those filed in California. Given the cash-strapped nature of many school districts and state and local public health agencies, the threat of suit might be enough to lead some districts to accede to parental wishes, leading to a new type of cluster of exempt populations—and communities vulnerable to vaccine-preventable diseases—heretofore unanticipated by state public health authorities.²⁶

Of greater public health concern would be if a court determined that the federal law preempted a state's vaccination law. Such scenarios, although speculative, are not out of the realm of possibility, although recent decisions have tended to be based on Constitutional grounds rather than on conflicts between federal and state statutes. In 2 cases in Arkansas in 2002, federal courts struck down the state's religious exemption language for being too narrow to accommodate religious beliefs that were not part of what the state described as "established" religions. This ruling led to the state legislature rewriting its vaccination law to include a much broader personal belief

exemption.²⁷ A court decision prioritizing the federal IDEA law over state exemption policy would force the state to rapidly rewrite its vaccine law, working through the increasingly contentious “sausage making” of the state legislative process to create either (1) a new category of exemption-eligible children under its school entry rules that could be open to a high-enough percentage of children to threaten (or breach) herd immunity thresholds for most childhood immunizations²⁸ or (2) a broad philosophical exemption that would allow parents to exempt their children for almost any reason.

Our community protection against vaccine-preventable diseases has relied on states having the authority to require proof of vaccination as a condition of entry into schools and day care centers. As cases such as this one highlight, however, we also must ensure that 2 other core public health functions are well supported and appropriately implemented: (1) robust, ideally publicly accessible surveillance systems that accurately monitor community, school, and day care vaccination coverage rates and (2) strong, evidence-informed health communication strategies at the community and clinical level²⁹ that maintain public knowledge of and support for childhood vaccination.

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