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Garden State CLE Presents:



COVID Vaccinations and the Constitution

Instructor:



Joseph P. Rem, Jr.,

Certified Criminal Trial Attorney

Lesson Plan

Part I

Constitutional and Statutory Protections

First Amendment to the United States Constitution

Congress shall make **no law respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Comments: The Free Exercise Clause has been made applicable the states under the Due Process Clause of the 14th Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).

NJ Constitution of 1947 – Article I, section 3

No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

Comments: Note that this constitutional provision does not address the establishment nor the free exercise issues set forth in the First Amendment. Accordingly, New Jersey statutory and case law related to vaccinations and religious exemptions have developed under the Free Exercise Clause of the First Amendment. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993):

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.

N.J.S.A. 26:1A-9.1

Exemption for pupils from mandatory immunization; interference with religious rights; suspension

Provisions in the State Sanitary Code in implementation of this act shall provide for exemption for pupils from mandatory immunization if the parent or guardian of the pupil objects thereto in a written statement signed by the parent or guardian upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights. This exemption may be suspended by the State Commissioner of Health during the existence of an emergency as determined by the State Commissioner of Health.

NJSA 9:6-1.1.

Treatment of ill children according to religious tenets of church

The article to which this act is a supplement shall not be construed to deny the right of a parent, guardian or person having the care, custody and control of any child to treat or provide treatment for an ill child in accordance with the religious tenets of any church as authorized by other statutes of this State; *provided*, that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not [sic] violated.

NJSA 26:2-99. Right to refuse medical examination, diagnosis or treatment on religious grounds

Nothing in this act shall be construed to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if the child or his parent or guardian objects thereto on religious grounds.

NJSA 26:1A-66. Construction in regard to specific matters; no denial of certain rights

This act shall not be construed to deny the right of a person, parent, guardian or custodian to treat or provide treatment for himself or an ill minor in accordance with the religious tenets of any church as is now or may hereafter be authorized by other statutes of this State, or to require any such person or any of his minor children to submit to physical examination other than as is now or may hereafter be required by other statutes of this State, or to require any such person or any of his minor children to submit to confinement in any hospital or medical institution other than as is now or may hereafter be required by other statutes of this State; *provided, always, however*, that the laws, rules and regulations relating to communicable diseases and sanitary matters are not [sic] violated.

NJSA 18A:61D-10. Exemptions

A student shall not be required to receive a vaccination pursuant to section 2 or 3 of this act based upon one of the following:

- a. a written statement submitted to the secondary school or institution of higher education, as applicable, by a licensed physician indicating that the vaccine is medically contraindicated for a specific period of time and the reasons for the medical contraindication, based upon valid medical reasons as determined by regulation of the Commissioner of Health and Senior Services, which shall exempt the student from the vaccination for the stated period of time; or
 - b. a written statement submitted to the secondary school or institution of higher education, as applicable, by the student, or the student's parent or guardian if the student is a minor, explaining how the administration of the vaccine conflicts with the bona fide religious tenets or practices of the student, or the parent or guardian, as appropriate; except that a general philosophical or moral objection to the vaccination shall not be sufficient for an exemption on religious grounds.
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Part II – Case Law

1.) Seminal Supreme Court decision

Jacobson v. Massachusetts, 197 US 11 (1905)

The authority of the state to enact this statute is to be referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description;’ indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, 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.

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

2.) New Jersey Courts adopt *Jacobson*

a.) *Sadlock v. Carlstadt Board of Education*, 137 N.J.L. 85 (1948)

So far as we have been able to ascertain the matter before us is one of first impression in this State, although the question of compulsory vaccination has received considerable attention in the federal courts and those of numerous sister states. We have carefully considered the depositions taken under the writ as well as the able briefs of counsel and are of the opinion that the resolution of May 6, 1947 under review was proper and efficacious. At the outset we desire to observe that the question of the desirability or efficacy of compulsory vaccination by virtue of R.S. 18:14–52, N.J.S.A. [repealed], and whether it is wise or unwise is strictly a legislative and not a judicial question. It is not the province of the Court to pronounce that vaccination is or is not a suitable and satisfactory means of combating disease. Judicial notice, however, will be taken that vaccination is commonly believed to be a safe and valuable means of preventing the spread of certain diseases, particularly smallpox, and that this belief is supported by high medical authority.

The question of general compulsory vaccination laws has received consideration by the United States Supreme Court in *Jacobson v. Massachusetts*, an opinion written by Mr. Justice Harlan. Our examination of that case leads us to the conclusion that the decision therein is dispositive of the issue before us. *Jacobson v. Massachusetts* held, inter alia, that the enactment of a statute requiring compulsory vaccination for the protection of local communities against the spread of smallpox was a proper exercise of the legislative prerogative and that such enactment did not deprive the individual of his constitutional guaranties with reference to personal and religious liberties.

b.) *Mountain Lakes Board of Education v. Maas*, 56 NJ Super. 245 (App. Div. 1959)

A requirement that a child must be vaccinated and immunized before it can attend the local public schools violates neither due process nor (as defendant tangentially suggests) the equal protection clause of the Constitution. The rationale for this rule is rooted in traditional concepts recognizing the authority of a local board, acting under a legislative grant of power, to promote the community health, safety and welfare.

The fact that there may be differences of opinion as to the necessity or efficacy of vaccination or immunization does not deprive the State of the power to enact legislation requiring compulsory vaccination or immunization, or the local board from acting pursuant to such a power. (Citing *Jacobson*)

3.) The holding in *Jacobson* extended to eugenics

a.) *Buck v. Bell*, 274 US 200 (1927)

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the order. In view of the general declarations of the Legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination [as announced in *Jacobson*] is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Note – the New Jersey view on the sterilization issue is set forth in *In re Grady*, 85 N.J. 235 (1981), holding that a trial court must not authorize sterilization of incompetent unless persuaded by clear and convincing proof that sterilization is in such person's best interests.

4.) School children and the free-exercise of religion

a.) DCP v. J.B., 459 N.J. Super. 442 (App. Div. 2019)

Parents have a constitutionally-protected, fundamental liberty interest in raising their biological children, even if those children have been placed in foster care. However, parental rights are not absolute. Balanced against the constitutional protection of family rights is the State's *parens patriae* responsibility to protect the welfare of children. As such, our courts have repeatedly recognized the State's right to intervene and override the desires of parents who refuse to consent to medical treatment if "it is necessary to prevent harm to a child."

The mother in this case contends her desire to preclude vaccination of Son and Daughter is expressly authorized by N.J.S.A. 26:1A-9.1, which states, in pertinent part:

Provisions in the State Sanitary Code in implementation of this act shall provide for exemption for pupils from mandatory immunization if the parent or guardian of the pupil objects thereto in a written statement signed by the parent or guardian upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights.

The mother also relies on N.J.A.C. 8:57-4.4(a), which provides for exemption “from mandatory immunization if the child's parent or guardian submits to the school, preschool, or child care center a written, signed statement requesting an exemption, pursuant to the requirements for religious exemption established at N.J.S.A. 26:1A-9.1.” Finally, the mother directs the court's attention to a May 19, 2017 administrative guidance letter issued by the New Jersey Department of Health (DOH) interpreting N.J.A.C. 8:57-4.3 and N.J.A.C. 8:57-4.4 regarding immunization of students; it states in pertinent part:

When a parent or guardian submits a written, signed request for exemption from mandatory immunization(s) due to religious beliefs, the statement should be accepted and the religious exemption granted. The request does not need to identify membership in a recognized church or religious denomination or describe how the administration of immunizing agents conflicts with the student's religious beliefs in order for the request to be granted.

The DOH letter emphasizes, however, that “requests for exemptions from mandatory immunization requirements ... are limited to medical and religious reasons. Requests for exemptions based on philosophical, moral, secular, or more general reasons are unacceptable and should not be granted.” This same limitation is set forth in N.J.A.C. 8:57-4.4(a)(1), which states: “The school, preschool, or child care center shall be prohibited from exempting a child from mandatory immunization on the sole basis of a moral or philosophical objection to immunization.”

Even assuming the mother's objection to vaccination is religious and not philosophical, we are not persuaded by her arguments. The Family Part found N.J.S.A. 26:1A-9.1 inapplicable because this matter does not concern Son and Daughter's attendance at school. We concur. Rather, this is a matter of ensuring the health and safety of children in the care and custody of the Division. Accordingly, this matter is governed by Title 9, not Title 26.

Part III – Products liability

a.) **Brusewitz v. Wyeth Laboratories, 562 US 223 (2011)**

The National Childhood Vaccine Injury Act of 1986 (42 U.S.C.A. § 300aa-1 *et seq.*) created a no-fault compensation program to stabilize a vaccine market adversely affected by an increase in vaccine-related tort litigation and to facilitate compensation to claimants who found pursuing legitimate vaccine-inflicted injuries too costly and difficult. The Act provides that a party alleging a vaccine-related injury may file a petition for compensation in the Court of Federal Claims, naming the Health and Human Services Secretary as the respondent; that the court must resolve the case by a specified deadline; and that the claimant can then decide whether to accept the court's judgment or reject it and seek tort relief from the vaccine manufacturer. Awards are paid out of a fund created by an excise tax on each vaccine dose. As a *quid pro quo*, manufacturers enjoy significant tort-liability protections. Most importantly, the Act eliminates manufacturer liability for a vaccine's unavoidable, adverse side effects.

Hannah Bruesewitz's parents filed a vaccine injury petition in the Court of Federal Claims, claiming that Hannah became disabled after receiving a diphtheria, tetanus, and pertussis (DTP) vaccine manufactured by Lederle Laboratories (now owned by respondent Wyeth). After that court denied their claim, they elected to reject the unfavorable judgment and filed suit in Pennsylvania state court, alleging, *inter alia*, that the defective design of Lederle's DTP vaccine caused Hannah's disabilities, and that Lederle was subject to strict liability and liability for negligent design under Pennsylvania common law. Wyeth removed the suit to the Federal District Court. It granted Wyeth summary judgment, holding that the relevant Pennsylvania law was preempted by 42 U.S.C. § 300aa-22(b)(1), which provides that “[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” The Third Circuit affirmed. *Held*: The NCVIA pre-empts all design-defect claims against vaccine manufacturers brought by plaintiffs seeking compensation for injury or death caused by a vaccine's side effects.