

Vaccine Mandates for Children A Talk with Professor Dorit Reiss

- Vaccine mandates and federalism
 - Public health is regulated at federal, state, and local levels. Vaccine mandates have been imposed on certain segments of the population and in certain jurisdictions based on public health needs for over a century.
 - Mandatory school vaccinations are regulated at the state level.
 - Federal: CDC provides vaccination recommendations for different age groups.¹
 - States are free to adopt CDC recommendations or set their own standards.
 - Specific school mandates vary state by state, but all 50 require DTap, polio, MMR, and varicella (chickenpox). Some require Hep A, Hep B, and Hib. As of 2020, Rhode Island, Virginia, and Hawaii require HPV vaccines.² Massachusetts requires the flu vaccine.³
 - Generally, vaccination mandates are in place for children in public and private schools, daycares, and college students.
- State power to mandate vaccines for public health
 - First litigation on vaccine mandate: *Abeel v. Clark*, 84 Cal. 226, (1890)
 - Supreme Court upheld the constitutionality of a school smallpox mandate as a proper exercise of police powers under the state constitution. It found that the legislature has power to enact vaccination laws as necessary to maintain public health and that such laws are reasonable restraints and burdens under the circumstances.
 - Supreme Court upholds vaccine mandate: *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
 - A Massachusetts statute allowed cities to mandate smallpox vaccinations for its residents over the age of 21 with a criminal penalty of \$5 for noncompliance. Subsequently, Cambridge adopted a regulation requiring smallpox vaccinations. Jacobson refused vaccination.
 - The Supreme Court held that the vaccine mandate was a legitimate exercise of the state's police power to protect public health. The Court

¹ CDC Vaccines and Preventable Diseases Recommended Vaccines Needed by Age, <https://www.cdc.gov/vaccines/vpd/vaccines-age.html>.

² NCSL HPV Vaccine: State Legislation and Regulation, <https://www.ncsl.org/research/health/hpv-vaccine-state-legislation-and-statutes.aspx>

³ Massachusetts Department of Public Health Press Release, "Flu Vaccine Now Required for all Massachusetts School Students Enrolled in Child Care, Pre-School, K-12, and Post-Secondary Institutions" 8/19/2020, <https://www.mass.gov/news/flu-vaccine-now-required-for-all-massachusetts-school-students-enrolled-in-child-care-pre>

noted, “[T]he liberty secured by the Constitution of the United States... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good” (197 U.S. at 26). In this case, the Court found that the Cambridge regulation was not arbitrary, unreasonable, or beyond what was reasonably required.

- Supreme Court upholds school mandate: *Zucht v. King*, 260 U.S. 174 (1922)
 - San Antonio, Texas city ordinance required a certificate of vaccination in order for children attend schools, both public and private. Rosalyn Zucht did not present a certificate and refused to be vaccinated. She was not allowed to attend private school.
 - The Supreme Court upheld the constitutionality of the school mandate. The Court cited *Jacobson* and other cases that held vaccination laws as a proper exercise of states’ police powers.
- Courts have consistently upheld school vaccination mandates. Courts have recognized that when it comes to children, the state draws its authority from its police power to regulate for the public health and as *parens patriae*.
- Exemptions and right to opt out of school mandates
 - Exemptions exist because vaccine mandates balance rights to personal and religious beliefs with public health needs. Although legal consensus is that nonmedical exemptions for mandates are not constitutionally required, states offer a variety of exemptions.
 - Types of exemptions
 - Medical exemptions
 - All 50 states provide medical exemptions.
 - Valid reasons may include a severe allergy or a disease that weakens the immune system.
 - Many states require a doctor to sign a form for the exemption.
 - Religious exemptions
 - 45 states (as of 2020) permit religious exemptions.
 - Some states may require evidence of belonging to a religious group that objects to vaccines.
 - Philosophical exemptions
 - 15 states (as of 2020) permit philosophical exemptions.
 - Reasons may include concerns about vaccine safety or a preference for alternative medicines.
 - May require getting a signature from the local health department or writing a letter explaining philosophical beliefs.

- See list of state exemptions at National Conference of State Legislatures website (link in footnote)⁴
 - Legislative responses to outbreaks
 - Well documented correlation between the availability of philosophical exemptions and outbreaks. The availability and use of philosophical exemptions and under-immunization tend to cluster, making those communities susceptible to more severe outbreaks.
 - In 2014, California had a measles outbreak that spread to many states and Canada and Mexico.⁵ Over 170 cases were reported by March 2015⁶ and about a fifth required hospitalization, with many experiencing long-term effects. In response, the California legislature responded by removing nonmedical exemptions from school mandates.⁷
 - In 2019, Maine⁸ and New York⁹ also eliminated nonmedical exemptions.
- Enforcement and other measures to improve vaccination rates
 - Criminal sanctions
 - Several European countries, including Italy¹⁰, impose criminal fines on parents who send their children to school unvaccinated.
 - Though likely constitutional, similar measures may not be politically feasible in the U.S. Enforcement measures seen as too heavy-handed can have the opposite effect, increasing distrust in the government and inflaming the anti-vaccination movement.
 - Vaccinations against parental discretion or will
 - When a child is under state care, the state may vaccinate even against parental will. See *Div. of Child Protection v. JB*, 212 A. 3d 444 (NJ Appellate Div. 2019)¹¹

⁴ NCSL States With Religious and Philosophical Exemptions From School Immunization Requirement, <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

⁵ CDC Morbidity and Mortality Weekly Report, Measles — United States, January 4–April 2, 2015, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a1.htm>.

⁶ “US Measles Cases Hit 170; New Outbreak in Washington: Through Feb. 27, 170 People in 17 States and Washington, D. C. , Have Developed Measles, According to the Centers for Disease Control and Prevention, up from 154 Reported Cases through Feb. 20.” *Becker's Hospital Review*, 2 Mar. 2015, www.beckershospitalreview.com/quality/us-measles-cases-hit-170-new-outbreak-in-washington.html.

⁷ California Senate Bill 277

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277.

⁸ Maine Public Law, Ch. 154 <https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/maine-vaccine-exemption-law-changes.shtml>.

⁹ New York Senate Bill S2994A, <https://www.nysenate.gov/legislation/bills/2019/s2994>.

¹⁰ “Italy bans unvaccinated children from school.” *BBC News*, 12 Mar. 2019, <https://www.bbc.com/news/world-europe-47536981>.

¹¹ <https://www.njcourts.gov/attorneys/assets/opinions/appellate/published/a3019-18.pdf?c=dnO>.

- In custody cases where one parent wishes to vaccinate against the wishes of the other parent with a nonmedical objection, the court may side with the parent seeking vaccination.
- Education and infrastructure support
 - Provide information on vaccination rates and increase support for education on the efficacy and safety of vaccines to combat misinformation.
 - Colorado passed a bill in 2020 seeking to improve immunization rates through various ways, including requiring schools to actively share their vaccination rates with parents annually and requiring parents to either get signoff from a doctor or complete an online education module prior to claiming a nonmedical exemption.¹²
- Lowering the age of consent
 - Has occurred in other healthcare contexts: some states have lowered the age of legal consent for access to certain types of health care like contraception, prenatal care, or mental health and substance abuse.
 - Similar measures can be enacted to allow older minors to be vaccinated without parental consent.

¹² Colorado Senate Bill 20-163, <https://www.colorado.gov/pacific/cdphe/senate-bill-20-163>.