Children's Health Defense

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April 30, 2024

SENT VIA USPS & EMAIL

Senator Gustavo Rivera,
172 State Street
Capitol Building, Room 502C
Albany, NY 12247

Re: Minor Consent Bills A6761 and S8352 are Unconstitutional and Violate NY State and Federal Law

Dear Sen. Rivera,

It was recently brought to the attention of Children's Health Defense that both the New York State Assembly and Senate Health Committees are considering similar bills, A6761 and S8352, proposing sweeping amendments to New York Public Health Law (PHL) § 2504 that would nullify fundamental and long-established parental consent protections regarding medical treatment for minors in New York State. Further, rather than protecting the health of minors, these bills actually put minors' health at grave risk by cutting out parents — those who know their children's and family medical history best — from medical decision-making for their children.

Respectfully, as set forth herein, these bills should be rejected and withdrawn.

In addition to undermining parental consent, A6761 and S8352 are deceptive and violate federal and state law including parents' constitutional rights. Moreover, they contain an unfunded mandate, forcing New Yorkers to pay for any medical service that may be performed upon a minor regardless of cost.

The Sweeping Changes Proposed by A6761 and S8352 Put Minors' Health at Grave Risk by Cutting Out Parents' Participation in Medical Decision Making

First, these bills mislead New York citizens. The bills claim to simply provide access to medical services for "homeless youth." However, that claimed purpose is superfluous because homeless

youth already have these protections under current law.[1] Instead, contrary to their purported limited purpose, A6761 and S8352 actually propose sweeping changes premised upon the significant expansion of New York Public Health Law (PHL) § 2504. First and foremost, the bills eviscerate parental consent protections, allowing **all children under age 18 the opportunity to consent to any medical, dental, health and hospital service** if they "comprehend the need for, the nature of, and the reasonably foreseeable risks and benefits involved..."[2] Among other controversial services, this expanded consent even includes consent to **inpatient and residential treatment**.

Unbelievably, the bills provide absolutely no guidance as to **who** may assess a minor's comprehension and competence, what information must be provided to a minor, or **upon what criteria** an assessor bases his or her decision that a child has "consented." Moreover, there is not even a minimum age at which consent is presumed not possible — allowing an assessor to claim that the youngest children have given "consent."[3] It is alarmingly easy to envision circumstances where a person assessing a minor's competency has a financial, ideological, or professional motive, resulting in a conflict of interest. Indeed, these bills give opportunistic adults the means to take advantage of children.

To make matters worse, these bills not only cut parents out of the decision-making process but also block a parent's access to medical information about services to which their child purportedly "consented."[4] Thus, for example, a child could be pressured (by teachers, school nurses, peers, online actors, etc.) to commit herself to an inpatient facility without a parent knowing where the child is or the reason for such admission. The parent would literally have no idea what happened to his child.

These bills conflict with public policy, as well as state and federal law and endanger children's health.

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[1] New York Pub. Health Law (PHL) § 2504 currently permits consent to medical services by any person "who is… a homeless youth as defined…"

[2] In addition to expanding minor consent, the bills would expand consent given by allegedly "persons in parental relation" to a child to include any medical, dental, health and hospital service, with no proof, let alone written confirmation, that the person is in fact in "parental relation." Under current law, "persons in parental relation" cannot consent to major medical services, electroconvulsive therapy, or the withdrawal of life-sustaining medical treatment. Further, the proposed bills dilute even the "emergency provision" of § 2504. Currently, only a physician has authority to provide emergency care in the absence of parental consent; however, these bills specifically substitute "practitioner,"a broad and undefined term, in place of "physician." This term does not, on its face, require a medical degree. To the extent it does not, these bills violate Education Code §§ 6521and 6522 concerning the illegal practice of medicine.

[3] Indeed, absurdly, these bills contemplate that even infants can give consent. A6761, Section 8, for example, discusses preventing parents' access to records concerning "any medical, dental, health, and/or hospital services that **such infant patient has consented to themselves** pursuant to section 2504." (Emphasis supplied.)

[4] For example, within A6761, Sections 6, 7 10, 11, 12, 13 and 14 designate medical records as confidential when they relate to services to which a minor has given consent, blocking parents and legal guardians from any information relating to such services.

A6761 and S8352 Conflict with Public Policy as Well as State and Federal Law[5]

New York law has long recognized the fundamental right of parents to give or withhold consent for health services for their children. The current version of PHL § 2504 reflects this right, **requiring parental consent for all medical services**.[6] Although there are limited exceptions to this requirement under New York law (for example, in the context of treatment for sexually transmitted diseases and for homeless youth), these exceptions reflect public health concerns rather than the legislature's belief or acknowledgment that minors possess the capacity to make these decisions.[7]

"The general incapacity of minors to consent to health services derives from the common-law rule that treated a minor's 'normal condition [as] that of incompetency.'" *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 262 (1993). "As legal incompetents, minors could no more consent to medical treatment than they could enter into binding contracts." *Id.* at 262. Indeed, children under eighteen are too young to compare and appreciate the risks and benefits of medical services, both generally and in the applied context of their personal and family history.[8] For this reason, in addition to medical services, New York State prohibits most or all minors from making many decisions, such as using the services of tanning salons, ear piercing, tattoos, ATV operation, jury service, military enlistment, and even buying an alcoholic beverage.

Moreover, these bills violate parents' constitutional rights under the 14th Amendment to the U.S. Constitution to the care, custody, and control of their children. This right specifically includes a parent's right to make fundamental medical decisions. In *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), the Supreme Court acknowledged the long line of cases going back almost a century establishing a parent's constitutionally protected right in the upbringing of his or her children. This fundamental right is infringed when the state intervenes and substitutes its decision-making for that of the parent. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) "([F]reedom of personal choice in matters of...family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). As the court stated in *Parham v. J.R.*, 442 U.S. 584, 621(1979), "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State, and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'" This right certainly includes a "high duty" to recognize need for medical attention and to seek and follow medical advice.

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[5] In addition to A6761 and S8352, the New York State Assembly and Senate Health Committees are considering A267b and S762a, which permit minor consent to vaccinations for sexually transmitted diseases. Like A6761 and S8352, these bills should be rejected because they violate state and federal law - including but not limited to conflicting with the National Childhood Vaccine Injury Act of 1986 (discussed below) - for the same reasons as the bills discussed herein, and similarly put minors' health at risk.

[6] It is also reflected in less consequential laws requiring parental consent, like laws regarding piercings, tattoos, and tanning salons.

[7] *See*, Diekema DS. Adolescent Brain Development and Medical Decision-Making. *Pediatrics*. 2020;146 (suppl 1):S18-S24. doi:10.1542/peds.2020-0818F (last viewed 10/21/2023)

[8] *Id.*, ("[A]dolescents, to varying degrees, experience what might be called prefrontal cortex deficit disorder, a developmental condition marked by those characteristics commonly associated with adolescence: impulsiveness; inflexibility; aggressiveness; recklessness; emotional volatility; risk-taking with less sensitivity to risks than to possible short-term rewards, excitement, and arousal; reactivity to stress; vulnerability to peer pressure; tendency to underestimate long-term consequences; and tendency to overlook alternatives.")

A6761 and S8352 Are Clearly Unconstitutional under the Constitution's Supremacy Clause Because They Directly Conflict with and Violate the National Childhood Vaccine Injury Act of 1986

In addition to violating parents' rights under the 14th Amendment, A6761 and S8352 are clearly unconstitutional under the Constitution's Supremacy Clause because they directly conflict with, and indeed violate, the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"). *See U.S. Const., art VI, cl.2;* 42 U.S.C. §§ 300aa-25 and 300aa-26. Federal law mandates that a person administering vaccines to a child provide to the parent or court-appointed legal guardian a Vaccine Information Statement (VIS) for each vaccine **prior** to its administration. 42 U.S.C. § 300aa-33(2). VISs contain certain information about, among other things, vaccine risks, and the availability of the National Vaccine Injury Compensation Program to those who may be injured or die as a result of vaccination.[9] Recognizing that vaccines can cause significant harm, including serious allergic reactions, deafness, long-term seizures, coma, lowered consciousness, anaphylaxis, permanent brain damage, and death, the Vaccine Act requires these dangers to be disclosed to an adult in the VISs. The federal statute does not permit a vaccine administrator to circumvent this requirement.

Indeed, Children's Health Defense represented a group of parents challenging a similar law, the District of Columbia Minor Consent For Vaccination Act, in *Booth v. Bowser*, 597 F. Supp. 3d 1 (2022). In that case, the Federal District Court issued a preliminary injunction prohibiting enforcement of that law, which forced its repeal. As Judge Trevor N. McFadden stated in his opinion: *"*States and the District are free to encourage individuals – including children – to get vaccines. But they cannot transgress on the program Congress created. And they cannot trample the Constitution." *Id.*[10] In sum, A6761 and S8352 violate federal law and should be withdrawn.

A6761 and S8352 Would Impose a Significant Unfunded Mandate Resulting in Potentially Overwhelming Financial Burdens on New York Taxpayers

In addition to health risks created by these bills, A6761 and S8352 would impose a significant unfunded mandate, resulting in potentially overwhelming financial burdens on New York taxpayers. The bills also serve as a deceptive mechanism for the state to maximize federal Medicaid funds (the federal government funds approximately 50% of Medicaid costs). Specifically, A6761, Section 9 provides: "A minor who is not otherwise eligible for medical assistance under this section, who consents to their own medical, dental, health and/or hospital services…is eligible for standard [Medicaid] coverage …for the specific services consented to by such minor."[11] In other words, **if a minor "consents" to a medical service, taxpayers under**

[9] When a child is harmed by vaccination without a parent's knowledge and consent, the parent is unlikely to recognize a vaccine-induced injury, and may not know to seek immediate medical attention, much less be able to provide a complete medical history to a treating provider. Moreover, a parent may not be aware of government-funded restitution programs, which have very circumscribed periods to make a claim (three years in the NVICP (or two for death) and one year in the CICP). Thus, a family may be foreclosed from funds to assist in the tremendously expensive care for their vaccine-injured child.

[10] *See also,* T. C. A. § 63-1-165, the Mature Minor Doctrine Clarification Act signed into law in Tennessee in May 2023, which recognizes the applicability of 42 U.S.C. § 300aa-26 (the VIS requirement) of the National Childhood Vaccine Injury Act of 1986.

[11] The bills also contemplate that private insurance can be billed, to the extent a child has access to such coverage. Unbelievably, parents paying for such coverage are precluded from access to information about these services, if the child is prompted to redirect the explanation of benefits to another address. This bill, therefore, contemplates adults

Medicaid must cover it. The bill does not acknowledge this burden or propose the source of this additional funding, which is likely to be substantial. Indeed, the state's budget has already begun redirecting to state coffers federal matching funds normally allotted to the counties for Medicaid; in fact, federal Medicaid funding to the counties will be completely phased out by 2026. With just the current slate of mandated services, it is anticipated that this redirection of federal Medicaid dollars will force the counties to cut local services and raise property taxes by 7-14% to cover the shortfall.[12] Clearly, if A6761 and S8352 pass, the current financial burden will be substantially increased, potentially bankrupting the state and its counties.[13]

Conclusion

In closing, the sweeping changes the bills propose apparently permit minors of any age to acquiesce to unknown medical procedures, prescription medications, surgery of any kind, and inpatient or residential services, though they are incapable of consent. Eradicating parental involvement and consent for serious and potentially life-threatening medical procedures places New York children in harm's way. A6761 and S8352 open the door to predatory medicine at the expense of children's health and well-being. Just imagine a parent receiving a call that his child had passed away or suffered a permanent injury from surgery or a medication when he had no idea what was happening. Imagine the grief, the guilt, and the righteous anger towards the legislators who made this possible.

For the foregoing reasons, Children's Health Defense respectfully requests that you heed our warning that both A6761 and S8352 violate state and federal law, the Constitution, and endanger the health and well-being of New York children. Please withdraw these ill-considered bills.

Respectfully,

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advising minors to deceive their parents. Moreover, if the person persuading the child has an improper motive, it is reasonable to anticipate that the minor will be encouraged to refrain from seeking access to the parents' insurance information to avoid all scrutiny.

[12] Lisa, Kate, "State to Gradually Withhold Federal Medicaid Funds from Localities," *Spectrumlocalnews.com*, May 1, 2023.

[13] In addition to increasing taxpayer burden, the funding mechanism in these bills potentially violates federal law, and specifically the Hyde Amendment, which restricts the federal funding of abortions, unless they involve "life endangerment, rape or incest".

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