

Children's Healthcare Is a Legal Duty, Inc.

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Equal rights for children under the law

Federal government may enact religious exemption from parental duty of care

A torturous twenty-year saga of federal involvement with religious exemptions to child abuse and neglect charges may be entering a new chapter. As part of the welfare reform bill, Congress has passed a law explicitly allowing states to have religious exemptions from a parent's obligation to obtain medical care for a sick child.

President Clinton has vetoed the bill, so it has returned to Congress for revision.

Regulation mandated religious exemption—1975

Although the executive branch of the federal government mandated religious exemptions to child abuse and neglect charges through regulation between 1975 and 1983, we have not had a religious exemption in federal law before.

Much of the background is very familiar to readers of the CHILD newsletter. In 1975, the U.S. Department of Health, Education, and Welfare made the religious exemption a federal grant requirement. States had to enact a religious exemption to child abuse and neglect laws in order to get federal funding for child abuse and neglect prevention and treatment programs.

An HEW official told CHILD President Rita Swan that the Christian Science church was the only party that asked for this policy.

Exemption dropped, medical care added—1983

In 1983 HEW's successor, Health and Human Services (HHS) stopped requiring the religious exemption and began requiring states to add failure

to provide medical care to their definitions of child abuse and neglect.

There were likely three main reasons for HHS's policy shift. First, the religious exemptions adopted by the states were contributing to scores of preventable deaths of children. Gradually, these deaths got national media coverage and became an embarrassment to HHS.

Secondly, in the 1980s there was national outrage when Indiana parents allowed their handicapped infant, identified as Baby Doe, to die without corrective surgery. The practice was reportedly widespread, and pro-life groups considered it an outgrowth of abortion rights. The Reagan administration decided to develop federal policy to prevent such deaths.

A policy of requiring medical care in Baby Doe cases was a glaring inconsistency with the federal regulation requiring state laws letting parents withhold medical care on religious grounds.

Thirdly, Rita and Doug Swan made three trips to Washington and wrote more than fifty letters to protest HHS policy on religious exemptions.

HHS claimed neutrality

Unfortunately, HHS's policy shift had no impact on state religious exemption policy. By 1983 virtually every state had adopted a religious exemption to child abuse and neglect, and none had the stomach to challenge the Christian Science church and repeal them.

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CHILD urged HHS to go beyond neutrality. We argued that allowing religious exemptions was inconsistent with requiring states to include failure to provide medical care in their definitions of child neglect.

In 1987 HHS advised Ohio that its religious exemption laws placed it out of compliance with the new federal standards. When Ohio refused to change the statutes, HHS withheld federal money from Ohio. In 1989, Ohio repealed its religious exemptions in the civil code, but refused to modify its religious defense to felony child endangerment and manslaughter in the criminal code. (CHILD and Steven Brown have filed suit against the Ohio Attorney-General charging that the defense discriminates against a class of children.)

Continued efforts by CHILD

In 1989 CHILD prepared a 17-page petition urging HHS to hold all states in its grant program to the same standard it had applied to Ohio. We also submitted a compilation of religious exemption laws in the civil code and news articles about children who had died because their parents believed they had a legal right to withhold medical care on religious grounds. CHILD board member and attorney Mike Botts drafted the petition and prepared the compilation of laws.

Later in 1989 HHS began a comprehensive national review of state religious exemption laws. Two years later HHS had determined that a handful of states were clearly out of compliance with federal standards, but that most states should ask their Attorneys-General for an opinion as to whether their laws were in compliance.

States found themselves in compliance

Since the states were the clients of the Attorneys-General, most of the opinions found that the states were entitled to continue receiving federal money.

HHS's new standards were difficult to understand. HHS said they were trying to make the laws consistent from state to state, but HHS's analysis of the laws seemed itself inconsistent to many observers. CHILD obtained the letters HHS wrote to the states about their religious exemption laws. CHILD

member Ken Casanova prepared a detailed comparison of them. He found many inconsistencies and contacted HHS about them.

HHS maintains medically neglected children not neglected by parents

After years of writing to HHS, CHILD determined that HHS's standards were as follows. The federal government did not object to state laws allowing parents to withhold medical care on religious grounds, but the laws could not offer, or even imply the existence of, a religious exemption from a duty to report a medically neglected child to protective services, from the protective services agency's authority to investigate the case, or from the court's authority to order needed medical care for the child.

Thus, HHS advised states that parents could be given a religious exemption from child neglect, but there could not be a religious exemption from considering the child to be neglected. Federal law is "silent" on "the status of the parent," HHS testified.

Also, HHS objected to laws characterizing spiritual treatment as health care on grounds that they could compromise a court's ability to order medical care.

While conceding that HHS's standards would improve the state laws, CHILD raised several concerns. We felt that there was not a clear reporting duty when the laws allowed parents to withhold medical care. Many of the state laws said that withholding medical care on religious grounds was not child neglect. Why would a person mandated to report abuse and neglect report a child whom the state law said was not being neglected?, we asked.

HHS finally told us orally that the religious exemption should not be in the definition of child abuse or neglect. If the statutory definition of child neglect did not provide an exemption for religiously-based medical neglect, then the potential reporters would know they should report all cases of medical neglect, HHS said. The department did not enforce this policy, however.

Children's lives depend on reporting

CHILD also argued that the lives of children should not be totally dependent on a reporting

requirement. If certain parents have no duty to obtain medical care for their children, then those children's lives are completely dependent on someone outside their church becoming aware of their illnesses and making a timely report to protective services.

Intent of Congress questioned

HHS's only response was that Congress intended for them to allow a religious exemption for the parents. We did not think so because there was no religious exemption in federal law.

Furthermore, Congress had rejected efforts to add the exemption to federal law after HHS placed it in regulation. These efforts suggested that the Christian Science church itself believed that an exemption was still needed in the law.

HHS efforts repeatedly challenged

HHS had tremendous difficulty implementing its proposed improvements to religious exemption laws. State human services departments resented HHS telling them to change laws that the federal government had required them to pass only a decade earlier. The Christian Science church made sure any proposals for changes were vigorously opposed in state legislatures.

When HHS ruled California out of compliance, the state filed suit against HHS and complained that changing the religious exemption laws was "politically impossible." The court ruled that HHS's policy was "arbitrary and capricious" and ordered HHS to give California federal grants for child abuse prevention and treatment. (See the CHILD newsletter, 1995, #1.)

In 1993, the Louisiana legislature passed a resolution praising Christian Science as safe and effective at healing children's diseases and imploring HHS not to rule the state out of compliance. (See next article.) The Louisiana Congressional delegation spent many hours complaining to the National Center on Child Abuse and Neglect (NCCAN) about HHS's efforts.

Congressman John Porter, R-IL, who had been raised as a Christian Scientist, continued to front for the church at every turn. He sent 45 questions for HHS to answer. They were, the director of

NCCAN said, rather obviously prepared by lawyers trying to construct a suit against HHS.

Other states hinted that they might also file suit.

Congress orders moratorium on HHS efforts

In 1994, Congress intervened directly to pass a moratorium on HHS implementation of its religious exemption policy. The battle over the moratorium took literally hundreds of hours and a trip to Washington by CHILD Inc. plus an enormous amount of work by the American Academy of Pediatrics, National Center for the Prosecution of Child Abuse, and others.

All that we achieved was abandonment of the House version which prohibited the federal government from imposing any requirements when parents were providing "non-medical health care." The Senate version adopted instead was a simple one-year moratorium with a promise that the issue would be considered in the 1995 hearings on child abuse.

Swan returned to Washington in December, 1994, to build opposition to religious exemptions, but the advocacy organizations were focused on the implications of the agenda being proposed by the new Republican majority.

House passes Christian Science amendment without debate

There were now five Christian Science Congressmen in the House: Christopher Shays, R-CT; Thomas M. Davis III, R-VA; Robert Goodlatte, R-VA; Lamar Smith, R-TX, and David Dreier, R-CA.

In 1995, as in 1994, the House was more inclined to rubberstamp the Christian Science church's amendments than the Senate. Lamar Smith put an amendment on the welfare reform bill (which included child abuse provisions) prohibiting the federal government from setting any requirements for state child abuse programs as to "the adequacy, type, and timing of health care (whether medical, non-medical, or spiritual)." The House held no hearings on the religious exemption issue and passed the Smith amendment with no discussion.

It was in reality overkill because the House had repealed the Child Abuse Prevention and Treatment

Act so the federal government would have had no authority to set standards for the states anyway.

Senate hearings canceled then reinstated

Senator Nancy Kassebaum, R-KS, the new chair of the Labor and Human Resources Committee, promised hearings on religious exemptions, but did not convene them. Senator Dan Coats, R-IN, the new chair of the Children and Families Subcommittee, said no policy would be made without a Senate staff briefing to which both sides would be invited, but in May we were told that Kassebaum's staff had worked out a done deal with the Christian Science church.

The American Academy of Pediatrics and CHILD Inc. complained. On June 7, Coats's staff announced that there would be a Senate staff briefing on religious exemptions the next day and invited the Academy and the church to speak.

The Academy asked Swan to represent its position at the briefing.

Spiritual treatment promoted as health care

Philip Davis represented the Christian Science church. He emphasized the states' rights theme so popular with the new Republican majority. The federal government should not force states to change their religious exemption laws, he said.

He accused HHS of "prejudging" that all children given only "spiritual treatment" for illnesses are neglected. The basis of this allegation is that HHS prohibited states in its grant program from defining prayer as health care.

The children would not be considered neglected by HHS regulation unless the illness had reached a certain threshold of seriousness. The church's claim that the child would automatically be adjudicated as neglected was therefore inaccurate. But it suited their attack on Washington's "one-size-fits-all approach."

Parents should be sole judge

Davis argued that the government should give parents the right to choose "what they have found to be very effective and the best for their children." He charged that HHS was "prejudicially forcing a

majority approach to children's health care on those who choose a minority approach."

Reimbursements and RFRA cited

He also cited the recognition that Congress had given to Christian Science "health care," including the Medicare and Medicaid reimbursements for Christian Science nursing homes and permitting church practitioners to certify leave in the Family and Medical Leave Act of 1993.

Davis argued that HHS's standards violated the Religious Freedom Restoration Act passed by Congress in 1994, which requires the state to demonstrate a compelling governmental interest before limiting religious freedom. "HHS has not proven that their actions advance or better the compelling interest of health care for children. *Absolutely no evidence exists showing Christian Science care and treatment to be any less effective for the health of a child than conventional medical treatment,*" he said (emphasis added).

Counterpoint: parents must protect children

Swan argued on behalf of the AAP that Congress should require the removal of any law that allows parents to withhold necessary medical care from children. Other points she made included the following:

- The first amendment right to religious freedom does not include the right to abuse or neglect a child.
- Prayer should not be a legal substitute for necessary medical care of children.
- The state's power to interfere in the family should be limited, but it should also be even-handed. All families deserve privacy in certain spheres, and all children deserve equal rights to medical care.

Senate staffer calls medical care risky

Stephanie Monroe on Senator Coats's staff argued against requiring any parents to get medical care. She said all medical care has risks and parents should have the right to decide whether to have it because they are the ones taking the risks. She even cited insulin overdoses as an example to an Eli Lilly researcher. When the researcher pointed out that his giant Indiana corporation is a major insulin manufac-

turer and that ten million Americans depend on insulin for their survival, Monroe retracted her argument. She nevertheless reiterated it when other CHILD members contacted her.

Compromising on children's health care

Monroe also insisted that the AAP and CHILD were trying to make a religious practice illegal and that child abuse issues should be left to the states. Finally she complained that the AAP and the Christian Science church were no closer at the end of the 90-minute hearing than before.

Arduous negotiations with the Senate staff went on for several weeks. Some staff floated proposals that removed requirements for any parents to obtain medical care for sick children. Some proposals talked about prayer as "treatment" and "health care."

The final wording added by the Senate Labor and Human Resources Committee to the Child Abuse Prevention and Treatment Act stated, **"Nothing in this Act shall be construed as creating a federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian."**

It also stated that the Act did not require or prohibit a state from finding abuse and neglect when parents withhold medical care on religious grounds and, vaguely, that the states must have authority to "pursue any legal remedies" to "provide medical care or treatment for a child" when "necessary to prevent or remedy serious harm to the child."

Need for reporting maintained

The AAP, ACLU, and CHILD Inc. strongly insisted that no religious exemption from reporting be allowed. We did not need Congress to give state courts the authority to order medical care, but if the child was not reported to protective services, the courts would not be able to act.

Comparison to Baby Doe

CHILD members, in particular, kept reminding the Senators of the Baby Doe issue. The bottom line was that a conservative Congress wanted the federal government to require medical care for

handicapped infants, but did not want to interfere with a religious practice.

Finally, the Senate Labor Committee issued its report on the welfare reform bill. Republican staffers pointed out that identical language was used for both Baby Doe and religion-based medical neglect cases. In fact, however, while some sections had identical language, the glaring hypocrisy remained that parents of certain faiths were allowed to withhold medical care from sick children, while the handicapped infants had the legal protection of medical care.

State laws must require reporting

Nevertheless, the committee did agree upon a clear reporting requirement. The exemption language in the bill "should not," their report said, "be interpreted to discourage the reporting of such incidences to child protective services nor to exempt any child's situation from State reporting requirements."

The Christian Science church said both verbally and in writing that the Senate bill and report were fine, but later lobbied for the more draconian House version instead.

At the House/Senate conference, however, the Senate version on religious exemptions was adopted. Some Senate staffers said the battle over religious exemptions had almost derailed the welfare reform bill and they therefore did not want any changes in the compromise reached by the Senate.

President Clinton has vetoed the welfare reform bill. We expect that the next welfare reform bill developed by Congress will have the same language on religious exemptions.

Comment

Having a federal law that allows states to exempt certain parents from the responsibility of caring for their children is a shame. Although it only gives the states permission to have such laws, it lends the prestige of the federal government to them. The Christian Science church will probably use it in state legislatures as evidence that the Constitution requires religious exemptions.

Louisiana legislature calls upon feds to allow medical neglect

In 1993 the Louisiana legislature passed a resolution defending its religious exemption to child neglect and complaining of HHS efforts to change it.

WHEREAS, legislators said, several Christian denominations including Christian Science, regularly and successfully use spiritual treatment in lieu of medical treatment for themselves and their children; and

WHEREAS, this practice of spiritual healing has been considered safe and legal in Louisiana for over one hundred years; and

WHEREAS, the practice of spiritual healing has proven for those who use it to be generally as safe as medical treatment, with the rate of serious illness and death now averaging less than half that of the normal population. . . .

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request Secretary Donna Shalala of the United States Department of Health and Human Services to immediately suspend the demands mentioned in the letter dated November 4, 1992. . . , which find the Louisiana statutes "not in compliance. . . ."

BE IT FURTHER RESOLVED that the Louisiana Legislature urges Secretary Shalala and her staff to meet as soon as possible in Washington D.C. with the Christian Science Committee on Publication, and other interested parties, to work out an understanding on this question.

BE IT FURTHER RESOLVED that the Louisiana Legislature intends that Secretary Donna Shalala and her staff at HHS recognize the great importance that the Louisiana Legislature places on the carefully chosen wording of our definition of "neglect" in the Children's Code, because the Louisiana Legislature desires to establish in its statutes that it is not negligent for a sincere parent to use "a well-recognized religious method of healing with a reasonable proven record of success," in lieu of medical treatment.

See House Concurrent Resolution 247.

Advisory Board waffles

The long-awaited report on child fatalities by the U.S. Advisory Board on Child Abuse and Neglect was a disappointment to CHILD Inc. Although we had been repeatedly promised by a board member that the report would urge the federal government to require the repeal of religious exemption laws, the report as published in April, 1995, had no recommendations for federal action.

The report described the harm done by the laws as an innocent mistake. It said they "may have created unintended barriers to the provision of timely, necessary medical care for children."

"Medical professionals and child advocates," it said, are concerned that HHS's "current policy undermines the legal responsibility that all parents have to care for their children and sends a confusing message to parents, spiritual healers, and professionals involved in the child protection system."

The conclusion, however, shifted the responsibility to the states:

However the Congress may decide these questions, the compelling issue of protecting children who may be denied needed medical care remains. Therefore, the Board recommends that States take action to ensure the protection of all children.

Though the report offered us no support at the federal level, it did speak up for the rights of children to medical care. The report's executive summary was especially pointed:

All states should ensure that child abuse laws include the provision that parents must provide medical care when such care is available and necessary to protect the child from death or serious harm. Failure to do so is reportable under child abuse and neglect reporting laws.

States should ensure that all health care providers, including spiritual healers who receive healthcare reimbursement, are listed as mandatory reporters of child abuse and neglect, thereby involving such providers in training activities that are conducted for mandatory reporters.