

Good morning. My name is Renée Steinhagen, and I am the Executive Director of New Jersey Appleseed Public Interest Law Center. New Jersey Appleseed is a public interest law center that seeks to provide a voice to underserved and unorganized people in the public policy debates occurring in our State. Our primary focus is election reform, institutional health reform issues, government and corporate accountability and, most recently, community and environmental health issues, including matters traditionally under the rubric of "public health."

Before I begin, allow me to take us back in time for a minute, to the late 1940s. World War Two has ended, and the alleged "Red Scare" is just beginning. U.S. citizens are **learning to fear** their former Communist allies abroad, but closer to home, they fear something else - something real, and something much smaller than any Soviet Union nuclear bomb. Something so small, in fact, it cannot even be seen with the naked eye: a virus. From the late 1940s to the early 1950s, over 35,000 cases of Polio were reported each year. Many of those patients died from paralysis of the respiratory muscles, and even more were forever severely disabled as their limbs became paralyzed. And yet, merely a decade later in 1965, that number had dropped to a scant 61.

What accounts for such a drastic decrease in the prevalence of what had once been one of the most dreaded childhood diseases in the United States? The answer, of course, as each of you in this audience knows, is very simple: a vaccine. The Salk inactivated poliovirus vaccine (IPV) was introduced in the United States in 1955, and helped almost completely rid the country of a terrible childhood disease. What was once a terrible reality for thousands of children across North American school yards, now exists almost entirely in history class school books.

The reason I bring up the polio example is to highlight the important role vaccines play in keeping us, and children in particular, alive and healthy. The reason I contrast this with the "Red Scare" is to similarly allude to the fear of autism and other disabilities that parents have learned or have come to believe poses a greater threat than certain childhood diseases. As you know, vaccines are undeniably a critical line of defense against the spread of dangerous and contagious diseases. For almost a century, the United States has allowed individual states to impose mandatory vaccinations for children wishing to attend school so long as the states allow for a medical exemption. Other exemptions have taken the form of either a

philosophical or personal exemption or a religious exemption.

While medical exemptions are largely uncontroversial, recently religious exemptions have come under attack. As you all are aware, the number of religious exemptions granted in New Jersey has more than doubled over the past five years to close to 4,000 in 2009. This increase comes at the heels of a December 1, 2008 letter from the Director of New Jersey Department of Health and Senior Services Communicable Disease Services to all school and public health officials that prohibits any state official from questioning the validity of any exemption request that utilizes the word religious or religion. This policy, now enacted into regulation, however, is most likely not consistent with New Jersey law, under which it would be constitutionally valid to question the sincerity and genuineness of the applicants' religious beliefs and to create a procedural framework for future religious exemptions.

The United States Supreme Court has allowed individual states' police power to impose mandatory vaccinations on individuals since 1905, when the court decided in *Jacobsen v. Mass*, 197 U.S. 11 (1905) to uphold a Massachusetts law that required individuals to be vaccinated against smallpox

or face fine or imprisonment. Nearly twenty years later, in 1922, a separate Supreme Court case (named *Zucht v. King*, 260 U.S. 174 (1922)) extended this power to states that sought to make vaccination a requirement for attending school. However, as far reaching as this state power has become, the courts have not allowed it to become unlimited, stating in the 1905 decision that the states could not use their power in an "arbitrary, unreasonable manner," or go "so far beyond what was reasonably required for the safety of the public." This decision suggests that, in certain cases, some exemption to the mandatory vaccinations are indeed constitutional required.

Such exemption to mandatory vaccinations is a medical exemption. Fairly uncontroversial - in fact, this type of exemption was even hinted at in the *Jacobsen* holding - all fifty states currently allow for some manner of medical exemption. However, while compelled to permit medical exemptions, states have been granted the power to limit the availability of exemptions, and, in some cases, to even question the validity of the individual claims. For example, while some states only require a statement from the child's physician that states the vaccination is "medically contraindicated," others, such as New York, go so far as to allow medical officers from the school

district to conduct investigations into the validity of claimed exemptions. New Jersey, like Connecticut, currently requires that the physician's statement be based on "valid reasons as determined by the Commissioner of Health and Senior Services," (N.J.S.A. 8A:61D-10) and "in accordance with the current recommendation of the National Centers for Disease Control and Prevention Advisory Committee on Immunization Practices (ACIP)." N.J.S.A. 8:57-6.14.

Regardless of their wording, all state medical exemptions are seemingly based on the "harm avoidance" standard created in the *Jacobsen* holding to safeguard individual liberties. In other words, exemptions to mandatory vaccination requirements appear to be constitutional so long as the direct harm caused by the vaccination is greater than the potential harm created by not vaccinating the child. In the case of medical exemptions, this standard can be applied relatively straightforwardly. For example, as suggested by the *Jacobsen* court, if a vaccination were to cause death or serious injury to a patient, then unquestionably the child's parents or guardians should not be compelled to have the child vaccinated. However, when applied to other

exemptions - such as philosophical or religious - the "harm avoidance" standard is much more difficult to apply.

Although a sizeable minority of the states offers a philosophical exemption (18) to the vaccination requirement, there does not appear to be any suggestion that such philosophical or personal exemption is required as a constitutional matter. Indeed, it seems that if a court were to hold that an individual has a constitutional right to a philosophical exemption to vaccination such a holding would run afoul of the S.Ct.'s decision in *Jacobson* where the Court said, "Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one's own will." It should be noted that New Jersey has gone as far as explicitly rejecting the notion that an exemption may be based on philosophical beliefs. N.J.A.C. 8:57-4.4. Furthermore my research has revealed no instance in which a person's personal objection, or the limits imposed on such objections, has been challenged in the courts.

Unlike the case with a medical exemption, the Supreme Court's rulings seem to suggest that religious exemptions to compulsory vaccination laws are not constitutionally required by the First Amendment. In fact, in *Bd. of Education v. Maas*, 56 N.J. Super. 245, 268 (App. Div.

1959), the NJ Appellate Division upheld a vaccination requirement and noted "the constitutional guaranty of religious freedom was not intended to prohibit legislation with respect to the general public welfare." That being said, however, all but two states - Mississippi and West Virginia - do currently offer religious exemptions. What the courts have gone on to say is that if states are going to allow these religious exemptions, then they must be provided in a constitutional manner, saying that "if the legislature chooses to provide a religious exemption from compulsory immunization, however, the exemption itself must pass constitutional muster." *McCarthy v. Boozman*, 212 F. Supp. 2d. 945, 948 (W.D. Ark. 2002).

This holding, in the context of vaccination exemptions, is consistent with the US S.Ct.'s holding in the context of military service exemptions, where the Court recognized that religious exemptions are constitutionally permitted, as long as the exceptions do not discriminate among religions or religious beliefs. Though religious exemptions, if designed properly, are constitutional, they are not constitutionally required. Accordingly, a majority of the states, including NJ, that offer a religious exemption allow the exemption to be suspended, or the unvaccinated children to be excluded from school, in the

event of an outbreak or epidemic. Notwithstanding the established principle that religious exemptions are not constitutionally required, but need to be constitutionally designed if enacted, most legal claims against religious exemptions brought by parents are based on violations of the First Amendment, or Equal Protection or Due Process Clauses.

State imposed limitations on religious exemptions that are based on First Amendment issues generally fall into one of three categories: (1) membership in a "recognized" religion, (2) tenets of a religious denomination, or (3) the religious beliefs of an individual (including, in some cases, the degree of sincerity or genuineness of the individual's belief.

The first of these, membership in a "recognized" religion, has been ruled unconstitutional multiple times throughout the nation - including in the New Jersey Law Division. The courts have repeatedly found that these requirements violate the Establishment Clause of the First Amendment. The states that do still contain a "recognized" religion exemption do so largely because they also include a "personal" religion exemption, and therefore have not been challenged in court.

The second potential limitation states can pose on the availability of religious exemptions is the requirement to be a member in a religious denomination, not necessarily a recognized religion. The states that invoke this limitation, such as Alaska, Kansas, and Oregon require membership in a religious denomination whose tenants are opposed to immunization. These laws have gone entirely unchallenged across the board, so we have no concrete evidence as to whether or not these particular limitations are constitutional. Of note, however, is a 1991 Montana Attorney General Opinion which states that an exemption limitation which would call into question whether or not the tenets of the claimed religion actually oppose vaccinations may be unconstitutional. However, in *Berg v. Glen Cov City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994), the District Court in NY in 1994 did consider the fact that Jewish teachings do not prohibit immunization as "bear[ing] on determining whether the plaintiff's beliefs are genuine and sincere.").

Interestingly, one New Jersey state court, much earlier than the *Berg* federal court, in denying a Christian Scientist's challenge to a statute that had **no** religious exemption, noted that "[t]here is some question whether the tenants and teachings of Christian Science actually compel

a person like defendant to resist plaintiff board's policy requiring vaccination and immunization for children who want to attend the local schools." *Bd. of Education v. Maas*, 56 N.J. Super. at 270. The Court even quoted from an excerpt of the writings of Mary Baker Eddy, the founder of the Christian Science Church, where she recommended that individuals submit to vaccination. *Id.* at 270-71. However, the Court went on to note that its discussion of the writings of Eddy were "not intended to be in any way dispositive of the religious freedom issue posed by defendant." Because defendant had only challenged the fact that no religious exemption was available under the statute at all, the Court was able to resolve the issue under existing precedent, without delving into whether tenants of Christian Science actually required refusal to immunization.

The third limitation on religious exemptions is based on the religious beliefs of the individual. These limitations often require a statement that vaccinations conflict with the religious beliefs of the individual, with some going even further to stipulate that the individual beliefs must be sincere, genuine, or bona fide (such as Maine, Massachusetts, and certain NJ immunization statutes). Statutes with this additional requirement have

for the most part been found constitutional. I have found only one case that has said otherwise. In 2001, the Wyoming Supreme Court (*In re LePage*, 18 P. 3d 1177 (Wyo. 2001)) ruled that its Department of Health had overstepped its bounds when it required additional written evidence regarding the sincerity of an individual's belief. This Court's ruling, however, was based on the Wyoming statute that said that the Department **shall** issue a religious waiver, and because such act was mandatory, not discretionary, the Department had exceeded its authority. Although the Courts' holding was based solely on the words of the statute, it nonetheless went on in dicta to state that inquiries into an individual's religious beliefs could possibly infringe upon the free exercise of religion. *Id.* at 1181.

New York federal courts, on the other hand, have repeatedly decided on the opposite side of the table as the Wyoming state court. In the 1994 case mentioned earlier, *Berg v. Glen Cove City School District*, the court explicitly stated that the court "must first determine whether plaintiffs' purported beliefs are 'religious.' Only if they are, then this Court must determine whether those beliefs are genuinely and sincerely held." This decision had precedent in the U.S. Supreme Court, which, in an

analogous holding, decided that when evaluating the claims of conscientious objectors for draft exemptions, courts were to decide "whether the beliefs proposed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." Clearly, it is indeed within a state's right to place such a limitation on religious exemptions to mandatory vaccinations.

Furthermore, it is well within a state's rights to impose additional, procedural requirements to those seeking religious exemptions. In the absence of a Supreme Court ruling that posits that religious exemption is a fundamental right, states appear to *carte blanche* in creating burdens to the right to exemptions so long as they be "rationally related to a state purpose." Across the nation, states impose various procedural requirements that have gone unchallenged in the courts. Amongst these requirements are such tasks as: a notarized statement in support of the exemption, education and informed consent, a statement that the religious beliefs apply to all immunizations, and a statement that even in the event of an outbreak the parent or guardian will not have the child immunized. The only procedural requirements that have been struck down by the courts are ones that run afoul of constitutional issues - such as a New Hampshire statute that

originally stated religious exemptions were to be allowed "at the discretion of the school board," which was ruled "unconstitutionally vague" and against the Due Process Clause of the Fourteenth Amendment. *Avard v. Dupuis*, 376 F. Supp. 479 (D.N.H. 1974) This was the case because the federal district court that the statute provided no standards to guide the Board's decision. Similarly, an Ohio federal court, *Hanzel v. Arter*, 625 F. Supp. 1259 (S.D. Ohio 1985), though declining to rule whether the exemption statute was unconstitutional on its face, recognized that the statute's language **might be** problematic in its "standardless delegation of discretion" to the local school boards. *Id.* at 1263.

As I have said, New Jersey need not allow all requests for religious exemptions to mandatory vaccination requirements out of fear of its statutes being struck down in a court of law. Our state's relatively recent decision not to question the validity of any claim which includes the word "religious or religion" seemingly rests on a misinterpretation of a 1964 case, *Kolbeck v. Kramer*, 84 N.J. 569 (Law Div. 1964) in which a New Jersey court ruled that Rutgers acted arbitrarily when it denied admission to a student who claimed that the required vaccinations were against his religious belief.

First, before I go on to discuss the decision in *Kolbeck* in some detail, I would like to make clear. Title 26 of the New Jersey Statutes provides for a religious exemption from vaccination when the parent objects "upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights." N.J.S.A. 26:1A-9.1. A statute enacted later than the exemption in Title 26 in the education code (regarding exemption from the Hepatitis B and meningitis vaccination) contains a religious exemption that requires a written statement "explaining how the administration of the vaccine conflicts with the bona fide religious tenets or practice of the student." N.J.S.A. 18A:61D-10. Such language - conflicts with the bona fide religious tenets or practices - was the exact language that was found in New Jersey regulation 8:57-4.4 prior to its informal amendment in November 2008, and its formal amendment in 2009.

In any case, back to the trial court's decision in *Kolbeck* in 1964. Although as noted above, the prevailing statute for a religious exemption in 1964 only required a statement that "vaccination interferes with the free exercise of [one's] religious principles," Rutgers required the student to certify that he was a member of the Christian Science faith. The student argued that his

opposition was based on religious belief, despite the fact that he was not a member of any recognized sect or religion. He certified as to the nature of his belief, how it restricted his activities, and how it required him to refrain from any immunizations. Rutgers, nonetheless denied him an exemption, concluding that his refusal was "not based on a bona fide claim of religious belief." *Id.* at 570.

Throughout its arguments, Rutgers used the phrase "bona fide" in relationship to whether the student belonged to a recognized religion. For example, Rutgers argued that it had eight "bona fide Christian Scientists" to whom it had granted the exemption. *Id.* at 575. The Court clearly troubled by the University's reliance on the fact that the student did not belong to a recognized religion as a basis for rejecting his exemption request, used the phrase similarly:

The suggestion that plaintiff does not have a bona fide religion to qualify for this exemption, in view of the facts and law on this question, indicates an arbitrary and capricious policy for a State University. There is no right on the part of a political subdivision of a State to discriminate action against a person in reference to his religious views. Membership in a recognized religious group cannot be required as a condition of exemption from vaccination under statute and constitutional law.

Id. at 576. The Court's and University's repeated use of "bona fide" appears to reflect an inquiry into whether the plaintiff's religious beliefs were a "real" religion -one that was established and recognized - not the sincerity of the plaintiff's beliefs. The *Kolbeck* Court did not say that the state had no right or ability to inquire into whether an individual's religious belief was genuine or sincere.

In this way, New Jersey's education statute and its previous health regulation requiring "bona fide religious tenets or practices" is constitutional if it is interpreted to mean that a person's religious tenets or practices must be sincerely and genuinely held. Such a standard has been found constitutional by the Second Circuit and New York state courts, and has been applied often by those courts to determine whether or not an individual qualifies for a religious exemption. Additionally, imposing "procedural" requirements may provide a constitutionally permissible means of ensuring that only those whom the legislature intended to qualify, in fact qualify for the exemption.

This legal fact is important to note. Since one commentator has observed that there is an inverse relationship between the complexity of the requirements to obtain the exemption and the proportion of children

claiming it, New Jersey's regulation must be changed if one believes in the importance of vaccination to public health. (Jennifer S. Rota et al. *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 Am. J. of Pub. Health 645, 647 (2001). As it currently stands in New Jersey, it is easier and simpler to obtain the religious exemption than to expend the effort to obtain the vaccination itself. With something as important and potentially life saving as a vaccination, this should never be the case.

Common sense and good policy suggests that the applicant for a religious exemption must provide evidence that the objection is:

Religious—Parents should provide an original statement about how the vaccination would violate their child's religious-based beliefs or practice; **consistently held** - Parents who pick and choose which vaccines be given their children and on what schedule are presumably making that choice on the basis of some concern other than a religious tenet (unless a specific vaccine is made from some substance that is religiously prohibited); and **consistently applied** -- Parents should be able to state their intent not to vaccinate their children even if an outbreak were to occur.

Other states have developed constitutionally sound ways to test the sincerity of the religious beliefs and practices that are entitled to exemption. Our attention should not focus on developing such regulations that are tailored to New Jersey's infrastructure for public health enforcement rather than seeking to broaden the exemption criteria itself.