



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to Vaccination Choice Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

The proposed Initiative ("Initiative") seeks to create a new chapter of Idaho Code called the Vaccination Choice Protection Act. The Initiative states in its Purpose section, proposed section 39-9201, that vaccines are not subject to adequate testing to

insure long term safety, and that the U.S. government has "put in place measures that would give vaccine manufacturers immunity from prosecution in certain circumstances despite studies which do not prove long term safety or efficacy." The Purpose language also creates a right for every person to determine his own health care needs or those of his or her minor children; that no one should be forcibly medicated; and a prophylactic non-emergent treatment should never be given to a minor without a parent's consent, particularly when the safety and efficacy of a product has not been adequately tested. The Initiative further provides:

1. No person qualified to consent to their own care as specified in Idaho Code § 39-4502 can be vaccinated without consent.
2. For those not qualified to give consent, a specific written permission for each vaccine injected shall be required, executed by persons qualified to give consent by section 39-4504.
3. Each patient will be given the package insert for a vaccine prior to injection, or will be informed that none exists.
4. Warnings specific to pregnant women will be repeated orally to the woman before vaccination.
5. Warnings pertaining to fertility will be repeated orally to any individual under the age of 50 or his or her parent.
6. No competent person can be threatened or coerced in any way to accept a vaccination. Describing potential negative health consequences of not being vaccinated are not coercion or threat.
7. No person can be treated differently by the government or any of its agencies for failing to get vaccinated, including selective quarantining or segregating non-vaccinated people from society.
8. In the event of quarantine or health emergency, no individual can be forced to be vaccinated, even in the event of martial law.
9. Employers who force employees to get vaccinated under threat of any type of reprisal shall be fully liable for any ill health effects the forcibly-vaccinated employee might suffer. "This right to prosecution can not be waived by written contract or waiver."
10. No employee or consultant of the state, any agency, county, or municipal corporation shall be forced or intimidated to take a vaccine by any agent of

the state, county, or municipality. Members of the state militia have the same protection.

11. The provisions of this section (proposed section 39-9207) apply to any and all federal officials and agents of the United States government. The right to determine the course of one's health is a valid natural right protected under the Ninth Amendment to the United States Constitution and there is no enumerated power that would allow the government to force vaccinate the people of Idaho. Any law to the contrary is null and void.
12. If any individual, including a doctor, Idaho peace officer, member of the state militia, any federal official or member of the military attempts to force vaccinate someone else, the person who is being so assaulted is entitled to self defense the same as if his life were directly under attack and has the unquestioned right to respond with whatever force he or she feels necessary. The person exercising his right to self defense shall not be charged with any crime, even if it results in the death of the person attempting to vaccinate the individual against his will. If the person being assaulted in the attempt to force vaccinate him is killed, the person who killed that individual shall be charged with any applicable homicide.
13. An individual who attempts to compel a person in Idaho into surrendering a right or property guaranteed by the Act by directly or indirectly threatening enforcement of a law or code which would be nullified by the Act shall be subject to penalties detailed in the Act.
14. A county attorney or the attorney general can prosecute an arrest, search, seizure, or attempts at such actions, with kidnapping, trespass, theft, or applicable homicide. Individuals involved can also be charged with other applicable criminal offenses in Title 18, Idaho Code. Prosecution for extortion or other criminal offenses is provided for. Victims of crimes prosecutable under this section are entitled to pursue independent concomitant civil actions. Individuals violating proposed section 39-9202 [39-9203] (A), (B), and (G) can be charged with battery as described under Idaho Code § 18-903 or any other applicable criminal offenses. Individuals guilty of violating section 39-9202 [39-9203] (D) or (E) shall be penalized for failure to obtain consent as provided in title 39, chapter 45, Idaho Code, or other applicable offenses. Victims have a right to independently pursue concomitant civil actions against perpetrators.

B. A Constitutional Basis for Idaho Health Care Freedom Act May Become a Question

Proposed section 39-9207 asserts a right to determine the course of one's health that is protected under the Ninth Amendment to the U.S. Constitution. The Ninth Amendment states that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The undersigned is not aware of any federal law or requirement that would force vaccinations under emergency or other circumstances. Such issues would need to be addressed if the Initiative becomes law and there is a potentially conflicting congressional enactment.

C. The Terms of the Initiative are Vague or Contradict Other Law

Proposed section 39-9202 defines "competent person" as "any emancipated minor or person eighteen (18) or more years of age who is of sound mind." However, as to infectious, contagious, or communicable disease, which is the type of scenario encompassed by the Initiative, Idaho Code § 39-3801 allows a minor fourteen years of age to consent to the furnishing of hospital, medical, and surgical care related to the diagnosis or treatment of reportable diseases. Idaho Code § 39-4302 states that, "Any person of ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure is competent to consent thereto on his or her own behalf."

The difference in who can consent for a minor is of significance in relation to proposed section 39-9203(F), the only section where the term "competent person" is used: "No competent person can be threatened or coerced in any way to accept a vaccination." According to the definition in the Initiative, a minor can be required to be vaccinated because a parent consents, but if the minor qualifies under Idaho Code § 39-4503, the minor can refuse the vaccination. These sections are not readily reconciled, which is a conflict inherent in subsection (A) of this proposed section as well: "No person qualified to consent to their own care as specified in 39-4503, Idaho Code, can be vaccinated without his or her consent." It is not clear what happens when parent and child disagree on whether the child should be vaccinated.

The definition of "vaccine" in the Initiative is "any biopharmaceutical agent or biological product designed to stimulate a humoral immune response to a specific pathogen or antigen." There is another definition of "vaccine" in H.B. No. 432, which is "any preparations of killed microorganisms, living attenuated organisms or living fully virulent organisms that are approved by the federal food and drug administration and recommended by the federal advisory committee on immunization practices of the centers for disease control and prevention." The latter is a more accurate definition and reflects the federal statutory scheme for the approval of pediatric vaccines. 42 U.S.C. §

1396s. If both the statute and the Initiative are enacted into law, there will be two very different definitions of "vaccine" in Idaho Code.

Proposed sections 39-9203(G), 39-9204, 39-9205, and 39-9206 have significant public health implications, which are outside the scope of this review. Section 39-9205 makes employers liable for any ill health effects from vaccination forced through threat of reprisal, which is undefined. Liability for ill health effects is a matter for civil litigation, not "prosecution."

In proposed section 39-9208, the law on the right of self defense against one who attempts to force another individual to accept a vaccination is dramatically restated. This section allows for self defense as if the individual is directly under attack and provides an unquestioned right to respond with whatever level of force the individual feels is necessary. The individual under attack shall not be charged with any crime even if the individual kills the "attacker." If the individual is killed, the "attacker" is to be charged with any applicable homicide. However, current law provides that a homicide is justifiable if committed when resisting any attempt to murder someone, to commit a felony, or to do some great bodily injury to any person. Idaho Code § 18-4009. This is a much higher standard than stated in the Initiative. Furthermore, self defense to the commission of an offense must be based on a reasonable means of resistance, not an excessive level of force in relation to the threat. Idaho Code §§ 19-202 and 19-202A. The Initiative makes no attempt to resolve the contradictions with current criminal law, or to amend the pertinent criminal code sections.

As in proposed section 39-9209, the Initiative subjects to criminal penalties anyone who attempts to compel a person in Idaho into surrendering a right or property guaranteed by the Act by directly or indirectly threatening a person with enforcement of a law or code that would be nullified by the Act. The concept of "indirect effects" and "threatened enforcement" from statutory or regulatory actions leaves the scope of the proposal indefinable.

In the Remedies provision in proposed section 39-9210, references are made to section 39-9202. These should probably be to section 39-9203. Section 39-9210(4) provides for sanctions available for failure to obtain consent in title 39, chapter 45, Idaho Code. However, the provisions regarding who can give consent to medical care do not have penalty provisions.

MATTERS OF FORM

Idaho Code § 34-1801A sets out requirements for the form of an initiative. The Initiative includes the warning set out in that Code section, stating that it is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a qualified elector. This Initiative contains two signature pages, one of

which has 20 signatures; the other, 15. One individual in Coeur d'Alene has signed both pages, in apparent violation of the requirement.

In addition, Idaho Code § 34-1804 requires that each signature sheet shall contain signatures of qualified electors from only one county. The signatories to the Initiative live in Hayden, Coeur d'Alene, Athol, Cataldo, Post Falls, Bonners Ferry, and Moscow, not all of which are in Kootenai County, where the majority of them reside.

The numbering scheme used in the proposed new chapter is not internally consistent, nor is it generally the numbering usually used for Idaho statutes.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Wasden', written over a horizontal line.

LAWRENCE G. WASDEN
Attorney General

Analysis By:

JEANNE T. GOODENOUGH
Deputy Attorney General
