OAH Docket No. 8-0900-30570
(Revisor No. RD4101)

BEFORE

MINNESOTA ADMINISTRATIVE LAW JUDGE ERIC LIPMAN

REBUTTAL COMMENTS

NATIONAL HEALTH FREEDOM ACTION

ON THE MDH JULY 17, 2013 RESPONSE LETTER TO TESTIMONY AND COMMENTS RECEIVED ABOUT THE DEPARTMENT'S PROPOSED AMENDMENTS TO RULES GOVERNING CHILD CARE AND SCHOOL IMMUNIZATIONS

Entitled:

"Proposed Permanent Rules Relating to Immunization of School Age Children and Children in Child Care and School-Based Early Childhood Programs"

Rebuttal Comments Submitted July 24, 2013

July 24, 2013

The Honorable Eric Lipman
Office of Administrative Hearings
600 North Robert St.
St. Paul, MN 55155

RE: In the matter of the Minnesota Department of Health's proposed amendments to rules governing school and childcare immunizations, Minnesota rules, chapter 4604; MDH response on July 17, 2013 to agency comments following June 27, 2013 administrative hearing; OAH Docket No., 8-0900-30570, Governor's Tracking Number AR1052, Revisor's ID Number RD4101.

Dear Judge Lipman:

By this letter NHFA provides **rebuttal comments** to the Minnesota Department of Health's July 17, 2013 response letter to testimony given at the June 27, 2013 hearing and comments received afterwards about the department's proposed revisions to the Minnesota Immunization Rules.

Specifically, we are responding to the portion of the department's response letter entitled "**Response to due process and equal protection arguments**", located on page 11 of the July 17, 2013 letter, which read as follows:

> The National Health Freedom Organization [sic] raised due process and equal protection arguments about mandated vaccines. These comments too exceed the scope of the proposed rule amendments. The department is bringing its existing immunization schedule up to date for school requirements that were first enacted in 1967. Since then, the schedule has undergone many legislative changes. As pointed out in the SONAR, the Minnesota legislature has given the department rulemaking authority to make changes to immunization requirements that are in line with the ACIP and AAP recommendations. All 50 states in the country have school and childcare immunization laws, which have been held constitutional. In their submitted comments both Ms. Diane Miller and Ms. Ann [sic] Tenner refer to Mary Holland's article. (Exhibit AM) This article correctly points out that the courts have found that the state's police power allows them to regulate matters related to health and safety, which includes immunizations. (See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Zuch* [sic] *v. King*, 260 U. S. 174 (1922)) [sic]

The Department's response is incorrect in two major respects.

First, the arguments raised by NHFA do not "*exceed the scope of the proposed rule amendments*." Due process and equal protection issues are constitutional concerns. Constitutional concerns are inherently within the scope of the proposed rule amendments because the department's actions are confined by the constitutional protections individuals have

when their inherent rights and liberties are infringed by the state. These protections must be upheld regardless of whether the infringement comes from a legislature or from a department with rulemaking power and in spite of the fact that state courts in other states have upheld immunization statutes on constitutional grounds. Each time the state acts in a way that infringes the rights and liberties of the citizens, it is the court's duty to be vigilant in ensuring that the state action does not run afoul of the constitutional guarantees of equal protection and due process. Since the judiciary, and therefore the Office of Administrative Hearings, must find that the Department is interpreting its rulemaking authority consistent with the enabling statute and that the enabling statute itself is constitutional, constitutional issues such as due process and equal protection are necessarily included in the analysis of whether to approve a department's proposed rule.

Secondly, the Department mischaracterizes the Mary Holland article, Exhibit AM, [hereinafter Holland article as it pertains to Supreme Court jurisprudence on vaccine mandates. The department states that the "*article correctly points out that the courts have found that the state's police power allows them to regulate matters related to health and safety, which includes immunizations*. (See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Zuch* [sic] *v. King*, 260 U. S. 174 (1922)) [sic]". However the Department fails to disclose the author's true position in the article which expressly rejects any reliance on those decisions in light of modern Supreme Court liberty interest jurisprudence, and the author's discussion of how early decisions interpreted *Jacobson* expansively and thereby used *Jacobson* to justify results that the original decision did not condone. The problematic nature of department's responsive letter is in fact a reiteration of the jurisprudential darkness surrounding vaccine-related decisions which the Holland article brings to light.

What the Department fails to say regarding the Holland article:

Although it's true that the Holland article acknowledges state courts have ruled that immunization programs have been within the state police powers to regulate health and safety, the author expressly renounces those decisions for purposes of current reliance on them for school vaccination prevention programs, and offers a realignment of constitutional principles as they apply to modern day vaccine regulations. Attorney Mary Holland's rebuke of these decisions and the reliance on them by modern courts is threefold: they dramatically depart from *Jacobson's* true precedential value and therefore they do not account for the shift from using the police power to control epidemics to using it to prevent disease[1]; they came before, and thereby do not reflect, Supreme Court decisions in which higher scrutiny rhetoric is applied to liberty interests[2]; and they do not address the limit to and safety of simultaneous vaccine administration.[3]

The Holland article adamantly discusses how early decisions interpreted *Jacobson* expansively and thereby used *Jacobson* to justify results that the original decisions did not condone. This blind adherence to precedent has allowed public health authorities to have unnecessary and

[1]Holland, M., Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children, Yale Journal of Health Policy, Law, and Ethics, XII:1 (2012), at 49-54.
[2] *Id*. at 59-66.
[3] *Id*. at 71.

inappropriate power over citizens, and the habit has been developed on the basis of a single case announced over one hundred years ago, whereby such authorities can run roughshod over important rights. Some courts have allowed this to occur wholesale, some have afforded marginal protection; but none have applied the developing – and now mainstream – constitutional law of the land to the questions of when, and whether, prophylactic immunization can be forced upon school children.[4] The legal foundations of the cases depend, with no basis in reality, upon the presence of an ongoing public health emergency.[5] These cases have led to the perverse results against which Jacobson warned.

Writing for the *Jacobson* majority, Justice Harlan's words speak for themselves. Describing the potential abuse of police power, the Court opined: "[A regulation] might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."[6]The Court noted cases where judicial interference was required, when state laws "went beyond the necessity of the case, and, under the guise of exerting a police power . . . violated rights secured by the Constitution."[7]

The ramifications of blind adherence to these early cases have changed as the public health imperative of vaccination has metamorphosed greatly. Immunization statutes, like Minnesota's immunization law, were developed in the frontline fight against rampant smallpox and under the ominous threat of a measles epidemic. Today, mandatory vaccination is simply a precautionary campaign targeting every disease, common or not, against which pharmaceutical companies can devise a pharmaceutical defense.[8]

The modern interest in vaccination is widespread participation. Herd immunity was not the central concept in 1905. The *Jacobson* court, refusing to consider evidence concerning the actual need for the petitioner to be vaccinated, observed, "what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not." But the Court no longer resists scrutinizing the dangers which are to be addressed by statutes that require uniform compliance. The "judicial notice" approach to assuming that all vaccines are necessary for all children will not withstand legal or factual scrutiny.

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[4] *See Id*., at note 55 and accompanying text (stating that "Several prominent public health scholars have suggested that a case like Jacobson today would require intermediate scrutiny because of the clear liberty interests at stake.")(*citing* Kenneth R. Wing & Benjamin Gilbert, THE LAW AND THE PUBLIC'S HEALTH 24 (7th ed. 2007)

[5] "The *Jacobson* Court's paradigm was clear: a mandate is permissible in 'an emergency,' when there was 'imminent danger,' when 'an epidemic of disease . . . threatens the safety of [society's] members,' when there was 'the pressure of great dangers,' and for an 'epidemic that imperiled an entire population.' The Court's language– emergency, imminent danger, peril to the entire population–suggests grave risk." Holland, at 8 and notes 35-39.

[6] Jacobson, 197 U.S. at 28 (*citing* Wis., Minn. & Pac. R.R. v. Jacobson, 197 U.S. 287 (1900)).

[7] *Id*.

[8] Holland, at 66 ("The contours of the vaccine issue have changed fundamentally since … [n]ow at issue are thirty to forty-five preventative vaccinations whose administration start on the day of birth and which are compelled almost exclusively on children."). *Compare* MDH 2003 SONAR, at Findings of Fact (1)(protecting against "contagious and infectious diseases") *with* MDH 2013 SONAR, at 1, Introduction (protecting against "vaccine-preventable diseases").

In passing the National Childhood Vaccine Injury Compensation Act, 42 USC §300aa-10 et seq., Congress found, "In the past, the medical problems that can be associated with the vaccines that are given to children have sometimes been overlooked. More recently, however, information has become available about the potential hazards of these vaccines and about the serious – and sometimes deadly – consequences they can have."[9] Congress went on to write, "There is today no 'perfect' or reaction-free childhood vaccine on the market."[10]

Juxtaposing the department's statement to Jacobson and Zucht

The court decisions interpreting *Jacobson* are unpersuasive not only because they expand *Jacobson's* holding but also because *Jacobson* and *Zucht* are utterly archaic in 14th amendment substantive due process terms[11], and worthless as precedent in light of the extensive jurisprudence of the 20th Century.

Jacobson required an adult's submission to vaccination on the basis of a local government's formal resolution that recited, among other things, that smallpox was "prevalent … and still continues to increase."[12] In *Zucht*, the Court simply cited Jacobson, stating that compulsory vaccination is within the police power. The very procedure used in *Zucht* – a writ of error – is outdated. Dismissing the writ, and commenting upon the constitutional challenge to the vaccination statute – also clad in outmoded, "equal protection" terms – the Court states, "questions of that character can be reviewed by this court only on petition for a writ of certiorari."[13]. Hence, the Court declined to decide an "equal protection" claim.[14]

By stating that the Holland article acknowledged these court decisions and then providing citations to *Jacobson* and *Zucht*, the department is guilty of the precise blind adherence that the Holland article criticizes. The precedential expansion of *Jacobson* in the post-*Jacobson* cases, the lack of a vaccine case applying modern liberty interest jurisprudence and the completely different immunization program at issue today – especially with the total lack of scientific study on its overall safety – provide evidence enough that this blind adherence needs to stop.

[9] H.R. Rep. 99-908, 99th Cong. 2nd Sess. 1986, 1986 U.S.C.C.A.N. 6344.
[10] *Id*.
[11] See Lochner v. New York, 198 US 45 (1905) (striking down a state public health regulation as a restriction on the substantive due process right to freedom of contract), decided two months after *Jacobson*.
[12] Jacobson, 197 U.S. at 28.
[13] Zucht, 260 U.S. at 177.
[14] *Id*.