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August 7, 2015

The Honorable Samuel I. Rosenberg  
Maryland General Assembly  
4811 Liberty Heights Ave.  
Baltimore, MD 21207

The Honorable Shelly Hettleman  
Maryland General Assembly  
311 House Office Bldg.  
Annapolis, MD 21401

Dear Delegates Rosenberg and Hettleman:

You asked for advice whether a private school, including a parochial school, is obligated to admit a student who does not have a physician's certification of immunization and asserts a religious exemption despite the fact that the private school has an admissions policy that all students must be vaccinated. State law provides that a certificate is not required when a parent or guardian objects to immunization on the ground that it conflicts with the parent's or guardian's bona fide religious beliefs and practices. It has been the long standing view of the Maryland State Department of Education ("MSDE") and the Department of Health and Mental Hygiene ("DHMH") that a private school was required to accept a religious exemption. After reviewing the legislative history of the relevant statutory provisions, however, we conclude that the General Assembly intended to *authorize* a private school to admit a student who has a religious exemption, but did not intend to require a private school to admit unvaccinated students.

### History of Mandatory Immunization Requirements for Private Schools

While Maryland has long required vaccinations for school children, it is difficult to pinpoint when the immunization requirements were specifically applied to students in private schools. Early statutory provisions relating to vaccinations were placed in Article 43, which contained the "Health" title. In 1864, an early statutory provision stated:

No teacher in any school shall, after the first day of January eighteen hundred and sixty-five, receive into such school any person, as a scholar, until such person shall produce the certificate of some regular practicing physician that such applicant for admission into the school has been duly vaccinated. Any teacher so offending shall, on conviction thereof, forfeit and pay a fine of ten dollars for each offence; and no public school trustee or commissioner shall grant a permit to any child to enter any public school without such certificate, under the same penalty.

Art. 43, § 31 (Chapter 269, 1864). Each subsequent amendment of the provision in Article 43 retained the phrase “public schools.”<sup>1</sup> By 1965, the provision stated in part that “[n]o teacher in any of the public schools of this State shall receive into such school any person who has not been successfully vaccinated...” Art. 43, § 72 (1957 Code, 1965 Supplement).

Ultimately, in 1972, the immunization provisions in that section, along with numerous other provisions in Article 43, were repealed altogether. Among the changes to Article 43 that year, the legislature added new section 81A, which was added as a new subtitle called “Vaccination of Persons at High Risk.” Chapter 174, Laws of Maryland 1972. The new section directed the health secretary to promulgate smallpox immunization regulations and contained the following language:

(b) In the absence of an emergency or epidemic of disease declared by the Secretary of Health, no person who objects in writing to vaccination or immunization upon the ground that it conflicts with the tenets and practice of a recognized church or religious denomination of which he is an adherent or member shall be required to be vaccinated.

In 1982, Article 43 was recodified in the Health-General (“HG”) Article; § 81A(b) of Article 43 became HG § 18-403.

The State’s education laws have also long contained a requirement for public school students to be vaccinated. In 1872, the “Public Education” title was amended to include the following: “Every child before being admitted to any public school shall produce a certificate from a regular physician that he has been properly vaccinated.” Art. 77, § 62. (Chapter 377, Laws of Maryland 1872.) This language remained the same until 1969.<sup>2</sup> That year, the “Public Education” title was repealed, rearranged and reenacted. The vaccination provision was changed to:

Every child before being admitted to a school in this State shall submit such evidence from a duly licensed physician of immunization from smallpox and such other communicable diseases as may be prescribed from time to time by regulation of the State Department of Health. The list of approved vaccinations and immunizations shall be prescribed by the Department in cooperation with the Medical and Chirurgical Faculty of Maryland.

Chapter 405, Laws of Maryland 1969, codified in Article 77, § 84.

That same year the General Assembly for the first time authorized a religious exception to mandatory immunizations for students. Chapter 800, Laws of Maryland 1969.

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<sup>1</sup> In 1904, the provision was in Art. 43, § 46; in 1924, § 73; 1939, § 73, 1939, § 73; 1951, § 73, and in 1971, § 74.

<sup>2</sup> In 1939, the provision was in § 114; in 1951, § 127, and at some point, moved to § 133. The language remained the same.

The State Board of Education in conjunction with the State Department of Health shall promulgate regulations regarding immunizations required of children entering public schools .... provided, however, that in the absence of an emergency or epidemic of disease declared by the commissioner of health, no child whose parent or guardian objects in writing to vaccination or immunization upon the ground that it conflicts with the tenets and practice of a recognized church or religious denomination of which he is an adherent or member shall be required to present said physician's certification of vaccination in order to be admitted to school.

*Id.* Because of some confusion in the 1969 provision,<sup>3</sup> however, the General Assembly enacted another religious exemption to mandatory vaccinations in 1972. Chapter 315, Laws of Maryland 1972. The purpose paragraph of the 1972 legislation "reiterates the purpose of providing for regulations 'regarding immunizations of children entering public schools.'" <sup>4</sup>

In 1978, the Education Article was codified. Chapter 22, Laws of Maryland 1978. The Revisor's Note states that the new section (then ED § 7-402(b)) "presently appears as Article 77, § 84. The only changes are in style." *Id.*

In 1982, the Court of Appeals invalidated the religious exemption. *Davis v. State*, 294 Md. 370 (1984). The Court found that the requirement for membership in a recognized religious group "contravenes the Establishment Clause of the First Amendment." *Id.* at 381-82. The Court went on to find that the unconstitutional portion of the immunization was severable. *Id.* at 385. The Court held that "the Legislature's dominant purpose was to provide for an immunization program rather than to protect those having religious beliefs against immunization." *Id.* at 384.

In 1983, the General Assembly responded to the *Davis* case by re-enacting a religious exemption. Chapter 188, Laws of Maryland 1983. The bill sponsor noted that the legislation "only empowers the Department [of Health and Mental Hygiene] to develop (1) a system for processing the requests for exemptions and (2) the criteria for declaring a health emergency necessitating suspension of the exemptions. The Department has no decision powers over who may receive an exemption." Memo from Delegate Judith C. Toth to the Senate Finance Committee regarding House Bill 224, dated March 23, 1983. In written support of the bill, DHMH stated that "[a] recent court ruling essentially eliminated the Secretary's statutory authority to offer religious exemptions. This bill restores that authority while accommodating the court's ruling that such exemptions should not be limited to members or adherents of 'a recognized church or religious denomination.'" In addition, the Office of Attorney General, in advising that the bill did not violate the Establishment Clause, noted that one of the secular purposes of the bill was "to insure that children of those with strong religious beliefs on immunization receive a public education ...." Letter to Senator Larry Young from Asst. Attorney General Robert A. Zarnoch, dated Feb. 17, 1983 ("Zarnoch letter").

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<sup>3</sup> Chapter 800 amended a provision of the Education title that was deleted by Chapter 405.

<sup>4</sup> *Davis v. State*, 294 Md. 370, 385 (1982) (quoting Chapter 315. Laws of Maryland 1972).

Nowhere in the legislative history of the 1983 legislation or in any other previous legislative enactments is there evidence that the General Assembly intended to require private schools to accept a religious exemption. The plain language of the statute says,

Unless the Secretary of Health and Mental Hygiene declares an emergency or an epidemic of disease, a child whose parent or guardian objects to immunization on the ground that it conflicts with the parent's or guardian's bona fide religious beliefs and practices may not be required to present a physician's certification of immunization in order to be admitted to school.

Education Article ("ED") § 7-403(b)(1). This provision is located in Title 7, which is designated "Public Schools." Elsewhere in Title 7, the Code specifies when its provisions apply to private and parochial schools.<sup>5</sup> The same 1983 bill that reinstated the religious exemption after *Davis* in the Education Article, House Bill 224, also amended HG § 18-403.

Current statutory provisions do not directly require students in public and private schools to be immunized to attend school. Section 7-403(a)(2) of the Education Article directs DHMH, in cooperation with the State Board of Education and the Statewide Advisory Commission on Immunizations, to issue rules and regulations regarding "immunizations required of children entering schools." In addition, the Secretary of DHMH is authorized to issue rules and regulations regarding infectious and contagious diseases. HG § 18-102. These provisions empower DHMH to require vaccinations for private school students, as well as public school students. Nevertheless, we found no evidence that DHMH expressly exercised this regulatory authority until 1985. 12 Md. Reg. 245 (Feb. 11, 1985) (final adoption). At that time COMAR 10.06.04.01A was amended to specifically apply to "public and private" schools. 11 Md. Reg. 1688 (Sept. 14, 1984) (proposed regulation). The regulation was thus changed to require that "[a] principal or other person in charge of a school, *public or private*, may not knowingly admit a pupil to, or retain a pupil in, a nursery or kindergarten through the sixth grade ...." *Id.*

In summary, no statutory provision expressly requires immunizations for private school children. Legislation establishing an immunization program in schools consistently

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<sup>5</sup> By contrast, other provisions of the Education Article expressly apply to private schools when that is the legislative intent. See, e.g., ED § 7-107 (private and parochial schools may use local education board's closed-circuit educational television system); ED § 7-206.1 (individual honorably discharged from military service may apply for high school diploma if individual left public or private high school to enlist in armed forces during certain armed conflicts); ED § 7-302 (each public or private school must report student absences); ED § 7-303 (requiring State's Attorneys to report certain student arrests to principals at public or nonpublic schools); ED § 7-404 (local health departments shall provide hearing and vision screenings for private schools that received certificate of approval); ED § 7-406 (an individual who has tuberculosis cannot work in a public, private, or parochial school); ED § 7-424.3 (requiring nonpublic schools to implement bullying, harassment and intimidation policy); ED § 7-426.3 (authorizing nonpublic schools to establish epinephrine policy); ED § 7-704 (public and nonpublic schools may participate in breakfast program); ED § 7-1103 (each local school system and nonpublic school shall develop student behavior intervention policy and procedures).

referred to requiring immunizations for children entering public schools. The Court of Appeals recognized that the “dominant purpose” of the legislation at issue is to provide for immunizations of children entering public schools. Moreover, the Office of Attorney General previously advised that the secular purpose of legislation establishing a religious exemption was to ensure that children of those with religious beliefs against immunization receive a “public education.” The first mention of private schools regarding the immunization program was in 1983 when DHMH promulgated regulations requiring reporting by public and private schools of the number of religious exemptions given.<sup>6</sup> In 1984, DHMH promulgated regulations expressly prohibiting schools, “public or private,” from admitting students without evidence of immunization.

### **Analysis**

Although it is not entirely certain, there is good reason to believe that the General Assembly did not intend to require private schools to admit students asserting a religious exemption to required immunization.

To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction.

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We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the [General Assembly] in enacting the statute.

*State v. Weems*, 429 Md. 329, 337 (2012) (citation omitted) (asterisks in the original).

A court will examine three factors when construing a statute: (1) text; (2) purpose; and (3) consequences.

Text is the plain language of the relevant provision, typically given its ordinary meaning, viewed in context, considered in light of the whole statute, and generally evaluated for ambiguity. Legislative purpose, either apparent from the text or gathered from external sources, often informs, if not controls, our reading of the statute. An examination of interpretive consequences, either as a comparison of the results of each proffered construction, or as a principle of avoidance of an absurd or unreasonable reading, grounds the court's interpretation in reality.

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<sup>6</sup> 10 Md. Reg. 1458 (Aug. 5, 1983).

*Town of Oxford v. Koste*, 204 Md. App. 578, 585-86 (2012). See also *Barbre v. Pope*, 402 Md. 157, 172 (2007) (“In statutory interpretation, our primary goal is always ‘to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the Rules.’”).

Applying these considerations, a court is unlikely to uphold an interpretation that the authority extended to DHMH is such that the agency may require a private school to accept a religious exemption. Pursuant to authority granted in § 18-102, DHMH has adopted regulations requiring that all students be immunized. COMAR 10.06.04.03A. The General Assembly has provided, however, that the Department “may not require” immunization if the parent objects on religious grounds. HG § 18-403. The plain language of § 18-403 presents a limitation on the Department’s power to require immunizations; it does not, on its face, apply to private schools or in any way restrict their admission policies. Moreover, such an interpretation does not support the purpose of the immunization program or the legislative rationales for authorizing the Department to offer a religious exemption to students, that is, to allow those with religious beliefs to attend public school and to promote religious tolerance.

The religious exemption provided for in DHMH regulations similarly applies to the immunization requirement imposed by the State, not to any such requirement imposed by a private school. COMAR 10.06.04.05 states “a student whose parent or guardian objects to immunization on the ground that the immunization conflicts with the parent's or guardian's bona fide religious beliefs and practices *is exempt from the requirement* to present a physician's certificate of immunization in order that the student be admitted to school.” (Emphasis added.) The “requirement” to which this regulation refers is the immunization requirement in COMAR 10.06.04.03, not any such requirement within private school admissions policies. See also COMAR 10.06.04.04 (“The requirements of Regulation .03 of this chapter *do not apply* to a student who presents a licensed physician's or health officer's written statement that the student's immunization against a disease in Regulation .03 of this chapter is medically contraindicated.” (emphasis added)).

Without a doubt, the General Assembly authorized DHMH to require students in public schools to be immunized. Moreover, there is little doubt that DHMH has the authority also to require private school students to be immunized. As the Court of Appeals recognized in *Davis*, the language of the statutory provisions requiring DHMH to issue regulations regarding children entering schools “clearly indicates that the Legislature’s dominate purpose was to provide for an immunization program rather than to protect those having religious beliefs against immunization.” 294 Md. at 384. When the General Assembly reinstated the religious exemption in 1983, the General Assembly clearly intended to grant a religious exemption from immunization requirements for entrance into public school, but there is no indication that the General Assembly intended to prevent private schools from requiring all of their students to be immunized.

More likely, to the extent that private schools were considered at all, the General Assembly at most sought to authorize private schools to admit a student without immunization where the student or the student’s parents have executed a religious

exemption. This interpretation is consistent with the legislative history, which indicates that the 1983 legislation was intended to restore DHMH's "statutory authority to offer religious exemptions." (DHMH written testimony to the Senate Finance Committee in support of H.B. 224, 1983.) By offering a religious exemption, as the Office of Attorney General advised legislators at the time that they were considering the provision during the legislative session, the State's secular purpose in doing so was

to insure that children of those with strong religious beliefs on immunization receive a public education, to reflect the pragmatic problems of converting those who dissent from immunization on religious grounds and the supremacy of conscience and to avoid persistent friction between the government and religious authorities.

Zarnoch letter at 3. The sponsor of the bill also pointed to "[r]eligious tolerance" as a reason to enact a statutory religious exemption to mandatory vaccinations. Memo from Delegate Judith C. Toth to the Senate Finance Committee regarding House Bill 224, dated March 23, 1983.

To read the provisions in law authorizing a religious exemption from vaccination as a requirement that a private school must admit a student who asserts a religious exemption despite that the private school has a policy that all students be immunized does not further the State's "secular purpose" of ensuring that students receive a "public education." Moreover, if interpreted to apply to a parochial school, the State's purpose to avoid friction between the government and religious authorities would be undermined. See *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) (finding that a state law exempting religious day care centers from certain licensing requirements did not violate the Establishment Clause because it is a legitimate legislative purpose to avoid interference with religious organizations operating in a nonprofit area); *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 288 (4th Cir. 2000) ("the government is entitled to accommodate religion without violating the Establishment Clause, and at times the government must do so"). Additionally, there is a risk that a court would find the mandatory application of the religious exemption to a parochial school, such that the school would be required to accommodate a religious belief and practice in conflict with its own, violates the Establishment Clause. For example, it is highly questionable whether the State could require a Catholic school to admit a student whose religious beliefs oppose organized worship services and force the school to allow the student to skip mandatory worship service attendance. The burden on the school's religion in that case would likely fail even a rational basis test.<sup>7</sup>

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<sup>7</sup> In *Employment Division v. Smith*, the Supreme Court held that in evaluating a generally applicable law that "incidentally" burdens religion, the appropriate test is whether there is a rational basis that the law will accomplish a legitimate government objective. 494 U.S. 872 (1990).

In conclusion, looking at the legislative history and development of the State immunization program, including the provision of a statutory religious exemption,<sup>8</sup> it is our view that the General Assembly did not intend to force a private school to admit a student with a religious exemption. Rather, the more reasonable interpretation is that the General Assembly's purpose in enacting the legislation was to authorize DHMH to allow parents to assert a religious objection to vaccines, thus, exempting their children from any *State required* vaccinations. Students holding a duly executed DHMH religious exemption form are entitled to be admitted in any public school. At the same time, there is no evidence that the General Assembly intended to require a private school to admit an unvaccinated student simply because the student asserts a religious exemption.<sup>9</sup>

Sincerely,



Sandra Benson Brantley  
Counsel to the General Assembly

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<sup>8</sup> The Supreme Court has declared that there is no constitutional right "to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67. See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Workman v. Mingo Co. Bd. of Ed.*, 419 Fed. Appx. 348 (4th Cir. 2011).

<sup>9</sup> Although this analysis applies to the grant of a religious exemption, other questions have been raised about the availability of the medical exemption and the degree to which a private school is obligated to accept a physician's or health officer's statement that immunization against a disease is medically contraindicated for a particular student. See COMAR 10.06.04.04. We defer to DHMH as to whether further guidance about the medical exemption is warranted. We note, however, that a student for whom immunization against a disease is medically contraindicated may be entitled to an accommodation under the federal Americans with Disabilities Act. The potential availability of such an accommodation would be something the private school would have to evaluate with the student and his or her parents.