Is SB 277 a denial of the right to education?

Last week, Governor Jerry Brown signed SB 277, which requires all children (except for those exempt due to "medical reasons") to get vaccinated against many common childhood illnesses, including measles, whooping cough, and chicken pox. Opponents of SB 277 were vocal, characterizing their crusade not as a fight against vaccines, but as a fight for parental rights.

SB 277 mandates vaccines as a condition for attending school, public or private. Because children who are not vaccinated may not attend school, it raises the question of whether this bill infringes on those children's right to education under the California Constitution.

Education is a fundamental right in California, as established by Article IX of the California Constitution (and later affirmed by cases like *Serrano v. Priest* in 1971). Because it is a fundamental right, the court may ask the state to justify infringing that right under the strict scrutiny standard.

To justify infringing the right to education under strict scrutiny, the state must establish that (1) the vaccination law is supported by a compelling governmental interest, and (2) the law is narrowly tailored to meet that interest (that is, the state must use the "least restrictive means" of achieving the interest).

In analyzing the state's potential argument for a compelling interest, the bill itself says the new law is "a means for the eventual achievement of total immunization of appropriate age groups against [various diseases]." A court will ask whether ensuring "total immunization" is a compelling state interest—enough to justify curtailing the constitutional right to education. Another possible justification could be to prevent the spread of disease, for example, to children who cannot be vaccinated for health reasons but are mandated by state law to attend school. This reasoning does not appear in the text of the bill, but it has been a potent rallying cry from the pro-vaccination camp.

Even if vaccination is a compelling interest, the state will still have to prove that this law is narrowly tailored to achieve that goal—whether it is the least restrictive means possible to achieve it.

It is easy to envision the California Supreme Court holding that vaccinations are a compelling state interest—both the Centers for Disease Control and the California Medical Association recommend vaccines not only for their health benefits for individuals, but also for herd immunity, which is important for kids whose health issues or young age preclude vaccinations. Whether prohibiting unvaccinated kids from attending school is the least restrictive way to achieve this goal is a more challenging decision to predict. Regulation through school attendance may be the only avenue for the state to access all kids through California's compulsory schooling laws. There may not be another way the state can reliably ensure that all kids are vaccinated.

At first blush, the case law seems to be in the hypothetical plaintiff's favor: the California Supreme Court has never found a deprivation of education to pass strict scrutiny, although it has found certain deprivations to fail, such as funding disparities (in *Serrano v. Priest* (1971)), a reduced number of school days (in *Butt v. California* (1992)), and fees for extracurricular school programs (in *Hartzell v. Connell* (1984)). These cases, however, also involved claims of an equal protection violation. Here, unvaccinated children are not a suspect class, so there is no logical tie-in to an equal protection violation. Therefore, the claim would have to rely solely on Article IX, something no case before the California Supreme Court has ever done. A potential claim against SB 277 would have no precedent in the California Supreme Court for finding a violation of the right to education.

For these reasons, the hypothetical plaintiff's claim grounded solely in a denial of the right to education provided by Article IX will be an uphill battle because it seems that the state may be able to withstand strict scrutiny. Ensuring vaccination against debilitating diseases is likely to be a compelling state interest ("compelling" in both the legal and the popular vernacular sense), and requiring children to be vaccinated before attending school is likely to be the least restrictive method for implementation. As a result, the parents of unvaccinated children will likely have a tough fight to succeed on their unprecedented claim based solely in Article IX before

the California Supreme Court.

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