

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VICTOR M. BOOTH, et al.,	.	
	.	
Plaintiffs,	.	CA No. 21-1857 (TNM)
	.	
v.	.	
	.	
MURIEL BOWSER, et al.,	.	Washington, D.C.
	.	Thursday, September 2, 2021
Defendants.	.	11:00 a.m.
.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE TREVOR N. MCFADDEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:	JAMES R. MASON III, ESQ. Home School Legal Defense Assn. 1 Patrick Henry Circle Purcellville, VA 20132 (540) 338-5600
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For Defendants:	MATEYA B. KELLEY, ESQ. PAMELA A. DISNEY, ESQ. Office of the Attorney General District of Columbia 400 Sixth Street NW Suite 10100 Washington, DC 20001-2703 (202) 724-7854
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P R O C E E D I N G S

(Via Teleconference)

THE DEPUTY CLERK: Civil Action 21-1857, Victor M. Booth, et al., versus Muriel Bowser, et al.

Counsel, please identify yourselves for the record.

MR. MASON: James Mason with the Parental Rights Foundation for the plaintiffs.

THE COURT: Good morning, sir.

MR. MASON: Good morning.

MS. KELLEY: This is Mateya Kelley with the Office of the Attorney General of the District of Columbia for defendant, and I'm also joined by my colleague, Pamela Disney.

THE COURT: Good morning, Ms. Kelley.
Good morning, Ms. Disney.

All right. We're here for a motions hearing. I'd note for the record I'd earlier entered an order indicating that I was considering consolidating the preliminary injunction sought here with a trial on the merits. Neither party has objected, and so I will plan to go ahead and do so and just have a ruling on the merits based on the parties' briefing and arguments here today.

I wanted to give you all my initial impressions. These are, of course, initial, and I'm very interested in hearing the attorneys' arguments, but I thought this might help you frame your arguments.

The standing issue seems to me to be a significant one,

1 and so I'm very interested in hearing the plaintiffs' argument
2 for standing. I'm inclined to agree with Ms. Kelley that the
3 plaintiff has kind of dodged this issue and has focused a lot on
4 the merits but not really satisfactorily overcome this initial
5 barrier.

6 If we do get to the merits, I'm inclined to think it's
7 a bit of a mixed bag. I'm kind of skeptical about the First
8 Amendment and RFRA claims; but I think that the plaintiffs
9 probably have the better of the interpretation of
10 42 U.S.C. § 300aa-25, and it strikes me that there may well
11 be a preemption issue.

12 And similarly, I think -- I guess I'm a bit torn on
13 the substantive due process and Fifth Amendment issue, but it
14 seems to me that the plaintiffs are making out a pretty good
15 claim there. So that's my initial impressions, but I'm very
16 interested in hearing from the parties.

17 Mr. Mason, I'll hear from you first.

18 MR. MASON: Thank you, Your Honor.

19 As a housekeeping matter, I need to report to the Court
20 that, in the complaint, all of the plaintiffs have said that
21 they would not be sending their children to school because of
22 the Act, and late yesterday I learned that they in fact had
23 sent their children to school beginning on Monday. I notified
24 the defendants of that as well before the hearing and just
25 wanted to be perfectly candid with the Court that some of the

1 facts alleged are not currently operative.

2 THE COURT: Okay. I appreciate that. And I was
3 interested in hearing the update now that kids are in school.
4 And I understand that there was a clinic, perhaps, in at least
5 one of the students' schools and how that affects the merits
6 and, well, I guess your standing here and whether there's
7 actually an injury that is imminent and certain.

8 MR. MASON: Yes. Thank you, Your Honor.

9 Let me begin by quoting from the *Parham v. J.R.* case,
10 and it says, "Simply because the decision of a parent is not
11 agreeable to a child, or involves risks, does not automatically
12 transfer the power to make that decision from the parents to
13 some agency or officer of the state."

14 And that's what the Minor Consent Act has actually done.
15 It has transferred the authority to make this vaccination
16 decision from parents who have claimed a religious exemption
17 to kind of unknown medical providers.

18 Now, the defendants say that we lack standing because we
19 can't allege things like our children have actually approached
20 the clinic or have asked to get a vaccine. Our argument for
21 standing is that, in this day and age, I mean we live in a
22 fraught time. And there are lots and lots of pressures on all
23 of us, but especially children, and especially children in the
24 public school setting, which is remarked about in the *Lee v.*
25 *Wiseman* case as well as the *Anspach* case out of the Third

1 Circuit, that there's just something different about it, that
2 children being, especially in the world today, there's peer
3 pressure, the schools are setting up clinics, they're providing
4 information, and the Act actually says you can get a vaccine no
5 matter what your parents say.

6 And that's a particularly difficult problem here, because
7 the parents have objected on religious grounds, which is a
8 lawful exemption that the District provides. And so they're
9 kind of in a dilemma.

10 They must comply with compulsory attendance laws, which
11 means they must send their children to school. They've always
12 sent their children to public school. They've always claimed
13 these exemptions, but they cannot send their children to school
14 with the certain knowledge that their religious exemption will
15 actually be honored because of the Minor Consent Act.

16 THE COURT: Mr. Mason, a couple of reactions to this.
17 First, I think you're right that this school setting is
18 different from some of the cases that the District cites and
19 that there's something potentially more coercive about it that
20 is probably helpful to you here.

21 But the *Wiseman* case, as I recall, it's talking about a
22 convocation or some sort of, you know, group graduation or
23 something where all the students are going. That strikes me as
24 a more extreme version of what we have here.

25 As I'm imagining it, you know, there's the school nurse's

1 office or something that people wouldn't normally be going to
2 but is available to them. So there's a convenience here to
3 the students, but I'm not sure that I see the coercive nature
4 that we saw at play at *Wiseman*.

5 I think it would be similar, perhaps, if the school
6 required everyone to visit the clinic, or if these vaccine
7 providers were going around and talking to each class and
8 telling them that they should get vaccinated, maybe that would
9 be the case. But as I understand it here, we're just talking
10 about a clinic in the school that is very available to students
11 but is not necessarily something that they're being compelled
12 or even encouraged to go to.

13 MR. MASON: The "compelled" part, I think that's true.
14 The "encouraged" I don't believe is true. I believe they are
15 being encouraged to get vaccinated, and the admissible schools
16 are communicating that to children.

17 And here's sort of our dilemma. We seek an injunction
18 against the ultimate thing happening, but we haven't had the --
19 we don't have children -- we haven't had children in school to
20 actually sort of figure out what is actually going on in the
21 schools.

22 And so the defendants say we haven't alleged that any of
23 our children have been approached, but we could not do that
24 until school actually started. So if those kinds of things need
25 to be alleged, then I would suggest perhaps time for that to

1 develop and amending the complaint to add those kind of factual
2 allegations. But I also --

3 THE COURT: Yeah. I'll tell you, it does strike me
4 that that may be your standing problem here, that you may not
5 have standing or -- you know, I don't think we need to consider
6 irreparable harm at this point but that maybe you would have
7 standing a couple of weeks from now. But looking at your
8 complaint and your PI motion, it seems to me that there's a lot
9 of speculation and atmospherics but perhaps, understandably,
10 not a lot of specifics that I can look to to find that a harm
11 is certain and impending.

12 MR. MASON: Well, I think that's the remedy for
13 that, then, that obviously we brought the complaint in a
14 timely fashion, and we tried to file the motion for preliminary
15 injunction to prevent the harms that we're fairly certain are in
16 the design of the Minor Consent Act as well as all of the -- we
17 said we expected clinics to appear at schools, and sure enough,
18 they have, and they're multiplying. But we don't have the
19 day-to-day experience of what's actually happening in the
20 schools with the children.

21 THE COURT: Okay. And you're the master of your
22 complaint. You're the plaintiff. I do want to be kind of
23 deferential to you about what we should be doing when, here.
24 You sought emergency injunctive relief. I'm trying to act on
25 this quickly. It may be we have to come back and think about

1 whether you should be withdrawing your PI or seeking a stay
2 or something. But I don't think any of us want to kind of
3 go through exercises in futility of me writing an opinion
4 dismissing without prejudice just for you to come back in a
5 few weeks when you do have a factual predicate.

6 Right now I want to hear you if you think you have facts to
7 the contrary, but this feels to me a lot like *Clapper v. Amnesty*
8 *International* where we're talking about a hypothetical, future
9 events that hinge upon the actions of independent third parties,
10 not least of whom are the doctors who would have to make a
11 determination that the minors are capable of giving informed
12 consent, and frankly also -- and I don't really see much about
13 this in your complaint -- that your clients' children are
14 essentially going to disobey their parents and go and get a
15 vaccine even though they know their parents don't want them to.

16 I know this is a little tricky, but it does strike me that,
17 at least as it's currently alleged, it's a little far-flung to
18 think that children in a religious home, knowing their parents'
19 strongly held objections, are nonetheless going to go and seek a
20 vaccine when they know that the parents think that's a bad idea.

21 MR. MASON: Yes. Thank you, Your Honor. As we've
22 argued in our memorandum, it is our position that the Act has
23 already injured the plaintiffs by providing all of these sort
24 of secret provisions, such that if a child did feel the peer
25 pressure and was given information by authority figures in the

1 school and directions on how to get to the nurse's office to get
2 the vaccine that is so vital that everybody is talking about on
3 social media and in the news, that whether a child will disobey
4 a parent or not, they're under an incredible amount of pressure
5 even now in the school system and no one is required to actually
6 involve the parents in the decision if a child as young as 12 --
7 that's the youngest plaintiff -- should make a decision on the
8 spur of the moment at the school, and we would never even know
9 that it happened under the provisions of the Act.

10 THE COURT: Can you point me in your complaint or
11 preliminary injunction motion where are the facts describing
12 this coercive environment?

13 MR. MASON: Yes. Each of the plaintiffs have
14 expressed that they are certainly concerned that it could happen
15 and that it likely would happen and -- sorry, I'm turning to
16 pages here.

17 THE COURT: Sure. What I preliminary see is testimony
18 or evidence about the council members' views, and I take your
19 concerns there, but I don' know --

20 MR. MASON: So paragraph 103 of our complaint,
21 Shameka Williams has already been contacted by her local school
22 board about getting vaccinations up to date before the start of
23 the school year, and both she and K.G. have faced intense peer
24 pressure to receive the COVID-19 vaccination; and I think we
25 have similar allegations for each of the plaintiffs, and the

1 public comments of the council and the actual operation of the
2 Act certainly facilitate that.

3 THE COURT: All right. So talk to me more about
4 this. Can you address my concerns here about the independent
5 decision-making both of the children who you're afraid they're
6 going to disobey their parents, and then the doctors who are
7 going to find that these children are mature?

8 And, you know, as I think the District points out, I don't
9 believe you actually make any allegations one way or the other
10 as to whether these children are likely mature such that they
11 would meet the exception of the Minor Consent Act.

12 MR. MASON: Well, I don't think we do either, but
13 that's sort of the problem with the Act, right? The parents
14 have already made a decision on behalf of their children, and
15 it's based on sincerely held religious beliefs.

16 And the Act strips them of that right to make that decision
17 and transfers it to an unknown medical provider who, you know,
18 on a case-by-case basis, will be making that judgment based on
19 what the Minor Consent Act describes as informed consent, which
20 doesn't really address the medical professional, doesn't address
21 things like what about, you know, they know that the -- the
22 school district knows that the parents have lawfully exercised
23 the religious exemption, but the medical provider doesn't have
24 to take that into account at all.

25 And that's part of what we've argued, that the District has

1 a duty to the children to support the lawful decision-making
2 of the parents, not to subvert it, and the Act doesn't provide
3 for that. So the medical professionals may ask questions about
4 risks and the like, but they cannot judge why the parents have
5 exempted the child. They don't have any expertise in that.

6 And the other problem with this is that the National
7 Vaccine Act requires that there are legal implications for
8 when you consent, and that's not taken into account either.
9 So if there is an adverse reaction, you have to file claims in
10 a certain period of time and so forth. The Minor Consent Act
11 doesn't take that into account on behalf of children, and it's
12 not a medical provider's expertise to even address that.

13 THE COURT: I understand that. You know, at various
14 points in your brief, you emphasize the risk that, under the new
15 regime, unvaccinated children will be coerced into consenting to
16 a vaccination. Do you think this coercion is a result of the
17 Minor Consent Act, or is this coercion coming from, you know,
18 third parties such as school teachers that aren't necessarily
19 before the Court?

20 MR. MASON: Well, the coercion is part and parcel
21 of the compulsory attendance law. You have to be there. The
22 children are -- you know, the schools have a certain amount
23 of control over children that they wouldn't have -- you know,
24 children are not under control in other places.

25 During the custodial time that the children are in the

1 school, there are going to be people encouraging them to get
2 vaccinations. I mean, we're fairly certain that's going to
3 happen. And the question is do we have to wait for that to
4 happen and be able to put that in a complaint, or is there --
5 it's part and parcel of what's going on in the schools today,
6 as we alleged and pointed out, that the clinics are being set
7 up; and children are particularly vulnerable when they're in
8 the public school setting to responding to the authorities that
9 are there, and if they walk into the clinic, no one's going to
10 be asking them about their religious exemption that their
11 parents have filed.

12 THE COURT: But kind of moving to the merits, as
13 I suggested, I think -- I'm most convinced by your discussion
14 of how this local code conflicts with the federal statute, 42
15 U.S.C. 300aa. If I disagreed with your claims under RFRA and
16 the Due Process Act, do you have a cause of action to vindicate
17 the rights you alleged under the National Childhood Vaccine
18 Injury Act, or would I have to find a due process violation at
19 the very least to rule for you?

20 MR. MASON: Well, Section 1983 gives us a cause of
21 action for violations of federal law, and that's what we've
22 relied on. There's -- sorry. I'm looking for a note here.
23 So anyway, so Section 1983 certainly gives us a cause of action
24 to challenge violations of our federal rights under the National
25 Vaccine Act.

1 THE COURT: Okay. Okay. So one of the tricky parts
2 of this is the federal statute talks about a child but doesn't
3 define who a child is as far as I can tell, and it seems like
4 it kind of incorporates state law for "child" purposes. Would
5 it be fair to kind of harmonize the federal statute with the
6 D.C. Code by saying that the D.C. Code has, in effect, said
7 that mature minors are not children for purposes of vaccine law?
8 What's wrong with that argument?

9 MR. MASON: Well, the D.C. Code actually provides,
10 in Section 46-101, that notwithstanding any rule of common law
11 or other law to the contrary, the age of majority in the
12 District of Columbia shall be 18 years of age. So a minor
13 is defined as somebody under 18 years of age. That's repeated
14 in the regulations which say, even in the context of medical
15 decision-making, 18 is the age of majority.

16 Now, the defendants cite to the CDC's questions and
17 answers. And just from a straightforward standpoint, it's
18 called the Minor Consent Act. They say that minors may provide
19 informed consent. They refer to them as mature minors
20 throughout their memos.

21 And what the CDC answers say to answer that exact question,
22 the VIS's must be provided to the legal representative of a
23 child. And you look to state law to determine who should be --
24 it says "should be deferred to for purposes of determining who
25 is a minor." So D.C. did not redefine who is a minor. They

1 have said that certain minors, if they're mature enough in
2 the judgment of the medical provider, may provide consent.

3 THE COURT: Sorry. What were you reading from right
4 there, Mr. Mason?

5 MR. MASON: That's the CDC's questions and answers
6 that the defendants had referred to in their brief.

7 THE COURT: Okay. Yeah. I guess I'm wondering
8 there whether "minor" is synonymous with "child." You know,
9 could, conceivably, a mature 17 year-old be a "minor" under
10 D.C. law but not a "child" under the U.S. statute.

11 MR. MASON: I'm sorry. Could you say that again?

12 THE COURT: Yeah. What I hear you talking about is
13 the D.C. Code defining what a minor is, but the federal statute
14 talks about a child. I'm wondering if there could be daylight
15 between "minor" and "child" such that somebody could be a minor
16 for D.C. Code purposes but not a child for U.S. statute
17 purposes.

18 MR. MASON: I agree with that analysis, that the
19 legal representative of a child must be provided with the
20 vaccine information sheets and that an 11 year-old in D.C.
21 is a child and not eligible to be treated as a, quote, mature
22 minor and give consent.

23 THE COURT: I think you miss my question.
24 My question is, is a minor the same thing as a child?

25 MR. MASON: Yes.

1 THE COURT: And what are you looking to for that?

2 MR. MASON: In the same Q&A, the Act does not define
3 a child for purposes of the Act, but a legal representative is
4 defined as the parent or an individual who qualifies as a legal
5 guardian under state law.

6 THE COURT: Right. So I guess you'd say that the
7 CDC, by using the "minor" term, understands "child" and "minor"
8 to be synonymous.

9 MR. MASON: Yes.

10 THE COURT: So as the defense points out under D.C.
11 law, a minor of any age may consent to various health services
12 for substance abuse, sexually transmitted diseases, and so on.
13 Why are parents' due process clause rights greater when it comes
14 to vaccinations than it is when it comes to these other medical
15 treatments?

16 MR. MASON: Well, first of all, the D.C. Code defines
17 minors as 18 for the purposes of that. The other things often
18 involve things like, you know, consent to abortions and
19 contraceptives and the like. And there's a difference in those
20 kinds of cases where you're balancing the rights of parents
21 against the rights of the child. And, I mean, they're not the
22 Act that's before the Court either. No one's challenging those.

23 THE COURT: Right. Yeah, I guess I'm just wondering
24 why -- do you think -- I mean, there's a constitutional right
25 here. How can it be so varied that the parents have this

1 constitutional right to decide about vaccine status but not
2 about these other things, and I guess maybe you think that the
3 District is violating the Constitution on these other areas.
4 I'm just wondering about that.

5 MR. MASON: Yeah. Well, so the Minor Consent Act
6 actually subverts the right of the parents directly, and the
7 other provisions, like I said, often involve things like
8 contraceptives and the like. So those are just analyzed
9 differently.

10 THE COURT: Okay. Aside from the directives aimed
11 at medical doctors, the Minor Consent Act lowers to 11 the age
12 that individuals can, without a parent, consent to receiving
13 vaccinations. Do you believe that that lowering by itself is
14 a violation of the Constitution or the NCVIA?

15 MR. MASON: Well, it certainly violates the National
16 Vaccine Act. The problem here is who is a child and who is a
17 parent, and children as young as 11 just do not have the ability
18 to understand everything that goes into these kinds of
19 decisions.

20 In *Parham* the Supreme Court said, "Most children, even
21 in adolescence, simply are not able to make sound judgments
22 concerning many decisions, including their need for medical
23 treatment. Parents can and must make those judgments."

24 Neither state officials nor federal courts are quick to
25 review such parental decisions. So that's what the Constitution

1 requires. Can states define those rights away by lowering
2 ages? I don't think so, especially as young as 11 in this Act.

3 THE COURT: Okay. So what if D.C. writes off the
4 books any regulations it had about the age that individuals can
5 consent to medical treatment? Do you believe that would be
6 constitutional?

7 MR. MASON: So that anybody could consent at any age
8 to any medical treatment?

9 THE COURT: Correct.

10 MR. MASON: No, I don't. I think the constitutional
11 right of parents to direct the medical care and treatment of
12 their children would still apply.

13 THE COURT: All right. So you believe that states
14 must have an age of consent, and then it must be of a certain
15 age lest it violate the rights of parents. Is that right?

16 MR. MASON: Well, I think it certainly requires the
17 wisdom and judgment of parents for many medical treatments.
18 There are exceptions that the courts have held, of course, of
19 things like in case of emergency --

20 THE COURT: Sure.

21 MR. MASON: But the general rule is that children
22 should rely on their parents to make those decisions.

23 THE COURT: Okay. I'll give you the last word,
24 Mr. Mason, but is there anything else you want to say before
25 I hear from Ms. Kelley?

1 MR. MASON: Well, I think that the Minor Consent Act
2 has already caused harm to the plaintiffs by transferring power
3 to unknown medical providers to make the judgments that the
4 parents should make and have already made, and so that's a
5 deprivation that's already occurred and will continue to occur.
6 It's not really speculative. It's happened.

7 To take the Court's point, the factual record could be
8 developed more in the coming days if that's needed. So, as
9 far as standing, I think that the Minor Consent Act has already
10 caused harm to the parents and the children.

11 THE COURT: But if the children obey their parents
12 or decide they're just not interested in vaccines at all, I'm
13 trying to see how anybody is possibly injured by the fact that
14 there's this mechanism out there that could allow for them to
15 get vaccinated if they decided to. If you --

16 MR. MASON: Well, I --

17 THE COURT: -- saying TransUnion, the fact that these
18 credit agencies have erroneous information about citizens out
19 there, but they've never released them to anyone, I can't see
20 the harm.

21 MR. MASON: Well, there's the ongoing pressure --
22 and I don't know. I feel pretty strongly that the world today
23 is quite different than it has been in the past and that there's
24 much, much more pressure on children in the age of COVID that
25 they have to be able to withstand. That's an ongoing harm that

1 they have to face that.

2 Whereas, if the Minor Consent Act honored religious
3 exemptions -- in other words, if the Court were to hold that
4 it could not be applied to parents who have lawfully filed a
5 religious exemption, and that's part of the equation in getting
6 the informed consent, that kind of pressure would be relieved
7 from the children to conform to things that they know their
8 parents don't want them to do. And they're particularly
9 vulnerable at this age to do that, to conform to other authority
10 figures' desires.

11 THE COURT: Okay. I'll hear from Ms. Kelley.
12 Mr. Mason, you might be thinking about whether you want to
13 supplement the factual record and whether you want me to rule
14 on what I have at this point, including this pending PI and
15 motion to dismiss, or whether you want to seek leave to amend.

16 MR. MASON: Thank you.

17 THE COURT: While you're thinking about that, let
18 me hear from Ms. Kelley.

19 MS. KELLEY: Thank you, Your Honor. This is
20 Ms. Kelley for the District. I would start by pointing out
21 that I believe that plaintiffs' counsel has conceded that
22 their complaint lacks crucial allegations that go to the Court's
23 jurisdiction, including stating that, quote, "I don't think we
24 do either," unquote, have allegations that speak to the minor's
25 capacity.

1 There's nothing in the complaint that says they are aware
2 of their own medical histories, which even plaintiffs in their
3 own briefing acknowledge would be required in order for these
4 kids to provide consent.

5 I believe that plaintiffs' counsel also agreed with Your
6 Honor that their allegations do not amount to behavior by
7 District officials that compels anything. I think that counsel
8 said the "compelled" part. I don't believe that's true either,
9 Your Honor, and he fell back to a position that the District is
10 encouraging students and their families to seek vaccination.

11 I think the law is clear that the District can encourage
12 vaccination and that without allegations that would make it
13 plausible to believe that plaintiffs' children would choose
14 to seek vaccination, that they would be pressured to seek
15 vaccination, that they would be capable of providing consent
16 to such vaccination, that they would do so, as Your Honor has
17 pointed out, against their parents' wishes, this case cannot
18 go forward.

19 I will also try to address the questions that Your Honor
20 has raised by plaintiffs, but, obviously, if there's anything
21 the Court would like me to turn to, I will.

22 THE COURT: Yes. Ms. Kelley, I guess on the standing
23 issue, I understand, I'm sympathetic, to the plaintiffs'
24 quandary here, that what do they need to be able to show prior
25 to their children actually getting vaccinated against the

1 parents' wishes. It feels a little bit like the injury could
2 always be uncertain and kind of inchoate right up until the time
3 that they are injured. But that's not what the law requires.

4 MS. KELLEY: Yes, Your Honor. Well, I think there are
5 multiple things that have to be true in order for the plaintiffs
6 to have standing here, and the idea that there is some kind of
7 -- even if we assumed that there would be some kind of pressure
8 on the children in schools, that's not enough.

9 The plaintiffs also have to allege some facts that would
10 make it plausible to believe that their children will agree,
11 even against their parents' wishes, and that even within the
12 ambit of the Act, the act only permits medical providers to give
13 vaccinations if the minors are capable of providing informed
14 consent. There's nothing in the complaint that speaks to that.
15 There's no evidence on the record that says plaintiffs' 12- and
16 13-year-old children meet that predicate.

17 So, regardless of what will or won't happen in schools
18 going forward, plaintiffs have failed to show they have
19 standing.

20 THE COURT: So, Ms. Kelley, I'm wondering what
21 they could possibly show. I mean that feels like a very
22 nuanced and, honestly, pretty subjective analysis as to
23 whether any given 13-year-old is mature.

24 And I imagine this is part of the plaintiffs' concern,
25 is the parents may think their children are not very mature,

1 knowing a child day in and day out as a parent does, but a
2 doctor who has a very brief interaction and believes that a
3 vaccine is best for this child may well be thinking, well,
4 gee, this kid has combed his hair and brushed his teeth and
5 seems very polite; yeah, of course he's mature enough.

6 I don't know. It's hard to imagine what the plaintiffs
7 could allege here that would -- you know, they've got to
8 anticipate how some doctor would see their children, wouldn't
9 they?

10 MS. KELLEY: To some extent, yes, Your Honor. It
11 would be an individualized question for every child, but there
12 are some basic facts that each minor would need to know that
13 the plaintiffs could speak to but haven't. So in their own
14 briefing, page 43 in the PI motion, they state, "Even if an
15 eleven-year-old child had the knowledge of vaccine warnings
16 and her own personal medical history to give informed consent."

17 So plaintiffs recognize that one of the key predicates
18 is that the minor must have some knowledge of their own medical
19 history. The plaintiffs would know that about their own
20 children, and they could say whether or not their own children
21 have that predicate knowledge.

22 And the D.C. law, which we've also cited in our briefing,
23 which the amicus has supported, is clear that the informed-
24 consent requirement rules that the minors should have knowledge
25 of their own personal medical histories. So if they don't have

1 that, it would be illegal and contrary to the physician's
2 ethical duties as described by the amicus to vaccinate that
3 child.

4 THE COURT: All right. Do you believe that somebody
5 could have standing to challenge this prior to the children
6 actually being vaccinated, or is this just going to be a
7 situation where it's hard to imagine anybody having standing?

8 MS. KELLEY: I think it's possible, Your Honor, yes.
9 I don't think that's what we have here.

10 THE COURT: Okay. Let's talk about this preemption
11 issue, Ms. Kelley. You know, as I read -- I guess there's two
12 different parts to this statute that I'm really wondering about.
13 One is part (d) where it says that a healthcare provider shall
14 provide to the legal representative of any child or to any other
15 individual to whom such provider intends to administer such
16 vaccine a copy of the information materials developed pursuant
17 to subsection (a).

18 I mean, aren't plaintiffs right about this, that it's
19 anticipating that you either -- you give it to a child's legal
20 representative or that any other individual is an adult who's
21 getting a vaccine, but not a mature child?

22 MS. KELLEY: No, Your Honor. We don't believe that
23 the plaintiffs are right about that. And there's already been
24 some discussion of the CDC's view, but I will point to it again.
25 The CDC has specifically addressed this question, and it has

1 interpreted the law to require that the information statement
2 should be given, basically, to whoever is the one providing
3 consent.

4 So that is, in the CDC's view, consistent with the terms
5 of the Act. And as also described in our briefing and by
6 amicus, it's also consistent with subsequently enacted law in
7 Congress, HIPAA, which in its regulations very specifically
8 addresses this issue.

9 You know, as you have also noted, the mature minor doctrine
10 long predates the NCVIA, and there were laws on the books, you
11 know, I believe all of the states or almost all of them, including
12 the District, that permitted minors to provide consent in
13 certain circumstances. So, as an initial matter, it's hard to
14 believe that this provision would destroy those laws silently.

15 But also, Congress, after passage of NCVIA, has
16 specifically addressed who gets access to information about
17 a patient's medical history and when, and it specifies that
18 if a minor has obtained certain services without a parent's
19 consent, that that person is the one who has control of the
20 information and not the parent.

21 THE COURT: Ms. Kelley, do you believe the CDC FAQ
22 is entitled to *Chevron* deference?

23 MS. KELLEY: I haven't really thought about it,
24 Your Honor, but I would hazard yes.

25 THE COURT: All right.

1 MS. KELLEY: If it's material to your decision,
2 we'd be happy to brief it.

3 THE COURT: Yeah. It strikes me that this Act isn't
4 directed specifically to the CDC. It seems to be directed
5 toward HHS and DOJ, maybe. It's not clear to me that the CDC
6 would have *Chevron* deference kind of jurisdiction, if you will,
7 for purposes of interpreting this Act.

8 MS. KELLEY: Yes, Your Honor. I honestly haven't
9 considered it, but I would point to HIPAA regulations, which
10 are formal regulations which are passed pursuant to notice
11 and comment and which speak to the issue and provide the same
12 guidance.

13 THE COURT: Okay. And can you say where specifically
14 in HIPAA, ma'am, you're looking? I didn't remember that.

15 MS. KELLEY: Yes, Your Honor. I'm looking for the
16 cite. It's also addressed in the amicus briefs. Give me just
17 a moment.

18 So 45 C.F.R. § 164.502(g)(3), which discusses when a minor
19 has the authority to act as an individual with respect to
20 protected health information pertaining to a healthcare service,
21 including when the minor may lawfully obtain such healthcare
22 service without the consent of the guardian, etc., and then it
23 defines the personal representative, which, under HIPAA, is the
24 person who's entitled to the confidential information as the
25 relevant decision-maker under applicable law including state

1 law.

2 THE COURT: All right.

3 MS. KELLEY: It's also at pages 42 and 43 of our
4 motion to dismiss.

5 THE COURT: So help me -- I mean, can you respond
6 to the plaintiffs' allegations about the statutory history there
7 of that section (d) that I'd been discussing that -- or to any
8 other individual language is kind of a second generation of the
9 statute and was...

10 MS. KELLEY: Hello? I've lost audio.

11 THE DEPUTY CLERK: This is Michelle, the courtroom
12 deputy. We may have lost the judge.

13 Do I have plaintiffs' counsel still on?

14 MR. MASON: Yes.

15 THE DEPUTY CLERK: Okay, great. And I still have
16 Ms. Kelley and Ms. Disney?

17 MS. KELLEY: Yes. This is Ms. Kelley.

18 THE COURT: Can you all still hear me? Sorry about
19 that. So I was asking Ms. Kelley to respond to the plaintiffs'
20 argument on the statutory history of section (d) indicating that
21 the "any other individual" language is a more recent amendment
22 to the statute and was intended to refer to an adult.

23 MS. KELLEY: Well, Your Honor, we would look back to
24 the plain text of the statute which, again, in our view makes
25 clear that it would be the legal guardian or the patient and,

1 again, that that should be interpreted to mean the relevant
2 person, you know, is the decision-maker.

3 THE COURT: All right. So I also want to talk about
4 this subsection (a) of the statute that talks about this
5 recording any vaccine in the person's permanent medical record
6 or in a permanent office log or file to which a legal
7 representative shall have access upon request.

8 So let's say I'm a 12-year-old student at one of these
9 schools that has a clinic in it. Are you saying that there's
10 two different records, Ms. Kelley, one that the parent has and
11 that you've added as Exhibit B, this universal health
12 certificate, but then there's also a second permanent office
13 log or permanent medical record somewhere that would have the
14 vaccine information?

15 MS. KELLEY: Yes, Your Honor. And I would note
16 that the amicus brief from the American Academy of Pediatrics
17 physicians supports this claim that, in their view, the Minor
18 Consent Act has nothing to do with a permanent record and
19 doesn't speak at all to what the provider should or shouldn't
20 put in a permanent record, or even for that matter what
21 information the provider should or shouldn't provide to the
22 parent. Yeah, they're completely different issues.

23 THE COURT: So you believe that one of these
24 plaintiffs could go to the school and see a record that does
25 have the vaccine and just wouldn't be the universal health

1 certificate.

2 MS. KELLEY: Your Honor, I don't believe that the
3 schools would have the permanent medical history. I think that
4 the purpose of the form that we filed is -- that is the record
5 the schools would have. And the other record that I'm referring
6 to and that the amicus speak about would be something maintained
7 by medical providers. And if the parents tried to obtain
8 information from that record, I think that their access to it
9 would be governed by HIPAA, and whatever other information they
10 might get from the provider would be at the discretion of that
11 provider.

12 THE COURT: All right. Yeah, I guess I'm wondering
13 what this permanent medical record is and how it could possibly
14 exist even if a parent doesn't know about it and all they're
15 seeing is this universal health certificate. Isn't there a
16 danger that you're kind of subverting the intent of this
17 recording requirement by having this D.C. universal health
18 certificate that would have misinformation?

19 MS. KELLEY: I don't believe so, Your Honor, because
20 again, the particular certificate that the law is talking about
21 is only for D.C. Public Schools and is only as a result of the
22 vaccine requirement. So that is the certificate that parents
23 must file showing that their children have received the required
24 vaccinations, and it is not the permanent record of vaccination.

25 So, for example, if I wanted to go get my permanent record

1 of vaccinations, I wouldn't call the school; I would call my
2 doctor. And I'm looking for the page here. But again I think
3 the amicus brief speaks well to this, and it was from doctors
4 who work with these laws every day; and they agree that the
5 requirement to omit certain information from the form that goes
6 to the school is different from the child's permanent record
7 and that the Act doesn't speak to the latter at all.

8 THE COURT: Okay.

9 Ms. Kelley, anything further for defense?

10 MS. KELLEY: No, Your Honor.

11 Well, yes. I would just note that you've asked plaintiffs'
12 counsel if they have a cause of action under the NCVIA or
13 through Section 1983. We specifically noted in our briefing
14 that we were assuming they did for purposes of this briefing
15 only, but if that becomes material to the Court's decision,
16 we would request the opportunity to brief the issue. And the
17 same as to your question on *Chevron* deference.

18 THE COURT: Okay. Thank you. I might have another
19 question for you, but I want to hear from Mr. Mason first.

20 Mr. Mason, do you want to respond briefly to Ms. Kelley?
21 I'm interested in your thoughts about what we should do here
22 moving forward and specifically if you want me to rule or if
23 you want to withdraw your preliminary injunction motion and
24 seek leave to amend.

25 MR. MASON: I could address some of the things that

1 Ms. Kelley said, particularly the form created by the Minor
2 Consent Act. I mean, even her response, how would a parent know
3 to go and where to go, I mean, if the child gets a vaccination
4 at a school clinic from an unknown doctor who files a form that
5 doesn't include the information with the school and then later
6 learns that the child did have a vaccine? Then there's going
7 to have to be some detective work to find any form. But the
8 National Vaccine Act actually requires that all forms contain
9 the information.

10 I don't think the District actually has the legal authority
11 to do anything other than that, and the only purpose for doing
12 it is to keep the information from the child's parents, which is
13 the only purpose for the explanation-of-benefits requirement in
14 the Act as well.

15 As far as *Chevron* deference, the CDC's Q&A is certainly not
16 probably entitled to *Chevron* deference insofar as it's not a
17 regulation interpreting a statute. It's just an FAQ. But we
18 would like to have the opportunity to brief that as well.

19 And I think, you know, to answer Your Honor's question,
20 the dilemma we face, of course, was that establishing concrete
21 facts of injury before school started on Monday was sort of the
22 dilemma we had; how do we establish that. And our concern was,
23 of course, that we wanted to prevent any injury that could
24 happen because of the operation of this Act. So we were kind of
25 operating under the assumption that we could -- you know, that

1 we didn't have to wait for the ultimate injury to happen to
2 invoke the jurisdiction of the Court.

3 But it appears obvious to me that we would be best served
4 by withdrawing the temporary injunction motion today and seeking
5 leave to amend based on the actual experience of the plaintiffs'
6 children in the schools, now that school has started, as well as
7 addressing some of the other issues that Your Honor has raised.

8 THE COURT: Okay.

9 Ms. Kelley, any reason that doesn't make sense for the
10 plaintiff to withdraw the preliminary injunction, and I guess
11 I'd -- I think what I'd do is grant your motion to dismiss the
12 plaintiff, but without prejudice, and give Mr. Mason however
13 long he thinks he needs -- and I'll hear from him in a second
14 on that -- to file the amended complaint.

15 Any objection to that, Ms. Kelley?

16 MS. KELLEY: No, Your Honor.

17 THE COURT: Okay. And, Mr. Mason, does that make
18 sense to you, and how long do you need?

19 MR. MASON: I would think we will know a lot more
20 in 30 days.

21 THE COURT: Okay. That makes sense to me.

22 All right. So I'm going to grant the defendants' motion
23 to dismiss the complaint, but without prejudice, and I think my
24 reason is probably self-evident at this point from the record,
25 but specifically based on standing concerns.

1 And I just point to *Clapper v. Amnesty International*,
2 568 U.S. 398 (2013) which requires that -- it says, "Although
3 imminence is a concededly somewhat elastic concept, it cannot
4 be stretched beyond its purpose, which is to ensure that the
5 alleged injury is not too speculative for Article III purposes
6 that the injury is certainly impending. Allegations of future
7 or possible future injury are not sufficient."

8 I agree with the plaintiffs' counsel that there may well
9 be an injury here that they can prove, but I need more facts
10 than we currently have. So I'm dismissing the complaint without
11 prejudice, granting the plaintiffs' leave to amend by Friday,
12 October 1. Does that work for you, Mr. Mason?

13 MR. MASON: Yes, Your Honor. Thank you.

14 THE COURT: Okay. And I guess I should make clear
15 that to the extent the preliminary injunction has not already
16 been consolidated into the trial on the merits, that that is
17 being denied as well without prejudice to the plaintiff filing
18 a future preliminary injunction motion.

19 Mr. Mason, anything further we should discuss today?

20 MR. MASON: No, Your Honor. Thank you.

21 THE COURT: And Ms. Kelley?

22 MS. KELLEY: No, Your Honor. Thank you.

23 THE COURT: Okay. One thing -- I don't think we need
24 to decide this right now, but there is a -- I guess a related
25 case with a single plaintiff. It's *Mazer v. Bowser*, I believe.

1 I'm sure Ms. Kelley is aware of it.

2 Mr. Mason, are you aware of it as well?

3 MR. MASON: Yes, Your Honor, I am.

4 THE COURT: All right. Maybe you should talk with
5 plaintiff's counsel there whether it makes sense for us to
6 consolidate these cases. I'm not sure if it does. I think
7 there are some interesting factual differences between these
8 cases, but I think the legal arguments are pretty similar.

9 So I don't think I'm going to make any order or anything
10 but just encourage you all to talk amongst yourselves and with
11 the Mazer counsel about whether it makes sense to consolidate
12 for efficiency for everyone's purposes.

13 All right, folks. Thank you very much. Have a good day.

14 MR. MASON: Thank you.

15 MS. KELLEY: Thank you.

16 (Proceedings adjourned at 12:08 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter. *

/s/ Bryan A. Wayne
Bryan A. Wayne

* PLEASE NOTE:

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