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DEPARTMENT OF JUSTICE
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November 22, 2021

VIA EMAIL AND US MAIL

Senator Page Cortez
Senate President, State Senate
101 W. Farrel Road Bldg. 5, Suite 100
Lafayette, LA 70508

Representative Clay Schexnayder
Speaker, State House of Representatives
6473 Highway 44, Suite 205
Gonzales, LA 70737

Senator Fred Mills
Chairman Health and Welfare Committee, State Senate
1019 Periou Street
Parks, LA 70582

Representative Larry Bagley
Chairman Health and Welfare Committee, State House of Representatives
671 Hwy. 171, Suite E
Stonewall, LA 71078

RE: Proposed LAC 51:II.701

Dear Sen. Cortez, Rep. Schexnayder, Sen. Mills, and Rep. Bagley:

Over the last several days, I have been contacted by a number of legislators that have raised concerns over the actions of the Louisiana Department of Health and the Office of Public Health regarding the proposed rule mandating COVID-19 vaccines for students.

We understand that the House Health and Welfare oversight hearing is scheduled for December 6, 2021, and we encourage and support an oversight hearing so that the concerns of the public can be heard and considered by the Legislature.

For your ease of reference and as a courtesy to you, our staff has researched the requirements set forth by statute that govern legislative oversight of proposed rules by an agency. (*See attached memo "LEGISLATIVE OVERSIGHT COMMITTEE HEARING PROCESS"*) Among these are

four factors, which the law requires the committee to determine. They are as follows:

1. Whether the proposed rule is in conformity with the intent and scope of the enabling legislation purporting to authorize the adoption thereof;
2. Whether the proposed rule is in conformity and not contrary to all applicable provisions of law and of the constitution;
3. The advisability or relative merit of the proposed rule;
4. Whether the proposed rule is acceptable or unacceptable to the oversight subcommittee.

We note that each of these factors should be discussed and a vote taken as to whether the members of the oversight committee believe that the rule meets the criteria spelled out by statute. I would note to you all that it is our legal opinion that the proposed rule does not.

Attached you will find a letter sent to the Secretary of the Louisiana Department of Health, which you should find supportive of our position.

Should you all have any questions or need further information regarding the challenge to this rule, we stand ready to assist.

Sincerely,



Jeff Landry
Attorney General

Encl.

Memo Legislative Oversight Committee Hearing Process
Letter to Dr. Courtney N. Phillips dated November 22, 2021

I. LEGISLATIVE OVERSIGHT COMMITTEE HEARING PROCESS

Rule promulgation is an extension of the lawmaking function that the Legislature has delegated to state agencies. The Legislature has the authority to review a state agency's exercise of this delegated authority. As part of this review, the Louisiana Administrative Procedure Act ("APA") sets forth specific actions that must be taken by state agencies as part of the rule promulgation process. As part of this review process, the First Oversight Report, which includes the Notice of Intent and the Fiscal, and Economic Impact Statement for proposed LAC 51:II.701 was sent to the Speaker of the House, President of the Senate, and House and Senate Health and Welfare Committees on September 10, 2021. La. R.S. 49:968(B). The Second Legislative Oversight Report was sent to the Speaker of the House, President of the Senate, and House and Senate Health and Welfare Committees on November 10, 2021. La. R.S. 49:968(D)(1)(b). The Second Legislative Oversight Report triggers the time for the Legislative Oversight Hearing.

The oversight hearing on proposed LAC 51:II.701 must be held no later than 30 days following the day the oversight committee received the Second Legislative Oversight Report. La. R.S. 49:968(D)(2)(a). Here, the Second Legislative Oversight Report was received on November 10, and the last day for an oversight hearing is December 10.

The chairman of each chamber's Health and Welfare Committee shall appoint an oversight subcommittee to conduct hearings on the proposed rule. La. R.S. 49:968(D)(1)(a). The subcommittee must consist of at least a majority of the membership of the standing committee, but at the discretion of the chairman, with the concurrence of the Speaker or the President, may also consist of the entire membership of the standing committee. La. R.S. 49:968(D)(2)(b). If both the House and Senate subcommittees call for a hearing, then they may meet jointly or separately. Members of the public must be provided an opportunity to appear before the committee, and any interested person may file with the committee a prepared statement concerning the matter under consideration.¹

The APA contains specific instructions for the determinations the oversight subcommittee must make. Louisiana Revised Statute 49:968(D)(3)(a)-(d) states that the oversight subcommittee *shall* make each of the following determinations at the oversight hearing:

1. Whether the proposed rule is in conformity with the intent and scope of the enabling legislation purporting to authorize the adoption thereof.
2. Whether the proposed rule is in conformity and not contrary to all applicable provisions of law and of the constitution.
3. The advisability or relative merit of the proposed rule.
4. Whether the proposed rule is acceptable or unacceptable to the oversight subcommittee.

These determinations must be made no later than December 10 and must be made by a favorable vote of a majority of the members of the oversight subcommittee who are present and voting. If the House and Senate Health and Welfare Committees meet jointly, the above determinations must still be made separately by each house. La. R.S. 49:968(E)(1)(a). If either the House or Senate oversight subcommittee determines that the proposed rule is unacceptable, the respective subcommittee must provide a written report containing a copy of the proposed rule and a summary of the determinations listed in La. R.S. 49:968(D)(3)(a)-(d). This report must be delivered to the governor, the Louisiana Department of Health, and the Louisiana Register no later than four days after the oversight subcommittee makes its determination. In making the determinations set forth in La. R.S. 49:968(D)(3)(a)-(d), our office recommends the members of the subcommittee consider the following issues.

¹ House Rules 14.32 and 14.33; Senate Rules 13.78 and 13.79.

II. LEGAL CONSIDERATIONS REGARDING THE VALIDITY OF LAC 51:II.701

1. **The proposed rule does not conform to the intent of the Legislature and is contrary to La. R.S. 17:170 because it imposes the requirement of evidence of immunity for all students, not just those identified by law.**

The First Oversight Report submitted by the Department of Health, Office of Public Health (“OPH”) to the oversight committees cites La. R.S. 17:170 and R.S. 49:954, *et seq.*, (the APA), as the authority that authorizes the promulgation of LAC 51:II.701.

Louisiana Revised Statute 17:170 contains OPH’s authority to approve the immunization schedule for vaccine-preventable diseases, specifically La. R.S. 17:170(A)(1), which states:

(a) **Each person entering any school within the state for the first time**, including elementary and secondary schools, kindergartens, colleges, universities, proprietary schools, vocational schools, and licensed day care centers, at the time of registration or entry **shall present satisfactory evidence of immunity to or immunization against vaccine-preventable diseases according to a schedule approved by the office of public health**, Louisiana Department of Health, or shall present evidence of an immunization program in progress.²

(b) Beginning with the 2009-2010 school year and thereafter, **each person entering the sixth grade** in any school within the state **shall present satisfactory evidence of immunity to or immunization against vaccine-preventable diseases according to a schedule approved by the office of public health**, Louisiana Department of Health, or shall present evidence of an immunization program in progress.

The proposed rule is contrary to La. R.S. 17:170 because this statute intentionally imposes evidence of immunity on only two groups of people (1) each person entering any school system within the state for the first time and (2) each person entering the sixth grade. Subsection (E) of the proposed rule attempts to impose evidence of immunity on each and every student attending any school in the state. Specifically, Subsection (E) states “each individual entering or attending any school within the state in-person shall present to such school satisfactory evidence of having received vaccination(s) in accordance with the dosing schedule, including any booster doses.” The proposed rule does not conform to the intent of the Legislature and is contrary to La. R.S. 17:170 as the proposed rule requires evidence of immunity from individuals who are specifically excluded from these requirements in La. R.S. 17:170.

2. **The proposed rule does not conform to the intent of the Legislature and is contrary to La. R.S. 17:170 because it does not allow satisfactory evidence of immunity to be furnished in lieu of immunization.**

The Legislature specifically provided in La. R.S. 17:170(A)(1)(a) that a person may “present satisfactory evidence of immunity to *or* immunization against vaccine-preventable diseases.” The proposed rule is contrary to the intent of the Legislature and the law because Subsection (E) does not allow a student to furnish satisfactory evidence of immunity in lieu of immunization.

[E]ach individual entering or attending any school within the state in-person shall present to such school *satisfactory evidence of having received vaccination(s)* in accordance with the dosing schedule, including any booster doses recommended by the U.S. Centers for Disease Control and Prevention (CDC), set forth in the applicable Vaccine Information Statement (VIS) for severe acute respiratory syndrome-coronavirus 2 (SARS-CoV-2, the virus which causes COVID-19), or known variants thereof, to the extent that such vaccines have been fully approved by the U.S. Food and Drug Administration (FDA) for the individual’s age.

² The issuance and approval of an immunization schedule by the Department of Health is considered a “rule” under the Louisiana Administrative Procedure Act and must be adopted in accordance with the APA. La. R.S. 49:951(8).

A person who has been previously infected with COVID-19 should be able to provide “satisfactory evidence of immunity” in accordance with La. R.S. 17:170(A)(1)(a). Under the proposed rule, a student who was previously infected with COVID-19 and has developed antibodies may still be excluded from attendance in the event of an outbreak, as the proposed rule now characterizes the student as unimmunized for the purposes of La. R.S. 17:170(F). The proposed rule eliminates the “satisfactory evidence of immunity” provision in La. R.S. 17:170(A)(1)(a) and is contrary to the law and legislative intent.

3. The mRNA injection is substantially different from a conventional vaccine and is not authorized by La. R.S. 17:170.

Prior to 2021, as evidenced by the CDC’s definition at that time, the generally prevailing meaning of “vaccine” was understood to be “a product that stimulates a person’s immune system to produce immunity to a specific disease, protecting the person from that disease.” In September of 2021, the CDC changed the definition of vaccine to “a preparation that is used to stimulate the body’s immune response against diseases.” There is no dispute that the mRNA injection is a new type of vaccine that is different from conventional vaccines. The CDC describes the mRNA injection as follows:

To trigger an immune response, many vaccines put a weakened or inactivated germ into our bodies. Not mRNA vaccines. Instead, mRNA vaccines use mRNA created in a laboratory to teach our cells how to make a protein—or even just a piece of a protein—that triggers an immune response inside our bodies. That immune response, which produces antibodies, is what protects us from getting infected if the real virus enters our bodies.³

According to the fixed-meaning canon of statutory construction, words must be given the meaning they had when the text was adopted.⁴ “When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.” La. C.C. art. 10. This new mRNA technology was not approved by the FDA for use as a vaccine at the time La. R.S. 17:170 was enacted in 1968 and was last amended in 2015. The word “vaccine” has only in the past few months been understood to encompass mRNA technology. The proposed rule broadens La. R.S. 17:170 to include technology that was not intended by the Legislature and that is contrary La. R.S. 17:170’s contemplation of conventional vaccines.

4. Adding La. R.S. 17:170(A)(1)(a) limits the immunization schedule to vaccine-preventable diseases.

The proposed rule exceeds the intent and scope of La. R.S. 17:170 by requiring immunization for a virus that is not a “vaccine-preventable disease.” Louisiana Revised Statute 17:170(A)(2) states that the vaccine schedule “shall include but not be limited to measles, mumps, rubella, diphtheria, tetanus, whooping cough, poliomyelitis, meningococcal disease, and hemophilus influenzae Type B invasive infections. Under the ejusdem generis rule of statutory construction, general words are not to be construed in their widest extent, but are to be held as applying only to such classes of things of the same general kind as those specifically mentioned. *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06), 925 So. 2d 1202, 1211. Each of the vaccines listed is for a “vaccine-preventable” disease.

In contrast, the COVID-19 vaccine is described by the CDC as, “effective at helping protect against severe disease and death from the virus that causes COVID-19, including known variants currently circulating (e.g., Delta variant).”⁵ The duration of protection from severe disease and death is still unknown. Unlike the vaccines listed in La. R.S. 17:170, which have long-term effectiveness, the CDC states, “[i]t’s not yet known how long COVID-19 vaccine protection lasts. Recent studies show that protection against the virus may decrease over time. This reduction in protection has led CDC to recommend certain groups get a booster shot at least 6 months after

³ Centers for Disease Control and Prevention, “How mRNA Vaccines Work” <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mRNA.html>

⁴ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* p.78

⁵ Centers for Disease Control and Prevention, “Key things to Know About COVID-19 Vaccines” <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>

completing their initial vaccination series.”⁶ OPH’s addition of an immunization for a virus that is not a vaccine-preventable disease is outside the scope of La. R.S. 17:170 and is contrary to law.

5. The Legislature has the inherent authority to stop the proposed rule from being promulgated.

The legislative power of the state is vested in the Legislature.⁷ Louisiana’s Constitution provides for a separation of powers among the three branches of government and provides that “no one of these branches, shall exercise power belonging to either of the others.”⁸ Although the legislature, in the exercise of its constitutionally vested powers, can delegate legislative power to a non-legislative body (as it has done here with the Office of Public Health), the legislature must establish, by statute, standards for the guidance of the non-legislative body so that there is no unconstitutional delegation of legislative authority. Those standards are set forth in the Louisiana Administrative Procedures Act and in the particular legislation authorizing the OPH to promulgate rules on a particular matter—here La. R.S. 17:170. If OPH or any other agency of the executive branch seeks to exercise legislative authority after the legislature has specifically determined that the proposed legislative instrument is outside of the scope of the delegated authority or contrary to law, the action violates the doctrine of separation of powers contained in La. Const. art. II and the resulting rule is unconstitutional.

⁶ Centers for Disease Control and Prevention, “Frequently Asked Questions about COVID-19 Vaccination.” <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>.

⁷ La. Const. art. III, § 1.

⁸ La. Const. art. II.

The inclusion of the specific vaccine preventable diseases in La. R.S. 17:170 is consistent with the definition of “vaccine” which existed at the time the Legislature last amended La. R.S. 17:170. At that time, Webster’s Dictionary defined the term vaccine as “any preparation of weakened or killed bacteria or viruses introduced into the body to **prevent a disease** by stimulating antibodies against it.” Interestingly, just as we have seen the science and knowledge surrounding COVID-19 shift over the last two years, Webster’s Dictionary also shifted its definition of vaccine to now mean “a preparation that is administered (as by injection) to **stimulate the body’s immune response** against a specific infectious disease.”

Similarly, the Centers for Disease Control and Prevention (“CDC”) recently changed its definition of the term “vaccine.” The CDC’s definition changed from “a product that stimulates a person’s immune system to produce immunity to a specific disease” to the current “a preparation that is used to stimulate the body’s immune response against diseases.” Arguably, such a definition was designed to hide the fact or account for the fact that COVID-19 vaccines are not within the traditional efficacy range of 85-99% effective at preventing the disease.

The Office of Public Health traditionally recognized and made a distinction between vaccines that could prevent a disease and that could not. For example, the Office of Public Health does not place the vaccine for flu on the schedule of “required” vaccines. The seasonal influenza is not a “vaccine preventable disease,” and the Office of Public Health has correctly placed the vaccine for influenza on the list of “recommended” vaccinations.

Therefore, it is clear that—when formulating the legislation at issue—the general prevailing meaning of what should be included in the immunization schedule for students entering schools was vaccines which would actually prevent a disease. We expect that there will be a legal challenge asserting that the concept of “vaccine preventable disease” was understood to be those diseases that a vaccine could actually prevent or eradicate, and the authority of your office to place a vaccine on the required immunization schedule is limited to whether or not a disease is “vaccine preventable.”

While the risk of contracting COVID-19 may be decreased after vaccination, it is still possible for there to be an outbreak at a school even when students are vaccinated. The former White House Senior Advisor for COVID-19 response, Andy Slavitt, recently posted a detailed thread on Twitter that addressed the question of whether everyone will get the virus at some point. Mr. Slavitt admitted that “given Delta’s contagiousness and the fitness of future mutations in order to beat it, this means SARS-CoV-2 will be contagious enough that everyone will get the virus.”¹

¹ Slavitt, Andy@ASlavitt “given Delta’s contagiousness and the fitness of future mutations in order to beat it, this means SARS-CoV-2 will be contagious enough that everyone will get the virus”. 14 Aug. 2021. Tweet.

Data and studies conducted by the CDC reinforce Slavitt's comments. As reported by the CDC:

In July 2021, following multiple large public events in a Barnstable County, Massachusetts, town, 469 COVID-19 cases were identified among Massachusetts residents who had traveled to the town during July 3–17; 346 (74%) occurred in fully vaccinated persons. Testing identified the Delta variant in 90% of specimens from 133 patients. Cycle threshold values were similar among specimens from patients who were fully vaccinated and those who were not.²

Around the time that the CDC published the above-mentioned study, Rochelle Walensky, Director of the CDC, publicly stated, "Our vaccines are working exceptionally well. They continue to work well with delta with regard to severe illness and death. They prevent it. But what they can't do anymore is prevent transmission."³

Officials at the World Health Organization reported that despite innovations in vaccine development and research, the COVID-19 virus is not going away and will likely circulate through society in a similar way as the common flu. CNBC reported that the World Health Organization declared that COVID-19 won't be eradicated.⁴ In the same article, CNBC further reported:

Officials at the global health agency have previously said vaccines do not guarantee the world would eradicate Covid-19 like it has other viruses. Several leading health experts, including White House chief medical advisor Dr. Anthony Fauci and Stephane Bancel, CEO of Covid vaccine maker Moderna, have warned that the world will have to live with Covid forever, much like influenza.⁵

These public statements, as well as statements by the CDC Director Walensky, WHO, Dr. Fauci at NIH, and the CEO of one of the vaccine manufacturers, all point to a virus that is endemic. The scientific consensus is that COVID-19 will become endemic and is more than likely here to stay. They also compare it to influenza, which will also likely be around forever and is not a "vaccine preventable disease".

² "Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021" Centers for Disease Control and Prevention, 6 Aug. 2021. <https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm>

³ CNN, Aug. 5, 2021; <http://www.cnn.com/TRANSCRIPTS/2108/05/sitroom.02.html>

⁴ CNBC, Sept. 7, 2021; <https://www.cnbc.com/2021/09/07/who-says-covid-is-here-to-stay-as-hopes-for-eradicating-the-virus-diminish.html>

⁵ *Id.*

Dr. Courtney N. Phillips
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Therefore, we believe your vaccine mandate for children will be challenged on the grounds that COVID-19 is not a “vaccine preventable disease” as contemplated by La R.S. 17:170, and you should not promulgate a rule mandating it on vaccination schedules required for school entry.

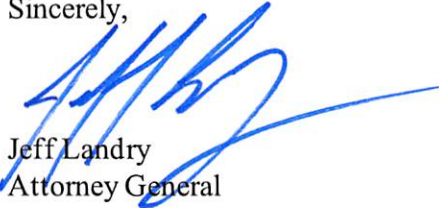
As the U.S. Fifth Circuit opined its recent decision involving vaccine mandates, no matter how tragic and devastating the pandemic has been, we cannot substitute the tragedy for the law or revise the meaning certainly without legislative action.⁶

We agree. We believe lower courts will interpret any attempt to mandate the currently available COVID-19 vaccines as a violation of law.

Finally, given that the mRNA vaccines used in children are not traditional vaccines, and the mandate involves emergency use only medical treatment on students, such an action represents a major policy decision reserved for our Legislature by our State Constitution.

I look forward to addressing these concerns with the Legislature at the House Health and Welfare oversight hearing scheduled for December 6, 2021.

Sincerely,



Jeff Landry
Attorney General

cc: Page Cortez, Senate President
Clay Schexnayder, Speaker
Fred Mills, Chairman Health and Welfare Committee, State Senate
Larry Bagley, Chairman Health and Welfare Committee, State House of Representatives

⁶ *BST Holdings, L.L.C., et al. v. OSHA*, (U.S. 5th Cir. 11/12/21).