

CCPPR

The Center for Children's Policy Practice and Research at the University of Pennsylvania

4200 Pine Street
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to Senate Judiciary Committee

RE: Religious Liberty Protection Act of 1999

The Center for Children's Policy Practice and Research at University of Pennsylvania (hereinafter CCPPR) is a nonprofit academic group composed of experts on child welfare and children's issues in the fields of law, medicine and social work. Established by Dean Ira Schwartz of the School of Social Work, the CCPPR is under the Co-Directorship of Dr. Richard Gelles of the School of Social Work, a specialist in domestic violence, Dr. Annie Steinberg of the Medical School Faculty and Children's Hospital, a pediatrician who is board certified in adult and pediatric psychiatry, and Professor Barbara Bennett Woodhouse of the Law School faculty, who is a specialist in constitutional law and in the rights of families and children. We work in collaboration with other experts on children's issues from all segments of the University of Pennsylvania. Our mission is to integrate policy, research and practice toward the goal of preserving children's health and developmental potential, and assuring the rights of America's children to be safe and secure in their own homes and communities. We believe that an interdisciplinary approach, which combines the skills of all relevant professionals, is essential to the formation of effective policies and practices, as well as reliable and sound research, in the area of child welfare.

The CCPPR is submitting this testimony to address questions raised about the potential effects of the Religious Liberty Protection Act (RLPA) on existing state and federal law schemes for protecting children from abuse and neglect. This legislation would significantly change the current legal standards embodied in state and federal statutes and applied by juvenile courts and local and state child welfare agencies regarding the balance between religious freedom of parents and protection of children from harm. In our opinion, it would place children at greater risk of abuse and neglect.

RLPA prohibits any local or state government entity or program that receives federal funding from placing a "substantial burden" on a person's "religious exercise," even if the burden results from a rule of general applicability. The principle is well established that parents' free exercise rights extend to inculcation of children with their religious beliefs and practices. Many of the most

famous free exercise cases from the Supreme Court of the United States have involved parents claiming an infringement of their First Amendment free exercise rights based on laws that interfered with their religiously based parenting decisions. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Jehovah's Witness Aunt and guardian seeks an exemption from child labor laws); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents seek an exemption from mandatory education laws); *Bowen v. Roy*, 476 U.S. 693 (1986) (Native American parents seek exemption from policy of assigning children a social security number). RLPA would shift the burden of proof to the state of demonstrating a "compelling state interest" and showing that the government funded program or agency had adopted the "least restrictive means" of furthering that interest. To the extent sects or individual believers treat child rearing practices and inculcating children in the parent's faith as a religious obligation, the overlap between "free exercise" claims and conduct harmful to children is substantial.

Limiting the law to programs receiving federal funds does little to mitigate this harm. Virtually all child welfare activities, from hospitals to foster care programs to family courts themselves, receive some level of federal funding through programs designed to assist states in dealing with the problems of children who are abused, suffering from medical neglect, or lacking "proper parental care and supervision" and thus within the state's "parens patriae" protective custody. States and localities currently participate in a host of federally funded programs including adoption assistance for special needs children, foster care and group homes, social work services to families and children in their own homes, all of which operate under rules of general application which have the potential for creating a "burden" on parents' religious exercise. States and localities routinely must determine whether to intervene, based on reports from medical personnel, schools, police and citizens, when parents' religious beliefs conflict with children's health and safety.

Rights of free exercise, when asserted by parents in connection with child rearing and religious practices, raise unique issues. No other situation involves the believer placing another individual's life at risk as an aspect of vindicating his or her own religious beliefs. Child protection and child welfare laws vary from state to state, but they rarely mandate the strictest level of scrutiny or require that the state's intervention be limited to the "least restrictive alternative". There is good reason not to apply the "least restrictive alternative" standard. In cases involving children, courts must balance, in addition to the parent's private interest in religious exercise and the government interest in protecting children, the child's independent interest in bodily integrity and children's right to life. These interests of children are interests of constitutional magnitude, under the due process clause. For this reason, courts and legislatures have drawn a more nuanced balance, and one that places as much or greater emphasis on children's rights to bodily integrity as on parents' free exercise rights.

The following are several scenarios that illustrate the obstacles RLPA creates for agencies, and the danger it poses of costing innocent children's lives by preventing government from meeting the needs of at risk children:

Effects on Schemes for Mandatory Reporting of Abuse: In 1993, almost 3,000,000 reports of suspected child abuse were filed in the United States. In 1,000,000 such cases, further

investigation showed the report to have been well founded. In the initial stages of an investigation, it is impossible to determine which reports are unfounded, which involve suspicious circumstances that cannot be proven, and which will uncover past abuse and grave risks of future harm. In a common scenario, a teacher or other “mandatory reporter” observes bruises on a child and is told by the child “Daddy punished me because I was bad.” State laws passed in response to the Child Abuse Prevention, Adoption and Safe Families Act of 1988 (PL 100-294) make it mandatory for the teachers, social workers, medical personnel and others to file a report if they have “reasonable grounds” to suspect child abuse. According to regulations promulgated under PL 100-294 “child abuse and neglect” is defined to include “physical injury.” Often, a school principal or child protective services worker will seek the opinion of a health professional who on visual inspection may confirm that the child’s condition warrants reporting and further investigation. The parent may be asked to explain the bruises and to give permission for a medical examination. Siblings or others may be interviewed. In *Foy v. Holston*, 94 F.3d 1528, 1536 (11th Cir. 1996), for example, a teenage runaway from a religious commune called “Holyland” exhibited bruising and reported she and other children were severely whipped for minor infractions. She was taken into protective custody, her parents and other children were interviewed, but after further investigation the case was dropped and she returned home voluntarily. Her parents sued, claiming first amendment and due process infringements.

Under RLPA if the parent (as in *Foy* cited above) concedes he caused the bruising but claims that his conduct is an integral part of his religious belief, whether based on scriptural references to corporal punishment or more unusual beliefs such as the need for force in exorcizing devils, RLPA would be triggered. While some reports (like those in *Foy*) may be dropped as lacking adequate evidence, others will lead to discovery of past abuse and risk of future abuse. Radiological investigation will often reveal both new and old fractures substantiating a history of severe battering. Normally, evidence of cuts or bruises resulting from corporal punishment will justify a court ordered medical exam should the parent refuse to authorize one. The parents protected by RLPA, however, could assert religious objections to any forms of medical care, including diagnostic X rays.

The teacher, school and police, by interposing their authority between parent and child, in matters concerning religion arguably have created a “substantial burden” -- but they are required to do so, or be guilty of a violation under laws passed in virtually every state as a precondition for receiving federal funding. Currently, doctrines of qualified immunity protect them precisely because this is an area in which child custody workers must engage, under difficult circumstances and without perfect information, in balancing of the competing interests of children, parents and the state. As the United States Court of Appeals for the Eleventh Circuit stated in *Foy*, supra “[S]tate officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of ‘clearly established law.’” The Circuit Court held that, considering the lack of bright line standards in the law of abuse and neglect, the officials enjoyed qualified immunity. Similarly, governments (and the taxpayers) are not liable under current laws every time they fall short of the ideal in investigating or responding to abuse, as long as they act reasonably under the circumstances. RLPA would change this balance, increasing risk for children as well as for government agencies that failed to adopt the least restrictive of an array of reasonable options.

RLPA is Clearly Less Protective of Children's Bodily Integrity than Current Standards such as "Reasonable Grounds" or "Reasonable Efforts:" While the state interest in protection of children will likely pass muster as a "compelling" interest, application of a "least restrictive means" test would place a heavy burden on the state, not contemplated by current law. Can the court order a medical exam based on "reasonable grounds" for intervening when the suspected abuse is religiously motivated -- or must there instead be clear and convincing evidence? Currently, even where the law imposes a standard requiring "clear and convincing evidence" of abuse or neglect, once there is a finding that a child is "in need of services" or "a dependent child", courts are typically instructed by statute to enter such orders as may be in the child's "best interest" or be "necessary" to protect the child. Judges are usually provided with a menu of alternatives, from ordering the parent to participate in counseling to removal of the child for placement in foster care. Under RLPA, however, if a court finds that a parent's religion requires application of "the rod" but that the punishment inflicted has been excessive, can it enter an order prohibiting the parent from repeating the same type of conduct, i.e., using a switch or belt? Or can it only restrict the parent from administering whippings that cross the boundary between discipline and abuse? Can the court remove the child into protective custody, or must it first try in-home services as "the least restrictive means" of vindicating the state's interest while protecting the parents' rights? In each of these circumstances, if a court concludes that the government entity or agency has failed to use the least restrictive means, the costs of attorney's fees and damages awards will add to the burdens of fiscally strained child welfare agencies.

In *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874 (E.D. Va. 1991), the parent claimed that the state burdened their religion by placing their children with foster parents who did not adhere to their specific faith and by depriving the parents of their right to conduct religious instruction. Quoting from *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988) the court held that "so long as the state makes *reasonable efforts* to assure that the religious needs of the children are met during the interval in which the state assumes parental responsibilities, the free exercise rights of the parents and children are adequately observed." *Id.* At 885 (emphasis added). The court held that the state's efforts had been reasonable: the children had been taken to a church of their faith (Roman Catholic) by the foster parents, and given access to religious instruction classes. The court highlighted the burdens states would face if they were required to match each foster child to a foster family of the same religion. "Thus, for example, a state has no duty to place a Buddhist child with a Buddhist foster family, a Quaker child with a Quaker family, or a Zoroastrian child with a Zoroastrian family, unless such family is reasonably and immediately available." *Pfoltzer* at 885. This approach, focusing on reasonableness, speed and efficiency, strikes a proper balance between children's interests, governments' resources, and the rights of parents. It is distinctly at odds with the far more stringent "least restrictive alternative" imposed by RLPA.

Effects on Pediatricians' Treatment of their Patients: For each case appearing in the news media or in printed court opinions, hundreds more are encountered every day by practicing pediatricians and pediatric psychiatrists. CCPPR Co-Director Dr. Annie Steinberg in her practice has encountered numerous instances of parents asserting religious beliefs as the basis for treatment decisions that threaten the life and health of their children. The following are some examples.

Example 1: A father brings a three year old with sickle cell disease and failure to thrive to a hospital receiving federal funds. The child is in medical crisis, suffering the effects of blood cells aggregating, including painful joint swellings. Under counseling from his minister, the father has placed the child on a protein free diet to heal her. While Grandmother, the day to day care giver, is open to a medically appropriate diet, father is home all day and, under their religion, Grandmother must obey him. He insists on continuing the dangerous protein free diet.

Example 2: Moslem parents give birth to a baby in a hospital receiving federal funds. The baby is born with VATER syndrome, which includes the absence of the radius, a bone in the arm, and other treatable conditions. Baby is premature and develops NEC, necrotizing enterocolitis, and needs emergency surgery. The parents refuse to authorize the surgery, claiming their religion gives them the choice to refuse life sustaining surgical treatment for their disabled child.

Example 3: An adolescent presents at a mental health clinic receiving federal funds with suicidal ideation and major depression (untreated). Her parents refuse to allow her to attend outpatient therapy, or receive treatment with antidepressants, insisting their religion requires that she “pray to God for forgiveness of her sins” instead. The danger of suicide is significant, but difficult to quantify.

In order to properly treat such patients despite the parents’ religiously based objections, pediatricians and other medical professionals rely on the systems in place for protecting children against “medical neglect.” This legislation creates a double standard, placing children whose parents adhere to certain religious beliefs at greater risk, and forcing doctors to adopt medically risky compromises to accommodate religious claims of parents.

Failure to Exempt Extreme and Abusive Conduct: Many proponents of RLPA are concerned with protecting parents who believe in spiritual healing from overly intrusive and unnecessary state intervention. However, RLPA is not narrowly focused on this set of benign cases. It applies even when spiritual healing appears to threaten the life of the child, as in the examples cited above. It also applies to the entire range of potential religious practices, however shocking or dangerous. Presently, state laws recognize various levels of harm. Abuse laws generally exempt moderate levels of physical discipline, labor laws distinguish between exploitation and household chores, and states are free, under federal laws such as the Child Abuse Prevention and Treatment Act to craft appropriate exemptions for spiritual healing. All states laws, however, unequivocally impose absolute prohibitions against, inter alia, ritual sexual acts committed on children; harmful ritual mutilation of children; forced marriages of minor children; incestuous or polygamous intermarriages within a religious community; and other forms of religiously motivated conduct which victimizes children.

RLPA does not distinguish among religious beliefs. Any citizen claiming laws of general application burdened his or her religion could invoke RLPA, and such claims would command the same ultra-strict level of scrutiny and narrowly tailored, individualized consideration as any other religiously based claims, adding to the burdens on courts and agencies charged with protecting children. Such scenarios are not far fetched. Recent cases covered in the media include the Branch Davidian sect in Waco Texas, whose leader allegedly engaged in sex with minor children as part of the religious practice of the community; a girl from an extremist Mormon sect whose

father was alleged to have forcibly married her to an uncle, imprisoned her and beat her when she ran away; Moslem fathers who forced their minor daughters to marry strangers against their will; and parents who fed their infant only lettuce and watermelon, believing this was the will of God. Instead of this blunderbuss approach, statutes creating religious exemptions should be tailored to specific concerns.

Implications for States Which require Heightened Protection of Children's Rights to Bodily Integrity in Cases Involving Repeat Offenders: Many states' laws contain special language requiring courts to make specific findings of fact and narrowly tailor their orders to protect the child, rather than the parents' rights. These laws often single out cases where there has been prior abuse, or where parents have caused the death of a child's sibling. In Maryland, for example, the law in such cases provides "unless the court specifically finds that there is *no likelihood* of further child abuse or neglect by the party, the court *shall* deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well being of the child." Md. Code, Family Law, section 9-101(b) (emphasis added). In addition, section 101.1(b)(3) states that the court *shall* consider evidence of abuse of any child residing within the . . . household" and "*shall* make arrangements for custody or visitation *that best protect the child.*" (Emphasis added).

RLPA contains no such exceptions and its language is clearly at odds with these states' policies of zealous protection of children's rights to be free from repeated incidents of abuse. Religiously motivated abuse and neglect often involve repeated offenses, since the usual deterrents are at their least effective when pitted against deeply held religious convictions, however unusual or bizarre. Thus, the very children most likely to be placed at risk repeatedly, would be deprived of protection in states responding to RLPA's incentives.

Repeal by Implication of Existing Federal Laws: "Reasonable Efforts" under the Child Abuse Prevention and Adoption Assistance Act of 1988. Under the 1988 Act, state agencies throughout the country were required as a condition of receiving federal funding to make "reasonable efforts" to avoid removing at risk children from their homes and to reunite children in foster care with their families. The "reasonable efforts" formula -- which reflected enlightened states' practices -- was designed to balance the state's and child's interests in protection with the parents' and child's interests in reunification. RLPA would, in effect, create a special category of cases requiring not just "reasonable" but "least restrictive" measures. It would also overrule in part at least one Supreme Court case construing that statute. In *Suter v. Artist*, 503 U.S. 347 (1992), the Supreme Court refused to find that the Congress intended to create a private cause of action based on a state's failure to make "reasonable efforts" to avoid placement. RLPA would do just that. In addition, to heightening the standard of review from reasonableness to strictest scrutiny, it provides for a private cause of action and for an award of attorney's fees as an incentive to litigate. The same factors that persuaded the Supreme Court that Congress had no intention of creating such a scheme in 1988 weigh against Congress' taking such a step now without extensive discussion and full investigation of costs and benefits.

The Adoption and Safe Families Act of 1997: In recent legislation, Congress has acted to strengthen not weaken government's role in protection of children. Dr. Richard Gelles, a Co-

Director of CCPPR, worked extensively on this Act and is involved in training of social workers for implementation of the Acts provisions. Professor Woodhouse also has written about ASFA and participated in training for ASFA compliance. This Act provides that a state or county is *not* required to make “reasonable efforts” let alone extraordinary efforts to avoid removal or to promote reunification in cases involving “aggravated circumstances” or abuse of a sibling. It also requires that a petition to terminate parental rights be filed after a pre-determined period in foster care and places the burden on the state to show a “compelling reason” why terminating the parents’ rights will *not* be in the child’s best interest. Clearly, RLPA is on a collision course with this recent congressional reform. Any parent who claimed state intervention burdened his religious exercise could demand not reasonable but extraordinary efforts -- even in cases involving acts such as torture, sexual abuse, or aggravated assault otherwise qualifying as aggravating circumstances.” Removal of an abused child’s siblings is surely not the least restrictive means of responding to an incident of abuse. Congress has struck the balance, in ASFA, in favor of children’s safety. Under RLPA, children whose removal from home was based on religiously motivated medical neglect or abuse, would virtually never qualify for termination and placement in adoptive homes since this is certainly not the “least restrictive means” by which states can secure the child’s safety. These children would suffer the foster care drift that the Adoption and Safe Families Act sought to avoid.

Other Areas Potentially Affected: Immunization, Labor Laws: In an individual case, forced immunization is rarely the least restrictive alternative. Segregation of the non-immunized child or quarantine are less restrictive. Yet the health of all children in a community depends on universal immunization. Child labor laws also protect the well being of all children. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the court rejected a challenge to the state’s police powers, noting “It is too late now to doubt that legislation appropriately designed to reach [child health, labor, and safety] is within the state’s police powers, whether against the parent’s claim to control of the child or one that religious scruple dictates contrary action.” For over fifty years the Supreme Court has distinguished cases involving children’s welfare from other burdens on free exercise. RLPA would for the first time subject such laws to the strictest level of scrutiny, forcing states to justify them in each individual case. Individualized exemptions, while less restrictive of an individual parent’s religious exercise, would have a cumulative impact on the state’s ability to enforce laws of general applicability.

Implications for State Decisions on Custody and Adoption: Custody and adoption, although generally considered “private” matters, might well be affected by RLPA. The Supreme Court has held that a custody order is a form of state action raising serious constitutional concerns, see *Palmore v. Sidoti*, 466 U.S. 429 (1984). As mentioned previously, federal funding of programs for court reform and programs for children in the courts and in adoption and in foster care touch almost every aspect of state and local activity, including the courts and services ordered by the courts. In cases involving disputes between parents of different religions, courts are prohibited from discriminating based on religion but they can and do take into account risks and dangers posed to the child by a parent’s religious practices. Applying a “best interest” standard, courts generally “examine the totality of the circumstances in the alternative environments” including the effects of a parent’s religious practice on the child’s health, emotional and material welfare and

relationships with parents, siblings and friends. See *Bienenfeld v. Bennett-White*, 605 A.2d 172 (Md. Ct. Spec. App. 1992).

Bienenfeld v. Bennett-White involved a dispute between parents, one of whom converted to the Orthodox Jewish faith and the other of whom was an Episcopalian. The mother, claimed that visitation, schooling and many other activities interfered with Orthodox religious practices. If RLPA were applied, it would require that claims of a parent based on the free exercise clause must trump a host of other factors, including the religious rights of a parent who claimed no religious “burden”. The court in *Bienenfeld* upheld the constitutionality of the chancellor’s removal of the children from the mother’s custody to the father’s custody, even though it was based in part on the disruptive effects of the mother’s new religion on the children’s day to day life.

Adoption also potentially raises similar scenarios to custody and overlaps with issues relating to foster care. Federal initiatives provide financial subsidies as well as other programs to promote adoption. Would an agency be forced to find a religious match for a child with “special needs” receiving federal adoption assistance as the least restrictive alternative consistent with the parent’s wishes? While time and space have not permitted me to research and document all potential concerns, it is imperative that this and other scenarios involving RLPA’s effects on children be fully explored.

Conclusion: These examples are illustrative of RLPA’s unforseen consequences for children. By singling out interventions in religiously based abuse and neglect for a “least restrictive means” test, RLPA would heighten the scrutiny placed on such interventions. This would discourage effective and speedy response in cases involving religious sects, depriving such children of the equal protection of the law. The Center for Children’s Policy Practice and Research at University of Pennsylvania joins the American Academy of Pediatrics and other organizations in urging that the Senate reject this Bill. The Senate must, at the very least, hold additional hearings to explore these complex issues. Any legislation must make absolutely clear that RLPA does not apply to state laws and actions involving protection of children from physical and mental abuse and neglect or other laws, both state and federal, whose primary focus is and must remain the best interests of children.

Respectfully Submitted,

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