

# THE CAIN LAW FIRM

2318 Center Street, Suite 310, Deer Park, Texas 77536

(832) 779-2246 OFFICE

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[cainfirm@gmail.com](mailto:cainfirm@gmail.com) EMAIL

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(281) 715-4327 FAX

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September 13, 2016

Eanes ISD

Dr. Tom Leonard & School Board  
601 Camp Craft Road  
Austin, TX 78746

New Braunfels ISD

Randy Moczygemba & Board of Trustees  
430 W. Mill Street  
New Braunfels, TX 78130

Pflugerville ISD

Dr. Alex Elias Torrez & Board of Trustees  
1401 W. Pecan Street  
Pflugerville, TX 78660

Hutto ISD

Dr. Douglas Killian & Board of Trustees  
200 College Street  
Hutto, TX 78634

Del Valle ISD

Dr. Kelly K. Crook & School Board  
5301 Ross Rd, Ste. 103  
Del Valle, TX 78617

Elgin ISD

Dr. Jodi Duron & School Board  
1002 N. Avenue C  
Elgin, TX 78621

Round Rock ISD

Dr. Steve Flores & Board of Trustees  
1311 Round Rock Ave.  
Round Rock, TX 78681

Manor ISD

Dr. Royce Avery & Board of Trustees  
10335 US Hwy 290E  
Manor, TX 78653

Lake Travis ISD

Dr. Brad Lancaster & Board of Trustees  
3322 Ranch Road 620 South  
Austin, TX 78738

Dear School Superintendent:

This letter is being sent to you on behalf of my clients' Texans for Vaccine Choice and several of their members in regards to your Kick the Flu vaccine program being conducted by Healthy Schools, LLC in schools located in your district.

It is my clients' belief that the Influenza vaccine program discussed herein is not in compliance with several laws of the State of Texas, violates principles of the fundamental right of the parent-child relationship, and at odds with the doctrine of informed consent. For the foregoing reasons my clients demand that you take immediate corrective measures to bring your programs into compliance with the law in order to protect the rights of my clients', the rights of their children,

and to prevent any discrimination, disparagement, or stigmatization of children and their families which can have been caused by such programs.

The following is based on an analysis of problems with Kick the Flu programs being conducted by Austin ISD, Bastrop ISD, Fort Bend ISD, Georgetown ISD, and Leander ISD. These five school districts sent letters similar to this which would have arrived on or about Monday, September 12, 2016. Since sending a letter to those five districts, my clients discovered you're schools within your district are conducting similar programs. Thus, while some of the specific examples discussed herein do not make mention of your district by name, it is believed that your district may also be violating similar state laws and legal principles.

What follows is substantially similar to the letter sent to Superintendents of Austin ISD, Bastrop ISD, Fort Bend ISD, Georgetown ISD, and Leander ISD:

### **Coercive Nature of the Consent Form**

The consent form is coercive and at odds with the doctrine of informed consent and offensive to the principles that embody the parent-child relationship. It goes beyond advising and informing the parent of the contraindications for receiving the Flu Vaccine—it attempts to procure consent by guilt and shame.<sup>1</sup>

For example, the form as it was originally sent home to parents contained the following selection:<sup>2</sup>

☐ YES, I Want To Help Protect My Family And Community From Flu By Allowing My Child To Receive a Flu Vaccine!

☐ NO, I DO NOT wish to help protect my child and community by allowing my child to participate(reason) \_\_\_\_\_

### **Problems with the Revised Consent Forms**

The revised form which now appears on the Healthy Schools website<sup>3</sup> is below:

☐ YES, I Want To Help Protect My Family And Community From Flu By Allowing My Child To Receive a Flu Vaccine!

☐ NO, I DO NOT wish to participate

The revision does not go far enough to cure the offensive nature of the consent form. The choice of words for the two options in either the original or revised forms provided to parents is akin to presenting someone with two bowls of candy, telling them that one of the bowls contains poison, and then asking them which bowl they would like to draw from. Just as the candy example

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<sup>1</sup> See, *Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967) (explaining that the “duty to make a reasonable disclosure to a patient of risks that are incident to medical diagnosis and treatment. . . is based upon the patient's right to information adequate for him to exercise an informed consent to or refusal of the procedure.”)

<sup>2</sup> Exhibit “A”

<sup>3</sup> Exhibit “D”; or online at:

<https://www.healthyschoolsllc.com/Content/documents/2016%20Generic%20English%20Consent%20TX.pdf>.

is a false choice, so too is the choice that was given to parents in the consent form. Again, consent cannot be compelled.<sup>4</sup>

For consent to be properly obtained it must be an un-coerced, voluntary choice of one's free will.<sup>5</sup> In order to cure the elements of undue influence contained in both the original and revised versions of the consent form, it is demanded that the two choices be completely revised. A suitable non-coercive substitute might simply read: 1) "Yes, I consent to my child receiving the flu vaccine; or 2) No, I do not consent to my child receiving the flu vaccine.

## Coercive Nature of the Cover Letter

The other source of major concern is the following line appearing on the cover letter sent home with parents: **"THIS FORM MUST BE RETURNED TO YOUR CHILD'S SCHOOL REGARDLESS OF PARTICIPATION."**<sup>6</sup> First of all, neither the school districts nor the schools have the authority to require the return of a form regarding the flu vaccine. Secondly, the flu vaccine is not one of the immunizations the State of Texas requires for school attendance.<sup>7</sup>

The use of such obligatory and commanding language (i.e. "THIS FORM MUST BE RETURNED") not only serves as a secondary constructive means of compelling consent, but misleads parents into believing that they have a legal duty of which the failure to comply could lead to some recourse.<sup>8</sup>

## Problems with the Revised Covered Letter

When faced with complaints, the only revision to the cover letter made by Austin ISD is the deletion of the following all caps, underlined and boldfaced line: **"THIS FORM MUST BE RETURNED TO YOUR CHILD'S SCHOOL REGARDLESS OF PARTICIPATION."**<sup>9</sup>

While Austin ISD and possibly others have revised the cover letter and deleted the offensive and misleading obligatory line above, it is known that other school districts, some of

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<sup>4</sup> See, *HCA, Inc. v. Miller*, 36 S.W.3d 187, 195 (Tex. App. Houston 14th Dist. 2000) (explaining that "where non-urgently needed or non-life-sustaining medical treatment is proposed for a child, a court order is needed to override a parent's refusal to consent . . .").

<sup>5</sup> See *Bumper v. North Carolina*, 391 U.S. 543, 550 (U.S. 1968) ("**Where there is coercion there cannot be consent.**"); *Wood v. Kane Boiler Works, Inc.*, 150 Tex. 191, 202 (Tex. 1951) ("**To be voluntary, an act must be done of one's own free will.**"); *Vasquez v. State*, 324 S.W.3d 912, 922 (Tex. App. Houston 14th Dist. 2010) (explaining that "**consent obtained through duress or coercion, whether actual or implied, is deemed involuntary.**") (emphasis added).

<sup>6</sup> See, first page of Exhibit "D".

<sup>7</sup> See, 25 Tex. Fam. Code § 38.001 ("Each student shall be fully immunized against diphtheria, rubeola, rubella, mumps, tetanus, and poliomyelitis, except as provided by Subsection (c) [of 38.001]."); and Tex. Admin. Code § 97.63 (listing and describing the required vaccinations for children); Tex. Health & Safety Code § 161.004(a) ("Every child in the state shall be immunized against vaccine preventable diseases caused by infectious agents in accordance with the immunization schedule adopted in department rules.").

<sup>8</sup> See, § 3 of Exhibit "E". ("My question is, what exactly is the penalty or not returning the form? If it's required, then what happens if I don't return it? Walking laps? Paying fines? CPS? I don't know, but would love to find out.").

<sup>9</sup> 3rd sentence, 2nd paragraph of Exhibit "B".

whom are recipients of this letter, have not corrected the cover letter. Specifically, at least as of September 1, 2016, Bastrop ISD has not revised or corrected the consent form or the letter.

In doing so, these districts are unapologetically standing by their misrepresentations. In fact, two school districts, Leander ISD and Georgetown ISD, sent out emails acknowledging the problems with the forms, expressing regret, but neither of the two districts took corrective action by sending new forms and letters home to parents. Instead, both districts told parents they would correct the issue going forward.<sup>10</sup>

We therefore demand that all districts still using this original cover letter remove this language. We further demand that in districts where the original cover letter was sent out to families on some campuses and the revised cover letter was sent out to families on other campuses that the revised cover letter be re-sent to all families on campuses that received the original cover letter.

### **Discriminatory Practices**

A line on the “about page” of the Healthy Schools website states that “[e]ach child in the primary grades (VPK-5) will receive a Health Hero wristband as a prize for participation in the program.” It is my client’s belief that the practice or act of rewarding children who receive vaccinations with a *Healthy Hero wristband* will publicly expose their children and other children who do not receive vaccinations to criticism and humiliation by their peers and school employees. Furthermore, children who do not receive wristbands are likely to be angry toward their parents for not allowing them to participate in the program and thus not receive a wristband.

To demonstrate that this concern is a material one, my clients have received an email from a parent in Fort Bend ISD on September 7, 2016 whose daughter was the only student in her class who did not receive a “gold medal” because she did not return a Kick the Flu consent form. The father reports that his daughter felt “sad to be singled out” in such a public manner and “came home mad” at him.<sup>11</sup>

### **Whether Parents or Guardians May be Present for the Procedure**

Whether parents or guardians of children receiving vaccines under the program may be present for the procedure is also an issue of concern. At least one parent of a student enrolled in a school in Leander ISD tells us that both the school principal and school nurse told the parent they were not allowed to be with their child during the vaccination.

Schools should be cautious to prohibit parents from being present while immunizations are administered to their children. The ability of a parent to attend an immunization can be drawn from a syllogistic reading of the Texas Family Code, which makes clear that a parent “is not required to be present when the immunization is administered.”<sup>12</sup>

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<sup>10</sup> See, §§ 1 and 2 of Exhibit “E”.

<sup>11</sup> § 3 of Exhibit “E”.

<sup>12</sup> Tex. Fam. Code § 32.102 (“The person authorized to consent is not required to be present when the immunization of the child is requested . . .”)

Adverse reactions to the flu vaccine are known to happen, and if parents are not allowed to be present to notice changes in their child until he or she goes home hours later, reactions, if any, could be much worse.

Moreover, it is acknowledged that the flush language on the Kick the Flu consent form states in relevant part that “I give permission to Healthy Schools, E3 Alliance, and Schoolhouse Pediatrics and their administrators to give my child the vaccine in my absence.” This requirement is too stringent and only further represents a form of parental alienation upon the parent-child relationship.

We recommend parents be permitted to witness and attend the administration of the vaccine.

### **Concern of the School Nurses**

School nurses on campuses providing this flu vaccine program have told my clients that they (the nurses) were not equipped or trained, and would be unable to identify and handle any adverse reactions that occur after the clinic administering the vaccine leaves. Additionally, they fear that any liability for vaccine reactions will ultimately fall on them<sup>13</sup> since the consent form waives liability to Healthy Schools and they will be the only medical professionals on campus attending to those with adverse reactions.<sup>14</sup>

### **The Consent Form is Not in Substantial Compliance with State Law**

In order to comply with state law, the consent form must include: 1) the name of the child; 2) the name of one or both parents, if known, and the name of any managing conservator or guardian of the child; 3) the name of the person giving consent and the person's relationship to the child; 4) a statement of the nature of the medical treatment to be given; and 5) the date the treatment is to begin.<sup>15</sup>

Neither of the consent forms include information pertaining to the fifth requirement, “the date the treatment is to begin,” a requirement of Texas Family Code Sec. 32.002(b)(5). It is anticipated that a school district may try to defend the form's deficiency by claiming that although the form does not state the date the treatment is to begin, the cover letter does. For example, Austin ISD's cover letter states that, “Healthy Schools will be providing flu vaccinations at your student's school on **September 14<sup>th</sup>-22<sup>nd</sup>, 2016!**”<sup>16</sup> However, such an assumption would be wrong. The only legally conceivable way dates listed on a separate letter could be used to bring the consent

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<sup>13</sup> Compare, Tex. Health & Safety Code § 161.004(c) (“Physicians shall be responsible for reviewing the immunization history of every child examined and administering any needed vaccinations or referring the child for immunization.”)

<sup>14</sup> See flush language of Exhibit “A” and Exhibit “D”.

<sup>15</sup>Tex. Fam. Code § 32.002(b); Tex. Fam. Code § 32.1011 (explain that “Consent to immunization . . . must meet the requirements of Section 32.002(a)”; see also Tex. Ed. Code § 38.053 (stating that “(a) A school-based health center may provide services to a student only if the district or the provider with whom the district contracts obtains the written consent of the student's parent or guardian or another person having legal control of the student on a consent form developed by the district or provider. The student's parent or guardian or another person having legal control of the student may give consent for a student to receive ongoing services or may limit consent to one or more services provided on a single occasion. (b) The consent form must list every service the school-based health center delivers in a format that complies with all applicable state and federal laws and allows a person to consent to one or more categories of services.”) (emphasis added).

<sup>16</sup> Exhibit “B” and Exhibit “C”.

form into compliance with state law is if the consent form made reference to the letter and the treatment dates included within the letter, thus incorporating a separate page for reference.

Because the consent form does not comply with Texas Family Code or the Texas Education Code, the consent forms are illegal. We therefore demand that your school district immediately cease its Kick the Flu program until parental consent can legally and properly be obtained.

### **Whether Contracting with Healthy Schools LLC was in Compliance with State Law**

Texas Government Code Sec. 2252.002 states that “A governmental entity [includes public school districts] may not award a governmental contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the greater of the following: (1) the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located; or (2) the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which a majority of the manufacturing relating to the contract will be performed.”

It is believed that Healthy Schools, LLC is a nonresident contractor located in Florida.<sup>17</sup> Therefore, drawing from Texas Government Code Sec. 2252.002, my clients demand proof that Healthy Schools, LLC, (and its subsidiaries, not limited to E3 Alliance and Schoolhouse Pediatrics) was awarded its contract with your school district compliance with the requirements of comply with Texas Government Code Sec. 2252.002.

### **Other Violations of Texas Law Suspected**

My clients are concerned that your school district's Kick the Flu program does not meet Section 38.012 of the Texas Education Code. Without detailing the provisions of this section, we advise that you read section 38.012 to ensure that the program is in compliance with the law. To be specific, my clients have two primary concerns: whether medical records pertaining to their children and the children in your schools will be kept secure and confidential; and whether the board of trustees held a public hearing at which the board disclosed all information on the proposed health care services and provided an opportunity for public comment.<sup>18</sup>

### **Recapitulation and Close**

To recap, it is believed that the Kick the Flu programs being conducted by schools in your district are illegal or unethical and discriminatory in the following ways:

- 1) The Consent Forms, whether original or revised, are unduly coercive and violate principles of the doctrine of informed consent;
- 2) The singling out of children who do not participate in the program by awarding the children who do is clearly discriminatory and harmful to children and injurious to the parent-child relationship;

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<sup>17</sup> the About page of Healthy Schools, LLC states that “Healthy Schools’ home office is in Ponte Vedra Beach, FL.”, available online at: <https://www.healthyschoolsllc.com/Home/About>.

<sup>18</sup> Tex. Ed. Code § 38.012 (1)-(2).

- 3) The prohibition on the attendance of parents to witness or be present while their child receives a vaccine is an improper form of parental alienation;
- 4) The Consent Form is not in compliance with State law;
- 5) And it is believed that your contract with Healthy Schools, LLC may have been made outside the requirements of State law.

In closing, my clients demand that your district immediately cease and desist your Kick the Flu program being conducted by Health Schools, LLC and any of its affiliates or subsidiaries; that you take immediate corrective measures to bring the program and its associated letters and forms into compliance with the laws of the State of Texas; that you take every and all course of action to prevent the discrimination, disparagement, and stigmatization of children whose parents will not, or have not signed and returned the consent forms; and that you, within a reasonable amount of time, comply with all other requests made herein.

Failure to comply with this letter may result in further action, including legal action, to protect the interests of my clients and their children.

If you have any questions, please feel free to contact my office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Briscoe Cain', with a stylized flourish at the end.

Briscoe Cain

Texas Bar No. 24073602