

**LAW OFFICE OF NICOLE C. PEARSON**  
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May 6, 2022

**Rebuttal to Senator Wiener's SB 866 Arguments in Support**

On May 5, 2022, the Judiciary Committee considered [Senate Bill 866](#), which would lower the age of consent to all vaccines to 12. Hundreds spoke out in opposition to the Bill, while approximately eleven (11) spoke in support, three (3) of which were Senator Wiener's in person witnesses. After hearing the speakers for and against the Bill, several Committee members questioned Senator Wiener regarding details of the bill. Senator Wiener provided responses that were legally and/or factually inaccurate; however, no rebuttal was permitted. Given the severity of this issue – the potential vaccination of children without their legal guardians' involvement, knowledge, or consent – we hereby submit the following in response:

**Misrepresentation #1: The ruling in *Booth, Mazer v. Bowers* does not mean SB 866 will be held unlawful by California courts.**

- On March 18, 2022, [the United States District Court for the District of Columbia granted the preliminary injunction](#) of Plaintiffs Booth and Mazer enjoining (stopping) D.C. from enforcing its Minor Consent Act ("MCA"), which would have allowed 11-year-olds to consent to vaccines. When asked if *Booth* ruling meant that SB 866 would also be found illegal if challenged in court in California, Senator Wiener said "No" because the *Booth* ruling (1) was wrong, and (2) would not apply to SB 866 if it became law. Both of these statements are **false** and **wrong** as follows:
  - **The first ruling the judge made in *Booth*<sup>1</sup> was that a federal law – the National Childhood Vaccine Injury Act ("NCVIA") – preempts the MCA because the MCA conflicts with the federal law's requirements.<sup>2</sup>**

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<sup>1</sup> Siri Glimstad, LLP also filed the *Mazer v. District of Columbia Department of Health, et al.* case (Case No. 1:21-cv-01782 (TNM)), also challenging the MCA, which was consolidated with the *Booth v. Bowser* case (Case No. 21-cv-01857 (TNM)). On March 18, 2022, the United States District Court for the District of Columbia **granted** Plaintiffs' preliminary injunction, which **enjoined D.C.** from enforcing the MCA. During the hearing, witnesses and Senator Wiener referred to this case as "Booth." Therefore, it will be referred to as such, herein.

<sup>2</sup> His second ruling was that the MCA violated parents' constitutional and statutory rights to exercise religion; however, since religious exemptions were removed for Californians, this argument does not apply and will not be addressed, here.



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- The NCVIA – a federal law which is superior to and must be followed by the states – **requires** healthcare workers administering a vaccine to a minor to give the legal guardian of the minor a Vaccine Information Statement (“Statement”)<sup>3</sup>. Because the MCA would permit minors to obtain a vaccine without a parent or legal guardian involved, it would be physically impossible to satisfy this federal requirement, thereby, conflicting with federal law.<sup>4</sup>
- During the hearing and in his 15-page Bill Analysis posted less than 24 hours before the hearing, Senator Wiener misleadingly stated that the *Booth* judge did *not* find that express or field preemption invalidated the MCA. Technically, **he is correct; HOWEVER:**
  - ***Neither of the Plaintiffs argued either of these theories of preemption.*** Of course the court did not rule in favor of the Plaintiffs on these issues. *They did not exist.*
  - Senator Wiener ***failed to mention*** the court’s only actual ruling regarding preemption: **the MCA “conflicts with the [NCVIA’s] structure and purpose”** and is preempted by the NCVIA under “conflict preemption.”<sup>5</sup>
- The court found the MCA conflicts with the NCVIA in 3 ways:
  - (1) Preventing exchange of information to healthcare provider from parent – who has the most comprehensive and typically exclusive understanding – regarding the minor’s and family’s medical history;
  - (2) Preventing exchange of information from the provider to the parent regarding the risks of the vaccine, including how

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<sup>3</sup> The Statement must include “(1) a concise description of the benefits of the vaccine, (2) a concise description of the risks associated with the vaccine, (3) a statement of the availability of the [Program], and (4) such other relevant information as may be determined by [HHS].” 42 U.S.C. §300aa-26(c). § 300aa-26(a), (c).

<sup>4</sup> *Booth*, Memorandum of Opinion, pp. 1-2, 17-18

<sup>5</sup> *Id.* pp. 24-26



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to identify and seek treatment for possible adverse reactions, and – most importantly – **how to file a petition with the National Vaccine Injury Compensation Program (“Program”)**, all of which is stated in the Statement.

- Contrary to another of Senator Wiener’s false statements, **only parents or legal guardians can file petitions for compensation under the Program.**<sup>6</sup>
  - ***See discussion, infra, below.***
- (3) Preventing “fast, informal adjudication” of vaccine injuries.
  - If a child does not inform their guardian they received a vaccine, are they going to tell them if they are having a reaction?
  - How will a guardian know they need to seek treatment for their child, *or file a petition with the Program* for financial support to treat their child, if they do not know their child is vaccinated?
  - A parent may not realize their child suffered a “vaccine injury” until after the **3-year window to file a petition** has closed.<sup>7</sup>
- Senator Wiener stated *Booth* was **not** a final ruling. This is **false**. The ruling was entered March 18, 2022. **The deadline to file an appeal in the D.C. Court of Appeal is 30 days after entry of final order.**<sup>8</sup> As of the date of the hearing May 5, 2022, the April 18 deadline had expired by *weeks*.
- Senator Wiener claimed *Booth* will not be binding on any California court. While it is true that the D.C. District Court is not higher than a California District Court so its ruling is not *binding* like a U.S. Supreme Court ruling, or ruling from a California Court of Appeal, it is **final ruling** and **precedent** and will weigh heavily in favor of invalidating SB 866.

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<sup>6</sup> 42 U.S.C. §300aa-11(b)(1) [stating that the only people who can petition for compensation from the Program are persons who have sustained vaccine-related injuries or “the legal representative if such a person is a minor.”]

<sup>7</sup> 42 U.S.C. §300aa-16(a)(2)

<sup>8</sup> D.C. Code, §13-307; D.C.C.A., Rule 4(a)(1)



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- This is especially true where the court’s analysis of the NCVIA / MCA conflict is correct, and can apply to the same terms of SB866.<sup>9</sup> (See discussion, above).

**Misrepresentation #2: SB 866 does not violate any other laws.**

Senator Wiener stated that SB 866 was constitutionally and statutorily sound, aka legal. This is **false**. If passed and codified (made law), SB 866 would violate the following:

- **California Constitution, Article 1, Section 1:** fundamental right to privacy, including the right to direct the health of the family.
  - It is worth noting that D.C. does *not* have a fundamental right to privacy, like California does, so this argument is even stronger and more well-protected in California.
- **U.S. Constitution, 1, 4, 5, 9, 14 Amendments:** fundamental right to privacy, including the right to direct the health of the family.
- **20 U.S.C. §§1400 et seq.: Individuals with Disabilities Education Act (“IDEA”),** including a *federal requirement* that parents to be involved in the development of and consent to child’s Individualized Education Program (“IEP”), which can include health care directives, such as vaccination.

**Misrepresentation #3: Minors can file claims with the Program.**

Senator Wiener stated minors can file a claim with the Program. This is **patently false**:

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<sup>9</sup> Senator Wiener’s Bill Analysis argued, “[f]or starters” that the MCA’s statutory scheme was more complex, including instructions how to manipulate medical paperwork to deceive parents, and . However, *as admitted by Wiener*, this issue related specifically to the Free Exercise of Religion claim, which may not be raised in California, and has no bearing on the court’s ruling that the MCA conflicted with the NCVIA and was preempted by it as a result. **That finding stands regardless of what other provisions are included in any other “minor consent law” and will (should) be analyzed the same to find that a federal requirement that legal guardians be given a Statement if their minor is receiving a vaccine cannot be circumvented by a minor consent law that prevents it.**



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- 42 U.S.C. §300aa-11(b)(1)(A) states that “any person who has sustained a vaccine injury, **the legal representative of such person if a minor** . . . may . . . file a petition for compensation under the Program.” [Emphasis added].

**Misrepresentation #4: Minors can obtain financial assistance from the Program in the event of vaccine complication, injury, or death.**

Senator Wiener’s representation that minors will not be barred from receiving compensation from the Program in the event of complication, injury, or death is also patently **false**:

- **Minors cannot file a petition for compensation** under the NCVIA.
  - 42 U.S.C. §300aa-11(b)(1)(A) [see above].
- **The window to file a petition for compensation under the Program is 3 years.**
  - 42 U.S.C. §300aa-16(a)(2) [“if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program . . . after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.”]
- **The NCVIA does not toll, or suspend, the 3-year window for minors.**
  - 42 U.S.C. §§300aa-11(b)(1)(A), 300aa-16(a)(2) [see above]
  - This means if a 12, 13 or 14 year old experiences an adverse reaction or injury, **he or she will never be of the age of majority (18+) to file a petition within the 3 year window.** These children will be left high and dry should any complication occur.
  - This also means that their **guardians will be responsible for the costs of their child’s care, and to support them into perpetuity, for an injury resulting from a vaccine they never consented to, let alone knew about.**
  - If we are operating under the “worst case scenarios” of parental neglect, misinformation, and conflict that Senator Wiener and his proponents are using to justify the bill, we must assume these factors will preclude the minor from asking for help so that the guardian can file a petition within



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the 3 year window. This also assumed the guardian finds out about the Program, since neither received the Statement.

### **Misrepresentation #5: Minors can give informed consent.**

Senator Wiener pontificated that even he, as a 51-year-old, does not know every detail of his 51 years of medical history, but that this would and does not prevent him from giving informed consent to receive medical treatment. Senator Wiener's incomplete hypothetical completely miss the mark and are not applicable with respect to minors in the following ways:

- As a general matter, California and federal law require that **every individual, regardless of age, give informed consent** in order to receive medical treatment.
  - 45 Code of Federal Regulations Part 46: Protection of Human Subjections in Research
  - H&SC 24170 et seq.: California's Protection of Human Subjects in Medical Experimentation Act
- **"Informed"** = knowing **"all information necessary to decide whether or not to undergo a procedure**, including but not limited to:
  - (1) An explanation of the procedure in language the patient can understand,
  - (2) Likelihood of success,
  - (3) Risks involved,
  - (4) Risk of death, serious injury, or significant complications.
    - May tell minor or unlikely risks, but not required.
    - See California Civil Jury Instruction No. 532
  - (5) Any other information a skilled practitioner in good standing would disclose to the patient under similar circumstances.
    - *Cobbs vs. Grant* (1972) 8 Cal.3d 229, 242
    - *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343
  - "Material information" is information "the physician knows or should know would be regarded as important by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291.)



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- **“Consent”** = knowing, voluntary, freely given agreement to proceed, *not* obtained under fraud, duress, mistake, undue influence or coercion.
  - *Mistake (CACI 330)*
  - *Duress (CACI 332)*
  - *Undue Influence (CACI 334)*
  - *Fraud (CACI 335)*
  - *Coercion* – pizza, prizes, fitting in
  
- **We know for a *fact*, including Senator Wiener’s own witnesses’ testimony in support, that children are “begging for” the vaccine because they want to:**
  - Go to school in person [duress, coercion]
  - Participate in extra-curricular activities [duress, coercion]
  - Travel [duress, coercion]
  - Not be ostracized from society / their friends [duress, coercion]
  - Hold a job or internship [duress, coercion]
  - Win prizes [coercion]
  - Not disappoint trusted adults in positions of authority [undue influence]
  
- **Children are also operating under mistaken assumptions regarding the risk of the virus and of the Pfizer vaccine<sup>10</sup>.**
  - Many children – in fact, many adults! – do not have the operating capacity to review and analyze the data.
  - *The data for the Pfizer vaccine is still being released / is not complete.*
  
- Senator Wiener claimed that a major reason for “empowering” children to make decisions regarding vaccines is because the adults charged with their care are being misled by “mis” and “disinformation.” ***If an adult cannot distinguish between mis/disinformation, how is it that a child can?***
  
- **In California, legislators have already decided that minors do not have the emotional or psychological capacity to understand the risks or significance of any of the following:**

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<sup>10</sup> Pfizer is the only vaccine available to 12-17 year old’s.



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- Getting a tattoo,
- Voting,
- Buying cigarettes,
- Vaping
  - *Of note, just last year, the California Legislature banned all tobacco and vaping products in flavors other than tobacco, recognizing that minors do not have the operating capacity to weigh the risks and benefits of vaping.*

**Misrepresentation #6: Getting a vaccine is the same as getting medical treatment for substance abuse, mental health, and/or sexual or reproductive health issues, which minors are already permitted to consent to in California.**

Senator Wiener argued that minors are already permitted to consent to treatment for substance abuse, mental health, and sexual and reproductive health issues, including receiving an abortion and also the HPV and Hepatitis B vaccines. **This is gravely different than a minor choosing to receive a vaccine** in the following ways:

- (1) The child has *active condition or symptoms* that requires immediate treatment v. a completely healthy child is seeking to take medicine s/he might not need.
- (2) The child was *actively involved* in the circumstances leading up to the need for medical care, meaning **they have personal knowledge of the possible cause(s) of their condition and certainly their symptoms and can participate in the discussion with their medical provider to identify appropriate treatment and give informed consent** v. many 12-year-olds have no idea about their medical history.
  - This is compounded by the fact that SB866 – as currently written – will allow your child to get vaccinated in your home, and/or at the dentist, podiatrist, ophthalmologist office, or pharmacy without your knowledge or consent.



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- SB866 defines vaccination “clinics” as follows:
  - California [Health & Safety Code, section 1200\(a\)](#): “an organized outpatient health facility that provides direct **medical, surgical, dental, optometric, or podiatric** advice, services, or treatment to patients who remain less than 24 hours, and that **may also provide diagnostic or therapeutic services to patients in the home** as an incident to care provided at the clinic facility.”
    - Your child can get vaccinated at the dentist, optometrist, and podiatric office, or even at home without while you are out.
      - ***If one of the main reasons for Senator Wiener’s bill is that parents are “too busy” to take their children to get vaccinated because they are working, this opens the door to vaccinations at home without consent.***
- SB866 defines vaccination “administrator” as follows:
  - California Department of Public Health, “[Licensees Authorized to Administer Vaccines](#)”
- (3) Services for mental health, substantive abuse, and reproductive / sexual health come with extensive support. In the context of vaccinations, the child gets the shot and is sent off on his or her way.
  - **This dilemma is further compounded by [Senate Bill 1419](#) that is also being considered this Legislative Session and would allow a minor who consents to medical treatment to **seal the records relating to the hidden treatment.****
- (4) None of those services violate federal law.



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- Senator Wiener argued that minors currently can and have had the ability to consent to vaccines, including HPV and Hepatitis B, “for over 36 years,” *proving* that allowing minors to consent to vaccines does not violate NCVIA. But this is also **false**.
  - Minors were not permitted to consent to HPV until **2011** (10 years ago) and Hepatitis B until 2019 (2 years ago). This is *not* “almost 40 years” of uncontested violation of federal law.
  - Just because these two violations have not been challenged, does not mean they do not violate federal law.<sup>11</sup>
  - See arguments, above, re: differences between receiving sexual / reproductive health treatment v. “other” vaccinations.
- Senator Wiener argued that other states permit minors to consent to vaccines. However, many of these have been overturned and most allow 16-year-old’s – not 12-year-old’s – consent. **California’s would be the lowest age of consent, second only to D.C.’s which was found to be illegal and overturned this year.**
  - D.C. (11) – declared illegal in March 2022, unappealed;
  - Rhode Island (16)
  - South Carolina (16)
  - Oregon (15)
  - Alabama (14)

**Misrepresentation #7: Once children are at school, they “belong” to the school and the school is permitted to act as a parent to “protect” the child under the doctrine of *in parentis loco*. The government should be able to do this, too.**

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<sup>11</sup> FLTJ is looking into the legality of these laws and the possibility of overturning them to comply with federal law.



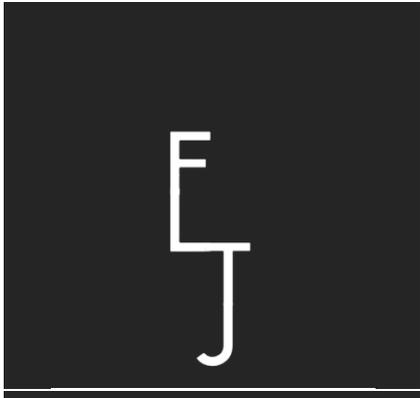
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- *In parentis loco* is a common law doctrine used to characterize the on-campus relationship between a school and its students **to justify and defend student discipline: the school stood in the shoes of the parent and had authority to discipline.** This is not the same as government stepping in and allowing permanent medical interventions while parents ARE involved and available to make decision.

**Misrepresentation #8: Parents/guardians are creating unreasonable, unjust barriers to their minor children getting vaccinated.**

- They are too busy.
  - False. If vaccination is important to the parent/guardian, the parent/guardian will make time on *one* day between the hours of 7 a.m. to 6 p.m., Monday through Sunday, to get their child vaccinated.
- They are being misled by misinformation.
  - If a parent cannot “filter through” “mis/disinformation,” how can we expect a child to?!
  - The fact the parent/guardian – again, who knows the child best and has the psychological and cognitive wherewithal to decide – does not want the child vaccinated is more likely based upon the child’s **and family’s medical history**, and analysis of the vaccine.
  - A parent’s/guardian’s informed decision outweighs a child’s impulses **influenced by peers and adults in trusted positions of authority**, which have been **compounded** by mandates that deny them access to critical services and opportunities, such as schooling, scholarships, therapies, extra-curriculars, etc.

**CONCLUSION:** SB866 does *not* empower minors to have access to health rights, this bill disempowers and sets them up for failure to make dangerous decisions without any data and without any resources or support *after* the decision has been made.

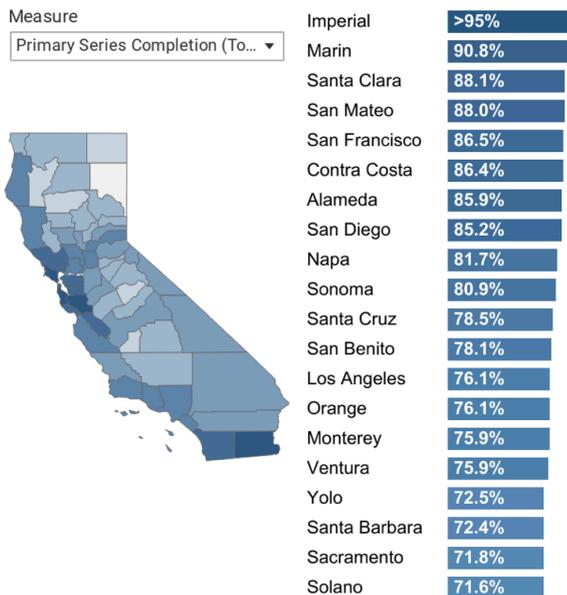
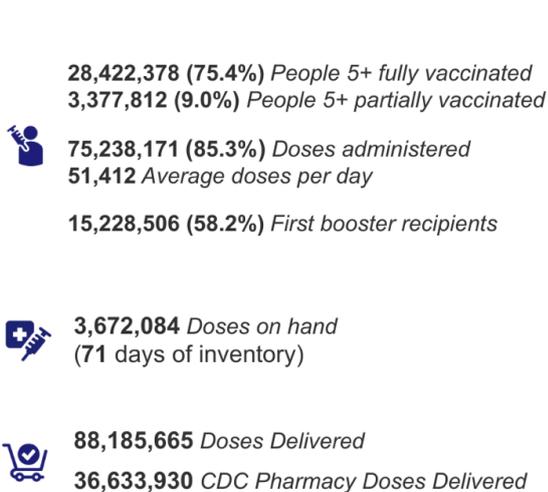


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Statewide Vaccination Data

Statewide

Vaccinated Persons by County of Residence

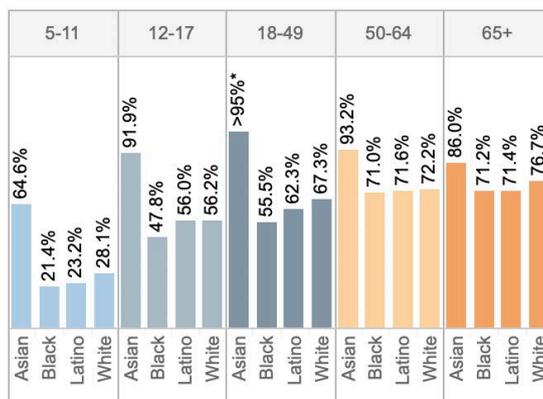


See [Data Dictionary](#) for Details.

Data: 5/2/2022 11:59pm | Posted: 5/3/2022  
 \* Data not reported on weekends or state holidays.

Vaccination status by age and race and ethnicity

	5-11	12-17	18-49	50-64	65+	Total
Asian	64.6%	91.9%	>95%*	93.2%	86.0%	93.7%
Black	21.4%	47.8%	55.5%	71.0%	71.2%	57.8%
Latino	23.2%	56.0%	62.3%	71.6%	71.4%	59.5%
White	28.1%	56.2%	67.3%	72.2%	76.7%	67.3%
Total	34.7%	66.9%	78.2%	84.1%	84.3%	75.4%



Data: 5/2/2022 11:59PM | Posted: 5/3/2022