

Refusing to Vaccinate and the Right to Refuse Treatment

A recent issue has arisen in the pediatric community as to whether it is appropriate to refuse to treat children whose parents refuse vaccinations. Eighty-five percent of pediatricians reported encountering a parent who refused or delayed administration of one or more vaccines to their child and 54% reported encountering a parent who refused all vaccines in a 12 month period.ⁱ Cognizant of the potential health threat to infants and under-immunized children in their waiting rooms, certain pediatricians refuse to treat unvaccinated children.

A physician-patient relationship is contractual and generally requires the consent, express or implied, of both the doctor and the patient. If no physician-patient relationship is in place, a physician has no duty to render treatment to anyone.ⁱⁱ If a patient has not sought medical advice or treatment, no physician-patient relationship exists.ⁱⁱⁱ There are instances, such as medical emergencies, where agreement to treat may be implied, however.

Generally, a patient-physician relationship can be said to occur when a patient seeks medical services and the physician agrees to serve the patient's medical needs. In some instances, however, a physician's agreement to undertake a physician-patient relationship may be implied, such as in emergency situations, where the physician provides advice by communicating through another health care professional, or when consultation services are performed at the request of the treating physician. So long as the person for whom treatment is requested is not in a life or death situation and the physician's reason for refusal is non-discriminatory, a physician generally will not run afoul of the law by refusing to agree to treat.

Examples of legitimate reasons for refusing to take on a person as a patient would include not accepting certain insurance, the volume of patients you are already treating, and not specializing in the specific problem presented. Reasons for refusal that could invite legal consequences include the patient's race, religion or disability (some contagious diseases, such as asymptomatic HIV, are considered disabilities for purposes of the ADA).

Once a physician-patient relationship is established, the general rule is the physician has a duty to continue to provide care to the patient until that relationship is terminated by mutual consent, the patient's dismissal of the physician, or when services are no longer needed. A physician may not unilaterally end an existing relationship unless he or she first provides reasonable written notice to the patient and sufficient time to locate another doctor. If a patient refuses to follow the physician's plan of care or to comply with an appropriate treatment regimen and the patient's

condition is not emergent, the physician may unilaterally terminate the relationship. Care must be taken to insure the proper steps are taken, since refusing to treat a patient's medical needs may well constitute patient abandonment, a potential violation both of professional ethics and the law. Some doctors view refusal to vaccinate as a marker for noncompliance with medical advice. They may also view an unvaccinated child as a danger to their other patients. In addition, because the benefits provided by most vaccines extend beyond the benefit to a particular child, physicians may believe a parent's refusal to vaccinate stands in direct conflict with public health concerns. The potential for harm to others within the community is not limited to the risk of an outbreak but may also include the costs of medical care of unvaccinated children who contract vaccine-preventable diseases. Parents who refuse immunization for their children have been referred to as "free riders," who take advantage of the benefit created by the participation and assumption of immunization risk by others while refusing to participate.

While physicians have an ethical duty in regard to safeguarding public health, in the case of a pediatrician faced with an unvaccinated child, the legal duty focuses on the physician's duty to the child. The physician-patient relationship creates a duty owed to the child patient, not to those outside of that relationship.^{iv} The doctor is seen as occupying a fiduciary role or position of trust.

In the context of a parent's refusal to vaccinate his or her child, the parent has a general right to direct the upbringing of his or her child. When there is legitimate disagreement about what is in the best interest of the child, the wishes of the parents should generally receive preference.

In determining whether duty requires further action beyond educating the parent as to the risk of failing to vaccinate, health care professionals should carefully consider whether parents are placing their children at substantial risk of serious harm by refusing to immunize them. Important factors include the probability of contracting the disease, the morbidity and mortality associated with infection, and the prevalence of disease in the community.

A century ago, the Supreme Court considered legislation enacted in response to an epidemic requiring Massachusetts inhabitants to be vaccinated against smallpox. The Supreme Court concluded in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), found an individual's constitutional right to liberty does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The Court noted the law in question required inhabitants to be vaccinated only when it was necessary for the public health or the public safety. In short, in face of an epidemic, even the inherent right of every citizen to care for his own body and health as to him seems best is not absolute. It is only when others are placed at substantial risk of serious harm, however, that the range of choices of the individual may be restricted. Further, ample legal precedents support broad a First Amendment right to refuse vaccinations on religious grounds.

The American Academy of Pediatrics recommends informing all parents and patients of the risks and benefits of preventative and therapeutic procedures, including vaccination. Under federal law, a discussion of the importance of vaccination is mandated. A physician should document the discussion with a parent about the risks of what could happen to an unimmunized child.

Flagging the chart as a reminder to revisit the issue of immunization and to alert the physician about missed immunizations is a good practice.^v

A physician's ethical obligation is to place an unvaccinated patient's welfare above self-interest and to advocate for the patient's welfare. A physician is required to use sound medical judgment, keeping paramount the best interests of the child patient. The legal and ethical obligations of physicians often are seen as imposing a high threshold before a doctor may refuse treatment, especially if the parents are exercising a legal exemption to immunizations.

A condensed version of this article was originally published in the October/September edition of Greater Kansas MD News published by True North Custom Media.

ⁱ American Academy of Pediatrics, "Documenting Parental Refusal to Have Their Children Vaccinated," available September 2011 at www.aap.org.

ⁱⁱ Under Kansas law, a physician's duty of care is limited to those situations where a physician-patient relationship exists. See *Esquivel v. Watters*, 154 P.3d 1184 (2007).

ⁱⁱⁱ *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010).

^{iv} See *Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995).

^v The American Academy of Pediatrics recommends having the parent sign a vaccine refusal form (available online), which is kept in the patient's medical records.