



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

April 29, 2021

TRANSMITTED VIA EMAIL

Senator Chuck Winder, President Pro Tempore of the Senate
Representative Scott Bedke, Speaker of the House of Representatives
Senator Kelly Anthon, Majority Leader
Representative Mike Moyle, Majority Leader
Senator Abby Lee, Assistant Majority Leader
Representative Jason Monks, Assistant Majority Leader
Senator Mark Harris, Caucus Chair
Representative Megan Blanksma, Caucus Chair

Re: Department of Health & Welfare's authority to maintain adult immunization information

Dear Senators and Representatives:

This letter is in response to your letter of April 9, 2021. Within that letter, you allege that the Idaho Department of Health and Welfare ("Department") is acting *ultra vires*, by exceeding the authority granted to it by the Idaho Legislature. You further ask that the Office of Attorney General advise the Department that it is acting *ultra vires*, and require that it cease these *ultra vires* activities and delete all adult immunization information in its possession thereby collected. Section 39-4803, Idaho Code, requires the Department to establish a voluntary immunization registry for children. Although there is no corresponding express statutory requirement from the Idaho Legislature to the Department to maintain a similar registry for adults, there is equally no prohibition placed upon the Department to prevent the maintenance of such a registry.

The Department verifies that information about adults receiving COVID-19 vaccines is registered by vaccine providers in Idaho's Immunization Reminder Information System (IRIS), as required in the providers' agreements with the Centers for Disease Control (CDC). The Department also verifies that IRIS contains information regarding other vaccines received by participating children and adults in the State of Idaho.

The question ultimately raised by your letter is therefore whether the Department can only maintain a voluntary adult immunization registry if expressly authorized by the Idaho Legislature. The answer is that the Department, as an executive department of the state government under article IV, section 20 and section 56-1002, Idaho Code, may exercise its executive and administrative discretion to maintain an adult registry for the following reasons: (1) The Department, the Director of the Department, and the Board of Health and Welfare are granted the broad obligation and authority to protect the life, health, and mental health of the people of Idaho, Idaho Code section 56-1003, as well as the express authority to maintain a vaccine registry for children, (2) the maintenance of adult vaccination information in IRIS is reasonably necessary to carry out these statutory charges given the practical health and safety purpose of maintaining vaccination information, and (3) the maintenance of an adult registry is not expressly prohibited.

1. The Department's Immunization Registry Authority

Generally, executive department agencies are provided statutory authority for their functions. Recognizing that the Legislature cannot foresee all the necessities, difficulties, and practical realities an agency will face, agencies also have implied and incidental powers. As the Idaho Supreme Court has recognized:

Since the Legislature cannot possibly foresee all the practical difficulties that state agencies will encounter while carrying out their statutory functions, "administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted."

Searcy v. Idaho State Board of Correction, 160 Idaho 546, 553 (2016), *citing* Vickers v. Lowe, 150 Idaho 439, 442 (2011) (quoting 2 Am.Jur.2d Administrative Law § 57 (2004)). Although the Legislature may not have expressly authorized an agency to undertake a measure, the agency may undertake such measure in fulfillment of its broad statutory functions and purposes.

Thus, in Vickers, the Idaho Supreme Court concluded that the Idaho Transportation Department's ("ITD") statutory authority to "[e]stablish standards for the location, design, construction, reconstruction, alteration, extension, repair and maintenance of state highways," Idaho Code section 40-310(5), meant that it had the implied power to "determine when and how a developer may build an encroachment." Vickers, 150 Idaho at 443. Taking ITD's implied power to an even more granular level, the Court concluded that ITD had the implied power to conditionally approve encroachment applications. Id.

The decision in Vickers, as well as the Searcy decision quoted above, demonstrate that the Department has the implied power to maintain an immunization registry that includes information on participating adults based on its statutory obligations and authorities to both create an immunization registry and also to protect the life, health, and mental health of Idahoans.

As the April 9, 2021 letter identifies, the Legislature has specifically required the Department to create an immunization registry for children. Specifically, the Department: "shall provide for the

establishment of a voluntary registry of the immunization status of Idaho children against childhood diseases.” Idaho Code § 39-4803(1). The statutory provision further requires that the Department maintain and disclose the data therein. The purposes for the registry are provided as well. According to Section 39-4803(1)(a-d), the purposes are:

- (a) To make immunizations readily available to every Idaho citizen that desires to have their child immunized;
- (b) To increase the voluntary immunization rate in Idaho to the maximum extent possible without mandating such immunizations;
- (c) To recognize and respect the rights of parents and guardians to make health care decisions for their children; and
- (d) To provide for timely reminders to parents of children in the registry.

Over time, this registry has come to contain information on adults because the value of ensuring an accurate record of an individual’s vaccination continues into adulthood. The IRIS system for children has been continuously maintained. This means that, even if immunizations given to adults after reaching adulthood were not included, children who entered the system at its beginning are now no longer children. For example, the children whose immunization information was registered in IRIS in 1999, the year the law was enacted establishing IRIS, are now – 22 years later – of majority age. Critically, vaccination records are considered essential medical information beyond childhood. This information protects public health by allowing medical providers to know what vaccinations have been received, which can then aid in diagnosis and further treatment, as well as avoiding multiple vaccinations. Thus, although created to encourage voluntary child immunizations, IRIS is a registry that holds immunization information for children and adults. The Department’s Public Health Medical Director and State Epidemiologist Dr. Christine Hahn has emphasized that IRIS is a “birth to death registry that already contains a lot of adult vaccination information.” 1/15/2013 3:00 hearing at 47:50–48:20.¹

The Department has broad authority to protect public health. The Idaho Legislature has vested in the Department Director “the general supervision of the promotion and protection of the life, health and mental health of the people of this state.” Idaho Code § 56-1003(3). Further, the Department is established as an executive department under article IV, section 20 of the Idaho Constitution with all executive and administrative power vested in its Director. Idaho Code § 56-1002(1). Given the practical health and safety function of maintaining adult vaccination information in IRIS, and absent a specific legislative prohibition, the Department’s maintenance of IRIS with adult vaccination information is within its statutory authority.

¹ <https://legislature.idaho.gov/sessioninfo/2013/standingcommittees/SHW/>

2. Creation of the Registry

The Idaho Legislature first directed the Department to establish the voluntary immunization registry in question in 1999, with the same purposes stated above. S.L. 1999, ch. 347, § 1. Under this legislative direction, the Department established IRIS.

Although the Department established and maintains this registry, the users of the system are Idaho's medical providers and their patients who receive immunizations. As explained by Dr. Hahn:

The registry functions as a secure web-based system that allows doctors and other medical providers participating in the registry to access their patients' immunization records and thus gain a better picture of the previous shots received by that patient. This could avoid unnecessary duplication of vaccination but also allows medical providers to identify their patients whose immunizations are not up to date and send them reminders if they like, if they choose to do that.

1/15/2013 3:00 hearing at 45:13-45:35. Thus, while the Department established and now maintains IRIS, the information in IRIS is collected by Idaho medical providers for the health and safety of their patients. This health and safety purpose, about which Dr. Hahn testified before the Legislature in 2013, is furthered by the Department's maintenance of IRIS.

3. The Legislature Has Known and Approved of IRIS's Use As an Adult Vaccination Registry

The Legislature has been aware of the Department's discretionary implementation of IRIS for adults since at least 2013 without legislative objection. For example, in 2013, the Department sought to amend section 39-4803 to, among other changes, have the provision accurately reflect that information in IRIS is not limited to that of children. *See* 1/15/2013 3:00 hearing (RS21593, RS21595); 1/30/2013 3:00 hearing (S1012, S1011); 2/7/2013 3:00 hearing (RS21948). For this, the Department proposed to replace "child" with "individual." Dr. Hahn explained what medical providers and hospitals saw as the value of such reporting: to have a record of when adults (and their children) – who do not opt out of IRIS – received which vaccinations.

Ultimately, the bill was pared down to include only a proposal adding the Idaho Health Data Exchange to the limited list of entities entitled to access IRIS. *See* Idaho Code § 39-4803(2). But questions and discussion concerning the bill did not reflect any concerns about IRIS, including adult immunization information. Instead, the discussion indicated the Department's openness and committee members' awareness that adult information was entered in IRIS, as well as the health and safety benefits of doing so.

At a hearing on January 15, 2013, Senator Bock, noted he had recently received shingles and pneumonia vaccines at a Riteaid pharmacy rather than his doctor's office, and asked if this information had been entered in IRIS. Dr. Hahn clarified that, while doctors' offices routinely use IRIS for patients' vaccination information, most pharmacies (at the time) did not. She said they

were working on getting more pharmacies to do so. This prompted the Senator to inquire, “What do we have to do to compel participation of pharmacies in the [IRIS] program?” 1/15/2013 3:00 hearing at 49:15 – 49:45. Dr. Hahn testified she believed most pharmacies were interested in participating, noting “they see the value as well and don’t want to vaccinate someone if they just got vaccinated and it’s . . . too soon to get another dose.” *Id.* at 49:50-50:05. Dr. Hahn explained the focus has been on children (for whom IRIS was created), rather than adults, and children tend to receive vaccinations in pediatricians’ offices. *Id.* at 50:05-50:25. She further stated the Department “gets so many questions from hospitals” about using IRIS for adults. *Id.* at 50:25-50:30.

Notably, the Board of Pharmacy adopted a regulation in 2012 requiring pharmacists to report “[a]dministration of immunizations to the Idaho Immunization Reminder Information System (IRIS) . . .” 2012 IDAPA 27.01.01.330.06.b. This rule was eliminated in a substantial re-organization of the Board of Pharmacy’s rules in 2018.² But the fact of the rule’s adoption in 2012 demonstrates the Legislature reviewed it with approval.

Thus, it would appear the issue of collecting and maintaining adult vaccine information beyond what is expressly required in section 39-4803 has been known, discussed, and approved by the Legislature historically.

4. Any Individual Can Opt-Out of IRSI and Can Remove Information From IRIS

In any discussion of IRIS, it is important to remember that there is no mandatory system for either children or adults, and both may opt out from their very first vaccination, or at any time thereafter. Idaho Code § 39-4803(2). Also, a mechanism to remove information from IRIS by those who so choose already exists and may be initiated by anyone wishing to invoke it, while leaving IRIS undisturbed for those who want their immunization information to remain. *See* Idaho Code § 69-4803(4).

5. Prohibiting the Inclusion of Adult Vaccination Information May Result in a Federally Mandated and Administered Registry and have Unintended Consequences

If there is a desire to specify that adult vaccination information shall not be included in IRIS, the Legislature has the authority to prohibit such activity. But it is important to note that the registry, as discussed above, fulfills an important public health function by allowing for the sharing of information among medical providers for those who have opted in.

A prohibition against using IRIS for adult vaccination information would not eliminate the collection of adult vaccination information outside of IRIS. The CDC requires that providers who give COVID-19 vaccines be enrolled through a Vaccination Provider Agreement with the CDC. These agreements require providers to receive training on proper vaccine administration, management, and reporting of vaccine inventories, and to register vaccine administration in their

² The Board of Pharmacy rules were again overhauled in 2020 and re-designated as IDAPA 24.36.01.

state's immunization registry. Enrollment in the agreement is required for a provider to be eligible to receive vaccines to administer.

Consistent with these requirements, and to receive federal funding under the Coronavirus Relief Fund, the CDC requires each state to maintain a registry for COVID-19 vaccine administration information. Idaho uses its IRIS database, which has served as a registry for immunizations since 1999, and for which Idaho has established processes for opting out and for requesting removal from the registry. Prohibiting use of IRIS for adult vaccination information could require Idaho to establish an alternative registry under CDC guidelines, and possibly delay or discourage vaccinations against COVID-19. Even more troubling is that such a registry would be governed and administered by the Federal Government without the information security protections (Idaho Code section 39-4803(5) & Idaho Code section 56-1003(8)) and opt-outs that Idaho has provided for.

Further, the fact that IRIS has been continuously maintained and now contains information about adults that was entered when those individuals were children means that if the system does need to be adjusted, it is unclear how to separate immunization information in IRIS that was entered by providers pursuant to section 39-4803 – that is, information about children's immunizations – from information entered by providers about adult immunizations.

6. Conclusion

Within the inquiry, this office was asked to “require IDHW to immediately cease these registration activities and destroy any such registration information...” This Office can only advise its clients with regard to their actions and has no authority to require action. As discussed above, the Department's exercise of executive and administrative discretion to offer an adult immunization registry falls within its statutory authority to promote and protect public health. Consequently, there is neither a legal basis nor authority for this Office to take the actions you request.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,



BRIAN KANE
Chief Deputy

BK:kw