



# The Draft CDC Circumcision Recommendations: Medical, Ethical, Legal, and Procedural Concerns

*Peter W. Adler*

Legal Advisor, Attorneys for the Rights of the Child, Berkeley, California, USA

*pwadler2@gmail.com*

## Abstract

The Centers for Disease Control and Prevention (“CDC”) is poised to recommend that physicians counsel the parents of every newborn boy and heterosexually active adolescent and man in the United States – approximately 36 million boys and men – that the benefits of circumcision outweigh the risks, that parents should take non-medical factors into account in making the “circumcision decision”, and that Medicaid should pay for it.

The draft CDC recommendations are not medically correct, ethically sound, legally permissible or procedurally valid. Accordingly, they should not be implemented and would be legally invalid if they are. They provide erroneous and misleading advice to physicians that exposes them to the threat of lawsuits by men and parents. The CDC must revise its draft guidelines to comport with the correct and prevailing view in the Western world that circumcision is on balance deleterious to health; that men have the right to make the “circumcision decision” for themselves; that physicians are not permitted to circumcise healthy boys; and that it is unlawful to use Medicaid to pay for unnecessary surgery.

## Keywords

circumcision – newborn circumcision – CDC circumcision – Draft CDC circumcision recommendations – CDC circumcision proposal – 2012 American Academy of Pediatrics circumcision – 2012 AAP circumcision – is circumcision ethical? – is circumcision legal?

In December 2014, the CDC, the health protection agency for the United States, issued the first ever draft federal circumcision recommendations (Draft CDC Recommendations) together with supporting background materials (CDC Background Materials) for public comment. The CDC expects that its recommendations, if implemented, will increase the number of boys and men circumcised in the United States (*id.*). Thousands of official comments have been filed opposed to the CDC proposal (Public Comments on Proposed CDC Circumcision Guidelines), however, and there have been public protests against it (*Washington Times*).

This article asks the manifestly important question of whether the draft CDC circumcision recommendations are medically (Part I), ethically (Part II), legally (Part III) and procedurally justified (Part IV). If not, what are the implications; can the draft recommendations be challenged; and what recommendations should the CDC be making about non-therapeutic circumcision (Part V)?

### **The Draft CDC Recommendations**

According to the draft CDC recommendations, physicians should inform the parents of every newborn boy in the United States and all heterosexually active genitally intact males as follows: (1) circumcision has many medical benefits – including a reduced risk of urinary tract infections (UTIs), penile cancer and sexually transmitted infections (STIs), especially a “significant” 50 per cent to 60 per cent reduction in the risk of female-to-male transmission of HIV; (2) these medical benefits outweigh the risks; (3) parents have the right to make the “circumcision decision” for their sons, and in doing so should take into consideration, in addition to the health benefits and risks, religion, societal norms and customs, aesthetic preference, and hygiene (Draft CDC Recommendations.) In addition, (4) the benefits of circumcision justify insurance paying for it, including the joint federal and state Medicaid insurance program (CDC Background Materials).

According to the draft CDC recommendations and supporting background materials, neonatal circumcision has few disadvantages. Analgesia can substantially control pain. The complication rate is approximately 0.2 per cent. The most common surgical complications – bleeding and infection – are usually minor and easily managed. Post-surgical complications are rare. Circumcision also leaves sexual function or satisfaction unchanged or improves it (Draft CDC Recommendations; CDC Background Materials.)

### The Burden of Proof

As a group of 38 distinguished physicians and other medical experts from Europe (37) and Canada (1) wrote about circumcision in 2012:

It is commonly accepted that medical procedures always need to be justified because of their invasive nature and possible damaging effects ... Preventive medical procedures need more and stricter justification than do therapeutic medical procedures, as they are aimed at people who are generally free of medical problems ... Even stricter criteria apply for preventive medical procedures in children, who cannot weigh the evidence themselves and cannot legally consent to the procedure.

*Cultural Bias*

Thus, the burden is on the CDC to prove that the claims in its proposed guidelines are medically correct, that circumcision is ethical and legal, and that it has complied with the requirements for the issuance of highly influential medical recommendations, which these are (see *infra*, Part IV). The benefit of the doubt must go to the boys and men who must live with the consequences of circumcision.

### Medically Justified?

Are the CDC's claims as to the medical pros and cons of circumcision accurate, and is circumcision medically justified?

#### *Unscientific and Isolated Medical Opinion*

1. *Undisclosed and Unaddressed Criticisms.* The CDC was an advisor to the Academy of Pediatrics ("AAP"), which in 2012 issued a revised circumcision policy (AAP Policy, 2012). The 38 physicians from Europe and Canada mentioned above published a comprehensive evidence-based critique of those recommendations (*Cultural Bias*). The draft recommendations issued by the CDC in December 2014 are similar to the AAP's recommendations in 2012 (AAP Policy, 2012), but the CDC failed in its duty to disclose the existence of that critique and others, which apply to its own recommendations, and to address the serious medical, ethical, and legal criticisms therein (*European CDC Critique*). The CDC also has not responded as required by law (see *infra*, Part IV) to Van Howe's scathing

peer review of its draft circumcision guidelines, or to the thousands of comments posted by the public, and by American physicians and 31 European physicians (*European CDC Critique*), opposed to the CDC's draft recommendations.

2. *Lack of Scientific and Scholarly Rigour.* The draft CDC recommendations show an obvious lack of scientific and scholarly rigour. For example, the CDC draft contains only 255 references, some of which are redundant, while a Pub Med search for "circumcision" identified 6,338 publications. (*Van Howe Peer Review*.)
3. *The Opposite of the Prevailing Medical Opinion Worldwide.* The draft CDC recommendations are the opposite of the prevailing view among physicians and medical associations in the Western world that there is no valid medical basis for circumcision; that it is unethical for physicians to circumcise healthy boys; and that circumcision violates the rights of the child (*Cultural Bias; European CDC Critique*). 'Remarkably, the draft fails to mention all the medical organizations outside of the United States who have weighed in with an opposing opinion on male circumcision' ... 'Furthermore, the CDC does not discuss that the U.S. is an outlier with respect to circumcision policy and rates compared to other OECD countries ...' (*Van Howe Peer Review*).
4. *Scientifically Untenable.* The German pediatric association concluded that the similar 2012 circumcision recommendations by The American Academy of Pediatrics (2012 AAP Policy) 'has been graded by almost all other paediatric societies and associations worldwide as being scientifically untenable' (*German Critique*). The same comment applies to the draft CDC recommendations.

#### *Undisclosed and Understated Disadvantages*

'The CDC made no serious attempt to review the pain, risks, complications, or harms associated with circumcision' (*Van Howe Peer Review*).

1. *Understated Risks and Unknown Complication Rate.* The CDC makes the false claim in its recommendations that circumcision is safe, while admitting in its background materials and thus knowing the opposite, that it risks a long list of minor injuries, serious injuries and occasionally death. The CDC claims a complication rate of 0.2 per cent, but this is deceptive as the CDC is only referring to risks during the surgery. The CDC states that the median complication rate during and after the surgery is 1.5 per cent; European physicians put the complication rate at 2 per cent; others call 2 per cent to 10 per cent a reasonable estimate; but

severe meatal stenosis was found in 20 per cent of boys 5–10 years after circumcision in the neonatal period (Joudi, *Meatal Stenosis*; Van Howe, *Meatal Stenosis*), often requiring surgical correction. The CDC did not disclose this. In a 1999 survey, men aggrieved to have been circumcised reported much higher complication rates than these (1999 Hammond Poll). As the AAP admitted in 2012, '[t]he true incidence of complications after newborn circumcision is unknown' (AAP, Technical Report, 2012). Likewise, the CDC states, 'Because of their rarity, rates of severe complications are difficult to document' (CDC Background Materials). This statement concedes that *the CDC does not know the true incidence of minor complications, severe complications, and fatalities caused by circumcision*. 'The medical community has never studied (retrospectively or prospectively) the long-term outcomes to men from infant circumcision' (unpublished, Hammond Poll, 2012.)

Attorneys for the Rights of the Child notes a long list of judgments and settlements for circumcision injuries, which likely represent the tip of the iceberg (ARC Judgments and Settlements). As Garber commented, 'It is inconceivable that the AAP [and now the CDC] could have objectively concluded that the benefits of the procedure outweigh the risks when the 'true incidence of complications' isn't known' (Garber). Without knowing the risks associated with circumcision, It is improper for the CDC to recommend that physicians discuss circumcision with parents and heterosexually active adolescents and men, which is to say offer it to them, and tell them that the complication rate is 0.2 per cent, when the risks associated with circumcision are many times higher and their true extent is unknown. This will mislead the parents and men; their consent to circumcision will not be fully informed; and the millions of boys and men who will be circumcised as a result will be exposed to a much higher risk of complications than the CDC claims.

2. *Pain Understated*. The CDC states, 'appropriate analgesia can substantially control pain' (CDC Background Materials), implying that infants being circumcised experience little pain. First, the CDC's statement concedes that circumcision is painful and that appropriate analgesia does not eliminate pain. Second, the statement falsely implies that physicians use appropriate analgesia during circumcision surgery, when often no anesthetics are used (AMA Circumcision Report, 1999). Third, Cold and Taylor suggest that anesthetics are largely ineffective (Cold and Taylor). The CDC itself reports that in a South African trial, 31.7 per cent of African *men* reported pain (CDC Background Materials). Moreover, pain is subjective. Taddio *et al.* found that circumcised infants show a stronger pain response

to subsequent vaccination and that ‘pain experienced by infants in the neonatal period may have long-lasting effects on future infant behavior’ (Taddio). Recently, an article reports a double risk of infantile autism before the age of five years in circumcised boys (Frisch). Thus, circumcision pain in infancy may change how the brain functions, but the CDC does not advise physicians to inform parents of this alarming possibility.

3. *No Discussion of the Foreskin.* The CDC has given physicians and thereby parents and men no information about the anatomy, histology, physiology and function of the body part being removed, the male foreskin. Without such information, parental consent will not be fully informed as the law requires. Imagine the CDC recommending that physicians discuss with parents removing other body parts from boys or girls without thoroughly analysing the body part being removed, addressing all medical, ethical and legal criticisms, and without justifying the removal of the body part.
4. *Omission that Circumcision may and in fact does impair Men’s Sex Lives.* The CDC recommendations do not mention anything about whether circumcision affects men’s sex lives (Draft CDC Recommendations). The CDC’s background materials also do not mention that the foreskin is erogenous. They devote only one paragraph to sexuality, citing a survey finding that ‘[a]dult men who undergo circumcision generally report minimal or no change in sexual satisfaction’ or an improvement (CDC Background Materials). The implication seems to be that men and their parents need not be concerned that circumcision does or might affect men’s sex lives. Many men would be alarmed to learn, however, that circumcision might result in any change in their sexual satisfaction.

The CDC then contradicts itself by citing in its background materials a survey that found ‘decreased erectile function and penile sensation’, by acknowledging that the foreskin is ‘highly innervated’, and by expressly acknowledging that circumcision risks ‘*the possibility of adverse effects on sexual sensation and function*’ (CDC Background Materials, my italics). Thus, the CDC recommendation is that parents be told nothing about whether circumcision might adversely affect men’s sex lives, even though the CDC concedes the opposite, that it may. If parents were informed that circumcision might impair their son’s sex lives, they might not consent to it. In those cases, the parental consent will not be fully informed and will be legally invalid, exposing physicians to lawsuits.

In fact, the CDC’s acknowledgment in background materials that circumcision *may* adversely affect men’s sex lives is false and misleading as

well, because circumcision *does* adversely affect men's sex lives. It plainly destroys how the normal penis functions. Once the foreskin is removed, it is no longer able to move to and fro over the glans penis and down toward the base of the penis in the so-called 'gliding action'. The prevailing opinion worldwide is that circumcision also impairs sexual sensation and satisfaction. An oft-cited 2007 study suggests that circumcision desensitises and removes the most sensitive part of the penis (Sorrells Fine-Touch). Bossio *et al.* stated in a 2014 review,

Adverse self-reported outcomes associated with foreskin removal in adulthood include impaired erectile functioning, orgasm difficulties, decreased masturbatory functioning (loss in pleasure and increase in difficulty), an increase in penile pain, a loss of penile sensitivity with age, and lower subjective ratings of penile sensitivity

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Thus, circumcision *does* impair men's sex lives, and the CDC should have disclosed that fact in its recommendations. Let us assume that all the CDC knows is that circumcision *might* impair men's sex lives, as the CDC concedes in its background materials. First, the CDC should have disclosed that risk in its recommendations. The public, the press and physicians are likely to read only the recommendations – or more likely the press release about the recommendations – and not the background materials. Second, applying the precautionary principle of medicine, the benefit of the doubt as to whether circumcision impairs the sex lives of adolescent boys and men must be given to boys and men. The CDC should not be recommending discussing circumcision with anyone, which it states will increase the circumcision rate, when the CDC admits that circumcision may adversely affect men's sex lives, and when circumcision does in fact impair men's sex lives.

5. *Penile Reduction Surgery.* The CDC has not disclosed to men or the parents of newborns that circumcision surgery reduces the width of the penis and decreases its length on average by 3/10" in the adult male (Richters).
6. *Undisclosed Risk of Anger and other Psychological Harm.* The CDC has ignored the literature about the potential deleterious psychological effects of circumcision, including the increasing probability of regret of anger at one's parents. The word "psychological" does not appear in the draft CDC recommendation or in the background paper. 'It is hard to believe, that the CDC is unaware of the literature concerning this subject' (*European*

*CDC Critique*). Adverse psychological effects after circumcision have been observed in infants (Taddio). Physicians who follow the CDC's recommendations, if implemented, will not be fully informing adolescents, men, and parents about the risk of resentment, anger, and psychological harm (Boyle), as the law requires, again exposing physicians to lawsuits by the men and parents.

7. *Undisclosed Certainty of Harm*. The CDC does not acknowledge the obvious, that circumcision harms all boys and men. As a California Appeals Court stated in *Tortorella v. Castro* in 2006:

[I]t seems self-evident that unnecessary surgery is injurious and causes harm to a patient. Even if a surgery is executed flawlessly, if the surgery were unnecessary, the surgery in and of itself constitutes harm ... the patient needlessly has gone under the knife and has been subject to pain and suffering.

Circumcision also radically changes the appearance of the normal penis, destroys its mobility, and leaves a scar, evidence of a wound (Cold and Taylor). A German court similarly ruled in 2012 that circumcision inflicts 'bodily harm' (BBC News). Thus, circumcision harms all boys and men, whether they recognise it or not.

### *Exaggerated Benefits*

1. *Misleading Discussion of 'Benefits'*. Circumcision does not have the benefits that the CDC claims for it. The CDC's principal claim that 'the benefits outweigh the risks' is false. First, this implies that all boys and men will benefit from the surgery when, at best, circumcision has only *potential benefits*. The CDC claims that circumcision reduces female-to-male transmission of HIV by an impressive sounding 50 per cent to 60 per cent, but this will mislead parents and men as this is the *relative risk reduction*; the *absolute risk reduction* is only an unimpressive sounding 1.3 per cent. The CDC further misleads decision-makers by stating the potential reduction in HIV risk in relative terms (50 per cent to 60 per cent) while stating the risks of circumcision in absolute terms. This inflates the potential benefits of circumcision in relation to the related risks and harms.
2. *No Meaningful Benefit during Childhood*. The only potential benefit that the CDC and the AAP claim for boys during childhood is a one per cent reduction in UTIs, but UTIs can be treated with antibiotics (*Cultural Bias*). The other claimed small, speculative, potential future benefits – a

slight reduction in penile cancer and some STIs – occur in adulthood. Boys are not at risk of penile cancer or STIs. The CDC ‘does not discuss the necessity of circumcision in male newborns and infants for the later prevention of STD. Why the rush? Infants are not coitally active ...’ (*European CDC Critique*).

3. *Unproven whether Circumcision reduces HIV in Africa and the U.S.* The CDC’s principal claim that circumcision has significant efficacy in reducing HIV in the United States is knowing false. First, the CDC,

... assumes that the randomized clinical trials in Africa could not harbor any bias (the CDC draft actually states this) and did not question the methodology of these studies, although their methodology has been questioned extensively ... Any evidence that does not support the CDC’s presumption is either ignored, criticized, or dismissed. As a consequence, the draft is laughably biased.

*Van Howe Peer Review*

First, it is unproven whether circumcision reduces HIV in heterosexually active men by 1.3 per cent even in Africa (Boyle and Hill). Second, let us grant for purposes of argument that it does. The CDC simply assumes that circumcision will reduce HIV by the same 1.3 per cent in the United States. There is no evidence that experiments in Africa can be applied to newborn boys, infants and heterosexually active circumcised adolescent and men living in the United States or in other countries with much lower HIV prevalence than found in the African trial sites. The CDC admits this, as in its background materials, the CDC only states that circumcision is *likely* to reduce HIV in the U.S., not that it *does*. Thus, the CDC has contradicted itself again, claiming a significant reduction in HIV in the U.S. while conceding that it may not reduce HIV in the U.S. at all. This is highly misleading. The CDC’s materials also contains no discussion of the observation that HIV rates are and have remained low in Europe, Canada, Australia and New Zealand, despite much lower circumcision rates in those countries than in the U.S. These countries also do not have higher rates of other STIs or UTIs in childhood in comparison than the U.S. (*European CDC Critique*).

According to the CDC, there have been fewer than 50,000 new cases of HIV annually in the U.S. since the mid-1990s, and in 2011, only 10 per cent of these arose from female-to male transmission of HIV (CDC Background Materials). As Bundick states, since 70 per cent to 80 per cent of American men are circumcised, ‘the data suggest that the number of HIV infections that could

*be prevented in the US by promoting infant male circumcision is likely to be only in the hundreds per year'* (Bundick, my italics).

Moreover, as the CDC impliedly concedes in its background materials (CDC Background Materials), men can acquire HIV from women during circumcision wound healing (Johns Hopkins). In addition, according to the CDC, 17 per cent of circumcised men mistakenly believe that if they are circumcised, they do not need to practice safe sex (CDC Background Materials). Not disclosed by the CDC, circumcised men engage more frequently in anal sex (Cold and Taylor), which the federal government states is the highest high risk factor for HIV infection (AIDS.gov). Thus, even if circumcision would otherwise reduce HIV by 1.3 per cent in Africa, which is unproven, and even if it reduced HIV by the same percentage in the U.S., for which there is no evidence, after taking into consideration these risk factors and lower condom use by circumcised men, circumcision may cause a net *increase* in HIV among men in the U.S. The CDC also has not disclosed that male circumcision will increase HIV among female sexual partners in the U.S. due to transmission during wound healing, which women need to know.

4. *No Number-Needed-to-Treat or Number-Needed-to-Harm.* The draft CDC recommendations contain no information about numbers-needed-to-treat (NNT) or the number-needed-to-harm (NNH), which are critical for decision-makers to know. It would be necessary to circumcise approximately 100 to 200 newborn boys to prevent one urinary tract infection during infancy at a cost of two complications, according to European physicians. Considering that UTIs can be and almost always are treated by antibiotics, the number needed to harm by circumcision to benefit a single boy is actually much higher than 100 to one. Insofar as circumcision harms all boys and men, the disadvantages of circumcision outweigh the potential benefits in childhood by 100 to one or more. Moreover, the risk (e.g., of serious injury) and harm greatly outweigh the benefit for the one (preventing a UTI). Thus, the CDC's implied claim that the benefit of circumcision during childhood outweighs the disadvantages, which some parents will rely upon, is false.

To prevent one case of penile cancer, it would be necessary to circumcise between 909 and 322,000 boys, causing 18 to 644 complications according to European physicians, and harming all 909 to 322,000 boys and men (Learman; Christakis). Penile cancer is a rare disease that usually occurs in old age.

As stated, according to the CDC's own numbers, circumcising 80 million American men would prevent HIV in only hundreds of men per year.

All 80 million of those men would be harmed through loss of their foreskin, and 2 per cent or 1.6 million of them would suffer complications according to European physicians, or more since the number of complications is unknown and likely higher.

*Any Potential Benefits can be Achieved More Effectively without Circumcision*

Moreover, since urinary tract infections in infants can be treated with antibiotics, there is no reason to circumcise any boy to prevent a UTI, let alone 100 to 200 boys to prevent one UTI at the risk of 2 or more complications. The risk of penile cancer – as rare as the risk of being struck by lightning – can further be reduced to close to zero by washing one's penis with soap, something that boys and men in the United States are likely to do without needing encouragement. The CDC circumcision guidelines and background materials contain no information about non-invasive prophylactic measures for preventing HIV and STIs, namely abstinence, monogamy, HPV immunisation and the use of condoms, heavily promoted by the United States government a few years after HIV was discovered. Condoms are almost 100 per cent effective, and so long as men engaging in dangerous sex use condoms, which they must continue to do or risk infection, circumcision adds no benefit. It is inexcusable that the CDC promotes circumcision to reduce HIV and does not even mention condoms, which men must use during dangerous sex or risk HIV infection, AIDS, and possibly death.

**Unbiased and Ethically Justified?**

*Biased*

The CDC was a consultant to the AAP when the AAP prepared its 2012 circumcision policy statement (AAP Policy, 2012). The charitable organization, Doctors Opposing Circumcision, has accused the AAP's 2012 circumcision recommendations, which are similar to the CDC's recommendations, as being financially, religiously and culturally biased (*DOC Critique*). Van Howe, a peer reviewer, states, 'The list of participants [at the CDC in 2007] reads like a Who's Who of Circumcision Advocates. No group opposing circumcision was allowed any input.' This violates the requirement by the federal government that important medical guidelines such as these be unbiased, evidence based and free from any conflicts of interest (see *infra*, Part IV). As stated, Van Howe calls the CDC guidelines 'laughably biased' medically as well, and deaf to criticism that circumcision does not prevent HIV in the U.S. (*Van Howe Peer Review*.) The CDC

did not disclose possible or actual biases and conflicts of interest in its draft recommendations or background materials, as is required and is the norm. Circumcision decision-makers will not be fully informed as the law requires unless physicians disclose their biases. The CDC guidelines must be disqualified because of the biases of the physicians who prepared them.

### *No Serious Ethical Discussion*

The CDC documents, like the 2012 circumcision recommendations of The American Academy of Pediatrics (2012 AAP Policy), do not contain any serious discussion of the central ethical and legal dilemma as to who has the right to make the circumcision decision, parents or their sons, the boys being operated upon, when they reach the age of legal consent. Nor do the CDC or AAP statements contain serious discussion of the ethics of performing surgery on boys to achieve potential medical benefits, if any, that can be achieved more easily and effectively without surgery and loss of the foreskin.

### *Unnecessary Surgery is Unethical*

The AMA Code of Medical Ethics, Opinion 8.03, states, 'Under no circumstances may physicians place their own financial interests above the welfare of their patients ... *For a physician to unnecessarily hospitalize a patient ... for the physician's financial benefit is unethical*' (my italics). Recommending or performing unnecessary surgery is also inconsistent with ethical practice, because all surgical procedures bear some degree of risk. *Performing unnecessary surgery is a major betrayal of the surgeon's paramount obligation to place the patient's best interests first*' (American Academy of Ophthalmology, my italics).

### *Circumcision Violates many other Ethical Rules*

Circumcision breaches numerous ethical rules: (1) the *fiduciary duty* of physicians only to perform medical procedures on a child that the child would consent to himself if able to make the decision; (2) the "*best interests*" rule, which the CDC acknowledges, whereby physicians must act in a patient's best interest; (3) the *autonomy* of the patient – a rule that the CDC acknowledges but ignores (CDC Background Materials) – whereby medical decisions for children that are not essential to their wellbeing and that can be deferred, such as elective surgery, must be deferred (Cultural Bias); (4) the cardinal rule of *non-maleficence*, or the Hippocratic Oath to "First, Do No Harm" (*Cultural Bias*; Diekema Affidavit); (5) *beneficence*, whereby 'all surgical or other interventions must ... have some reasonable prospect of providing a tangible benefit to him [each individual boy]' (Diekema Affidavit); (6) the rule of *proportionality*,

whereby, '[i]f other less risky but equally beneficial treatment options are available [as here], they should be considered instead of surgery' (*id.*); and (7) the rule of *justice* (Diekema Clinical Ethics). It is unjust to circumcise boys when genitally intact men rarely choose it for themselves, when increasing numbers of men are angry to have been circumcised without their consent, when physicians do not cut the genitals of healthy girls, or surgically remove other body parts from healthy children. These ethical rules all prohibit physicians from circumcising healthy boys.

### Legally Justified?

#### *Unlawful to Charge Medicaid for Circumcision*

It would be unlawful for physicians to follow the CDC's recommendation that physicians are justified in charging Medicaid for circumcision when the parents are unable to pay for the surgery. The fundamental rule of Medicaid law, contained in the federal statute, 42 USC § 1396a(a)(10)(C), and all state Medicaid statutes and regulations, and confirmed by the U.S. Supreme Court in *Schwartz v. Hogan* and *Beal v. Doe*, is that Medicaid only covers services that are 'medically necessary'. '[C]ircumcision is a "non-therapeutic" procedure, which means it is not medically necessary' (Canadian Paediatric Society). Likewise, the CDC does not recommend circumcision, and calls it elective surgery (Draft CDC Recommendations; CDC Background Materials), meaning that parents can consent to it or not as they please. It is obvious that circumcision is not medically necessary: most men who have ever lived have been genitally intact, as are approximately 70 per cent of men now living (UNAIDS). Even if circumcision had all of the medical benefits that the CDC, The American Academy of Pediatrics and other proponents of circumcision claim for it, and no risks or other disadvantages, insofar as it is not medically necessary, under federal and state law, it is not a covered Medicaid benefit under any circumstances (Adler, *Medicaid*). Physicians who charge Medicaid for circumcision as the CDC recommends commit Medicaid fraud, violate federal and state False Claims Acts, and risk large penalties and multiple damages for every circumcision that they perform. (Adler, *Medicaid*; also see, e.g., New Hampshire Criminal Statute.)

#### *Unlawful to Allow Circumcision for Reasons having Nothing to do with Medicine*

Another principal argument of the CDC is that in making the "circumcision decision", parents should take into account, in addition to health benefits and risks, 'religion, societal norms and social customs, hygiene, aesthetic

preference, and ethical considerations' (Draft CDC Recommendations). This argument fails as well, for several reasons. First, as discussed above, ethical considerations prohibit non-therapeutic circumcision. Second, in *Prince v. Massachusetts*, the U.S. Supreme Court settled that parents cannot risk harming or harm their children, as circumcision does, for religious reasons, nor could the rule that the safety of children is of paramount importance be changed. Third, pursuant to various federal laws, regulations and executive orders discussed below, the CDC must ensure that its recommendations with respect to circumcision are *scientifically objective* and *justified by medical evidence* (see *infra*, Part IV.D.). In taking non-medical factors into consideration, the CDC has violated its pledge to '[b]ase all public health decisions on the highest quality *scientific data* that is derived openly and *objectively*' by '[p]utting science into action' to find '*the most effective ways to prevent [disease]*' (CDC Mission, Role and Pledge, my italics.) The CDC's mandate, mission, role and pledge prohibit it from recommending that parents make decisions about circumcision surgery for reasons having nothing to do with medicine. Fourth, the CDC draft recommendation that religious factors should be taken into account violates the Constitutional separation of Church and State, which prohibits the government from coercion in religious matters and from favouring one religion over another (First Amendment and Religion). The CDC is favouring Judaism and Islam while disfavouring Catholicism, whose doctrine provides that anyone who circumcises another person will be eternally damned (Papal Bull), and Christianity, the dominant religion in the United States. Fifth and in any event, physicians are only licensed to perform medical procedures after a diagnosis and recommendation. The American Academy of Pediatrics' ethics committee correctly states the rule that pediatric health care providers:

... have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses ... [T]he pediatrician's responsibilities to his or her patient exist independent of parental desires or proxy consent

AAP Informed Consent

As Merkel and Putzke have written, 'It is obvious that there can be no legal right granting unfettered permission to intrude into another's body simply at one's discretion' (Merkel, *Criminal Assault*). The CDC is advising professional doctors, not witch doctors.

Finally, the CDC has not acknowledged, let alone addressed, the arguments legal scholars have been making for at least the past 30 years (Brigman) that it is unlawful for physicians to operate on healthy boys.

### *Lack of Fully Informed Parental Consent*

Assuming that parents had the right to elect circumcision for their sons if physicians follow the draft CDC guidelines, parents will not be giving fully informed consent to circumcision as the law requires (e.g., undisclosed conflicts of interest, understated and unknown risks, no disclosure that circumcision may or does impair men's sex lives, no mention of the risk of psychological harm, no mention that circumcision harms all boys and men, exaggerated benefits, and no proof that circumcision reduces HIV in the U.S.). Moreover, physicians routinely take advantage of largely uninformed and trusting parents such as by falsely diagnosing phimosis, not informing them of any risks, and by badgering them to consent.

### *Violation of Boys' Rights*

1. *Equal Protection.* In 1997, the U.S. Congress made it a criminal offence to cut a girl's genitals or breasts except when medically necessary, 18 U.S.C. Ch. 7, Sec. 116, and thereafter some states enacted similar state statutes. The Equal Protection Clause of the U.S. Constitution also applies to the federal government and thus to the CDC through the Due Process Clause of the Fifth Amendment (Heyman). Boys have a constitutional right to equal protection of the law.
2. *The Right to Safety and Personal Security.* *'The first and principal purpose of government [and thus of the CDC] under the common law and federal and state constitutional law is the affirmative duty to protect the safety and health of individuals'* (Heyman, my italics). The CDC concedes that circumcision risks injury and, as stated, it is always harmful. Thus, the CDC is recommending putting boys and men at risk and harming their health when its duty is to do the opposite. Likewise, the mission, role and pledge of the CDC, the self-described "nation's health protection agency", is to protect the health and safety of Americans (CDC Mission, Role and Pledge). The Bill of Rights to the United States Constitution similarly prohibits the government, here the CDC, from interfering with the inalienable right of every individual, including every boy, to personal security or bodily integrity, of which genital integrity is a subset.
3. *The Right to Liberty (Autonomy and Privacy).* The United States Supreme Court stated in 1891 in *Union Pacific Railway Company v. Botsford* that no right is held more sacred than a person's 'right of complete immunity; to be let alone', and to make important choices about one's own body that can be deferred for oneself. As the Supreme Court of Montana stated in *Armstrong v. State*, bodily autonomy is violated by a surgical operation or bodily "invasion" imposed against a person's will. Thus, boys and adolescents both have an ethical and legal right to autonomy, or to make

the circumcision decision for themselves when they reach the age of legal consent.

4. *The Right to Freedom of Religion.* Under the Freedom of Religion Clause of the First Amendment, boys and men have the right upon reaching adulthood to choose the same religion as their parents, if any, another religion, or no religion. As a court in Cologne, Germany held in 2012, circumcision ‘conflicts with the child’s interest of later being able to make his own decision on his religion affiliation’ (*German Case*).
5. *A Violation of International Human Rights Law.* Under international law as well, the law of the land in the United States, boys and men have the same rights to personal security, liberty and equality as they do under American common law and constitutional law (Svoboda, *Human Rights*). Under international law, boys also have the right to be free from prejudicial traditional practices such as circumcision (*id.*). Thus, circumcision violates boys’ international human rights (*Cultural Bias*).

#### *Unlawful for Physicians to Circumcise*

As the Royal Dutch Medical Association has written, ‘The rule [for physicians] is: do not operate on healthy children’ (Dutch Position). The AAP’s ethics committee conceded this in 1995 when it wrote that pediatric health care providers have legal and ethical duties to their child patients to render competent medical care based only on what the patient needs.

#### *Fraudulent*

As discussed above, the CDC’s draft recommendations and background materials are riddled with illogical, contradictory, false and misleading medical, ethical and legal claims and omissions. As will be shown, the CDC also did not comply with the procedural requirements for the issuance of influential medical guidelines. Physicians who follow the CDC recommendations, if implemented, risk suits for actual and constructive or imputed fraud. Under the doctrine of constructive fraud, insofar as physicians have a strict fiduciary duty to their patients, they can be held liable for making false statements that gain an unfair advantage over a patient or another person – here, boys, men, and their parents – even without knowledge of the falsity of their statements and without intent to defraud (Adler, *Legal*; Svoboda, *Unethical and Unlawful*).

Several medical groups, physicians and attorneys have essentially called the draft CDC recommendations and the similar AAP circumcision policy guidelines fraudulent. For example, the 31 distinguished European physicians representing medical associations in Northern Europe commented,

[T]he way from the [CDC's] background paper to the recommendations is marked by *exclusion, omission and minimization of scientific peer evidence that does not support the recommendation*. This is very similar to the development of the AAP circumcision policy statement in 2012 in which *critical evidence was omitted or downplayed*

*European CDC Critique, my italics*

Dr. Van Howe, a peer reviewer, similarly concluded,

[T]he most remarkable thing is that the CDC is recommending clinicians and health care providers relay information that is *counterfactual, incomplete, and biased* to medical decision makers. In essence, they are *deliberately encouraging health care providers to misinform their patients and thus commit medical malpractice [fraud]*.

*Van Howe Peer Review, my italics*

Bundick states, 'medical data from the African circumcision trials are being *inappropriately used* to defend and promote' circumcision: '*Everyone should be told the whole story – a story that does not point to any significant reduction in HIV transmission*' (*Bundick Critique, my italics*). The author of this article argued previously that circumcision in general, and the 2012 AAP recommendations in particular, which are similar to the 2014 draft CDC recommendations, *are unlawful and fraudulent* (Adler, *Legal*). Svoboda, Van Howe and Adler have made the same claim in a peer reviewed article pending publication in a leading journal of medicine, law and ethics (Svoboda, *Unethical and Unlawful*). Doctors Opposing Circumcision also concluded that the similar 2012 AAP recommendations will mislead the public:

The task force, inadvertently or intentionally, declined to elaborate upon and *withheld from the American public, significant information on the effect of circumcision on sexual function*. ... The AAP has been concerned about state Medicaid agencies denying payment for unnecessary circumcision because its doctors receive less money. ... One apparent purpose for this statement is to re-energize taxpayer-funded Medicaid to allow payment to doctors who perform non-therapeutic, unnecessary circumcisions once again, although it has been argued persuasively that it is unlawful to use Medicaid to pay for unnecessary, elective cosmetic surgery like circumcision. *To increase the income of their members ... these medical associations are willing to put healthy American boys under the*

*circumcision knife and expose them all to the risks of any surgery, and the unique risks, harms, and losses of circumcision itself.*

DOC Critique, my italics

In short, there is not only widespread opposition to the draft CDC guidelines, but national medical associations in Europe and other professionals have independently reached the conclusion that they are fraudulent, and intended to take unfair advantage of boys, men and their parents.

### **Procedurally Valid?**

Finally, let us ask whether the CDC has met the procedural requirements for the issuance of its proposed guidelines. The draft CDC guidelines are subject to the requirements set forth in a federal statute, 44 U.S.C. 3506(c)(2)(A), in Executive Orders (Executive Order 13563), by the Office of Management and Budget (“OMB”) (OMB Quality Bulletin), and by the U.S. Department of Health & Human Services (“HHS”) (HHS Guidelines for CDC). The draft CDC recommendations and background materials qualify as Highly Influential Scientific Assessments (“HISA”). The CDC explicitly states this in its Peer Review Plan (*Peer Review Plan*). In addition, recommendations are highly influential when, as here, they are ‘novel, controversial, or precedent-setting’ (*OMB Quality Bulletin*). Moreover, the CDC recommendations would be highly influential if implemented as according to the CDC itself, they would increase the number of surgeries performed on boys and men. Highly influential scientific assessments must comply with stricter requirements set forth in the OMB’s *Final Information Quality Bulletin for Peer Review* (*OMB Quality Bulletin*).

### ***Inadequate Opportunity for the Public to Comment***

The OMB states that federal agencies are required to give the public 60 days notice to comment on highly influential proposed guidelines. Executive Order 13563 likewise states that in order to give the public a meaningful opportunity to participate, the comment period should generally be at least 60 days. The CDC, however, ignored this requirement, and only gave the public and the peer reviewers 45 days to comment (*Van Howe Peer Review*).

The CDC also failed to meet the requirement of ‘sponsor[ing] a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public’ (*OMB Quality Bulletin*). Moreover, given that the CDC has received thousands of comments largely opposed to the draft guidelines (Public Comments on Proposed CDC Circumcision

Guidelines), there is an obvious need for a public hearing. There is no indication, however, that the CDC plans to hold one.

### *Guidelines for Peer Review Ignored*

When employing a public comment process, as required in this case, the agency is required to provide peer reviewers with access to the public comments (*OMB Quality Bulletin*). The CDC's Peer Review Plan expressly states and thereby acknowledges that external peer reviewers were not provided with the public comments (*Peer Review Plan*). (2) Executive Order 13563 also provides,

an agency conducting a peer review of a highly influential scientific assessment must ensure that the peer review process is transparent by making available to the public the written charge to the peer reviewers, the peer reviewers' names, the peer reviewers' report(s), and the agency's response to the peer reviewers' report(s).

None of this information has been made available to the public.

### *Conflicts of Interest and Bias not Disclosed*

Executive Order 13563 requires that the agency address reviewers' potential conflicts of interest, which appears not to have been done. Similarly, the AAP did not disclose conflicts of interest and bias in its 2012 circumcision policy statement (AAP Policy, 2012), even though it required those commenting thereon to do so, as is the norm in medicine.

### *Lack of the Required Objectivity*

The OMB states, '[e]ach agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions' (Executive Order 13563). HHS guidelines for the CDC similarly provide,

CDC will ensure that disseminated information meets the standards of quality set forth in the OMB, HHS and CDC guidelines. It is CDC's policy to ensure and maximize the quality, objectivity, utility, and integrity of information that it disseminates to the public. We strive to provide information that is accurate, reliable, clear, complete, unbiased, and useful.

HHS Guidelines for CDC

This requirement of objectivity precludes the CDC from claiming that parents should take religious, cultural, social and personal preferences into

consideration in making the “circumcision decision”. As discussed in this article, the CDC circumcision policy also is not objective, accurate, reliable, complete, or unbiased.

### *No Accurate Assessment of Risk*

In addition, when as here there are risks to human health and safety involving influential scientific assessments, HHS guidelines specify that the CDC must use the best available, peer-reviewed science in accordance with sound and objective scientific practices.

*In the dissemination of public information about risks, the agency shall ensure that the presentation of information about risk effects is comprehensive, informative, and understandable. The CDC must specify, ‘[e]ach appropriate upper-bound or lower-bound estimate of risk’; ‘[e]ach significant uncertainty identified in the process of the assessment of risk effects and the studies that would assist in resolving the uncertainty’; and ‘[p]eer-reviewed studies known to the agency that ... fail to support any estimate of risk effects and the methodology used to reconcile the inconsistencies in the scientific data’*

HHS Guidelines for CDC, my italics

The draft CDC recommendations do not meet these requirements. They are not comprehensive; they do not provide upper-bound estimates of risks; and the CDC has not cited peer-reviewed studies that fail to support its estimates of risks. The CDC has conceded in its background materials that *it does not know the risks*, but misleadingly, the CDC has failed to disclose this critical fact in its recommendations. The CDC has not reconciled inconsistencies about risks or proposed studies that would resolve uncertainties. Insofar as the CDC does not know the risks, it cannot lawfully recommend that health care providers make circumcision available to anyone, let alone to every newborn boy in the United States and to every heterosexually active adolescent and man not yet circumcised. Disregarding and violating these requirements is another of many acts of deliberate and constructive fraud.

### *Peer Reviews and Comments not Incorporated*

The Peer Review Plan for the draft CDC recommendations provides,

After the initial peer review period, proposed changes to the recommendations resulting from the public comments will be shared with the peer reviewers and peer reviewers will be allowed to provide additional

comments at that time. The final documents will be revised to incorporate feedback received from these sources

Peer Review Plan

The CDC is thus required to revise its draft recommendation to incorporate comments received from peer reviewers and from the public. It has not done so, and given that the CDC has not complied with the other procedural requirements for highly influential scientific assessments, it seems unlikely that it will comply with this rule either.

### The Implications and Conclusion

To summarise, the draft CDC recommendations are riddled with innumerable false, misleading and often contradictory – and thus intentional – medical, ethical, and legal claims, and with procedural flaws that could not have been accidental either. These fatal flaws have been brought to the attention of the CDC by a peer reviewer (*Van Howe Peer Review*), by the public in thousands of official comments (Public Comments on Proposed CDC Circumcision Guidelines), by European medical associations (*Cultural Bias*; European CDC *Critique*), by an ethicist (Earp, *Critique of the CDC*) and by legal scholars (Svoboda, *Fatal Flaws*). Yet the CDC has not withdrawn its proposed federal circumcision guidelines.

The draft guidelines can be challenged in complaints before several federal agencies, which would have a legal duty to prevent their implementation. In any event, given that the CDC has not followed the procedures required by law for the enactment of highly influential scientific assessments, if implemented, these federal circumcision guidelines would be legally invalid. They also would be legally invalid because they violate the constitutional rights of the child and the constitutional separation of church and state.

It is too late for the CDC to correct procedural deficiencies (e.g., adequate time to comment, showing the peer reviewers public comments in advance). The CDC has a duty to withdraw its proposal even though it has not been implemented. Otherwise, having widely publicised its many false and misleading claims, the public will believe that they have merit. The CDC must withdraw its proposal and start over.

If the CDC starts over, follows the required procedures and evaluates the medical evidence alone, as it is required by law to do, it would have to conclude that the prevailing view among medical associations in the Western world and among ethics and legal scholars is correct. The CDC should be

advising physicians to inform parents and men that circumcision is bad for health, and that heterosexually active males must practise abstinence, monogamy or safe sex to prevent STIs and HIV. In any event, the CDC should be advising physicians that, as the Royal Dutch Medical Association states, the ethical and legal rule for physicians is, 'Do not operate on healthy children' (Dutch Position).

As The Royal Dutch Medical Association also concluded, physicians should use their best efforts to *deter* circumcision. Since the CDC is part of the federal government, whose first duty is to protect its citizens, and since the CDC's mission is to use science to protect Americans and to improve their health, the CDC should be telling American physicians the same thing, not promoting circumcision.

Physicians who follow the CDC guidelines will mislead parents, adolescent boys and men about circumcision. Accordingly, they risk being sued and held liable on many grounds, including fraud, for every circumcision that they perform, and for every circumcision that they charge to Medicaid.

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