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19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

20 **COUNTY OF SAN DIEGO**

21 S.V., individually, and on behalf of J.D., as  
22 guardian ad litem,

23 Plaintiff,

24 v.

25 SAN DIEGO UNIFIED SCHOOL DISTRICT;  
26 and DOES 1 through 50, inclusive,

27 Defendants.

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**12/06/2021** at 10:29:00 PM

Clerk of the Superior Court  
By Erika Engel, Deputy Clerk

Case No.: 37-2021-00049949-CU-MC-CTL

**NOTICE OF MOTION AND MOTION FOR  
JUDGMENT ON PETITION FOR WRIT OF  
MANDATE; MEMORANDUM OF POINTS  
AND AUTHORITIES; DECLARATION OF  
S.V.; DECLARATION OF CAROLINE  
TUCKER, ESQ.**

*[[Proposed] Order filed jointly by plaintiff in  
soon to be consolidated case no. 37-2021-  
00043172]*

**Date: December 20, 2021**

**Time: 9:00 a.m.**

**Dept.: C-64**

Complaint filed: November 24, 2021

Trial Date: Not yet set



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On or about September 28, 2021, the San Diego Unified School District (“**SDUSD**”) voted to  
4 mandate the Covid-19 vaccine for students eligible under FDA guidelines. (“**SD Mandate**”). The SD  
5 Mandate currently provides that students ages 16 years and older who are not in compliance by January  
6 24, 2022, will be forced into the SDUSD’s independent study program (“**ISP**”).

7 SDUSD had no legal authority to implement or enforce the SD Mandate because it is preempted  
8 by California State Law in multiple ways. Firstly, the SD Mandate directly contradicts relevant state  
9 laws, and is therefore conflict preempted. Likewise, the SD mandate is also field preempted because  
10 the California State Legislature (the “**Legislature**”) has passed a comprehensive set of statutes that  
11 occupy the field with respect to what vaccines students must receive to attend any school. These  
12 comprehensive statutes very clearly delineate the roles of the Legislature, the California Department of  
13 Public Health (“**CDPH**”), and local school districts (“**School Districts**”) with respect to the  
14 implementation and enforcement of those statutes. In creating this structure, the State Legislature did  
15 not grant any School Districts the power to implement its own vaccination requirements. In fact, the  
16 legislative history of the vaccination statutes shows that the drafters explicitly chose a statewide approach  
17 and rejected the suggestion of permitting the over 1,000 school districts in the state to deviate from state  
18 law or to issue additional vaccine requirements.

19 The Legislature made it clear that only it and the CDPH may add a new disease to the current  
20 list of 10 diseases that students must be vaccinated against to attend school. Despite the pandemic raging  
21 for over 18 months, neither the Legislature nor the CDPH has added Covid-19 to that list of diseases.

22 The Legislature was also very clear that, when the CDPH unilaterally adds a new disease to the  
23 list, students must be permitted a personal beliefs exemption (in addition to the normal medical  
24 exemption). Thus, even if the SDUSD had the authority to add to the list of diseases, similar to the  
25 authority of the CDPH, (which it does not) the SDUSD would need to permit a personal beliefs  
26 exemption. However, the SD Mandate only provides for medical exemptions and conditional admissions  
27 for certain unvaccinated students, which also conflicts with the California State Law that occupies the  
28

1 field with respect to what vaccines a student must have to attend school. Secondly, the SD Mandate  
2 also directly conflicts with the California Education Code and its own internal Board policies regarding  
3 ISPs and therefore is both *ultra vires* and preempted by state law on these grounds as well.

4 For the reasons stated above, as further discussed below, SDUSD does not have the authority to  
5 implement or enforce the SD Mandate and Judgment must be entered against it.

## 6 **II. FACTUAL BACKGROUND**

### 7 **A. Parties**

8 Plaintiff, S.V., is the parent of J.D., who is 16 years old and resides in San Diego, California.  
9 (Declaration of S.V. ¶¶ 2, 3, 4 (“**S.V. Dec.**”)) J.D is a junior who attends Point Loma High School, a  
10 public high school in the Defendant’s school district. (S.V. Dec. ¶ 5.) J.D. has been attending in-person  
11 learning since the start of the 2021-2022 school year. (*Id.* at ¶ 7.) J.D. has received all vaccines required  
12 to attend school in California, meaning he is “fully vaccinated,” but J.D. is not vaccinated against Covid-  
13 19. (*Id.* ¶¶ 8, 9.) S.V. does not, at least at this time, consent to giving J.D., and J.D. does not want to  
14 receive, a Covid-19 vaccine. (*Id.* ¶¶ 9, 11.) The SD Mandate nonetheless will force J.D. into SDUSD’s  
15 ISP because S.V. refused to give J.D. the initial dose of the Covid-19 vaccine by November 29, 2021.  
16 (*Id.* ¶ 10.) S.V. does not want J.D. in an ISP, nor does J.D. qualify for any exemptions to the vaccination  
17 requirements. (*Id.* at ¶ 10, 12.) S.V. and J.D. have a beneficial interest in an order barring enforcement  
18 of the SD Mandate. Defendant SDUSD is a California public entity responsible for the implementation  
19 and enforcement of the SD Mandate.

### 20 **B. California State Law Regarding Vaccinations for School Attendance**

21 Over the years the Legislature has enacted and amended comprehensive vaccination statutes,  
22 which regulate, *inter alia*, what vaccinations are required for school, the process of adding additional  
23 required vaccines, what records are acceptable to prove vaccination, the sources for obtaining  
24 vaccinations, exemptions to vaccination requirements, the role of school boards regarding required  
25 vaccines, and the use of school personnel to administer vaccinations. Cal. *Health and Safety Code*  
26 (“**H&S**”) §§ 120335, 120345, 120355, 120360, 120370-75, 120380. The Legislature has chosen to  
27 broadly cover the field of school vaccination requirements.  
28

1 In *H&S* § 120335(b), the Legislature identified 10 diseases every student must provide proof of  
2 being vaccinated against in order enroll in school. In addition, the Legislature requires students to  
3 provide proof of receiving a vaccine for “[a]ny other disease deemed appropriate by the department [*i.e.*,  
4 the CDPH], taking into consideration the recommendations of the Advisory Committee on  
5 Immunization Practices of the United States Department of Health and Human Services, the American  
6 Academy of Pediatrics, and the American Academy of Family Physicians.” *Id.* at § 120335(b)(11). The  
7 Legislature expressly identifies a student who has received vaccinations against all diseases stated in  
8 subsection b as being “fully immunized.” *Id.* at § 120335(b).

9 According to the Assembly Committee on Health (“**Assem. Com.**”): “[e]ach of the 10 diseases  
10 was added to [the] California code through legislative action, after careful consideration of the public  
11 health risks of these diseases, cost to the state and health system, communicability, and rates of  
12 transmission....” *Love v. State Dept. of Education*, 29 Cal. App. 5th 980, 987 (2018) (citing Assem.  
13 Com. on Health, Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.), as amended May 7, 2015, p.  
14 4.)). Given this level of review and consideration by the Legislature of the 10 vaccines listed in *H&S* §  
15 120335, the Legislature chose to only permit a narrow medical exemption (“**ME**”) and eliminated the  
16 personal belief exemption (a “**PBE**”) to the vaccines for these 10 diseases in 2015. *H&S* § 120335(g)(3).

17 In contrast, the Legislature mandated that when the CDPH adds to the list of diseases students  
18 are required to be fully immunized against in *H&S* § 120335, students must be afforded both an ME and  
19 a PBE. *H&S* § 120338. The reason for permitting both exemptions can be found in the Senate Judiciary  
20 Committee (“**Sen. Jud. Com.**”) 2016 report addressing the need to balance individual rights and states’  
21 rights when mandating vaccinations. (Sen. Jud. Com., Analysis of Sen. Bill No. 277 (2015–2016 Reg.  
22 Sess.) (April 22, 2015) pp. 7, 18 Tucker Dec., ¶ 2, Ex. A. (“**Jud. Com. Analysis**”).) Specifically, the  
23 Sen. Jud. Com. wrote that the vaccination laws “must strike a reasonable balance that furthers public  
24 health and safety without unduly encroaching on the private family sphere.” (*Id.* p. 13; *see also Id.* p. 7  
25 (titling section “Liberty rights and parental rights balanced against the police powers of the state”).) The  
26 Sen. Jud. Com. had concerns that permitting CDPH to add vaccination requirements “has the potential  
27 to dramatically expand the scope of the bill and disrupts the careful balancing of the various rights  
28



1 involved.” (*Id.* p. 18.) For these reasons, the Sen. Jud. Com. Proposed the amendment that became law  
2 that requires a PBE for any vaccination requirements added by the CDPH. (*Id.* p. 18); H&S § 120338.

3 The Legislature did envision a role for a local school “governing authority” (i.e., **School**  
4 **Districts**) in its vaccination scheme, but that role was circumscribed, ministerial, and provided such  
5 School District with little or no discretion in the implementation. H&S § 120335(a) (defining “governing  
6 authority”). School Districts enforce the vaccination requirements established by the Legislature and  
7 CDPH by collecting proof of vaccination or exemption requests. H&S § 120375. However, showing the  
8 limited role the Legislature envisioned for School Districts, it required the CDPH to develop standard  
9 forms for School Districts to use for MEs and requires the CDPH to review all requests for MEs. H&S  
10 § 120372. the Legislature directed School Districts to not unconditionally admit any student if they are  
11 not “fully immunized against all of the diseases listed in Section 120335.” H&S § 120335(a); H&S §  
12 120340 (permitting a temporary conditional admission while a student seeks required immunizations).  
13 The Legislature also authorized School Districts to “temporarily exclude[] from the school” any student  
14 who has “been exposed to a disease listed in subdivision (b) of Section 120335.” H&S § 120370(b).

15 The Sen. Jud. Com. also addressed the question of whether the vaccination requirements should  
16 be mandated “on a community by community or school district or school district basis.” (Jud. Com.  
17 Analysis p. 18.) The Sen. Jud. Com. and the bill’s authors rejected this approach. Instead, they stated  
18 that “**a statewide approach is the correct approach** because:”

19 ...To provide a statewide standard, allows for a consistent policy that can  
20 be publicized in a uniform manner... [D]istricts ... should have a [single  
21 uniform] policy which they can easily implement. Further in consultation  
22 with various health officers, they believe a statewide policy provides them  
23 the tools to protect all children equally from an outbreak.

24 *Id.* Thus, while the Legislature granted School Districts ministerial roles in enforcing state vaccination  
25 requirements, it intentionally never granted them the power to add new vaccination requirements.

### 26 **C. SDUSD Implements a COVID-19 Vaccination Mandate Without Legislature Approval**

27 The Legislature has not passed a law that requires vaccination against Covid-19 to attend school.  
28 H&S § 120335; *Cal. Code Regs.*, tit. 17, § 6025. Nevertheless, on or about September 28, 2021, the  
SDUSD approved the SD Mandate, described as an “initiative” to require all SDUSD students to be

1 vaccinated against Covid-19 in order to participate in “in-person” education and extracurriculars. (Press  
2 Release, *San Diego Unified To Require COVID-19 Vaccines*, (Sept. 29, 2021) Tucker Dec., ¶ 3, Ex. B.)

3 Currently, the SD Mandate only applies to students ages 16 years and older, but when the FDA  
4 approves a Covid-19 vaccine for younger ages, the SD Mandate will apply to those ages as well. *Id.*  
5 Eligible students were required to have the first dose of an approved Covid-19 vaccination by **November**  
6 **29, 2021**, and the second dose by **December 20, 2021**, in order to stay enrolled in in-person learning.  
7 (*Vaccination Roadmap* p. 13 (Sept. 28, 2021) Tucker Dec. ¶ 4, Ex. C. (“**Vaccination Roadmap**”).)

8 According to the Vaccination Roadmap, starting January 24, 2022<sup>1</sup>, “[s]tudents who are eligible  
9 for the vaccine and **not vaccinated by established deadlines** will be required to participate in  
10 independent study programs.” (*Vaccination Roadmap* at 15.) It also incorrectly claims that “[s]tate law  
11 does not recognize religious or personal belief exemptions for student immunizations” and hence  
12 SDUSD would only provide a “medical exemptions” to the SD Mandate. (*Id.* at 15.)

### 13 **III. ARGUMENT**

#### 14 **A. Legal Standard For Writ of Mandate**

15 There are two requirements for the issuance of an ordinary writ of mandate: (1) a clear, present  
16 and ministerial duty on the part of the respondent; and (2) a clear, and present beneficial right on the  
17 part of the petitioner to the performance of that duty. *California Assn. for Health Services at Home v.*  
18 *State Dept. of Health Services*, 148 Cal. App. 4th 696, 704 (Cal. Ct. App. 2007). A ministerial duty is  
19 an act an entity is required to perform in a prescribed manner without the exercise of judgment or opinion  
20 concerning the propriety of the act. *Id.* at 707-708. A beneficial interest means the petitioner has a special  
21 interest over and above the interest of the public at large. *Id.* at 706. The writ “must issue in all cases  
22 where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” CCP § 1086.

#### 23 **B. The SD Mandate Violates Existing Law and SDUSD had no Legal Authority to Issue it**

24 The Covid-19 vaccine is not listed as a vaccine a student must obtain to attend school under H&S  
25 §120335. Therefore, the SDUSD is preempted from requiring vaccination against Covid-19.

26  
27 <sup>1</sup> Initially this date was stated as January 21, 2022, but was updated to January 24, 2022. See Covid-19  
28 Status: Safety Comes First, SDUSD., [https://sandiegounified.org/covid-19\\_status](https://sandiegounified.org/covid-19_status).

1           **1. Standard For Preemption Of Local Ordinances**

2           “Under article XI, section 7 of the California Constitution, [a] county or city may make and  
3 enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict  
4 with general [state] laws. If otherwise valid local legislation conflicts with state law, it is preempted by  
5 such law and is void. A conflict exists if the local legislation *duplicates, contradicts, or enters an area*  
6 *fully occupied* by general law, either expressly or by legislative implication.” *O’Connell v. City of*  
7 *Stockton*, 41 Cal. 4th 1061, 1067 (2007) (internal quotations omitted, emphasis in original). “[L]ocal  
8 legislation is ‘contradictory’ to general law when it is inimical thereto.” *Sherwin-Williams Co. v. City*  
9 *of Los Angeles*, 4 Cal. 4th 893, 898 (1993). “[L]ocal legislation enters an area that is ‘fully occupied’ by  
10 general law when the Legislature has expressly manifested its intent to ‘fully occupy’ the  
11 area [Citation], or when it has impliedly done so in light of one of the following indicia of intent: (1) the  
12 subject matter has been so fully and completely covered by general law as to clearly indicate that it has  
13 become exclusively a matter of state concern; (2) the subject matter has been partially covered by general  
14 law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further  
15 or additional local action; or (3) the subject matter has been partially covered by general law, and the  
16 subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state  
17 outweighs the possible benefit to the locality.” *Id.* (internal quotations omitted).

18           “The denial of power to a local body when the state has preempted the field.... is a rule of  
19 necessity, based upon the need to prevent dual regulations that could result in uncertainty and confusion.  
20 Thus, the term ‘conflict’ as used in section 11 of article XI has been held not to be limited to a mere  
21 conflict in language, but applies equally to a conflict of jurisdiction.” *Am. Fin. Services Assn. v. City of*  
22 *Oakland*, 34 Cal. 4th 1239, 1252-53 (2005). For these reasons, “[w]henver the Legislature has seen fit  
23 to adopt a general scheme for the regulation of a particular subject, the entire control over whatever  
24 phases of the subject are covered by state legislation ceases as far as local legislation is concerned.” *Id.*

25           To evaluate a field preemption challenge “we must first identify the subject” that the local law  
26 “regulates and the specific field” that the plaintiff “claims is occupied by state law.” *People v. Nguyen*,  
27 222 Cal. App. 4th 1168, 1177-78 (Cal. Ct. App. 2014) (citing *Sherwin–Williams Co. v. City of Los*  
28

1 *Angeles* 4 Cal.4th 893, 904 (1993)). To make this determination, the Court “must look to state law to  
2 define the relevant field when determining whether the Legislature has fully occupied the area by  
3 enacting a comprehensive statutory scheme.” *Id.* at 1178. Next, the Court “must examine the nature and  
4 scope of those state statutes to determine whether they are logically related and establish a ‘patterned  
5 approach’ to regulating an area that includes the subject matter covered by” the local ordinance. *Id.*

## 6 **2. The SD Mandate Is Preempted By The California Health & Safety Code**

7 The Legislature’s comprehensive statutes, as intended, cover all aspects of vaccinations required  
8 to attend school. Among other things, this scheme created a fixed list of 10 diseases for which  
9 vaccinations are required and gave only the CDPH the right to expand that list. In passing the SD  
10 Mandate, SDUSD unilaterally inserted itself into the State’s vaccination program. In doing so, the SD  
11 Mandate is both conflict preempted and field preempted by state law.

### 12 **i. The SD Mandate Conflicts with *H&S Code* § 120335**

13 Nothing in the SDUSD’s press release or in the Vaccination Roadmap provides any statutory  
14 basis or any legal authority whatsoever for the SDUSD to adopt the SD Mandate. This is because no  
15 California statute permits School Districts to add to the list of required vaccinations. “According to the  
16 Assembly Committee on Health (“**Assem. Com.**”): “[e]ach of the 10 diseases was added to [the]  
17 California code through legislative action, after careful consideration of the public health risks of these  
18 diseases, cost to the state and health system, communicability, and rates of transmission....” *Love v.*  
19 *State Dept. of Education* 29 Cal. App. 5th 980, 987 (2018) (citing Assem. Com. on Health, Analysis of  
20 Sen. Bill No. 277 (2015–2016 Reg. Sess.), as amended May 7, 2015, p. 4.)). The Legislature may add  
21 Covid-19 as a disease on the list but it will only add same after careful consider of many issues like the  
22 health risks to children from Covid-19, communicability, rates of transmission, and that fact that the  
23 Covid-19 vaccines do not stop infection and transmission of Covid-19.<sup>2</sup> There are a number of other

24 <sup>2</sup> CDC Director stating “what [the COVID-19 vaccines] can’t do anymore is prevent transmission.”  
25 <https://twitter.com/CNNSitRoom/status/1423422301882748929>. See also <https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm> (74% of those infected were fully vaccinated for Covid-19).  
26 [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/pdf/10654\\_2021\\_Article\\_808.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/pdf/10654_2021_Article_808.pdf)  
27 (“Increases in Covid-19 are unrelated to levels of vaccination across 68 countries and 2947 counties  
28 in the United States”). <https://pubmed.ncbi.nlm.nih.gov/34596015/> (“high transmissibility of the SARS-CoV-2 delta variant amount twice vaccinated and masked individuals”);

1 diseases for which there are vaccines licensed for school age children which are not on the list in *H&S*  
2 § 120335(b), and in *H&S* § 120335(b)(11) the Legislature gave only the CDPH a limited ability to  
3 expand the list of required vaccinations. That same statute identifies a role for School Districts, but the  
4 Legislature expressly rejected that School Districts could add to the list. (Jud. Com. Analysis p. 18.)

5 As discussed above, the legislative history regarding that section states that the Legislature only  
6 permitted the CDPH to add required vaccines because the Legislature was concerned about how  
7 “[l]iberty rights and parental rights [would be] balanced against the police powers of the state” if bodies  
8 other than the Legislature or CDPH were permitted to add new vaccination requirements. (Jud. Com.  
9 Analysis pp. 7, 13.) Allowing any other body beyond the CDPH to add vaccinations to the list created  
10 by the Legislature runs the risk of “dramatically expand[ing] the scope of the” vaccination requirements  
11 and thereby trampling on parents’ and children’s constitutionally protected rights. *Id.* p. 18.

12 The Jud. Com’s Analysis also makes clear that the Legislature intended there to be only a single  
13 statewide standard for school vaccination requirements. *Id.* p. 18. That Analysis quotes the Bill’s authors  
14 as stating that a “statewide standard, allows for a consistent policy that can be publicized in a uniform  
15 manner,” which allows each district to adopt “the best practices.” *Id.* A statewide standard is also “easily  
16 implement[ed]” and will “protect all children equally from an outbreak.” *Id.* According to the California  
17 Department of Education, there are approximately 1,085 School Districts in California. Permitting  
18 School Districts to add to the list of required vaccines would conflict with each of these goals by making  
19 the rules hard to publicize, hard to enforce, track, and monitor and would risk that the School Districts,  
20 who are not experts in vaccinations and would not implement the best practices. This would greatly  
21 complicate implementation of the *H&S* code on a statewide basis (see discussion below regarding MEs),  
22 and would result in children not being equally protected. This is why in crafting *H&S* § 120335, the  
23 Legislature rejected the idea of permitting School Districts, like the SDUSD, to craft their own  
24 requirements, doing so would undermine the goal of having consistent statewide requirements.

25 Furthermore, by permitting an exception for the CDPH to require a vaccination, the Legislature  
26 was inherently precluding any other body from adding vaccination requirements. This falls within the  
27 “familiar rule of construction, *expressio unius est exclusio alterius*,” because “where exceptions to a  
28

1 general rule are specified by statute, other exceptions are not to be implied or presumed.” *Mut. Life Ins.*  
2 *Co. v. City of Los Angeles*, 50 Cal. 3d 402, 410 (1990). Typically, “[t]he very existence of express  
3 exemptions” implies that the Legislature did not intend for there to be other exemptions implied. *Id.*  
4 Therefore, by creating only one exception for the CDPH it must be assumed that the Legislature intended  
5 no other exceptions, such as for School Districts to add to the list of required vaccinations.

6 Thus, by usurping the right to add Covid-19 as a disease students must be fully immunized  
7 against to attend any SDUSD school, the SD Mandate contradicts H&S § 120335(b). “A local  
8 ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law.” *O’Connell*  
9 *v. City of Stockton*, 41 Cal. 4th 1061, 1068 (2007). In this way, the instant situation strongly resembles  
10 the situation recently addressed in *Haytasingh v. City of San Diego*, 66 Cal. App. 5th 429 (Cal. Ct. App.  
11 2021). There, state law required all boats to stay under five miles per hour in certain areas, with the  
12 limited exception of “government employees who are actively engaged in direct law enforcement  
13 activities.” *Id.* (internal quotations omitted). The local ordinance exempted all government employees  
14 operating boats from any speed limits. *Id.* The Court of Appeal reversed the trial court, holding that by  
15 expanding on the limited exception created by state law the local ordinance contradicted state law and  
16 therefore was preempted. *Id.* In the same way here, state law created an exception for the CDPH to add  
17 to the list of diseases students are required to be fully immunized against, and the SD Mandate  
18 improperly expands that exception to also include School Districts. As such, the SD Mandate contradicts  
19 *H&S* § 120335, meaning the SD Mandate is preempted by state law.

## 20 **ii. The Legislature Covered the Field of School Vaccinations**

21 As discussed above, the Legislature passed numerous statutes covering all aspects of the  
22 vaccinations required to attend school. Those statutes cover everything including, but not limited to:

- 23 • who needs to receive the vaccines, *H&S Code* § 120335(b);
- 24 • what vaccines are required, *Id.* at § 120335(b)(1)-(11);
- 25 • who can add vaccines to that required list (only the CDPH), *Id.* at § 120335(b)(11);
- 26 • where the vaccines can be obtained, *Id.* at §§ 120345, 120350, 120380;
- 27 • what evidence of vaccination a parent needs to provide to a school, *Id.* at § 120355;

- 1 • what information School Districts must report to the CDPH, *Id.* at § 120370(c);
- 2 • how a parent can obtain a ME, *Id.* at § 120370;
- 3 • what form and information a physician must supply when applying for a ME, *Id.* at § 120372(a)
- 4 • how much a physician can charge for providing a ME, *Id.* at § 120372(c) (prohibiting charging);
- 5 • what process the CDPH must undertake to review requests for MEs, *Id.* at §§ 120372(d), 120372.05;
- 6 • when School Districts can conditionally admit students not fully vaccinated, *Id.* at § 120340;
- 7 • what happens when a child is not vaccinated, *Id.* at §§ 120370(a)(3), 120370(b);

8 In all these, the Legislature required a single statewide standard rather than a patchwork of standards.

9 As noted, the Sen. Jud. Com.’s analysis of *H&S* § 120335 discusses this desire for a single  
10 standard statewide. The bill’s authors explicitly decided that “a statewide approach is the correct  
11 approach” in order to permit a single easily implementable system that uniformly protected children  
12 across the state. (Jud. Com. Analysis p. 18.) The Legislature’s desire for a single statewide standard is  
13 quintessential evidence of Cal. Leg’s intent to occupy the field of school vaccination mandates. *Nguyen*,  
14 222 Cal. App. 4th at 1186 (holding that where the state enacted numerous laws regarding sex offenders  
15 and expressed an intent “to create a standardized statewide monitoring system for known sex offenders”  
16 that was clear evidence that the state intended to occupy the field of regulating sex offenders’ daily life).

17 In enacting the single statewide scheme, the Legislature clearly identified what roles other  
18 entities in the State would play. The role envisioned by the Legislature for School Districts is ministerial  
19 when compared to the broad discretion granted to the CDPH. *See H&S* § 120335(b)(11) (permitting  
20 CDPH to add vaccinations to the required list); *Id.* at § 120372 (authorizing CDPH to review exemption  
21 requests); *Id.* at § 120330 (permitting CDPH to enact and enforce “all regulations necessary to carry  
22 out” the state’s vaccination program). For example, School Districts are required to collect information  
23 regarding the vaccination status of students, *H&S* §§ 120335, 120340, 120375, and collect information  
24 regarding MEs (though only on forms approved by the CDPH), *Id.* at § 120372(a)(1). That information  
25 is then reported to the CDPH. *Id.* at § 120375(c). The Legislature further instructs all School Districts  
26 that they “shall not unconditionally admit or readmit” a student “unless the pupil has been immunized  
27 pursuant to Section 120335 or the parent or guardian files a medical exemption form that complies  
28

1 with Section 120372.” *Id.* at §§ 120370(a)(3), 120375(b). The Legislature granted no discretion to the  
2 School Districts in this regard, they cannot choose what vaccines to require or unilaterally grant  
3 exemptions to the state law vaccine requirements. *Id.* at §120375(b) (stating that the School Districts  
4 “shall prohibit” unvaccinated students from attending (emphasis added)). School Districts are not even  
5 given a role to play in evaluating ME requests (the review of such requests is centralized with the  
6 CDPH). *Id.* at § 120372 (requiring the School Districts to collect some exemption requests and provide  
7 them to the CDPH). The limited, ministerial role granted to School Districts is consistent with the  
8 Legislature’s desire to have a single vaccination standard apply statewide. (Jud. Com. Analysis p. 18.)

9 Thus, the scheme created by the Legislature is clear both from its expressed intent and through  
10 the pattern of its legislation. By statute the Legislature has fully and completely covered the field of  
11 vaccinations required for admission to schools in California. Those statutes present a single unified  
12 standard throughout the state and carve out a limited role for School Districts. Nothing in those statutes  
13 indicates that the Legislature intended for School Districts to have any power beyond that limited,  
14 ministerial role, including the power to add to the list of 10 diseases for which full immunization is  
15 required by *H&S* §120335. To the contrary, as discussed above, the fact that *H&S* § 120335 gives the  
16 CDPH the authority to add additional vaccination requirements shows that the Legislature did not intend  
17 for any other entities within the state to add to that list. Therefore, with the SD Mandate, SDUSD has  
18 interfered with the general scheme created by the Legislature for regulating mandatory vaccinations  
19 required for enrollment to schools in California. As such, because it intrudes on a field occupied by state  
20 law, the SD Mandate is preempted by that state law.

21 **iii. The SD Mandate Contradicts the Legislature’s Medical Exception Statutes**

22 SDUSD claims that students will only “be afforded the opportunity for medical exemptions”  
23 because “[s]tate law does not recognize religious or personal belief exemptions for student  
24 immunizations.” (Vaccination Roadmap p. 15.) However, “if the subject matter [of a local ordinance]  
25 is one of general or statewide concern, the Legislature has paramount authority; and if the Legislature  
26 has enacted general legislation covering that matter, in whole or in part, there must be a presumption  
27 that the matter has been preempted.” *N. Cal. Psychiatric Socy. v. City of Berkeley*, 178 Cal. App. 3d 90,  
28



1 106-07 (Cal. Ct. App. 1986). “The Legislature has recognized that matters of health and medicine ... are  
2 of statewide concern.” *Id.* at 108. Consistent with this approach, in enacting school vaccination  
3 requirements, the Legislature made clear its intent to preempt the field of MEs in order to create uniform  
4 statewide standards. The SD Mandate’s supposed ME and the ME form SDUSD created<sup>3</sup> falls outside this  
5 program, and therefore is preempted.

6 The Legislature created a comprehensive statewide statutory regime for addressing all requests  
7 for MEs, review of those requests by the CDPH, and appeals of any denial of a ME. *See H&S* §§ 120370,  
8 120372, 120372.05. The statewide nature of this program can be seen in the Legislature’s mandate that  
9 the CDPH develop “an electronic, standardized, statewide medical exemption certification form.” *H&S*  
10 § 120372(a)(1). That form must be transmitted directly to the CDPH’s statewide immunization registry  
11 and the Legislature provided that the CDPH’s forms “shall be the **only documentation of a medical**  
12 **exemption that**” School Districts may accept. *Id.* (emphasis added). The CDPH “review[s]  
13 immunization reports from all schools and institutions” to scrutinize all exemptions and weed out any  
14 that “do not meet applicable [federally created] criteria for appropriate medical exemptions.” *H&S* §  
15 120372(d). The CDPH is the only entity that “may accept a medical exemption that is based on other  
16 contraindications or precautions” beyond the federally created criteria. *Id.* at § 120372(d)(3)(B), (d)(5).  
17 Conflicting with this requirement, SDUSD’s directs students to email their completed SDUSD ME form  
18 to a SDUSD email: [immunizations@sandi.net](mailto:immunizations@sandi.net) to be evaluated by SDUSD.<sup>4</sup> The CDPH is also charged  
19 with monitoring whether physicians are issuing too many MEs, and then notifying the Medical Board  
20 of California to take proper actions to discipline that physician, a role it cannot fulfill for the SD  
21 Mandate. *Id.* at § 120372(d)(7).

22 These procedures in reviewing MEs and monitoring issuing physicians require a statewide  
23 approach. Covid-19 vaccinations are not required statewide. As such the State’s procedures are not  
24 established to deal with COVID-19 vaccination ME requests, and the SD Mandate’s ME requests will  
25 interfere with the statewide system created by the Legislature. On the other hand, if the SDUSD creates

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27 <sup>3</sup> See Exhibit F to the Declaration of Caroline Tucker, ¶ 7.

28 <sup>4</sup> *SDUSD Student Vaccine FAQs*, available at <https://sites.google.com/sandi.net/nursingwellness/covid-19-vaccine/student-vaccine-faqs>.

1 its own separate ME approval form or system, that will disrupt the CDPH’s obligation to monitor  
2 physicians statewide (e.g., the CDPH is required to review all exemption requests from “[p]hysicians  
3 and surgeons who have submitted five or more medical exemptions in a calendar year”, a count that will  
4 be inaccurate if certain requests are only reviewed by the SDUSD). *H&S* § 120372(d)(20(B)). Because  
5 it interferes with the statewide system, the SD Mandate’s ME must be preempted.

6 In addition to interfering with the single statewide system, SDUSD is incorrect in stating that  
7 state law does not recognize a PBE. *H&S* § 120338 specifically requires a PBE any time the CDPH adds  
8 a disease a student must be immunized against to be enrolled in school. The Legislature believed that to  
9 preserve the balance between individual and states’ rights, the CDPH could not be allowed to add  
10 required vaccinations without allowing students a PBE. (Jud. Com. Analysis p. 18.) Given this fact, it  
11 is clear that, even if the Legislature permitted a School District to implement an additional vaccination  
12 requirement (which it did not), then it also would have mandated the same exemptions “for both medical  
13 reasons and personal beliefs” as it did for the CDPH. *H&S* § 120338. Therefore, even if SDUSD could  
14 enact its own vaccine requirements, which as shown it cannot, the fact that the SD Mandate does not  
15 include a PBE means that it is inconsistent with the system created by the Legislature and is thus  
16 preempted.

17 **3. The SD Mandate is *Ultra Vires* and Preempted By The California Education Code**

18 SDUSD’s disregard for state law does not end with the provisions of the *H&S* Code. The  
19 Legislature instructs all School Districts that they “shall not unconditionally admit or readmit” a student  
20 “unless the pupil has been immunized pursuant to Section 120335 or the parent or guardian files a  
21 medical exemption form that complies with Section 120372.” *Id.* at §§ 120370(a)(3), 120375(b). The  
22 SD Mandate prevents SDUSD from unconditionally admitting students in compliance with *H&S*  
23 §§ 120335(b) or 120372. For any student that has not received a Covid-19 vaccine, the SD Mandate  
24 would make the enrollment conditional on being forced into the ISP and excluded from extracurricular  
25 activities. The SD Mandate provides that any eligible student who does not complete his/her Covid-19  
26 vaccination by December 20, 2021, “will be required to participate in independent study programs,” and  
27 will be excluded from both in-person learning and all extracurricular activities, including sports.  
28

1 (Vaccination Roadmap pp. 10, 13, 15.) However, by forcing students into ISPs, the SD Mandate violates  
2 several sections of the California *Education Code* (“**Ed. Code**”) and SDUSD’s own regulations. As a  
3 result, the SD Mandate is both *ultra vires* and preempted by state law.

4 *Ed. Code* § 51747(g) expressly provides that “independent study is an **optional** educational  
5 alternative in which **no pupil may be required to participate.**” (emphasis added). *Cal. Code Regs.*, tit.  
6 5, § 11700 defines this requirement to mean, in relevant part: “a pupil's or an adult education student's  
7 choice to commence, or to continue in, independent study **must not be coerced...**” *Cal. Code Regs.*,  
8 tit. 5, § 11700(d)(2)(A) (emphasis added). Likewise, according to the CA Dept. of Education,  
9 “Participation in independent study must always be the choice of the pupil, parent, guardian, or  
10 caregiver. [School Districts] shall not require or otherwise obligate the pupil’s participation in an  
11 independent study program.”<sup>5</sup>

12 Similarly, SDUSD’s own policies regarding independent study, which were revised as recently  
13 as September 8, 2021, “authorize[] independent study as an optional alternative instructional strategy  
14 for eligible students **whose needs may be best met** through study outside of the regular classroom  
15 setting.” (BP 6158(a), *Instruction, Independent Study*, Tucker Dec. ¶ 5, Ex. (emphasis added); *San*  
16 *Diego County Office of Education, Policy No. 6158*, p. 1 Tucker Dec. ¶ 6, Ex. E.) Likewise, citing *Ed.*  
17 *Code* § 51747, the SDUSD’s independent study policy clearly provides that:

18 A student's participation in independent study **shall be voluntary**. Students  
19 participating in independent study **shall have the right, at any time, to**  
20 **enter or return to the regular classroom** mode of instruction.

21 *Id.* (emphasis added). The SD Mandate does not require that the ISP be in the best interests of the student,  
22 it is not voluntary, and students do not have the right at any time to return to an in-person learning  
23 environment. Furthermore, *Ed. Code* § 51747(g) requires a written agreement for each independent  
24 study student, which must contain several provisions, including a provision that “independent study is  
25 an optional educational alternative in which no pupil may be required to participate.” *Ed. Code* § 51747  
26 (g)(8). (See also *San Diego County Office of Education, Policy No. 6158*, pp. 2-3 Tucker Dec. ¶ 8, Ex.

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28 <sup>5</sup> *Specialized Programs, Educational Options, Independent Study*, <https://www.cde.ca.gov/sp/eo/is/>.

1 E (requiring “a written independent study agreement, as prescribed by law, exists for each participating  
2 student”).) The SD Mandate does not require such a written agreement.

3 Additionally, *Ed. Code* § 51746 requires school districts to “ensure the same access to all existing  
4 services and resources in the school in which the pupil is enrolled ... as is available to all other pupils  
5 in the school.” Reflecting this requirement, SDUSD’s policies state that “[s]tudents in independent  
6 study shall have access to the same services and resources that are available to the other students in the  
7 school and shall have equal rights and privileges.” (*San Diego County Office of Education, Policy No.*  
8 *6158*, pp. 2-3 Tucker Dec. ¶ 8, Ex. E.) Thus, SDUSD is prohibited from excluding independent study  
9 students from the services and resources other students utilize, a requirement the SD Mandate violates.


10 SDUSD is prohibited from enrolling students in its ISP unless the requirements cited herein are  
11 met. Even though the SD Mandate’s first deadlines have passed, the SDUSD has not presented any plans  
12 to meet any of these requirements. Therefore, by forcing students who refuse to comply with the SD  
13 Mandate into ISPs, the SD Mandate is again preempted by California law because it contradicts such  
14 law and violates SDUSD’s own policies making it *ultra vires*.

15 **CONCLUSION**

16 For the foregoing reasons, this Court should grant Plaintiff’s Motion for Judgment on Petition  
17 for Writ of Mandate and Plaintiff respectfully requests the Court issue the Order in the form proposed.

18 Dated: December 6, 2021

19  
20 **SIRI & GLIMSTAD LLP**

21 By:   
22 \_\_\_\_\_  
23 Aaron Siri (Pro Hac Vice Pending)  
24 Caroline Tucker  
25 Attorneys for Plaintiff  
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27 as guardian ad litem  
28