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VIA: TRUEFILING

Chief Justice Patricia Guerrero and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

**Re: Request for Depublication of Fourth District Appellate Opinion
Let them Choose, et al. v. San Diego Unified School District;
Appellate Case No. D079906 (Opinion Filed: November 22, 2022)**

Dear Chief Justice Guerrero and the Justices of the Supreme Court of California:

This request to depublish the Fourth District Court of Appeal’s decision (the “Opinion”) in *Let Them Choose v. San Diego Unified School District*, Case No. D079906, (2022) 85 Cal.App.5th 693 (the “School District Action”) is made pursuant to Rule 8.1125(a) of the California Rules of Court by two independent California charter schools operated by nonprofit corporations, Granada Hills Charter and New West Charter (the “Charter Schools”). Charter schools are schools of choice which students may voluntarily choose to attend if the school programs and policies align with their needs and values; no student is required to attend a charter school.

The Charter Schools make this request to advance the public interest and their interests to protect against unintended future school health consequences created by the Opinion. The Opinion affirmed the invalidation of one *school district’s* COVID-19 vaccination policy, but was overly broad and erroneous in its analysis and apparent conclusions that (i) heightened campus vaccine requirements conflict with state law, and (ii) state law impliedly preempts school policies on the subject of vaccination. Significantly, while the Charter Schools are nonparties to the School District Action, as addressed below, the Charter Schools were sued in similar litigation brought by the same plaintiff, and *prevailed* based on arguments and analysis on both issues that were not considered in the Opinion. The Opinion stands to be misused to interfere with the prerogative of **public and non-public schools alike**, e.g., district, charter, and private schools, to implement campus health policies and procedures designed to protect student and staff health and minimize learning disruption through heightened vaccination requirements for campus access.

Background and Pertinent Procedural History

The School District Action was brought in San Diego Superior Court by Let Them Breathe,¹ a citizen group opposing school mask and vaccine policies, against the San Diego Unified School District (“SDUSD”) to enjoin its enforcement of a policy requiring eligible students to be vaccinated against COVID-19 as a condition of in-person classroom access (or instead, participate in remote learning programs.) The prerogative of the government to condition children’s access to public schooling based on vaccination status has been repeatedly affirmed by federal and state courts and was not challenged in the School District Action. Similarly, no laws

¹ Let Them Breathe also identifies itself in filings as “Let Them Choose,” an “initiative” of Let Them Breathe.

Document received by the CA Supreme Court.

prohibit public and private educational institutions from setting vaccination standards pertaining to who may access their facilities. Instead, the issue raised by Let Them Breathe in the School District Action was a statutory interpretation question, namely, whether, under the preemption doctrine, a *school district* is prohibited from implementing vaccine requirements beyond the State’s minimum immunization requirements applicable to schools, i.e., requirements schools are obligated to enforce at the point of school admission age milestones to ensure a baseline herd immunity in California against “childhood diseases,” as described in the relevant statute.

After filing the School District Action, Let Them Breathe sued the Charter Schools as well,² seeking to enjoin their enforcement of COVID-19 vaccination policies similar to that of SDUSD (the “Charter School Actions”), i.e., policies requiring that students be vaccinated against COVID-19 (or eligible for an exemption) as a condition of access to campus and in-person programming. Just as in the School District Action, Let Them Breathe argued that the Charter Schools’ policies were, too, preempted by State law. But, whereas Let Them Breathe prevailed in the School District Action before the trial court (affirmed by the Court of Appeal in the Opinion), Let Them Breathe lost its cases against the Charter Schools in the Charter School Actions. Let Them Breathe chose to let the adverse decisions against it stand, and did not appeal from the judgments. Thus, those judgments are final, and the Charter Schools’ legal right to maintain their policies has been finally resolved. Given the vigor in which Let Them Breathe litigated the Charter School Actions, the Charter Schools are left to assume that Let Them Breathe did not appeal to avoid potentially elevating the loss in the Charter School Actions to a published decision that might undermine its win in the School District Action. However, the integrity of California jurisprudence, and by extension the public interest, does not benefit from such happenstance of the manner in which one decision is appealed and one is not, i.e., where two separate cases proceed nearly simultaneously on the same legal issues, where they result in opposite conclusions on the interpretation of the same statutes and regulations, and where only the case with more limited analysis is published for public reliance, because the other case was not appealed.

While the Opinion decidedly addressed the questions at issue in the specific context of *school district* operations, and not that of *non-school district operated schools*, e.g., charter schools, private schools, and parochial schools,³ the Opinion is troubling because the Court of Appeal incorrectly interpreted the State’s school vaccine laws and regulations in general, and in a matter that could be unintentionally misused to apply to *all* schools, e.g., including non-school district operated schools such as charter schools and private schools. As indicated by the more developed reasoning in the Charter School Actions (the “Contrary Decision,” attached hereto as **Exhibit A**), the Opinion does not warrant publication, and risks imperiling future pro-health measures adopted by schools of all kinds. Specifically, the Opinion could be misused and misconstrued to preclude all schools of all types, public and non-public, from maintaining heightened vaccination standards for purposes of campus access during a health crisis.

Below, the Charter Schools address the two grounds on which the Opinion was wrongly decided, including arguments and evidence presented by the Charter Schools in the Charter School Actions that were not addressed in the School District Action: (i) the Opinion’s first core conclusion that school health policies imposing heightened vaccination standards for campus

² *Let Them Breathe v. New West Charter School*, Los Angeles Superior Court Case No. 22SMCP00029; *Let Them Choose v. Granada Hills Charter School*, Los Angeles Superior Court Case No. 22CHCP00001.

³ (See, e.g., Opinion, p. 699) [“The issue here is whether a *school district* may require students to be vaccinated for COVID-19 as a condition for both (1) attending in-person class, and (2) participating in extracurricular activities.”] (Emphasis in original.)



access and activities conflict with state law; and (ii), the Opinion’s second core conclusion that state law impliedly preempts school policies on the subject of vaccination.

Let Them Breathe’s Preemption Claim, Generally

The sole legal theory litigated in the School District Action and the Charter School Actions was an argument that State law preempts school districts and individual schools, respectively, from adopting their own policies setting forth vaccination requirements for campus access and participation in campus activities, e.g., athletic programs. Preemption occurs where “an otherwise valid local ordinance conflicts with the state’s general law.” (*City and County of San Francisco v. Post* (2018) 22 Cal.App.5th 121, 129.) “A conflict exists if the local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’ [citation].” (*Id.*) The preemption doctrine is based on the principle that “[u]nder the police power ... [political subdivisions of the state] have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation.]” (*T-Mobile West LLC v. City and Cty. of S.F.* (2016) 3 Cal.App.5th 334, 347.)

This Court’s jurisprudence addressing state law preemption over local regulations confirms that “[a]bsent a clear showing that the Legislature intended to preempt the field, [courts] will not find that general laws preempt local ordinances.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149; *see also Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707 [“We will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.”].) Even in the case of preemption based on a purported conflict between a local regulation and State law, preemption on this basis may be found only when local legislation “contradicts” state law in that “it is inimical or cannot be reconciled with state law,” and is impossible to comply with both. (*O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068; *see City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743 [conflict preemption “does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands”].) If it is possible to comply with both state and local legislation under any circumstances, as here, no contradiction will be found for purposes of preemption.

In the School District Action, Let Them Breathe argued, and the Court of Appeal agreed, that the State implemented a comprehensive school immunization scheme, which left no room for local regulation, that SDUSD’s policy contradicted state law, and thus, that SDUSD was preempted by state law from maintaining its policy. Again, the trial court in the Charter Schools Actions found otherwise. Specifically, the Contrary Decision explains that private actors (e.g., independent schools not operated by the government) are not subject to the preemption doctrine at all, and that even if preemption principles were applied, there was no conflict between the Charter Schools’ COVID-19 vaccination policies and state law, and that the purported comprehensiveness of State law did not preclude the Charter Schools from adopting their COVID-19 vaccination policies. The differences in the reasoning in the two actions justifies depublishing the Opinion.

The Court of Appeal’s Interpretation of the Key Regulation is Incorrect

In sum, the Court of Appeal incorrectly held as part of its conflict analysis that the principal school immunization regulation, California Code of Regulation, Title 17, Section 6025 (the “Regulation”) “gives the school no choice but to ‘admit or allow *continued attendance*’ to any pupil whose parent or guardian has provided documentation of the 10 required immunizations and/or medical or applicable personal belief exemptions,” that “[t]he plain meaning of ‘attendance’



in this context is in-classroom learning,” and that the extent a school policy “requires a student who is fully vaccinated within the meaning of [the regulation] to choose between a mandated COVID-19 vaccination and involuntary independent study, it is a choice the Legislature does not permit the District to compel.” (Opinion p. 710) (Emphasis in original.)

This assessment, and the Court of Appeal’s ultimate conclusion that a school policy setting forth heightened vaccination requirements for campus access conflicts with State law, rests on several mistakes in its interpretation of the Regulation. The Regulation was promulgated by the California Department of Health (“CDPH”) to implement Health and Safety Code (“H&S”) Section 120335, the principal school vaccine law providing that a school’s “governing authority **shall not** unconditionally admit any person as a pupil of any ... school ... unless, prior to his or her first admission to that institution, he or she has been fully immunized” against the diseases identified in statute.” (Emphasis added.) Section 120335 directs what schools may **not** do, i.e., who may not be admitted. The Regulation, however, is awkwardly written in the converse to provide that “[a] school or pre-kindergarten facility shall unconditionally admit or allow continued attendance to any pupil ... whose parent ... has provided documentation of any of the following for each immunization required for the pupil’s age or grade, as defined in Table A or B of this section...” (Section 6025) (Emphasis added.)

Let Them Breathe argued, and the Court of Appeal appeared to hold that the Regulation means that if a student has been vaccinated according to State immunization requirements, that schools must in all cases allow such students onto campus and to participate in in-person learning and activities, and that the school cannot impose additional vaccine standards during a pandemic or other health crisis for access to campus, classroom, and activities. (Opinion, pp. 706-7, 710.) Putting aside the fact that agency regulations cannot modify or contradict the underlying statutory requirements of the laws they are intended to implement (and in this case, Section 120335 clearly sets a vaccination floor and not a ceiling^{4, 5}), the Court of Appeal’s interpretation of the Regulation is wrong on its face, including its assertion that it creates a right of “in-classroom learning.” But, per the Opinion, SDUSD did not offer arguments interpreting the Regulation other than that the Regulation was inconsistent with Section 120335. (Opinion, p. 704, citing its “only response.”)

In the School District Action, Let Them Breathe and the Court of Appeal both erroneously truncated Section 6025 as stating that “[a] school ... facility shall unconditionally admit” and allow “continued attendance” of students vaccinated according to the State’s schedule, (Opinion, p. 703) but “facility” does not modify school; “pre-kindergarten facility” is a self-contained defined term of art referring to programs like daycares. (See *id.*, 17 CCR Section 6000(h).) The Regulation does not mandate a “school,” much less a “school facility,” to provide classroom and activity access to a student so long as they meet the State’s minimum vaccination requirements.

The purpose of the Regulation is not to legislate a right to classroom-based learning, but to identify which “documentation” of vaccines all “schools” of all kinds must “check” for in Table A and B of Section 6025 and what to report to the State per Sections 6075 and 6075. “Unconditional admission” is merely a status label meaning “admission based on documented

⁴ “Even under the broadest of statutory mandates” regulations “may not ... alter, enlarge, subvert or impair” the authorizing statute. (*County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 837.)

⁵ An Ohio court concluded in *State ex rel. Mack v. Board of Ed.* (Ohio Ct.App. 1963) 204 N.E.2d 86, 90, that a law like California’s with prohibitory language did not “require that the pupil be admitted initially,” only “that he shall not be admitted unless he complies with one of the permissible exceptions” and “[c]ompliance with any of the exceptions does not make it mandatory upon the [school] board to admit him.” (*Id.*)



receipt of all required immunizations ... in accordance with section 6025,” as distinguished from “conditional admission” where some immunizations required under Section 6025 are incomplete (Section 6000(a)), and does not require “unconditional admission” or “continued attendance” to a “school facility” at all. At most, the Regulation means that if a student is vaccinated per the State’s schedule, that the student is *eligible* to be admitted and to attend the school *based on the State’s vaccination standards*, not that the school must specifically allow them to attend all campus activities and programs irrespective of additional school health and admission protocols.

Consistent with the correct interpretation, that the Regulation is not creating a right to classroom access at a “school facility” for all students who have been vaccinated according to the State’s schedule, “school” is defined, for purposes of the Regulation, as including all types of schools students “attend,” not just traditional brick and mortar schools with campuses and classrooms offering site-based programs, but also independent study schools, home study schools, and distance learning schools. (Section 6000(k).) For students attending nonclassroom-based schools, i.e., independent study, remote learning/virtual schools, and homeschools, CDPH instructs schools that “parents or guardians must continue to provide immunization records for these students to their schools, and schools must continue to maintain records of immunizations for these students and report their immunization status.” (**Exhibit B**.) (See also Section 6075(d)-(e) [vaccine reporting obligations inclusive of “home, online/e-learning” schools].)⁶ Thus, the Regulation cannot be read as creating a right to a classroom at every “school,” since it addresses admission-immunization document requirements for all schools, even non-classroom programs.

Consistent with the conclusion that the term “school” in the Regulation does not create a right to access a classroom or campus, and contrary to the Court of Appeal’s assertion, the word “attend” in the Regulations also cannot be read to guarantee in-person attendance to a student just because they have received the minimum State-required vaccinations. With respect to the Regulation, CDPH advised in its Statement of Reasons for the Regulation that it “us[ed] ‘attendance’ as it is a term that is generally familiar to school ... staff,” instead of “entry.” (**Exhibit C**.) As the evidentiary record in the Charter School Actions demonstrated (not addressed in the Opinion), school professionals understand “continued attendance” to mean post-admission continued enrollment in school programs, not necessarily in-person attendance because a student can “attend” a school without being on-site, e.g., through distance learning. (Contrary Opinion, p. 28.) Notably, for purposes of daily attendance accounting (absent/present marks), attendance at a charter school is defined not based on site presence, but when students are “engaged in educational activities required of them by their charter schools, on days when school is actually taught in their charter schools.” (5 CCR Section 11960.) Students who participate in learning remotely or through the submission of independent study work product “attend” the schools in which they are enrolled.

Similarly, the Honorable Stanley Mosk, as Attorney General, issued an opinion interpreting “admission” under a prior school vaccination law in accord (which was not briefed by the parties or addressed by the Opinion): “the word ... in the field of education generally means the act of examining the qualifications of the prospective pupil and permitting him to become a pupil in the school” and “is often referred to as ‘enrollment’ or ‘registration.’” (**Exhibit D**, 38 Ops. Cal. Atty. Gen. 41.) The opinion rejected that admission meant “entry to class each morning,” and that “[i]f the Legislature had meant admission to be the entry to class each morning, it would no doubt have

⁶ Although students may ultimately be exempted from state vaccination requirements if they do not receive any classroom-based instruction at all (Section 120335(f)) such exemption does not change the definition of “school” as used in the Regulation to mean “classroom at a school.” Indeed, the definition of “school” used in the Regulation long predated the available exemption in Section 120335(f), i.e., when students attending school remotely were required to provide immunization records for enrollment, or an exemption, just like their classroom-based peers.



used the words ‘admitted to class’, rather than ‘admitted to any . . . school as a pupil.’ Thus, the use of the terms “school,” “admit,” and “attend” as used in the Regulation cannot be read to guarantee students a right to “entry to class each morning” just because they have received the ten state-required immunizations, nor preclude schools from imposing heightened health and safety requirements on such access or for other activities, like athletic programs.

Thus, even if in spite of the “shall not” language in Section 120335 the Regulation were read as somehow mandating all schools, district, charter, and private, to admit students and allow them to continue to “attend” if they have received the State-required immunizations (an overbroad interpretation), the Regulation does not require schools to provide *classroom-based* programming to such students after they have been admitted in order to “attend” the program. As the meanings of “school,” “admission,” and “attendance” as used by educators confirm, students who are vaccinated according to the State vaccine schedule may be admitted and attend through distance learning, independent study, or homeschool programming (or a hybrid of non-classroom and classroom attendance), even as school policy limits campus access based on heightened requirements. Thus, under the preemption doctrine, there can be no conflict between such a policy and State law, because it is possible for a student to be admitted and attend a school per the Regulation (if read as mandating a right of admission and attendance) even when students are not permitted on campus without proof of COVID-19 vaccination, i.e., because they may be admitted and attend through the school’s remote learning offerings. (See *O’Connell*, 41 Cal.4th at 1068.)

The Court of Appeal was not presented with these arguments and evidence, and did not otherwise consider them, and thus its analysis and interpretation of the Regulation as perhaps guaranteeing classroom-based programming to vaccinated students at, in effect, all district, charter, and private schools is incorrect. (Opinion, p. 710 [The Regulation “gives the school no choice but to “admit or allow continued attendance” to any pupil” and “[t]he plain meaning of “attendance” in this context is in-classroom learning.”].) As the trial court in the Charter School Actions correctly concluded, with the benefit of the above arguments and evidence, the Regulation does not provide such a guarantee and does not preclude campus policies that condition classroom and activity access on heightened vaccination requirements. (Contrary Decision, p. 32-34.)

It is also important to consider that the practical objective of the State’s school vaccination laws under the Health and Safety Code was to ensure widespread immunization for children under *minimum* state standards for “childhood diseases,” (H&S Code Section 120325(a)), not to guarantee a particular type of pedagogical experience even at specialized charter and private schools, i.e., classroom-based learning, nor limit campus health protocols. Likewise, the notion that *public health officials* at CDPH were intentionally seeking to use vaccine regulations to mandate new education policy, that schools provide classroom-based programming, and preclude school communities from employing heightened health policies during a pandemic, is an interpretation that impermissibly reads the Regulation to hide elephants in mouseholes.

The Court of Appeal’s Analysis of Field Preemption is Incorrect

Short of an actual conflict between the Regulation and a campus access policy that imposes a heightened vaccination standard for campus access, of which there is none as addressed above, the Court of Appeal’s Opinion rises and falls on field preemption, i.e., a determination that the Legislature has completely spoken on the subject area of school vaccination, and has left no room for the adoption of local policies, even if not contradictory. Again, because non-district operated schools like the Charter Schools (non-state actors) are not subject to preemption at all, this issue in the Opinion can have no effect on charter and private schools at all. However, like its

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interpretation of the Regulation, the Court of Appeal’s analysis on field preemption was wrong, and for the following reasons, the Opinion should be depublished as to that issue as well.

The Court of Appeal did not find that the school vaccine laws contain an express preemption clause (it does not.) Instead, the Court apparently found *implied* field preemption on the basis that the school vaccination laws are comprehensive. (Opinion pp. 702-6.) However, the standard for imposing implied field preemption is exacting, and was not satisfied in the Court of Appeal’s brief analysis. “Claims of implied preemption must be approached carefully, because they by definition involve situations in which there is no express preemption. Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances. Hence the rule has developed that implied preemption can properly be found only when the circumstances ‘clearly indicate’ a legislative intent to preempt.” (*Cal. Rifle & Pistol Ass’n v. City of W. Hollywood* (1998) 66 Cal.App.4th 1302, 1317.)

The comprehensive and extensive nature of a statutory scheme, alone, is no basis for a finding of implied field preemption. As this Court explained in *IT Corp. v. Solano County Bd. of Sups.* (1991) 1 Cal.4th 81, 89, mere “comprehensive state statutes and regulations governing” a subject “do not necessarily indicate implied preemption” including because “[t]hrough extensive and detailed,” a scheme that “purports only to be a ‘minimum standards’ program and implies no general purpose to strip local entities of their traditional power” in a particular area, e.g., campus health and safety, is not indicative of a legislative intent to preempt the field.

The purpose of the state vaccination law is “that all children covered by section [120335] are required by state law to be immunized.” (*Salasguevara v. Frye* (1995) 31 Cal.App.4th 330, 340.) Section 120335 prohibits admission for students who do not comply with the State’s minimum vaccination requirements, but does not require schools to guarantee daily site access to students as long as they meet the State’s minimum vaccination requirements. There is no “clear indication” that the entire subject of vaccination in schools is exclusively a matter of state concern, particularly where the law addresses the “elimination of childhood diseases,” (H&S Section 120325) not site safety, site access, non-childhood diseases like COVID-19, nor pandemic response, and where State policy supports local school vaccination programs and policies related thereto. Certainly, the State expresses no interest in precluding district, charter, and private schools from imposing more rigorous requirements, as public health officials expressly encouraged, and as were imposed in workplaces throughout the United States during the pandemic.

It is notable that the school vaccination laws have not abrogated Education Code Section 49403, providing that “[i]t is the intent of the Legislature to encourage school-based immunization programs, when feasible, to use the California Immunization Registry to assist providers to track patient records, reduce missed opportunities, and to help fully immunize all children in California,” and that “school immunization programs” may address immunizations against “diseases that represent a current or potential outbreak as declared by a federal, state, or local public health officer.” The entire field of *everything* having to do with the topic of vaccination in schools is clearly not preempted. It is improper to ascribe some kind of legislative intent to preclude pro-vaccination policies, given, again, that implied preemption should be applied with caution. Implied field preemption cannot be found where “[t]here are various subjects that the legislation deals with only partly or not at all,” (*see, e.g., Great Western Shows v. County of Los Angeles* (2002) 27 Cal.4th 853, 861), and certainly, when not dealt with in a “clear” way. Here, the school vaccination laws do not cover local school policies on site access, nor mandate a classroom-based course of study for vaccinated students, nor address site safety during a pandemic.



That the State sets minimum school vaccination standards and allows CDPH to add to that minimum list and have statewide effect in enforcing those minimum standards does not logically preclude an individual school from setting its own post-admission site access policies that are tailored to its needs, particularly during a pandemic. Again, “[e]ven if a legislative scheme is detailed and extensive, if it purports only to set minimum standards and implies no general purpose to deprive local entities of their traditional powers, preemption by implication will also not be found.” (*City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 276.)

It has **always** been within the traditional powers and prerogative of schools to implement policies to keep students safe based on the needs of the day; this is indeed the essence of the centuries-old doctrine of *in loco parentis* found in the English common law. There is no evidence anywhere in the legislative history for H&S Code Section 120325 *et seq.* that the Legislature was broadly concerned with district, charter, and private schools imposing more rigorous vaccination standards for campus access.⁷ The State’s decision to set “uniform standards” for minimum requirements, to ensure a baseline of childhood vaccination in California for childhood diseases, does not preclude district, charter, and private schools from setting additional requirements for campus access. Again, the State’s vaccination laws have been concerned with too little vaccination, and evasion of vaccination, not too much vaccination. The legislative history cited in the Opinion on the subject of statewide uniformity was in the context of discussion on whether personal belief exemptions to the State’s minimum vaccination schedule should be eliminated on a statewide basis or not, the very subject of SB 277 (not a statewide maximum vaccine standard).

There are also no “terms” in the school vaccination laws that “indicate clearly” that a “paramount state concern will not tolerate further or additional local action” within the meaning of *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898. The “paramount state concern” in these laws was ensuring children are immunized against *at least* “childhood diseases.” The law, addressing admission that must be prohibited, was not intended to restrict more cautious post-enrollment site access policies by school districts, charter schools, and private schools alike during a pandemic. The State has encouraged school COVID-19 vaccination and flu shot programs. It is sensible that the State identify minimum vaccination standards for admission, and that school districts, charter schools, and private schools may identify vaccination standards during a pandemic as conditions for access to a school site. The Opinion contains no analysis on these issues, aside from a generalized conclusion that the school vaccination laws are “extensive” and provide a procedure for CDPH to add vaccines to the *state-required* minimum list of vaccines.

The trial court in the Charter School Actions performed an extensive analysis of these issues, and concluded that the State vaccine laws are not subject to field preemption because, in sum, “[t]he fact that the school vaccination laws set minimum student vaccination standards and allows CDPH to expand on the minimum list with statewide effect does not preclude individual schools from setting their own post-admission site access policies, particularly during a pandemic.” (Contrary Decision p. 36.)

Conclusion

The School District Case is not a proper bellwether for issues it purported to resolve, and the Opinion does not warrant publication. Notably, SDUSD has never actually sought to enforce its policy (even as the trial court decision invalidating the policy was stayed). SDUSD argued that

⁷ As the Contrary Decision correctly held (and the Opinion expressly declined to address), Education Code Section 49405 at most addresses limits related to local smallpox vaccination regulations and is not connected to the statutory scheme at issue, i.e., the school vaccination laws in the Health and Safety Code. (Contrary Opinion p. 35.)



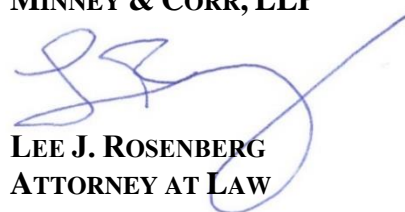
the issues on appeal were moot and that the appeal should be denied on that basis. (Opinion, FN1.) As the Court of Appeal observed, on the critical issue of interpretation of the at-issue regulation, SDUSD’s “only response [was] that the regulation itself is void because it ‘contradicts the plain language’ of the underlying statute, i.e., the Court of Appeal did not consider argument interpreting the Regulation to permit complimentary campus health policies. SDUSD only litigated the issues in its position as a school district, and was not making arguments to account for the application of school vaccine laws to other types of schools, including charter schools and private schools. By contrast, in the Charter School Actions, the Charter Schools provided significant argument on the correct interpretation of the key regulation relied upon in the Opinion, accounting for the varied school types covered by the regulations, and which was adopted by the trial court. (Contrary Decision, pp. 25-29, 31-32.) Notably, the pre-published Opinion was 17 pages, double spaced, whereas the Contrary Decision spanned 38 pages of substance, *single spaced*, i.e., four times the analysis on essentially the same legal questions.

Depublication is important because the Opinion risks undermining the capacity of charter schools and private schools to nimbly, quickly, and effectively respond to their own communities’ health and safety needs in the future, beyond the COVID-19 pandemic, and as warranted by the circumstances of the day. Unlike SDUSD’s experience of deferring its COVID-19 vaccination policy, the Charter Schools have actually implemented their policies for over a year now, with marked success as demonstrated through attendance rates that have dramatically outpaced those throughout the State, even through surges of COVID-19 variants. The Charter Schools have kept more students in their seats and engaged in learning, and minimized learning loss. For example, as the spring semester opened in January 2022 and the Omicron variant was at its peak, Los Angeles Unified School District saw attendance rates at 66% whereas the Charter Schools maintained attendance rates between 20 and 30 percentage points higher. By further example, New West Charter’s 1.6% chronic absenteeism rate in the 2021-22 school year stood dramatically lower than the 30% chronic absenteeism rate statewide.

In assessing the unintended impact of the Opinion, the Court should consider, for example, that the Opinion may frustrate heightened vaccination requirements at schools where they are specifically and uniquely warranted, including (i) a school specializing in serving medically fragile children; (ii) a school engaging in expeditionary learning to foreign countries where disease risks warrant special vaccination requirements, e.g., against malaria; (iii) a school with a residential program facing repeated meningitis outbreaks; (iv) a school specializing in vocational training with work study at health care or child care facilities requiring, e.g., a flu vaccine; and others.

On an issue as important as school health and safety, the Opinion falls short in providing an adequately reasoned analysis meriting publication. Critically, the Opinion may be misused and misapplied to preclude the health policies of non-state actors like charter and private schools that operate independently, to meet the needs and interests of their students through their own policies. For these reasons, the Charter Schools respectfully request that this Court depublish the Opinion.

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Exhibit A

July 27, 2022 Trial Court Decision in Let Them Choose v. Granada Hills Charter School

Los Angeles Superior Court Case No. 22SMCP00029

Let Them Choose v. Grenada Hills Charter School, 22CHCP00001

Decision on petition for writ of mandamus denied

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Superior Court of California
County of Los Angeles
JUL 27 2022
Sherri R. Carter, Executive Officer/Clerk of Court

Petitioner Let Them Choose (“LTC”), an initiative of Let Them Breathe (“LTB”), applies for a writ of traditional mandamus enjoining Respondent Grenada Hills Charter School (“GHC”) from enforcing a COVID-19 vaccine mandate for students and requiring it to rescind the mandate currently in effect.

The court has read and considered the moving papers, opposition, and reply,¹ heard oral argument, and renders the following decision.

A. Statement of the Case

1. Petition

Petitioner LTC filed its Petition on January 3, 2022 alleging: (1) violation of Health and Safety (“H&S”) Code section 120335 and title 17 California Code of Regulations (“CCR”) sections 6025, 6060, and 6065; (2) violation of title 5 CCR section 11700; (3) violation of Education (“Educ.”) Code sections 51746 and 51747; (4) preemption by state law; (5) violation of the right to privacy; (6) violation of Article IX of the California Constitution; (7) violation of the Equal Protection Clause of the California Constitution; (8) violation of Educ. Code section 220; and (9) violation of Government (“Govt.”) Code section 11135. The Petition alleges in pertinent part as follows.

On September 9, 2021, the Los Angeles Unified School District (“LAUSD”) Board of Education adopted the Superintendent’s Resolution requiring vaccination of all students at least 12 years old by the end of 2021, with a mid-October 2021 deadline for any students partaking in in-person extracurricular activities. The online FAQ explicitly states that religious and personal belief exemptions are not among the exemptions and conditional admissions to the mandate. Unvaccinated students must enroll in independent study whereby a student is homeschooled and uses Zoom to call in to the teacher for one hour per week.

On October 11, 2021, a GHC board report implemented a mandatory COVID-19 vaccination policy (“Policy” or “GHC Policy”) with certain exemptions and conditional admissions aligned with the LAUSD resolution. The list of exemptions does not any religious and personal belief exemptions. While the Policy provides for approved medical exemptions, GHC has arbitrarily denied valid medical exemptions provided by California-licensed physicians. Meanwhile, unvaccinated student athletes from other schools are allowed to come to GHC for games.

On November 18, 2021, GHC sent emails warning parents that their child must either be vaccinated, accept independent study, provide evidence of an exemption, or lose his or her enrollment in Spring 2022 classes. Independent study does not offer the same access to education – including access to Advanced Placement (“AP”) classes, the full range of foreign languages, and Academic Decathlon – as classroom education and denies extracurricular activities and events to

¹ LTC filed consolidated papers with Let Them Breathe, the petitioner in Let Them Breathe v. New West Charter School, 22SMCP00029. Although styled as a motion for judgment, the moving papers are the opening brief for trial of this case.

Document received by the CA Supreme Court.

students as well.

LAUSD delayed implementation of its plans following public media reports, but GHC has moved forward with implementation of its Policy. GHC continues to harass unvaccinated students and their parents while unenrolling said students. The Policy has no expiration date.

The FDA has only issued an Emergency Use Authorization (“EUA”) for a COVID-19 vaccine for children as young as 12 years old; no vaccine has received full FDA approval for children less than 16 years old. A risk-benefit assessment of one vaccine noted possible myocarditis/pericarditis hospitalizations and explained that the risk-benefit analysis depended on the prevalence of COVID-19 at any given moment. COVID-19 poses a significantly lower risk to schoolchildren than for the general population, they are not the primary source of the disease’s spread, and vaccinated children can still contract and spread the disease.

Petitioner seeks a writ of mandate enjoining Respondent GHC from enforcing a COVID-19 vaccine mandate for students and requiring GHC to rescind the mandate currently in effect. Alternatively, it applies for an injunction and writ of traditional mandamus enjoining GHC from excluding unvaccinated children from reasonably enjoying the benefits of full-time, in-person instruction, extracurricular activities, and all other benefits afforded to vaccinated children.

2. Course of Proceedings

On January 7, 2022, Dept. F49 (Chatsworth) (Judge Pfahler) heard an *ex parte* application for a Temporary Restraining Order (“TRO”) and Order to Show Cause re: Preliminary Injunction (“OSC”) in the instant case that would (1) stay enforcement of GHC’s vaccine mandate requiring all GHC students who are 12 years of age and older to receive the COVID-19 vaccine and excluding pupils who have not been vaccinated for COVID-19 from school campuses, buildings, classrooms, in-person instruction, sports, extracurricular activities and all other programs, including but not limited to virtual instruction; and (2) prevent GHC from involuntarily disenrolling students who did not receive a COVID-19 vaccination by January 27, 2022, or transferring them to independent study. The court denied the TRO on the condition that students who meet the requisite medical grounds be exempted from the vaccine mandate and that GHC provide an independent study program and scheduled the OSC for February 8, 2022.

On January 11, 2022, LTC served GHC by substitute service with the Complaint and Summons.

On January 12, 2022, GHC filed a Notice of Related Case for the instant case and Kelly Fennell v. Grenada Hills Charter School, 21STCP03965.

On January 19, 2022, Judge Beckloff related the two cases. He also advanced and vacated the February 8, 2022 OSC hearing in the instant case.

On January 24, 2022, GHC filed a Notice of Related Case for the instant case, Let Them Breathe v. New West Charter School, 22SMCP00029, and Kelly Fennell v. Grenada Hills Charter School, 21STCP03965. On February 1, 2022, Judge Beckloff related the three cases.

On February 8, 2022, Judge Beckloff transferred all three related cases to Department 1 for reassignment. All three cases were reassigned to this court on February 14, 2022.

On March 15, 2022, the court consolidated the cases for trial with three separate judgments. The trial date was initially set for May 24, 2022 but was continued by the court *sua sponte* to the instant date when Petitioners lodged non-compliant documents for trial.

B. Standard of Review

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for traditional mandamus is appropriate in all actions “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...” CCP §1085.

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers’ Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance.” Id. at 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

A ministerial act is one that is performed by a public officer “without regard to his or her own judgment or opinion concerning the propriety of such act.” Ellena v. Department of Insurance, (2014) 230 Cal.App.4th 198, 205. It is “essentially automatic based on whether certain fixed standards and objective measures have been met.” Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dept. of Resource Mgmt., (2008) 167 Cal.App.4th 1350, 1359. By contrast, a discretionary act involves the exercise of judgment by a public officer. County of Los Angeles v. City of Los Angeles, (2013) 214 Cal.App.4th 643, 653-54.

Where a duty is not ministerial and the agency has discretion, mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency’s discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. An agency decision is an abuse of discretion only if it is “arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” Kahn v. Los Angeles City Employees’ Retirement System, (2010) 187 Cal.App.4th 98, 106. Mandamus will lie where the agency’s discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

No administrative record is required for traditional mandamus to compel performance of a ministerial duty or as an abuse of discretion.

C. Governing Law

1. The Charter Schools Act

The Charter Schools Act of 1992 (“CSA”) (Education Code (“Educ. Code”) §47600 *et seq.*) sought to allow teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure by improving student learning, holding the schools accountable for measurable student outcomes, and provide vigorous

competition in the public school system. Educ. Code §47601. The CSA allows charter school to operate as or by a non-profit public benefit corporation organized pursuant to the Nonprofit Public Benefit Corporation Law. Educ. Code §47604(a). A charter school shall comply with the CSA, its charter provisions, and selected provisions of the Educ. Code but is otherwise exempt from the laws governing public school districts. Educ. Code §47610.

Charter schools shall be nonsectarian in programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against a pupil on the basis of the characteristics listed in Educ. Code section 200. Educ. Code §47605(e)(1). Prohibited discrimination includes disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes, including immigration status, equal rights, and opportunities in the educational institutions of the state. Educ. Code §200.

A charter school shall not encourage a pupil currently attending the charter school to disenroll from the charter school or transfer to another school for any reason, including, but not limited to, the pupil's academic performance. Educ. Code §47605(e)(4)(C). A school district shall not require a pupil enrolled in the school district to attend a charter school. Educ. Code §47605(g).

Any petition to the chartering authority for the establishment of a charter school must include “[t]he procedures by which pupils can be suspended or expelled from the charter school for disciplinary reasons or otherwise involuntarily removed from the charter school for any reason,” subject to procedural due process requirements. Educ. Code §47605(c)(5)(J).

Charter schools must offer a certain number of minutes of instruction per grade and maintain records of attendance. Educ. Code §47612.5(a). Although charter schools may provide independent study programs, they must do so in a way that complies with Education Code Article 5.5 of Chapter 5 of Part 28 and implementing regulations adopted thereunder. Educ. Code §47612.5(b). The state Board of Education is required to adopt regulations that determine to what extent non-classroom-based instruction – including independent study, home study, work study, and distance and computer-based education – can contribute to this education and to a charter school's funding. Educ. Code §47612.5(d)(1).

In 1999, the California Department of Public Health (“CDPH”) issued a Statement of Reasons for proposed regulations governing charter schools and their programs. RESP²-287. Once passed, Educ. Code section 11705 would add charter schools to the definition of alternative schools, since enrollment therein is voluntary, and therefore grant them additional flexibility. RESP-288. The proposed regulations would provide guidance to charter schools in determining how to apply independent study law to their independent study programs. RESP-287.

The Office of Financial Systems and Management Assistance issued an economic analysis of the proposed regulations. RESP-286. Existing statutes did not allow schools to offer independent study without also offering in-class instruction. RESP-286. The new regulations defined charter schools as alternative schools, exempting them from that requirement. RESP-286.

2. The Independent Study Laws

² “RESP-” refers to the opposition evidence followed by a page number.

A school district and county office of education offering independent study shall provide the same access to all existing services and resources of the school as are available to all other pupils in the school. Educ. Code §51746; *see also* 5 CCR §11701.5 (“the independent study option is to be substantially equivalent in quality and in quantity to classroom instruction,” and its students are to have access to the same resources.).

If a local educational agency³ is receiving apportionments for independent study by pupils, it shall have written policies and independent study agreements stating that it is an optional educational alternative in which no pupil may be required to participate. Educ. Code §51747(g)(8). The agency shall obtain a signed written agreement for an independent study program of any length of time from the pupil, or the pupil’s parent or legal guardian if the pupil is less than 18 years of age. Educ. Code §51747(g)(9)(F). Before signing the agreement, upon request of the parent or guardian, the agency shall conduct a telephone, videoconference, or in-person pupil-parent-educator conference or other school meeting during which the pupil, parent or guardian, and, if requested by the pupil or parent, an education advocate, may ask questions about the educational options, including which curriculum offerings and nonacademic supports will be available to the pupil in independent study. Educ. Code §51747(h)(2). The agency shall have a plan for transitioning pupils in no less than five instructional days who wish to return to in-person instruction from independent study. Educ. Code §51747(f).

3. The Smallpox Law

The control of smallpox is under the direction of the California Department of Health Services, and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities. Educ. Code §49405. The governing board of a school district shall cooperate with the local health officer in measures necessary for the prevention and control of communicable diseases in school age children. Educ. Code §49403(a).

In 1911, Chapter 134 of the California Statutes used the term “vaccination” to refer to immunity to smallpox. RESP-276. Chapter 370 of the 1921 statutes use the same definition of “vaccination” when noting that no school or local health authority can adopt rules on vaccinations, only the state Department of Health can. RESP-280.

4. The School Vaccination Laws

The H&S Code provides a means for total immunization against ten childhood diseases and any other diseases deemed appropriate by CDPH. H&S Code §120325(a). Diseases should be added only after taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians. H&S Code §120325(a).

The governing board of any school district or private institution cannot unconditionally admit a student unless, prior to their first admission, they were fully immunized against all of the diseases identified in H&S Code section 120325(a). H&S Code §120335(b). This requirement does not apply to pupils in home-based private school or independent study. H&S Code

³ A “local educational agency” means a school district, county office of education, or a charter school. Educ. Code §51745.5(b).

§120335(f).

Aside from the ten enumerated vaccinations, CDPH may only mandate an immunization before a pupil's first admission if exemptions are allowed for both medical reasons and personal beliefs. H&S Code §120338. A child is medically exempt from an immunization requirement if the parent or guardian files a written statement by a licensed physician and surgeon to the effect that the physical condition of the child is such that immunization is not considered safe. H&S Code §120370(a)(1). Otherwise, a school's governing authority shall not unconditionally admit, readmit, or advance any pupil to 7th grade level unless the pupil has been immunized pursuant to section 120335. H&S Code §120370(a)(3).

a. SB 277 Legislative History

On April 25, 2015, the Senate Judiciary Committee analyzed SB 277's proposed amendment to vaccination laws that would require medical and personal belief exemptions for any vaccination requirements under H&S Code sections 120325(a)(11) and 120335(b)(11). Andelin Decl., ¶4, Ex. H; RESP-306. In response to questions whether a narrowly tailored bill should instead allow schools and communities to issue mandates based on local conditions, the authors asserted that a statewide standard allows for a consistent policy that can be uniformly publicized while school districts enact their own measures. Andelin Decl., ¶4, Ex. H; RESP-306.

On June 9, 2015, the Assembly Committee on Health explained that the ten vaccinations included in the proposed statewide mandate for all schoolchildren were based on careful consideration of cost, communicability, rate of transmission, and which diseases pose the more serious public health risk. Andelin Decl., ¶5, Ex. I.

The third reading of SB 277 explained that the bill eliminated the personal belief exemption from vaccination requirements. RESP-313. It explained that the existing law prohibited unconditional admittance of students not immunized from certain diseases and that CDPH has the authority to add to the list of required immunizations, but only subject to medical and personal belief exemptions. RESP-313-14. The bill would eliminate the personal belief exemption because large communities of unvaccinated individuals had led to a measles outbreak in 2015, and a high vaccination rate was necessary to prevent future outbreaks. RESP-315-16. The final June 30, 2015 version of SB 277 was substantively similar. RESP-324.

b. Regulations

On July 26, 2016, CDPH released a Statement of Reasons regarding school immunization regulations, clarifying that H&S Code sections 120325 through 120375 only require certain immunizations for children to attend schools or childcare facilities. RESP-329. Proposed amendments to various regulations such as 17 CCR section 6025 were intended to provide clearer guidance as to those requirements, including the immunizing agents and age-appropriate requirements for unconditional admission. RESP-331, 335, 338. This included using the word "attendance" instead of "entry" because it is a familiar term used with students. RESP-336. This also included changes to H&S Code section 6070 to clarify the required immunization information schools and pre-kindergarten facilities need to record for each pupil. RESP-345. H&S Code section 6075 then delineates the required reporting elements prekindergarten facilities and schools need to report yearly. RESP-348. CDPH also noted that adding new vaccinations that school have to check for, such as varicella, will impose minimal economic burden since the school already

checks for others. RESP-351.

On March 10, 2017, CDPH issued a notice of proposed regulations to comply with SB 277. RESP-456-58. CDPH observed that the added expense for charter schools of such regulations should be minimal - \$0.65 per pupil in kindergarten, and nothing for students in seventh grade – because it was taking advantage of the preexisting process for checking immunizations. RESP-460.

“Admission” is defined as a pupil's first attendance in a school or pre-kindergarten facility or re-entry after withdrawing from a previous enrollment. 17 CCR §6000(a). “Unconditional admission” is admission based upon documented receipt of all required immunizations for the pupil's age or grade, except where medical or personal exemptions apply. 17 CCR §6000(a)(1).

A school or pre-kindergarten facility shall unconditionally admit or allow continued attendance to any pupil aged 18 months or older whose parent or guardian has provided documentation of certain immunizations or exemptions. 17 CCR §6025(a), Table B. If a pupil is subsequently discovered not in compliance, the school's governing authority shall notify the parent or guardian of the period to receive those doses, no more than ten school days and the pupil must be removed from attendance if the parents do not provide documentation of immunization in that time. 17 CCR §6040(a). Parents must also provide documentation that seventh grade immunization requirements have been met prior to the student beginning seventh grade. 17 CCR §6040(b).

CDPH's flow chart on checking immunization requirements shows the full process for determining “whether a child may be admitted to school or not.” RESP-354.

5. Rulemaking

A state agency can only issue, utilize, enforce, or attempt to enforce a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule if it was adopted as a regulation pursuant to proper procedure. Govt. Code §11340.5(a).

The agency shall (1) file its determination with the Secretary of State; (2) make its determination known to the agency, the Governor, and the Legislature; (3) publish its determination in the California Regulatory Notice Register within 15 days of issuance; and (4) make the determination available to the public and courts. Govt. Code §11340.5(c).

State agencies issuing regulations must make available to the public upon request (1) the express terms of the proposed regulation and (2) an initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. Govt. Code §11346.2. The agency must assess the potential for adverse economic impact on California business enterprises and individuals and avoid the imposition of unnecessary or unreasonable regulations. Govt. Code §11346.3(a).

The agency must provide 45 days' notice of a hearing and close of the public comment period for any proposed regulation to (1) every person who has filed a request for notice of regulatory actions with the state agency; (2) the director of the department to which the agency belongs; (3) a representative number of small business enterprises likely to be affected; and (4) any person or group of persons whom the agency believes to be interested in the proposed action when appropriate. Govt. Code §11346.4(a).

Following adoption of the regulation, the agency must provide the Secretary of State with a final statement of reasons including, in part, (1) an update of the information contained in the initial statement of reasons, and (2) a determination as to whether adoption, amendment, or repeal

of the regulation imposes a mandate on local agencies or school districts. Govt. Code §11346.9(a). It must also provide an updated informative digest containing a clear and concise summary of the immediately preceding laws relating directly to the adopted regulation and the effect thereof on them. Govt. Code §11346.9(b).

D. Statement of Facts⁴

1. Petitioner LTC's Evidence

LTB is a non-profit public benefit corporation that started advocating for mask choice in lieu of mandate at the beginning of 2021. McKeeman Decl., ¶¶ 3-4. LTB has over 20,000 members statewide. McKeeman Decl., ¶5. LTC is an initiative within LTB that seeks to protect families' right to make personal medical decisions and their child's right to an in-person education. McKeeman Decl., ¶4.

⁴ Petitioner LTC asks the court to judicially notice unspecified resolutions, policies, and official acts of GHC and other government bodies. This non-specific request does not comply with CRC 3.1306(c) and the request is denied. LTC also asks the court to judicially notice Exhibits H and I to the Declaration of Lee M. Andelin. These exhibits are part of the legislative history of SB 277 and are judicially noticed. Evid. Code §452(b).

GHC requests judicial notice of the following: (1) the Statutes of California and Amendments to the Codes, Chapter 134 passed in 1911 (Opp. Ex. 28); (2) the Statutes of California, Chapters 1, 2, and 370, passed in 1921 (Opp. Ex. 29); (3) the Office of Financial Systems and Management Assistance's ("OFS") "Economic and Fiscal Impact Analysis, Proposed Emergency Title 5 Regulations, Charter Schools – Independent Study (Chapter 162, Statutes of 1999 SB 434)" signed on December 7, 1999 (Opp. Ex. 31); (4) the Initial Statement of Reasons for Senate Bill 434 amending provisions of the Charter Schools Act (Opp. Ex. 32); (5) the April 22, 2015 Senate Judiciary Committee's SB 277 regarding Public Health: Vaccinations (Opp. Ex. 33); (6) the May 7, 2015 Third Reading of SB 277 by the Senate Rules Committee (Opp. Ex. 34); (7) the June 30, 2015 version of SB 277 (Opp. Ex. 35); (8) CDPH's Initial Statement of Reasons regarding Pre-kindergarten and School Immunization Requirements dated July 26, 2016 (Opp. Ex. 36); (9) the CDPH Immunization Branch process for Checking Immunization Requirements of K-12th Grade (Opp. Ex. 37); (10) the California Immunization Handbook (Opp. Ex. 38); (11) the Education Audit Appeals Panel's "2021-22 Guide for Annual Audits of K-12 Local Education Agencies and State Compliance Reporting" (Opp. Ex. 39); (12) CDPH's "K-12 Schools Guidance 2021-2022 Questions and Answers" (Opp. Ex. 41); (13) State Senator Dr. Richard Pan's ("Pan") statement dated April 14, 2022 (Opp. Ex. 42); (14) "California Becomes First State in Nation to Announce COVID-19 Vaccine Will be Added to List of Required School Vaccinations" from the website for the Office of the Governor (Opp. Ex. 43); (15) CDPH's announcement regarding the COVID-19 and flu vaccination in schools (Opp. Ex. 44); and (16) CDPH's "Notice of Proposed Rulemaking regarding Title 17, California Code of Regulations, DPH-11-004 Pre-Kindergarten and School Immunization Requirements." (Opp. Ex. 45). The court judicially notices Exhibits 28, 29, 32-36, and 45 (Evid. Code §452(b)) and Exhibits 31, 38-39 (Evid. §452(c)). The requests are denied for Exhibits 37 and 41-44.

The court has ruled on the parties' written objections to evidence (all of Petitioners' objections were overruled). The clerk is directed to scan and electronically file the court's rulings.

a. The GHC Policy

Parents and students who enrolled in GHC for the 2021–2022 school year relied on the promise of in-person learning. Romero Decl., ¶9; Harrelson Decl., ¶8; Basmadshyan Decl., ¶8; Luna Decl., ¶8; Hinds Decl., ¶8; Mekhael Decl., ¶8.

On September 9, 2021, LAUSD’s Board of Education adopted the Superintendent’s Resolution requiring full vaccination of all students at least 12 years old by December 19, 2021. Mekhael Decl., ¶¶ 15-17. The Resolution included charter schools co-located on LAUSD sites. Mekhael Decl., ¶16. The deadline for vaccination of any students partaking of in-person extracurricular activities was October 31, 2021. Mekhael Decl., ¶¶ 15, 17. LAUSD’s policy provides exemptions for foster youth, homeless, migrant, students from military families, or students with an Individual Educational Plan (“IEP”). Mekhael Decl., ¶18. LAUSD’s policy required any non-exempt and unvaccinated student to be involuntarily enrolled in its City of Angels Virtual Academy, a completely online independent-study program separate from its long-established City of Angels Independent Study program. Mekhael Decl., ¶19. As of December 7, 2021, however, about 34,000 LAUSD students were still unvaccinated, prompting it to delay implementation of the policy until Fall 2022. Mekhael Decl., ¶¶34-36, Ex. D.

On October 11, 2021, GHC’s governing board adopted a resolution on the “Implementation of mandatory student COVID-19 vaccination policy” (the Policy), modeled after LAUSD’s Resolution. Mekhael Decl., ¶¶ 10, 20-21. The GHC Policy required full vaccination of any student over 12 years old by January 11, 2022 in order for the student to access GHC facilities, in-person classes, sports, and extracurricular activities. Romero Decl., ¶11; Jones Decl., ¶11; Basmadshyan Decl., ¶11; Luna Decl., ¶10; Pascher Decl., ¶10; Hinds Decl., ¶10; Mekhael Decl., ¶¶ 22-24, Ex. A. The Policy’s only exemptions were for (1) an approved medical exemption submitted to GHC by November 19, 2021 for the spring semester, and (2) students granted conditional admittance as foster youth, homeless, a migrant, an in-service military family, or with an IEP. Mekhael Decl., ¶¶ 20, 27, Ex. A. There was no religious or personal belief exemption. Mekhael Decl., ¶27. Medical exemptions must be approved by a medical exemption committee whose identity and credentials are unknown to GHC families. Mekhael Decl., ¶27. The GHC Policy has no expiration or “sunset” date. Jones Decl., ¶49.

On October 12, 2021, GHC sent an email to families outlining the Policy, noting that there were no religious or personal exemptions. Mekhael Decl., ¶30, Ex. B. The email warned that any student who did not vaccinate could enroll in independent study but could not access in-person instruction or participate in any school activity or event on campus. Mekhael Decl., ¶30, Ex. B.

On December 14, 2021, GHC Director Brian Bauer (“Bauer”) released an email announcement that, due to GHC’s Policy, 99% of high school students on-campus during the spring semester and 40% of students in grades eight or below, were fully vaccinated. Mekhael Decl., ¶62, Ex. G.

b. Transfer to Independent Study

After adopting the Policy, GHC sent repeated emails warning students or their parents that students must either be vaccinated, apply for and accept independent study, or provide evidence of a medical exemption to avoid losing their enrollment in Spring 2022 classes. Romero Decl., ¶26; Reynold Decl., ¶¶ 26-27; Harrelson Decl., ¶16; Luna Decl., ¶22; Hinds Decl., ¶32; Mekhael

Decl., ¶¶ 31-32, Ex. C. If a student filed proof of vaccination or applied for independent study after November 19, 2021, that might lead to an undesirable schedule or rejection from independent study as space in classes was limited and priority would be given to timely applications. Mekhael Decl., ¶32, Ex. C.

On January 11, 2022, GHC transferred students to an independent study program that uses pre-recorded videos from third-party vendors. Romero Decl., ¶13; Jones Decl., ¶13; Reynolds Decl., ¶11; Basmadshyan Decl., ¶13; Mekhael Decl., ¶47. Some parents never signed an agreement for this transfer. Romero Decl., ¶27; Pascher Decl., ¶12. Others agreed to independent study only after numerous emails and with the fear that disenrollment would jeopardize college applications. Jones Decl., ¶50; Reynolds Decl., ¶¶ 25-28; Villamar Decl., ¶¶ 36-37; Luna Decl., ¶23; Pascher Decl., ¶¶ 19-21; Hinds Decl., ¶¶ 31, 33-34; Mekhael Decl., ¶43.

Unvaccinated students enrolled in GHC cannot attend class in person or participate in extracurricular activities; they must either partake in independent study programs or disenroll from the school altogether. McKeeman Decl., ¶7. Even after forcing independent study enrollment, GHC continues to send daily emails to some parents threatening to disenroll the student if he or she still does not receive a COVID-19 vaccine. Romero Decl., ¶29.

c. The Inadequacies of Independent Study

While GHC promotes a controlled, flexible program called iGrenada with both online learning and face-to-face instruction with opportunities for projects and student collaboration, that is not the independent study program given to unvaccinated students. Pascher Decl., ¶15. Unlike the “Zoom classes” of past semesters, the independent study program is a series of fixed learning modules devoid of interaction with peers or opportunities to ask teachers questions about the course content. Romero Decl., ¶¶ 18-19; Jones Decl., ¶¶ 19-20; Reynolds Decl., ¶¶ 12-13; Villamar Decl., ¶¶ 21-22, 24; Basmadshyan Decl., ¶¶ 13-15, 21; Luna Decl., ¶¶ 13-14; Pascher Decl., ¶¶ 15-16; Mekhael Decl., ¶39. The independent study program lacks access to certain classes: (1) advanced programs such as AP and IB courses (Romero Decl., ¶¶ 14, 17, 20-22; Reynolds Decl., ¶¶ 14-15; Harrelson Decl., ¶17; Basmadshyan Decl., ¶¶22-23; Luna Decl., ¶15; Pascher Decl., ¶13; Hinds Decl., ¶¶ 12-18, Ex. M-O; Mekhael Decl., ¶¶ 12, 42); (2) the full range of foreign language classes (Romero Decl., ¶23; Jones Decl., ¶¶ 21-25; Mekhael Decl., ¶13; Mekhael Decl., ¶44); (3) enrichment programs like Model United Nations (Romero Decl., ¶¶ 15, 23) and the Global Business and Finance Program (Mekhael Decl., ¶11); (4) physical fitness classes that involve more than reading and writing (Jones Decl., ¶¶ 18, 33; Villamar Decl., ¶¶ 18-20, Ex. S; Hinds Decl., ¶27); (5) practical music classes (Villamar Decl., ¶¶ 18, 24, Ex. S); and (6) enrichment programs that allow a student to be more competitive for college admission (Romero Decl., ¶24; Mekhael Decl., ¶¶ 14, 42).

The independent study replacements for other courses, such as Language Bird for foreign language classes, fail to replicate the student’s in-person educational experience. Romero Decl., ¶23; Jones Decl., ¶¶ 30-31. Some students have rejected virtual courses such as drawing and painting, chemistry, and AP psychology believing that it cannot replace the in-person class experience and support for those courses. Villamar Decl., ¶26; Basmadshyan Decl., ¶¶ 24-27; Pascher Decl., ¶13. GHC has rejected requests to attend class via Zoom, which all students did during GHC’s closure. Jones Decl., ¶27.

Independent study students also lose access to a variety of in-person nonacademic events

such as sports, clubs, the Winter Formal dance, the Spring prom, and eventually the commencement ceremony. Romero Decl., ¶16; Jones Decl., ¶¶ 14-15, 35, 48; Reynolds Decl., ¶¶ 16, 24; Villamar Decl., ¶¶ 15, 31, 34; Harrelson Decl., ¶¶ 13, 18; Luna Decl., ¶20; Luna Decl., ¶25; Pascher Decl., ¶¶ 17-18; Hinds Decl., ¶¶ 25-26, 29-30; Mekhael Decl., ¶¶ 33, 41.

During the pandemic, the long hours of online school in front of a computer have caused social harm and learning loss. Romero Decl., ¶8; Reynolds Decl., ¶4; Villamar Decl., ¶7; Harrelson Decl., ¶7; Basmadshyan Decl., ¶7; Luna Decl., ¶7; Pascher Decl., ¶7; Hinds Decl., ¶7; Mekhael Decl., ¶7. The return of in-person classes prior to the Policy provided significant benefits to children who suffered under remote learning. Romero Decl., ¶10; Jones Decl., ¶9; Reynolds Decl., ¶8; Villamar Decl., ¶9; Harrelson Decl., ¶10; Basmadshyan Decl., ¶9; Luna Decl., ¶9; Pascher Decl., ¶9; Hinds Decl., ¶9; Mekhael Decl., ¶9. The independent study program returns students to a state of isolation and leaves them uninterested in school, all while knowing that their vaccinated friends are together with their teachers and enjoying normal school activities. Romero Decl., ¶30; Reynolds Decl., ¶21; Villamar Decl., ¶¶ 12, 35; Harrelson Decl., ¶¶ 15-16; Basmadshyan Decl., ¶¶ 16-17; Luna Decl., ¶24; Pascher Decl., ¶22; Hinds Decl., ¶¶ 35-36. The Policy has negatively impacted the mental well-being of unvaccinated students, sometimes creating feelings of isolation or hostility against them even beyond the GHC threatened disenrollment. Reynolds Decl., ¶22; Basmadshyan Decl., ¶¶ 29-30; Mekhael ¶61. This has manifested as loss of weight, musculature, self-confidence, and general disinterest in some cases. Reynolds Decl., ¶¶ 17-19, 23; Villamar Decl., ¶¶ 14-15, 32; Harrelson Decl., ¶19.⁵

d. Equitable Issues

Some parents of unvaccinated GHC students know of vaccinated students who nonetheless contracted the virus, recovered, and returned to campus. Romero Decl., ¶31; Jones Decl., ¶¶ 37-39; Harrelson Decl., ¶18; Hinds Decl., ¶28; Mekhael Decl., ¶63.

GHC plays against teams with unvaccinated students both on and off the GHC campus. Jones Decl., ¶40. GHC administrator Julia Howelman responded to concerns about this on February 6, 2022 by sending copies of the County DPH's Protocol for Youth Sports, Appendix S ("Sports Protocol"). Jones Decl., ¶44, Ex. Q. The Sports Protocol recommends vaccinations for all athletes ages 5 or older but does not require it. It simply requires unvaccinated students in moderate or high-risk sports to test negative once a week, preferably twice for indoor moderate or high-risk sports. Jones Decl., ¶45, Ex. Q. Additionally, it lists a variety of sports as low-risk and therefore exempt. Jones Decl., ¶45, Ex. Q.

On December 7, 2021, the Los Angeles Times noted that 34,000 LAUSD students had not complied with LAUSD's vaccination mandate, portending significant disruption in their education as they will be barred from campus. Mekhael Decl., ¶¶ 34-35. On December 14, 2021, LAUSD's Board voted to postpone enforcement until Fall 2022 and suspend efforts to transfer unvaccinated students to independent study. Mekhael Decl., ¶36. GHC did not follow LAUSD's lead and continues to enforce the Policy. Mekhael Decl., ¶38.

e. Medical Expert Opinion

⁵ Technical issues also have plagued the independent study experience. Villamar Decl., ¶¶ 25, 27-28, 30; Luna Decl., ¶¶ 18-19; Pascher Decl., ¶¶ 13-14.

Richard Scott French, M.D., a board-certified emergency medicine physician, is Petitioners' medical expert. French Decl., ¶1. Children are not little adults. French Decl., ¶11. Their immune systems are in some ways more robust than adult immune systems, but they have unique vulnerabilities so as to require broader and longer-term testing of the COVID-19 vaccine than that has been applied to adults. French Decl., ¶11.

Children are not the primary source of COVID-19 transmission in a community. French Decl., ¶12. In February 2021, a Center for Disease Control and Prevention ("CDC") study of eight elementary schools found that teachers who did not use basic mitigation measures, not students, were the central source of in-school transmission. French Decl., ¶13.

Another three-month study of 5,530 students and staff in Wisconsin schools in February 2021 found that only seven out of 191 COVID-19 cases were transmitted between students while student-to-adult transmission was nonexistent. French Decl., ¶14. The CDC concluded that attending school where recommended mitigation strategies are implemented might not place children in a higher risk environment than exists in the community. French Decl., ¶14.

A July 2021 comprehensive CDC review of COVID-19 transmission in K-12 schools found that, although outbreaks do occur in schools, transmission in school settings was lower than or similar to community transmission rates when preventative measures were in place. French Decl., ¶16.

A Swedish study published in the New England Journal of Medicine found that even schools that remained open through 2020-2021 and did not have a mask mandate experienced a low incidence of severe COVID-19 in children and adults. French Decl., ¶15. The ICU admission of teachers was lower than for adults in other occupations not routinely exposed to children. French Decl., ¶15. Of the 15 children who were admitted to an ICU – four of them with preexisting conditions – no child with COVID-19 died. French Decl., ¶15.

For clinicians, the concern is focused on death rate and ICU admission rate, not the infection rate of a highly contagious virus. French Decl., ¶ 18. The mortality rate of children who contract the virus is very low, less than 0.01% according to the American Academy of Pediatrics. French Decl., ¶ 18. This accounts for less than 0.25% of all COVID deaths. French Decl., ¶¶ 17-18. Three states have reported zero deaths. French Decl., ¶18. The CDC has reported 272 male and 218 female deaths of children between the ages of 5 and 18. French Decl., ¶19. When H1N1 influenza mortality rates were at similar levels in 2009, schools did not mandate the H1N1 vaccine. French Decl., ¶20.

The natural immunity for children that results from contracting and recovering from the disease seems more effective than immunity from vaccination. French Decl., ¶21. A Swedish nationwide cohort study published in JAMA on October 11, 2021 found that the decreased likelihood of infecting family members was the same for vaccinated individuals and those recovering from previous infection. French Decl., ¶22. Recent data similarly shows that those recovering from previous infections have a lower, or at least equivalent, hospitalization rate as those who are fully immunized. French Decl., ¶28.

A June 19, 2021 Cleveland Clinic Study found that none of 1,359 employees recovering from COVID-19 were not re-infected upon exposure, suggesting that they did not need the vaccine. French Decl., ¶23. Another study found that individuals seropositive from a prior COVID-19 infection but not vaccinated had 64.5% protection from any infection, 69.2% protection against symptomatic infection, and 79.4% protection against the Delta variant. French Decl., ¶24. A

May 3, 2021 study found that natural immunity utilized a highly augmented interferon response absent from vaccination. French Decl., ¶25. Another study on October 28, 2021 concluded that vaccination does not completely prevent transmission of the virus within the household, the most common site of transmission. French Decl., ¶26.

This information, combined with reports of serious adverse side effects to the vaccine such as myocarditis – inflammation of the heart muscle – suggests that a risk-benefit analysis does not support vaccination of children with no known risk factors. French Decl., ¶¶ 30-38, 57. Due to its recent development, the long-term safety of the Pfizer mRNA COVID-19 vaccine for children under 17 has not been established. French Decl., ¶32. Current data shows that rates of myocarditis cases were highest after the second vaccination dose in males ages 12 to 24. French Decl., ¶34. One article noted that, of seven male adolescents who suffered symptomatic myocarditis after Pfizer vaccination, all seven recovered but one had heart damage. French Decl., ¶38.

Such symptoms would normally cause scientists and public health officials to pause before mandating a vaccine, particularly in the absence of data about long-term effects. Finland, Sweden, Denmark, and Norway have refrained from using mRNA vaccines on younger age groups for that reason. French Decl., ¶¶ 37, 39-41. COVID-19 vaccines induce human cells to produce COVID-19 spike proteins and presents a risk of autoimmune diseases such as subsequent myocarditis. French Decl., ¶¶ 43-44, 54. The risk-benefit analysis for at-risk children favors vaccination with the consent of a parent. French Decl., ¶42. There is no evidence of a favorable risk-benefit analysis supporting a mandatory vaccine for all healthy children. ¶42.

The standard vaccines required for all children have undergone the full FDA testing regimen. French Decl., ¶46. In contrast, the COVID-19 vaccine has only received EUA for those less than 15 and full authorization for those 16 years old and above. French Decl., ¶46. Mandating vaccinations for children who do not need them also diverts vaccinations from those at higher risks. French Decl., ¶60.

2. GHC's Evidence

a. Background

GHC is an independent public charter school operated by a California nonprofit public benefit corporation, established pursuant to the CSA. Bauer Decl., ¶2. It currently has over 5,610 students and 550 staff members across two campuses. Bauer Decl., ¶2.

b. Medical Expert Opinion

Michael Bolaris, M.D., a pediatric infectious disease specialist, is GHC's medical expert. Bolaris Decl., ¶1. The Policy is a highly prudent response and mitigation measure to COVID-19. Bolaris Decl., ¶11. Vaccination against COVID-19 is the most effective tool to reduce the spread of infection and prevent serious illness, hospitalization, and death. Bolaris Decl., ¶11.

Data shows that vaccination, while not perfect, prevents hospitalization even among teen agers. Bolaris Decl., ¶26. As of the height of the Omicron variant, children who remain unvaccinated against COVID-19 are up to three times greater more likely to get infected than their vaccinated counterparts. Bolaris Decl., ¶¶ 13, 23, 37; RESP-34; RESP-75-77; RESP-158. In December of 2021, the hospitalization rate between the groups was different by a factor of six. Bolaris Decl., ¶26; RESP-82. Additionally, the Omicron hospitalization rate is five times higher

among children younger than 4 years old than the Delta hospitalization rate. Bolaris Decl., ¶27; RESP-95. This is consistent with international data suggesting that new variants pose a threat to younger demographics than older variants. Bolaris Decl., ¶28; RESP-108.

It appears that Omicron poses a greater risk of hospitalization for children than the Delta strain. Bolaris Decl., ¶27. While these numbers are small, they show that children remain at risk and vaccination reduces the risk of acquiring the Omicron variant. Bolaris Decl., ¶28. It also reduces the risk of hospitalization and death if the Omicron variant is acquired. Bolaris Decl., ¶29. For adolescent males 12-17 years old, the risk of myocarditis is two to six times lower from vaccination than from COVID-19 itself. Bolaris Decl., ¶30.

The rate of death, hospitalization, and serious illness among children is not the only concern. Bolaris Decl., ¶¶ 14, 31. Funds are spent on the logistical challenges of protecting staff and the immunocompromised from infection, including testing programs and substitute teacher pay. Bolaris Decl., ¶14. The death of a loved one is an extremely disruptive and traumatic event that impairs a student's ability to learn and a teacher to teach. Bolaris Decl., ¶14. Any measure to reduce the spread is therefore critical to ending the pandemic. Bolaris Decl., ¶15.

Because the vaccine is not 100% effective, near-universal vaccination is critical to preventing a single case from becoming an outbreak and non-medical exemptions undermine that goal. Bolaris Decl., ¶¶ 16-17. While other measures have been effective in the past, the unique strengths of the Omicron variant make it a greater concern while many schools are relaxing one of those measures – a mask requirement. Bolaris Decl., ¶34. Another measure, testing, is limited by the fact that symptoms can take days before they appear while the student continues to spread the virus. Bolaris Decl., ¶36.

The vaccine is safe overall, and the CDC, American Medical Association (“AMA”), American Academy of Pediatrics, and others all recommend the COVID-19 vaccine as safe and effective way to keep one from getting and spreading the virus that causes COVID-19. Bolaris Decl., ¶20. The AMA has concluded that serious problems are rare, and benefits outweigh the risks. Bolaris Decl., ¶20; RESP-1-2. The American Academy of Pediatrics has publicly applauded the CDC's endorsement of the vaccine for children ages five to 11. Bolaris Decl., ¶20; RESP-4.

The Pfizer vaccine is fully approved for ages 16 and above and only approved for children ages 5-15 under an EUA, that still means that it is safe and effective and that FDA criteria have been met, including evidence that strongly suggests patients have benefited from the treatment. Bolaris Decl., ¶21. CDPH also recommends the vaccine for all eligible children and adults and encourages widespread vaccination in schools. Bolaris Decl., ¶22, Ex. 5. Vaccination of a student population will allow two to three times fewer students to get sick from the virus. Bolaris Decl., ¶37.

c. Statewide and Local Public Agency COVID Vaccination Policies

Following Spring Break of 2022, Los Angeles County (“County”) saw an increase in the number of COVID-19 infections among County school students and staff. Bolaris Decl., ¶32; RESP-144. Spread of the virus therefore remains an active risk that can lead to classroom closures if students and staff alike do not take appropriate action. Bolaris Decl., ¶15.

The CDC identifies vaccination as the leading public health prevention strategy to end the COVID-19 pandemic and allow students to safely return to in-person classes and extracurricular

activities. Bauer Decl., ¶8; RESP-179. CDPH and the County's Department of Public Health ("DPH") also consider vaccination of all eligible people crucial to protecting communities and schools, even as CDPH encourages mask mandates. Bauer Decl., ¶¶ 10-11; Bolaris Decl., ¶22; RESP-23; RESP-197. This will remain important given the possibility of new variants, such as the Omicron variant, proved highly communicable and disruptive. Bolaris Decl., ¶¶ 18-19. That the current vaccine does not eliminate the possibility of contracting COVID-19 does not change this fact. Scientists continue to work on more effective vaccines and will evaluate when additional dosages or vaccines are necessary. Bolaris Decl., ¶19.

Throughout the pandemic, CDPH has promoted vaccination, even launching a program whereby students could register to take both flu and COVID vaccinations concurrently in clinics. RESP-455.

In October 2021, the Office of the Governor ("Governor") released a statement announcing that he was directing CDPH to add the COVID-19 vaccine to the list of required school vaccinations. RESP-452. This would be accomplished by regulations promulgated pursuant to H&S Code section 120335(b)(11), would apply to all pupils in public or private school, will be phased in by grades, and would be a condition of in-person student attendance. RESP-453. Non-vaccinated students would be eligible for independent study but not in-person instruction. RESP-453. The announcement noted that requirements established by regulation, not legislation, must include medical and personal belief exemptions per H&S Code section 120338. RESP-453. Five school districts in the state, including LAUSD, already had vaccine mandates and the Governor encouraged other schools to adopt them as they see fit. RESP-454.

CDPH recommends that, for any sport, schools consider ensuring that all student athletes, parents, volunteers and coaches are vaccinated. RESP-446. Similarly, CDPH recommends that schools ensure that all student and adult attendees at dances or large assemblies are vaccinated, conducting pre-entry testing if necessary. RESP-447-48.

On August 28, 2021, the County's DPH observed a four-fold difference in the COVID-19 rate between vaccinated and unvaccinated children, as well as a general increase in cases. Bauer Decl., ¶12; RESP-219. An October 2, 2021 press release noted the same discrepancy and concluded that community vaccination was the best protective measure. Bauer Decl., ¶13; RESP-232. On March 11, 2022, DPH issued updated safety protocols for public schools that identified high vaccination rates as "the first and best way" to lower the risk of infection among the immunocompromised. Bauer Decl., ¶11; RESP-205.

In a statement issued on April 14, 2022, Senator/Doctor Richard Pan asserted that a statewide mandate requiring vaccinations in schools is not the immediate priority until children have greater access to COVID-19 vaccines. RESP-450. Until then, school districts with suitable vaccine access should enact similar policies. RESP-450.

d. The GHC Policy

In the fall 2021 semester, at least 150 GHC students and 25 staff members (2.8% of the GHC population) were diagnosed with COVID-19. Bauer Decl., ¶16. Additionally, 800 students from grades 9-12 (20% of the student population in that grade range) and 109 students from the TK-8 grades (11% of the student population in that grade range) had to be quarantined. Bauer Decl., ¶¶ 17-18. One teacher was hospitalized, and staff members spent hours performing contact tracing in response to positive cases. Bauer Decl., ¶¶ 19-20.

Following a proposal at an October 11 2021 governing board meeting, GHC announced the Policy mandating vaccination for all GHC students age 12 and older. Bauer Decl., ¶¶ 22, 29; RESP-245; RESP-463. GHC's charter is authorized by LAUSD, and its COVID-19 vaccination policy was "was developed in alignment with" LAUSD's policy. RESP-464. GHC has resolved to "comply with ... District health and safety policies and procedures as they relate to charter schools on District sites." RESP-466.

GHC set a November 19 deadline for a student to submit proof of the first vaccination dose and a December 17 deadline to submit proof of the second dose to avoid independent study enrollment. RESP-246. Although parents could seek a medical exemption, the Policy deliberately prohibited all religious and personal belief exemptions to increase vaccination rates. Bauer Decl., ¶¶27-28; RESP-246-47.

The Policy's lack of a personal belief exemption is consistent with California's exemptions for other immunizations; only personal belief exemptions filed before 2016 exempt a student from applicable immunizations. RESP-364. While at-home students receiving no classroom instruction do not need immunization, parents are still required to provide, and schools are still required to maintain, immunization records. RESP-364.

The Policy provides conditional admission to unvaccinated homeless students, migrant students, and military families, but this is not an exemption and only defers the deadline for vaccination. Bauer Decl., ¶30.

A Medical Exemption Committee led by a doctor from UCLA's Pediatric Infectious Disease department reviews all medical exemption requests. Bauer Decl., ¶33. GHC has granted 18 student medical exemptions based on medical documentation that it would be unsafe for the student to receive the vaccination based on his or her medical condition. Bauer Decl., ¶33. Denied medical exemption requests are subject to appeal to a panel of independent medical experts. Bauer Decl., ¶33.

Although GHC staff members are able to request medical or personal exemptions, none have been granted; an employee who is not vaccinated is not allowed on campus. Bauer Decl., ¶32.

On January 24, 2022, GHC's governing board voted to keep the Policy in place. RESP-441. Many students and parents feel safer with the Policy even if vaccination does not completely prevent infection. *See* Bauer Decl., ¶¶ 24-25. This includes Lily Ybarra, whose immunocompromised son suffers from dysmorphia due to contracting the flu at a toddler. Ybarra Decl., ¶¶ 2-3. Because his condition reduces the vaccine efficacy for himself, her son relies on community measures such as masking and vaccination. Ybarra Decl., ¶¶ 4-7. Even a vaccinated student not currently on campus considers the Policy vital to her decision to return. Jenkins Decl., ¶14. A parent who initially was hesitant about vaccinating her son now understands that vaccination is key to returning to a state of normalcy. Farmer Decl., ¶8.

The Policy's results are apparent. On January 14, 2022, LAUSD reported an attendance rate of 66.8%, even as its incoming chief claimed its schools were safe and urged parents to send their students to class. RESP-251. Long Beach Unified School District's attendance rate was 70% for the first few weeks of the spring semester, and the rate for New York and Boston schools was 70%. Bauer Decl., ¶36; RESP-262-67.

In contrast, GHC's spring semester attendance started at 86% and rose to 91.3%. Bauer Decl., ¶¶ 37-38. 99% of GHC's onsite students are vaccinated and its onsite staff is 100%

vaccinated. Bauer Decl., ¶32. Additionally, GHC’s chronic absenteeism rate – defined as more than 15 absences through March – is 11.7% for grades 9-12, compared with 46% for LAUSD. Bauer Decl., ¶39.

GHC’s administrative team is aware that the Policy must remain subject to modification and adaptation as the challenges of the pandemic continue to evolve. Bauer Decl., ¶5. GHC also feels the Policy remains appropriate given the rise of other variants and the risk that a mass outbreak can cause to the community as a whole. Bauer Decl., ¶¶ 41-42, 66-67; Bolaris Decl., ¶19. No state or county agency has complained that GHC is violating immunization law by enacting the Policy. Bauer Decl., ¶69.

e. GHC’s Independent Study

In 1961, then-Attorney General Stanley Mosk issued an opinion holding that the word “admission” refers to examining the qualifications of the prospective pupil and permitting him to become a pupil. RESP-283. If the Legislature intends to instead refer to the daily admission of a student into class, it must instead use the term “admitted to class.” RESP-283-84.

GHC staff understands the term “attend” to apply to anyone enrolled in a school as a student, whether they receive in-class instruction or independent study. Corpus Decl., ¶¶ 4-6. The term “continued attendance” refers to eligibility to remain enrolled at school, not necessarily to receive credit for in-class work. Corpus Decl., ¶7.

GHC provides independent study to grades 9-12 through iGranada, which provides access to STEM and advanced programming at the same level as in-person classes, taught by highly qualified teachers. Bauer Decl., ¶56. For grades TK-8, GHC has used iGranada as a model for its independent study program coordinated by the same teachers as on-campus instruction. Bauer Decl., ¶62.

iGranada has offered this program to GHC’s high school students for 12 years, long before the pandemic. Howelman Decl., ¶3. All courses are approved by the University of California, and, with the exception of a few courses, they include a full slate of AP and International Baccalaureate (“IB”) classes. Howelman Decl., ¶¶ 6, 19-20. GHC’s independent study students score well on the corresponding AP tests. Howelman Decl., ¶19. This independent study qualifies for high school graduation and eligibility for admission to the University of California and California State University systems. Howelman Decl., ¶6.

Independent study combines the schedule flexibility of remote learning with access to advisors and supervising GHC administrators/teachers, with which students must meet at least one hour per week. Bauer Decl., ¶¶ 57, 60; Howelman Decl., ¶6. That flexibility allows some classes to be more rigorous than on-campus equivalents insofar as students can dive deeper into topics because courses are more customized to their needs. Howelman Decl., ¶¶ 5, 14. By the same token, those who need to pace themselves and spend more time on a subject can spend more time reviewing the content of mathematics classes. Jenkins Decl., ¶10.

As a general matter, a traditional school course and an independent study course are designed in the same way. Howelman Decl., ¶8. Independent study students often have more options for interacting with and obtaining support from teachers than in-class counterparts. Howelman Decl., ¶¶ 10-11; Jenkins Decl., ¶12. While the lectures are non-interactive, pre-recorded videos – which independent study students can replay and review as needed – the support students receive and other components of the class are part of the experience. Howelman Decl.,

¶13; Farmer Decl., ¶4. Assignments through the online platform Buzz are interactive and challenging, often requiring critical thinking, research, and high-level analysis. Jenkins Decl., ¶11.

iGranada also offers on-campus resources for independent study students, although the student must meet the vaccination requirements to access them. Bauer Decl., ¶58; Howelman Decl., ¶16. These resources are optional and not an integral component of iGranada education. Howelman Decl., ¶17; Farmer Decl., ¶5. 90 vaccinated students chose to enroll in independent study and access the on-campus resources and activities as needed. Bauer Decl., ¶58.

Aside from a few short-term independent study courses coordinated directly with GHC classroom teachers, all high school students enrolled in independent study were offered iGranada; there is no other program. Bauer Decl., ¶61; Howelman Decl., ¶7. For some yearlong classes not available through iGranada, GHC arranged for students to remain enrolled in those classes with livestreamed lessons and supervision from their fall semester teachers. Howelman Decl., ¶18. Other courses, such as dance or physical education, were impossible to conduct identically online, but GHC then strove to help a student continue a course of study in the given discipline. Howelman Decl., ¶24. Arranging for these options sometimes required programming adjustments at the beginning of the semester, which is typical. Howelman Decl., ¶23.

Ultimately, independent study requires a different mindset than in-person classes and some students are a better fit than others. Howelman Decl., ¶26. No matter how effective iGranada is, it cannot satisfy some students who need classroom-based study. Howelman Decl., ¶26.

iGranada has a graduation rate of 94%, with 90% then going on to further higher education. Bauer Decl., ¶59. GHC's independent study programs are on par with GHC's campus-based program, are superior to independent study programs in other districts, and have not resulted in a loss of educational opportunity or quality. Bauer Decl., ¶63; Howelman Decl., ¶25. That there are differences between independent study and in-person GHC classes does not make them lower quality. Howelman Decl., ¶¶ 21-22.

f. Student Options

The Education Audit Appeals Panel issues a guide for annual audits that outlines the consequences of all regulatory violations, but only in terms of adjustments to a charter school's funding. RESP-384. This includes the sections on immunization and IS. RESP-416-23.

GHC denies ever promising any parent or student that all classes in the 2021-2022 school year would be in person. Bauer Decl., ¶6. No student has the absolute right to any course of study at GHC; the school maintains responsibility for deciding which academic programs it will offer, program policies, and eligibility requirements for those programs. Bauer Decl., ¶51. At the same time, no unvaccinated student has ever been coerced into joining the independent study program; such a student may pursue classroom education at other schools, and some have. Bauer Decl., ¶¶ 44-45, 50, 53; Howelman Decl., ¶27. Nor has any student has been encouraged to disenroll from GHC. Bauer Decl., ¶54. To the contrary, GHC actively encourages either vaccination for in-person classes or independent study enrollment. Bauer Decl., ¶54; Howelman Decl., ¶28.

3. Reply Evidence

In a meeting on May 10, 2022, LAUSD's Board of Education voted to align its vaccination

requirement with the state's timeline, thereby delaying implementation to July 1, 2023. Andelin Reply Decl., ¶4, Ex. A, p. 18. This includes any LAUSD-approved charter schools, regardless of location. Andelin Reply Decl., ¶4, Ex. A, p. 18. The presentation advocating this proposal explained that the delay was sought in light of the high vaccination rate and the endemic status of the virus. Andelin Reply Decl., ¶5, Ex. B. LAUSD plans to launch a robust communication campaign emphasizing the importance of vaccinations for all students. Andelin Reply Decl., ¶5, Ex. B.

E. Analysis

Petitioner LTC argues that the GHC Policy is inconsistent with the CSA and the independent study laws, is inconsistent with the State's school vaccination laws, and is preempted.⁶ As LTC suggests, this is mostly a legal question for which the court exercises its independent judgment. McIntosh v. Aubry, (1983) 14 Cal.App.4th 1576, 1584. Pet. Op. Br. at 10. GHC correctly adds that LTC's supporting declarations complaining about the education received by individual students are not particularly relevant to these issues. See Opp. at 10.

1. Ministerial Duty

GHC argues that LTC's sole theory is that the Policy is preempted by state law. LTC makes no argument that the Policy breaches a statutory obligation, is not supported by substantial evidence, or constitutes an abuse of discretion. GHC argues that LTC does not identify any clear and present ministerial legal duty on the causes of action it has pursued, and the California Supreme Court has rejected attempts to find a mandatory implied duty read into a statute. Tuthill v. City of San Buenaventura, (2014) 223 Cal.App.4th 1081, 1090 (citing Guzman v. County of Monterey, (2009) 46 Cal.4th 887, 902-11). GHC contends that its Policy is authorized by statute, is compatible with the school vaccination laws, does not mandate that any student be vaccinated to be admitted, enrolled, and receive a public education, and is not legally subject to preemption. Opp. at 13.

LTC replies that the state Department of Education ("DOE") considers GHC to be a public school, and public schools are government entities. GHC's Policy violates numerous state statutes imposing three ministerial duties: (1) GHC must unconditionally admit students who have shown proof that they have received the state-required vaccination regimen; (2) GHC may not disenroll or bar enrolled students from school facilities on the basis of COVID-19 vaccination status; and (3) GHC may not require students to enroll in independent study because of their COVID-19 vaccination status. Reply at 9-10.

The court agrees with LTC that charter school statutory duties for the admission and disenrollment of students, and for independent study, are clear and present ministerial duties the violation of which is subject to traditional mandamus.⁷

⁶ LTC is proceeding only on the Petition's first, second, and third causes of action and has withdrawn the fourth through ninth causes of action. Pet. Op. Br. at 7, n. 1. As such, the fourth through ninth claims are ordered dismissed.

⁷ The Policy's preemption is also subject to declaratory relief. Although not pled as such, the court construes LTC's third cause of action as a declaratory relief claim.

2. GHC's Policy Is Not Barred by the CSA and the Independent Study Laws

LTC makes six arguments that GHC's Policy is inconsistent with either the CSA or the independent study laws.

First, LTC notes that the CSA requires GHC's charter to include admission policies and procedures that they are consistent with Educ. Code section 47605. Educ. Code §47605(c)(5)(H). Educ. Code §47605 (e) provides that "[a] charter school shall admit all pupils who wish to attend the charter school." Educ. Code §47605(e)(2)(A) (emphasis added). "If the number of pupils who wish to attend the charter school exceeds the charter school's capacity, attendance, except for existing pupils of the charter school, shall be determined by a public random drawing." Educ. Code §47605(e)(2)(B). While certain preferences are allowed – e.g., siblings of existing students -- "[e]ach type of preference shall be approved by the chartering authority at a public hearing." Educ. Code §47605(e)(2)(B)(i). GHC is at maximum capacity and admits students through a lottery. GHC's chartering authority is DOE. GHC's Policy explicitly give admissions preference to students who have been vaccinated for COVID-19 and were implemented through board resolutions. *See* GHC Exs. 23, 40, 46, 47, 48. They were not approved by DOE and therefore are invalid. Reply at 4-5.

The short answer to this argument is that LTC has provided no evidence that GHC gives preference to lottery candidates who have been vaccinated.

Second, LTC argues that the Policy violates the CSA because it forces unvaccinated students to enroll in its independent study program. The CSA provides: "[A] charter school that provides independent study shall comply with Article 5.5 (commencing with Section 51745) of Chapter 5 of Part 28 and implementing regulations adopted thereunder." Educ. Code §47612.5(b). The independent study laws require that a student's enrollment in an independent study program be voluntary: "independent study is an optional educational alternative in which no pupil may be required to participate." Educ. Code §51747(f)(8). Regulations promulgated by DOE further emphasize that "a pupil's ... choice to commence, or to continue in, independent study must not be coerced" 5 CCR §11700 (d)(2)(A). Pet. Op. Br. at 15.

To ensure that a choice to enroll in independent study is voluntary, and in a student's best interest, enrollment can occur only if there has been a "pupil-parent-educator conference" (Ed. Code §51747(h)(2)) and "a signed written agreement for independent study from the pupil, or the pupil's parent or legal guardian if the pupil is less than 18 years of age". Educ. Code §51747(f)(9)(F)).⁸ LTC presents evidence that enrollment in GHC's independent study is not voluntary. Basmadzhyan Decl., ¶13; Green Decl., ¶¶ 9–14; Harrelson Decl., ¶16; Hinds Decl., ¶¶ 31–34; Jones Decl., ¶¶ 13, 50–51; Luna Decl., ¶¶ 21–24; Mekhael Decl., ¶¶ 32–33, 60; Pascher Decl., ¶¶ 19–21; Reynolds Decl., ¶¶ 25–28; Romero Decl., ¶ 13, 25–30; Villamar Decl., ¶¶ 36–37.⁹ Pet. Op. Br. at 15; Reply at 8.

⁸ GHC is obligated to inform students of these rights. For the 2021–22 school year, school districts must "notify the parents and guardians of all enrolled pupils" of their rights, "including, but not limited to, the right to request a pupil-parent-educator conference meeting before enrollment pursuant to this section [and] pupil rights regarding procedures for enrolling, disenrolling, and reenrolling in independent study" Educ. Code §51747(h)(1). Pet. Op. Br. at 17; Reply at 8-9.

⁹ Although some of the moving papers' supporting declarations pertain to NWC and others

Third, LTC notes that the independent study regulations promulgated by the state's Superintendent of Public Instruction require that the independent study program offered by GHC be "substantially equivalent in quality and in quantity to classroom instruction" 5 CCR §11701.5(a). LTC's declarations indicate that GHC's independent study is substantially inferior to the in-person education provided in GHC's classrooms. Basmadzhyan Decl., ¶¶ 13–28; Green Decl., ¶¶ 14–17, 22, 27–37; Harrelson Decl., ¶¶ 17–23; Hinds Decl., ¶¶ 12–27; Jones Decl., ¶¶ 16–32; 52–55; Luna Decl., ¶¶ 13–20, 24–26; Mekhael Decl., ¶¶ 11–13, 39–46, 60–61; Pascher Decl., ¶¶ 12–18, 22–23; Reynolds Decl., ¶¶ 11–15; Romero Decl., ¶¶ 13–24; Villamar Decl., ¶¶ 11–35. Pet. Op. Br. at 15-16.

Fourth, the independent study laws require that students in an independent study program be given access to all school resources. A school providing independent study "shall ensure the same access to all existing services and resources in the school in which the pupil is enrolled ... as is available to all other pupils in the school." Educ. Code §51746 (emphasis added). Similarly, DOE regulations provide that "pupils ... who choose to engage in independent study are to have the same access to existing services and resources as the other pupils ... of the school in which the independent study pupil ... is enrolled." 5 CCR §11701.5(b). "[P]upils ... who choose to engage in independent study are to have equality of rights and privileges with the pupils ... of the district ... who choose to continue in the regular school program." 5 CCR §11701.5(c). These services, rights, and resources include the use of campus facilities, participation in the student's chosen course of study (including AP classes), and participation in extracurricular activities. LTC contends that students who do not receive the COVID-19 vaccine will not have the same services, rights, and resources as students attending GHC's classroom. Pet. Op. Br. at 16.

Fifth, the independent study laws require that independent study students must be allowed to return to classroom instruction. A student enrolled in an independent study program retains the option to return to his regular classroom, and the school is required to "transition pupils whose families wish to return to in-person instruction from independent study expeditiously, and, in no case, later than five instructional days." Educ. Code §51747(f). GHC's Policy has no expiration date, and students cannot return to in-person instruction as long as they remain unvaccinated. *See, e.g.*, Jones Decl., ¶49. Pet. Op. Br. at 16-17.

Sixth, the CSA precludes a charter school from encouraging students to disenroll. "A charter school shall not encourage a pupil currently attending the charter school to disenroll from the charter school or transfer to another school for any reason (except for suspension or expulsion)." Educ. Code §47605(e)(2)(C). LTC argues that GHC violates this requirement by encouraging students who have not received COVID-19 vaccination to disenroll, and involuntarily disenrolling them if they do not wish to participate in independent study. *See, e.g.*, Basmadzhyan Decl., ¶ 29; Green Decl., ¶¶ 11–14, 18; Hinds Decl., ¶¶ 32–34; Mekhael Decl., ¶¶ 31–33, Exs. C, D, E; Reynolds Decl., ¶¶ 25–28. Pet. Op. Br. at 17. GHC is telling unvaccinated students that their only choice is to disenroll from the school or enroll in independent study, a behavior bordering on coercion. Reply at 9.

These issues all concern whether the CSA or the independent study laws preclude GHC from using COVID-19 vaccination status to determine a student's eligibility for site access.

pertain to GHC, the court's analysis does not separate them as a matter of convenience.

LTC's arguments that independent study must be voluntary and GHC may not require students to participate in independent study, that the independent study program is inferior, that students must be given access to all school resources and the option of returning to the classroom, and that they have been encouraged to disenroll are all indirect consequences of the Policy's requirement of student vaccination for site access. They do not reflect a clear ministerial duty with respect to mandatory vaccination, and such a duty may not be implied. Tuthill v. City of San Buenaventura, *supra*, 223 Cal.App.4th at 1090. The Policy does not mention independent study and its conditioning of student access to campus on a COVID-19 vaccination does not conflict with the CSA or the independent study laws. These laws are silent on the topic of immunization and do not guarantee students access to a charter school classroom education free of site access conditions.

More specifically, Educ. Code section 51746 provides that schools "shall ensure the same access to all existing services and resources in the school in which the pupil is enrolled pursuant to Section 51748 as is available to all other pupils in the school." (emphasis added). The resources available to classroom attending students are contingent on their compliance with campus policies, and those resources are available to independent study students who comply with campus policies. Bauer Decl. ¶58; Weir Decl. ¶50.

As for the substantial equivalence of independent study, GHC notes that the defined standard of quality is that "a pupil ... who engages in independent study ... will be enabled to complete the ... adopted course of study within the customary time frame for completion of that course of study." 5 CCR §11701.5(a). GHC's independent study program exceeds that standard. Bauer Decl., ¶¶ 55-63; Howelman Decl., ¶¶ 2-28; Weir Decl., ¶¶ 48-55; Barnett Decl., ¶¶ 4-12. Opp. at 22-23.

It seems obvious that independent study is generally inferior to classroom learning for most students. This is true for a variety of reasons, not the least of which is the lack of social interaction with one's peers. But GHC's independent study program does lead to completion of the requisite course of study and high school graduation, and LTC is not suing GHC over the inadequacy of its independent study program. Rather, LTC contends that unvaccinated students should be permitted to attend school in the classroom, which they prefer over independent study. GHC's Policy does not require students to participate in independent study. Students have the options of continuing their education at GHC either through vaccination or independent study and of leaving GHC if they do not wish either. Bauer Decl. ¶¶47-54; Weir Decl. ¶¶22-23, 54-55.

Contrary to LTC's claims, no student has been coerced to participate in independent study and no student has been encouraged to disenroll from the school. The fact that "independent study must not be coerced" (5 CCR section 11700(d)) does not create an entitlement to condition-free site access. Students may view this as a Hobson's choice, but it is a choice nonetheless.

As GHC argues, the fact that some students may face an undesirable choice -- vaccination with site access, no vaccination and independent study without site access, or no vaccination and transfer to another school -- does not mean that they have been coerced into independent study. "Plaintiffs are not 'forced' to vaccinate. Rather, under the Policy, vaccination is a condition of physical presence at the University. All students ... have a choice - albeit undoubtedly a difficult one - to get vaccinated, seek an exemption (if applicable), or transfer elsewhere." America's Frontline Doctors v. Wilcox, (C.D.Cal. July 30, 2021) 2021 U.S.Dist.LEXIS 144477, at *22-23. Students are not guaranteed by the CSA, or the independent study laws, a charter school education

free of choices with no consequences. Opp. at 22.¹⁰

GHC's Policy is not inconsistent with the CSA or the independent study laws.

3. Inconsistency with the School Vaccination Laws

GHC argues that its Policy is not a vaccine mandate because it allows unvaccinated students to enroll and only limits them to its independent study programs.

The court disagrees. As LTC points out (Reply at 7), the same is true of the school vaccination laws: "This section does not apply to a pupil in a home-based private school or a pupil who is enrolled in an independent study program pursuant to Article 5.5...of the Education Code and does not receive classroom-based instruction." H&S Code §120335(f). Thus, a child enrolled in an independent study program does not need to be vaccinated for measles, just like he or she does not need to be vaccinated for COVID-19 under GHC's Policy. While the Policy is a campus health and safety measure, it dictates who may attend school in a classroom setting. The Policy is a mandate for students who want to attend school on campus.

a. The School Vaccination Laws

The school vaccination laws provide: "The governing authority shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school unless, prior to his or her first admission to that institution, he or she has been fully immunized." H&S Code §120335(b).

LTC correctly argues (Reply at 3-4) that the statute's use of the term "that institution" indicates that the Legislature intended elementary and secondary schools of every kind – school district, private, or charter -- to be included in the institutions subject to the law. GHC (and its principal) are subject to the state's school vaccination laws.

The school vaccination laws impose on all California schoolchildren certain immunization requirements for "continued enrollment to any public or private elementary or secondary school...within the state" H&S Code §120370(a)(2). Subject to existing medical exemptions, beginning July 1, 2021, "the governing authority shall not unconditionally admit or readmit to any of those institutions specified in this subdivision, or admit or advance any pupil to 7th grade level, unless the pupil has been immunized pursuant to Section 120335" H&S Code §120370(a)(3).

In turn, H&S Code section 120335 states: "The governing authority shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school, unless, prior to his or her first admission to that institution, he or she has been fully immunized." H&S Code §120335(b) (emphasis added). The statute enumerates ten diseases for which immunization is required and the ability to include more immunization requirements: "(1) Diphtheria; (2) Haemophilus influenzae type b; (3) Measles; (4) Mumps; (5) Pertussis (whooping

¹⁰ At the hearing, LTC's counsel relied on Educ. Code section 51747(g)(8), which requires that the written agreement for independent study between a charter school and a student reflect that independent study is optional and that independent study will be provided to a student only if the student is offered the alternative of classroom instruction. This statute does not add to the analysis; independent study students do have the alternative of classroom instruction with a vaccination.

cough); (6) Poliomyelitis; (7) Rubella; (8) Tetanus; (9) Hepatitis B; (10) Varicella (chickenpox); (11) Any other disease deemed appropriate by [CDPH], taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians. H&S Code §120335(b) (emphasis added). Only CDPH is authorized to add another disease to these statutory vaccination requirements, and it can do so only through a rulemaking process. H&S Code §120335(b)(11); Govt. Code §§ 11340.5, 11346.2, 11346.3, 11346.4, 11346.9.

In sum, the school vaccination laws mandate full immunization of schoolchildren against ten specific diseases and any other disease deemed appropriate by CDPH after considering the recommendations of three expert entities. The vaccination requirements are intended to provide “[a] means for the eventual achievement of total immunization of appropriate age groups against certain diseases.” H&S Code §120325(a); Love v. State Dept. of Education, (“Love”) (2018) 29 Cal.App.5th 980, 986.

CDPH’s implementing regulations, promulgated in consultation with DOE pursuant to H&S Code section 120330, require that “[a] school or pre-kindergarten facility shall unconditionally admit or allow continued attendance to any pupil age 18 months or older whose parent or guardian has provided documentation of [the state mandated immunizations or an applicable exemption].” 17 CCR §6025(a). The regulations define “school” to mean “any private or public kindergarten, elementary, or secondary school.” 17 CCR §6000(k). The regulations require a school to unconditionally admit or allow the continued attendance of each pupil providing proof of immunization for the enumerated diseases: “A school ... shall unconditionally admit or allow continued attendance to any pupil age 18 months or older whose parent or guardian has provided documentation of any of the following for each immunization required for the student’s age or grade, as defined in Table A or B of this section ...” 17 CCR §6025(a) (emphasis added). Table A applies only to pre-kindergarten children. *Id.* Table B lists diseases for which immunization is required at the three stages of K–12 admission, grades 7–12, and 7th-grade advancement. *Id.* COVID-19 is not listed in Tables A and B.

There are three forms of permissible documentation: (1) receipt of immunization in accordance with 17 CCR sections 6065 and 6070 regardless of exemptions for other required vaccines; (2) a medical exemption; and (3) a personal beliefs exemption in accordance with Health and Safety Code section 120335.” *Id.* “Admission” is defined as “a pupil’s first attendance in a school ... facility or re-entry after withdrawing from a previous enrollment”. 17 CCR §6000. “Unconditional admission” is defined as “admission based upon documented receipt of all required immunizations for the pupil’s age or grade, in accordance with section 6025,” except for immunizations exempted for medical reasons (17 CCR § 6051) or “exempted for personal beliefs in accordance with Health and Safety Code section 120335.” 17 CCR §6000 (emphasis added).

17 CCR section 6040 sets forth a school’s authority with respect to currently enrolled pupils: “If a pupil attending a school ... who was previously believed to be in compliance is subsequently discovered to not be in compliance with either the unconditional admission requirements specified in section 6025 or the conditional admission requirements specified in section 6035,” the pupil “shall continue in attendance only if the parent or guardian provides documentation that the immunization requirements have been met within” the period set by the governing authority. 17 CCR §6040 (a)(1), (2) (emphasis added). In addition, “[t]he parent or

guardian shall submit documentation that seventh grade immunization requirements have been met to the governing authority prior to first 7th grade attendance.” 17 CCR §6040(b) (emphasis added).

CDPH’s regulations allow the exclusion of “any pupil who does not meet the requirements for admission or continued attendance as specified in Article 2 of this subchapter and Health and Safety Code section 120335.” 17 CCR §6055 (emphasis added). Article 2 includes 17 CCR sections 6025 and 6040, and H&S Code section 120335 enumerates the diseases requiring immunization.

b. Charter School Authority

Under the CSA, a charter school is a tuition-free public school that is approved by, but not governed by, a public-school authority such as a school district. The CSA’s purpose is to allow “teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure.” Educ. Code §47601. Charter school policies are limited in that they “shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against a pupil on the basis of the characteristics listed in [Educ. Code] Section 220.” Educ. Code §47605(e)(1). Charter schools are schools of choice to which students apply and which no student may be required to attend. Educ. Code §47605(g).

Although charter schools are deemed part of the system of public schools for purposes of academics and state funding eligibility and are subject to some oversight by public school officials, they are operated not by the public school system but by outside entities that are given substantial freedom to achieve academic results free of interference by the public educational bureaucracy. Wells v. One2One Learning Foundation, (2006) 39 Cal.4th 1164, 1200-01 (charter schools may be civilly liable for submission of false claims for school funds without supplying the purchased educational materials even though school district may not).

“A charter school may elect to operate as, or be operated by, a nonprofit public benefit corporation. Educ. Code §47604(a). Under the Corporation Code, a nonprofit public benefit corporation “in carrying out its activities, shall have all of the powers of a natural person.” Corp. Code §5140. Corporate policies are subject to the business judgment rule, the “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.” Gaillard v. Natomas Co., (1989) 208 Cal.App.3d 1250, 1263. The management of a corporation is primarily responsible for judging whether a particular act or transaction is helpful to the conduct of corporate affairs and “a court cannot determine that a particular transaction is beyond the powers of a corporation unless it clearly appears to be so as a matter of law.” Marsili v. Pacific Gas & Elec. Co., (1975) 51 Cal.App.3d 313, 324.

Per Educ. Code section 47610 -- known as the mega waiver -- a charter school shall comply with the CSA, its charter provisions, and certain provisions of the Educ. Code but is otherwise exempt from the laws governing school districts. Anderson Union High School Dist. v. Shasta Second. Home School, (“Anderson”) (2016) 4 Cal.App.5th 262, 278.

Although school districts are more regulated, they too have broad authority to act so long as not preempted by state law and not in conflict with their statutory purposes. Educ. Code §35160. “[S]chool boards have broad discretion in the management of school affairs.” Dawson

v. East Side Union High School Dist., (1994) 28 Cal.App.4th 998, 1018 (citation omitted). “Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.... It follows that courts should give substantial deference to the decisions of local school districts and boards within the scope of their broad discretion, and should intervene only in clear cases of abuse of discretion.” *Id.* at 1018-19. Under this broad authority to manage their own affairs, school districts may exclude students on campus for numerous reasons -- *e.g.*, dress and conduct code violations, disruptive behavior, coming to school while sick, and demanding a particular class, program, or course for which they do not qualify.

From this general authority of school districts and the broader authority of charter schools, GHC concludes that no law elides a charter school’s authority to adopt a policy that students must be vaccinated as a condition of access. Just as a “natural person” can decide whether to let an unvaccinated person into their home, a non-profit corporation may make the same decision for its facilities. Vaccination status is not a protected characteristic limiting the scope of charter school policies under Educ. Code sections 47605(e)(1) and 220.

GHC argues that no student is legally entitled to a classroom-based education at a charter school, much less a classroom-based education free of site access requirements. There is nothing in the CSA requiring charter schools to offer all students a classroom-based education program without access conditions. Educ. Code section 47612.5(a) provides only that, as a condition of “apportionment” (*i.e.*, funding), a charter school shall offer certain minutes of instruction. The penalty for a charter school’s failure to meet these instructional minutes is a funding reduction. *See* Educ. Code §47621.5(c). Educ. Code section 47612.5(a) does not require charter schools to offer classroom-based minutes or any particular courses, and it does not limit the conditions under which instructional minutes may be offered, including compliance with campus safety policies. *Opp.* at 12.

A charter school may satisfy its funding obligation to offer instructional minutes through classroom-based minutes, non-classroom-based minutes (independent study), or a hybrid (Educ. Code §47612.5(d)(1)), and even may offer all of its minutes as non-classroom minutes. *See* 5 CCR §11963.5 (“A virtual or on-line charter school is one in which at least 80 percent of teaching and student interaction occurs via the Internet.”); *see also* RESP-286 (“By deeming charter schools to be alternative schools for purposes of high school graduation requirements, [Educ. Code §51747(e)] allows charter schools to not provide classroom instruction as an option to independent study.”); RESP-288 (“Alternative schools that provide independent study need not themselves provide the classroom instruction to which independent study is an optional alternative, since their students have the right to a classroom program in a conventional school.”). *Opp.* at 12.

GHC adds that the only penalty for a charter school’s failure to comply with statutory and regulatory requirements for independent study is reduced funding. As with Educ. Code section 47612.5(a)’s minimum instructional minutes, charter schools must comply with the independent study laws to “be eligible to receive apportionments for independent study by pupils.” Educ. Code §51747. A charter school that does not do so is subject to a reduction of its funding by State-approved auditors pursuant to audit standards. *See* RESP-384-434. Charter schools still are free to design their programs and policies, for which students may decide whether they wish to accept the instructional program offered. *Opp.* at 12-13.

The court agrees with GHC that the mega-waiver exempts charter schools from most laws governing school districts (Educ. Code section 47610), that they have general authority to conduct their affairs so long as they comply with the CSA, their charter provisions, and selected provisions of the Educ. Code (Anderson, supra, 4 Cal.App.5th at 278), and that the business judgment rule applies to the corporate decisions of the charter school's governing board (Gaillard v. Natomas Co., supra, 208 Cal.App.3d at 1263). There is no legal requirement in the CSA that charter schools must offer all students a classroom-based education program without access conditions, and charter schools may deviate from laws concerning minutes of instruction (Educ. Code §47612.5(a), (c)), and the requirements for independent study (Educ. Code §51747), and suffer only the consequence of an adverse impact to their funding by the State.

Nonetheless, LTC correctly replies (Reply at 3-4) that charter schools are not exempt from the school vaccination laws. The mega waiver in Educ. Code section 47610 only exempts charter schools from the laws governing school districts. The school vaccination laws are not limited to school districts but rather apply to the "governing authority" of each educational institution, which is "the governing board of each school district or the authority of each other private or public institution responsible for the operation and control of the institution or the principal or administrator of each school or institution." H&S Code §120335(a). Similarly, Educ. Code section 49405, the smallpox statute, provides that the control of smallpox is under the authority of CDPH and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities." (emphasis added).

c. GHC's Interpretation of the School Vaccination Laws

LTC concludes that the school vaccination laws require GHC to unconditionally admit a student once the student proves his or her immunization for all diseases enumerated under H&S Code section 120335 and 120379 and 17 CCR section 6025, and to allow that student to continue to attend his or her school in person. GHC is constrained from barring admission or continued attendance based on vaccination status other than for the statutorily enumerated diseases. Pet. Op. Br. at 12-13.

17 CCR section 6025 provides that "[a] school or pre-kindergarten facility shall unconditionally admit or allow continued attendance to any pupil ... whose parent ... has provided documentation of any of the following for each immunization required for the pupil's age or grade, as defined in Table A or B of this section..." (emphasis added).

LTC contends that 17 CCR section 6025 requires a school to unconditionally admit or allow continued attendance of each pupil who provides proof of immunization for the enumerated diseases. "Admission" is defined as "a pupil's first attendance in a school or pre-kindergarten facility or re-entry after withdrawing from a previous enrollment." 17 CCR §6000 (emphasis added). The regulation's use of the term "in" with school implies entry into the school building or campus, not merely enrollment on a piece of paper. Use of the terms "facility" and "re-entry" also imply a physical building or campus rather than school as a virtual concept. Applying the definitions of "admission" and "attendance" in 17 CCR section 6000, 17 CCR section 6025 requires a school to allow a child to attend class at his or her school building or campus upon proof of the state-required immunizations. Reply at 7-8.

GHC argues that LTC's interpretation is wrong. The school vaccination laws direct what a school may not do -- it may not admit students who do not satisfy the state's minimum vaccine

requirements – they do not direct what a school may not do. GHC argues that LTC’s contention that charter schools have a duty to allow students unvaccinated against COVID-19 to access a charter school site impermissibly expands the scope of the statutory scheme to transform a regulation regarding school immunization recordkeeping requirements at the time of admission (17 CCR §6025) into an education entitlement requiring all schools to admit and offer a particular learning format to all students, and to mandate site access free of other qualifications deemed appropriate by the school. Opp. at 17.

GHC contends that LTC unfairly truncates 17 CCR section 6025, which states that a “school or pre-kindergarten facility”, not a “school”, shall unconditionally admit, and a “kindergarten facility” is a defined term referring to entities like child daycares. See 17 CCR §6000(h). 17 CCR section 6025 identifies the documentation of vaccines that schools must check for in Table A and B and what to report to the State in 17 CCR sections 6075 and 6075. “Unconditional admission” is merely a status meaning “admission based on documented receipt of all required immunizations ... in accordance with section 6025” as distinguished from “conditional admission” where some immunizations required under 17 CCR section 6025 are incomplete. 17 CCR §6000(a). It does not mean unconditional admission in a broader sense. Opp. at 17-18.

To some extent, GHC is correct. The word “attendance” as used in 17 CCR section 6025 does not guarantee classroom attendance. CDPH’s Statement of Reasons for amending the regulations states that it uses the term “attendance” instead of “entry” in 17 CCR section 6000(a)’s amended definition of “admission” as that term is generally familiar to school staff. RESP-336. School staff also understand “continued attendance” to mean post-admission continued enrollment in school programs and a student can attend a school without being on-site. Corpus Decl., ¶¶4-6. For purposes of daily attendance (absent/present marks), attendance at a charter school means that a student is “engaged in educational activities required of them by their charter schools, on days when school is actually taught in their charter schools”. 5 CCR §11960. Attendance is not based on site presence.

GHC also correctly argues that the word “school” is defined to include all schools attended by students, not just schools offering only site-based programs. 17 CCR §6000(k). Although students may ultimately be exempted from state vaccination requirements if they do not receive classroom-based instruction (H&S Section 120335(f)), such exemption available on the backend does not change the frontend definition of “school” to mean “classroom at a school.” Even for students attending home-based private school or an independent study program, “parents or guardians must continue to provide immunization records for these students to their schools, and schools must continue to maintain records of immunizations for these [exempted] students and report their immunization status.” RESP-364. See also 17 CCR §6075(d)-(e) (reporting obligations inclusive of “home, online/e-learning” schools). Opp. at 20.

However, GHC deviates from the proper interpretation of 17 CCR section 6025(a) when it argues that the word “shall” does not obligate public and private schools to admit or allow a student to attend a school. GHC argues that, in “determining whether the Legislature intended a statute to be mandatory or permissive, use in the statute of ‘may’ or ‘shall’ is merely indicative, not dispositive or conclusive.” Tarrant v. Superior Court, (“Tarrant”) (2011) 51 Cal.4th 538, 542. Opp. at 18. GHC has unfairly cropped Tarrant, which expressly noted that “[u]nder well settled principle[s] of statutory construction,” we ‘ordinarily’ construe the word ‘may’ as permissive and

the word 'shall' as mandatory, 'particularly' when a single statute uses both terms." *Id.* at 542 (citation omitted) (emphasis added). However, the use of "may" or "shall" is merely indicative, not dispositive, and the court will also consider other evidence of legislative intent. *Id.* Thus, contrary to GHC's argument, 17 CCR section 6025(a)'s use of the word "shall" is mandatory, not permissive, if interpreted standing alone.

GHC then argues that CDPH intended the word "shall" to mean "may" in 17 CCR section 6025(a), as reflected by CDPH's "Tool for Determining Admission Status K-12" ("Tool") which provides a practical, plain English decision-tree for school staff to use to process immunization records under the regulations. This Tool instructs schools to "[f]ollow the decision tree below to determine whether a child may be admitted or not." RESP-354 (emphasis added). *Opp.* at 18. GHC is wrong. The Tool's use of the word "may" simply refers to conditions for the admittance of a student to school; it does not suggest that the conditions may be ignored as permissive.

GHC also argues that CDPH's guidance about COVID-19 affirms that the school vaccination laws do not preclude a school from excluding students from in-person activities based on COVID-19 vaccination status because appropriate policies for school events and athletic activities include a recommendation that "all eligible student athletes, coaches, and parent/adult volunteers" are vaccinated against COVID-19 and "[e]nsuring all eligible attendees (students and adults) are vaccinated." RESP-446, 448. *Opp.* at 18.

GHC analyzes CDPH's July 2016 Statement of Reasons for amending the regulations as confirming that they are not intended to guarantee admission or site-based access or a right of attendance. RESP-329-53. *See* Govt. Code §11346.2(b)(1) (requiring statement of reasons for state regulation). GHC contends that the Statement of Reasons shows that the purpose of amending 17 CCR section 6025 was just to identify the immunizing agents and age-appropriate immunization requirements -- i.e., vaccination schedules and dosages -- not mandate the right to school admission or site access free of additional conditions. *See* RESP-338. GJC also relies on the economic analysis in CDPH's Statement of Reasons as affirming that the regulations merely mandate the manner in which schools check vaccination documents to determine whether a student is eligible for admission. RESP-351. GHC concludes that H&S Code section 120335 states the diseases for which immunization is required, 17 CCR section 6025 identifies the vaccines schools must check for a student to qualify for unconditional admission, and 17 CCR sections 6070 and 6075 identify reporting requirements. RESP-345. *Opp.* at 18-19.

The Statement of Reasons for amending the regulations does not aid GHC. It does not suggest that any school, public, charter, or private, can impose more restrictive immunization requirements for children than the vaccination law requires. GHC admits that H&S Code section 120335 states the diseases for which immunization is required and the regulations do not purport to broaden that limitation (nor could they). The Statement of Reasons explains that the purpose of the regulations is to "[p]rovide clear guidance to ... school staff implementing immunization requirements" (RESP-335), which most certainly includes what immunizations are required, not just vaccination schedules and dosages. Nor does the economic analysis or rulemaking notice support GHC's position simply because they focus on the cost of checking a student's immunizations. Under LTC's interpretation, GHC is limited to the immunizations in H&S Code section 120335 and there is no cost associated with that limitation.

GHC concludes that its interpretation of 17 CCR section 6025's use of "shall" to mean "may" hews best to the statutory school vaccination law, which only identifies who cannot be

admitted, not who must be admitted. GHC argues that, under its interpretation of 17 CCR 6025 as merely specifying the immunization agents that schools are required to confirm for threshold admission and attendance eligibility in line with H&S Code section 120335, it has complied with its duties to not admit and not allow continued attendance for students who have failed to present the required immunization records or secured an exemption. Bauer Decl., ¶69; Weir Decl. ¶59. Opp. at 18, 20-21.

GHC's analysis of 17 CCR section 6025 ignores the school vaccination statutes. The school vaccination laws impose on all California schoolchildren certain immunization requirements for "continued enrollment to any public or private elementary or secondary school...within the state" H&S Code §120370(a)(2). Subject to existing medical exemptions, GHC may not unconditionally admit, or admit or advance any pupil to 7th grade level, unless the pupil has been fully immunized. H&S Code §§ 120370(a)(3), 120335(b). There are ten diseases for which immunization is required and only CDPH is authorized to add another disease to these statutory vaccination requirements through a rulemaking process after reviewing the recommendations of three expert entities. H&S Code §120335(b)(11); *Love, supra*, 29 Cal.App.5th at 986.

In this context, 17 CCR section 6025's use of "shall" is mandatory. It states that a "school ... shall unconditionally admit or allow continued attendance to any pupil... whose parent or guardian has provided documentation of...each immunization required for the student's age or grade 17 CCR §6025(a) (emphasis added). If a student meets the immunization requirement, GHC must unconditionally admit and allow that student to continue to attend his or her current school and is constrained from barring admission based on vaccination status other than for the enumerated diseases.

This interpretation of the school vaccination laws and regulations does not mean that GHC must allow an unconditionally admitted student to attend school in the classroom. The Attorney General has issued an opinion that the term "admission" "in the field of education generally means the act of examining the qualifications of the prospective pupil and permitting him to become a pupil in the school" and "is often referred to as 'enrollment' or 'registration.'" The Attorney General rejected an interpretation that would mean "entry to class each morning." RESP-282-83. Thus, a school must unconditionally admit, or allow continued attendance, of a student who meets the immunization requirements of H&S Code sections 120370(a)(3) and 120335(b), and CDPH's regulations. But that does not mean classroom attendance.

As GHC argues (Opp. at 19-20), it admits (registers) students without regard to their COVID-19 vaccination status. Such students have been allowed to continue attending school through the independent study program, irrespective of their COVID-19 vaccination status. Bauer Decl. ¶44; Weir Decl. ¶54. No provision in the CDPH's regulations preclude a school from conditioning student site access during a pandemic on vaccination against the pandemic disease.¹¹

¹¹ At the hearing, LTC's counsel argued that the definition of "admission" in 17 CCR section 6000 "means a pupil's first attendance in a school" and the word "in" means in the classroom. As GHC's counsel replied, independent study students are admitted to school within the meaning of 17 CCR section 6000 and yet by definition they are not in the classroom.

4. Preemption

Given the court's interpretation of the school vaccination laws, the question is whether GHC can impose a greater vaccine requirement for students to have campus access. The court does not doubt that GHC can require teachers (without a labor agreement), employees, parents, and third parties to be vaccinated before entry on campus. The issue is whether GHC lawfully can require its students to be vaccinated against COVID-19 before entry on campus.

Under the California Constitution, municipalities may enact and enforce local ordinances so long as they are 'not in conflict' with the state's 'general laws.' Cal. Const., art. XI, §7. Conflicting ordinances are preempted by state law and are void. O'Connell v. City of Stockton, ("O'Connell") (2007) 41 Cal.4th 1061, 1065. "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." Sherwin-Williams Co. v. City of Los Angeles, ("Sherwin-Williams") (1993) 4 Cal.4th 893, 897. An ordinance conflicts with state law and is preempted where the local legislation duplicates, contradicts, or enters an area fully occupied by general law. Sherwin-Williams, *supra*, 4 Cal.4th at 897; O'Connell, *supra*, 41 Cal.4th at 1067.

a. GHC's Contention That It Is Not a Government Actor Subject to Preemption Law

GHC argues that preemption principles do not apply to charter schools because they are not government actors exercising a police power. GHC is a non-profit corporation that adopted an internal policy for its program and students which should not be disturbed so long as they are not illegal. Opp. at 14.

Preemption is grounded in the principle that "[u]nder the police power ... [municipalities] have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation.]" T-Mobile West LLC v. City and Cty. of San Francisco, (2016) 3 Cal.App.5th 334, 347. The California Supreme Court has been particularly "reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest that may be served that may differ from one locality to another." Big Creek Lumber Co. v. County of Santa Cruz, (2006) 38 Cal.4th 1139, 1149. "Absent a clear showing that the Legislature intended to preempt the field, [courts] will not find that general laws preempt local ordinances." *Id.*

In Gateway Community Charters v. Spiess, (2017) 9 Cal.App.5th 499, 506, the court held that charter schools were not a "municipal corporation" or comparable public entity because they lack the indicia of such public entities. A charter school "does not have the power to acquire property through eminent domain; it may not impose taxes and fees upon those who live within its geographical jurisdiction, indeed it has no geographical jurisdiction but exists pursuant to its charter; it has no independent regulatory or police powers but remains subject to the limitations of its charter throughout its existence; and its board of directors is not comprised of members elected by the public." *Id.*

GHC notes that the Policy is not a local ordinance or municipal regulation issued by a municipal entity pursuant to a police power. The Policy imposes no requirements on citizens living in any particular jurisdiction; it applies only to students choosing to enroll in GHC, just like private school students. Opp. at 14.

GHC's counsel found no California caselaw where preemption was applied to the internal policies of private corporations or charter or private schools. In an analogous context, two Washington Supreme Court cases affirmed that, even where there is an express statutory

preemption clause in which the legislature declared an intent to occupy the field, preemption did not prevent public and private employers from establishing their own workplace policies on the preempted subject. Cherry v. Metro. Seattle, (1991) 116 Wn.2d 794, 801 (“The Legislature did not intend to interfere with public employers in establishing workplace rules” prohibiting employees from possessing firearms on the workplace because “[t]he ‘laws and ordinances’ preempted are laws of application to the general public, not internal rules for employee conduct.”); Shooting Park Ass'n v. City of Sequim, (2006) 158 Wn.2d 342, 357 (preemption clause did not preclude city from imposing requirements that are “not laws or regulations of application to the general public.”). GHC’s Policy governs eligibility for site access and is not a law or regulation “of application to the general public.” Opp. at 14-15.

LTC argues that GHC’s self-characterization as a private institution is incorrect. DOE considers charter schools to be public schools: “A charter school is a public school that may provide instruction in any combination of grades (kindergarten through grade twelve).” Charter Schools–CalEdFacts”.¹² Regardless of labels, whether GHC is considered a public school, a private school, or some hybrid, it must unconditionally admit students who either provide proof of the state-mandated vaccinations or an exemption. Reply at 4.

The court agrees with GHC that it is not a municipal entity issuing an ordinance or regulation. As such, preemption law does not directly apply to it. It is more appropriate to evaluate whether the Policy impermissibly conflicts with the school vaccination laws, a point which LTC’s counsel conceded at the hearing. The following analysis therefore uses preemption law as a means to consider whether the Policy unlawfully conflicts with the school vaccination laws.

b. Conflict Preemption

LTC argues that GHC’s Policy conflicts with the school vaccination laws. A local ordinance contradicts state law when it is inimical or cannot be reconciled with it, such as an ordinance that sets a lower speed limit than set by state law. Sherwin-Williams, *supra*, 4 Cal.4th at 897; O’Connell, *supra*, 41 Cal.4th at 1067.

(i). The Vaccination of Existing Students

LTC argues that GHC may not require the vaccination of enrolled students. Under the school vaccination laws, new immunization requirements only apply to a child’s “first admission” to his or her school. H&S Code §120335(b). This is underscored by the provision that “any immunizations deemed appropriate by [CDPH] pursuant to paragraph (11) of subdivision (a) of Section 120325 or paragraph (11) of subdivision (b) of Section 120335, may be mandated before a pupil’s first admission to any private or public elementary or secondary school ... only if exemptions are allowed for both medical reasons and personal beliefs.” H&S Code §120338 (emphasis added). Similarly, “the governing authority shall not unconditionally admit or readmit to any of those institutions specified in this subdivision, or admit or advance any pupil to 7th grade level, unless the pupil has been immunized pursuant to Section 120335 or the parent or guardian files a medical exemption form” H&S Code §120370(a)(3). GHC’s Policy requiring a COVID-19 vaccine for already enrolled students is contrary to this law, which contemplates that

¹² <https://www.cde.ca.gov/sp/ch/cefcharterschools.asp>.

vaccination status will be verified before the student's first admission to the school or advancement to 7th grade. Pet. Op. Br. at 14.

LTC adds that it does not seek access to campus facilities for unvaccinated students free of restrictions such as dress codes, behavioral standards, and other health and safety policies. Those kinds of rules arise from different authority and implicate different concerns than the school vaccination laws. For example, a school may suspend or expel a student, whether or not enrolled in independent study, for committing an act of violence or bringing a weapon or certain substances to school. Educ. Code §48900(a). A school may also remove a student for non-behavioral reasons. For example, when "there is a good reason to believe that the child is suffering from a recognized contagious or infectious disease, he shall be sent home and shall not be permitted to return until the school authorities are satisfied that any contagious or infectious disease does not exist." Educ. Code §49451. LTC notes that unvaccinated students are not necessarily suffering from for a contagious or communicable disease. GHC retains its power to exclude persons for any of these reasons to preserve order as well as the health and safety of the campus community but cannot exclude students based on their vaccination status unless the student is in violation of statewide vaccination requirements. Reply at 9.

The gravamen of LTC's argument is that, once a student proves immunization for all diseases enumerated under H&S Code section 120335, GHC must allow that student to attend his or her current school in person," and that the Policy conflicts with this legal requirement. Yet, the school vaccination laws (H&S Code §§ 120325, 120335(b)) and 17 CCR section 6205 merely direct a student's admission and continued attendance in school if he or she meets the immunization requirement for ten enumerated diseases. GHC must unconditionally admit a student who does so, must allow that student to continue to attend school, and is constrained from barring admission based on vaccination status other than for the enumerated diseases.

GHC correctly responds (Opp. at 15) that conflict preemption exists only where "the local ordinance directly requires what the state statute forbids or prohibits what the state enactment demands," and "no preemption exists 'where it is reasonably possible to comply with both the state and local laws.'" Kirby v. County of Fresno, (2015) 242 Cal.App.4th 940, 955 (citation omitted) (emphasis added). The Policy does not require the admission or attendance of students forbidden under the state vaccination laws, nor prohibit anything demanded by the state vaccination laws.

There is no direct conflict between the school vaccination laws' requirement for admission of an immunized student and the Policy's student's eligibility for onsite access. The state vaccination laws do not prohibit schools from setting site access policies based on vaccination status; it is possible to comply with both the school vaccination laws and the Policy. The school vaccination laws do not expressly guarantee an admitted student daily access to the classroom free of restrictions on campus attendance and there is nothing in those laws that expressly conflicts with a charter school imposing more conservative immunization standards as a condition of site access.

(ii). Personal Belief Exemption

LTC argues that GHC cannot require student COVID-19 vaccinations without a personal belief exemption. If CDPH were to add the COVID-19 vaccine to the statutory list of required immunizations, a student would have the statutory right to an exemption based on personal beliefs. In addition to the ten vaccinations required by H&S Code section 120335(a), any immunizations

deemed appropriate by CDHP pursuant to H&S Code section 120325(11)(a) or H&S Code Section 120335(b)(11) “may be mandated before a pupil’s first admission to any private or public elementary or secondary school ... only if exemptions are allowed for both medical reasons and personal beliefs.” H&S Code §120338 (emphasis added); *see also* Brown v. Smith, (2018) 24 Cal.App.5th 1135, 1139, n. 1; Love, supra, 29 Cal.App.5th at 986, n. 6. LTC contends that GHC may not override CDHP’s authority by mandating an additional immunization without also providing for a personal belief exemption. Pet. Op. Br. at 14-15.

H&S Code section 120338’s requirement that new vaccines mandated by CDHP for school admission must be subject to a personal beliefs exemption does not preclude charter schools from setting site access policies based on vaccination status without a personal belief exemption. There is no direct conflict between student eligibility for a waiver from a CDHP immunization admission requirement and GHC’s site access policy. H&S Code section 120338 does not expressly guarantee an admitted student daily access to the classroom free of restrictions on campus attendance during a pandemic. There is nothing in this statute that expressly conflicts with a charter school imposing more conservative immunization standards as a condition of site access.

c. Whether State Law Preempts Because It Occupies the Field

LTC argues that state law fully occupies the field of immunization requirements for school children.

An ordinance enters an area field “fully occupied by general law” either because the Legislature has expressly manifested its intent to occupy the legal area or because it impliedly does so. O’Connell, supra, 41 Cal.4th at 1067-78. An ordinance enters an area field fully occupied by general law either because the Legislature has expressly manifested its intent to occupy the legal area or because it impliedly does so. Where the Legislature has not expressly stated an intent to occupy a field of law, it impliedly does so in three situations: (a) where the subject matter has been fully and completely covered so as to indicate it has become exclusively a matter of state concern; (b) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action, and (c) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of local ordinance on the citizens of the state outweighs the possible benefit to the locality. Id. at 1067-78.

The Legislature’s intent to occupy a field of law to the exclusion of local regulation must be determined not by the statutory language alone but by the whole purpose and scope of the legislative scheme. Id. at 1069. When the Legislature has adopted a general scheme for the regulation of a particular subject, local control ceases over the subject covered. Id. “[W]hen local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute.” Big Creek Lumber Co. v. County of Santa Cruz, (“Big Creek”) (2006) 38 Cal.4th 1139, 1149 (emphasis in original).

(i). Express Intent to Fully Occupy the Field

“Express preemption requires an express statement by the Legislature that it intends a state law to fully occupy the area” (Valley Vista Services, Inc. v. City of Monterey Park, (2004) 118

Cal.App.4th 881, 887), and “is determined by the plain language of the statute.” Kirby v. County of Fresno, (2015) 242 Cal.App.4th 940, 956.

(a). Educ. Code Section 49405

The smallpox law provides: “The control of smallpox is under the direction of the State Department of Health Services, and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities.” Educ. Code §49405 (emphasis added).

LTC argues that schools have been respecting the smallpox law’s allocation of authority for a century. When Educ. Code section 49405 was enacted in 1921, the smallpox vaccine was the only vaccine available, and the state’s focus was on administering the smallpox vaccine. Educ. Code section 49405 reflects a legislative determination that vaccination policy in California would be established statewide rather than by a patchwork of local regulations. Although in 1921 that state policy was limited to the smallpox vaccine, the Legislature since has enacted a comprehensive set of statutes and regulations for new vaccines, including for whom vaccines are required and at what ages, as well as the conditions under which an individual may be exempted. Reply at 6.

GHC responds that Educ. Code section 49405 is inapplicable to charter schools. The statute is found in “Article I. General Powers- School Boards” which includes the preamble: “[t]he governing board of any school district shall give diligent care to the health and physical development of pupils.” Educ. Code §49400 (emphasis added). Per the mega waiver of Educ. Code section 47610, Educ. Code section 49405 is a law restricting rules and regulations promulgated by school district boards and is not applicable to charter schools. Opp. at 23-24.

As LTC replies (Reply at 6), the plain language of Educ. Code section 49405 applies to any “school.” The mega waiver in Educ. Code section 47610 only exempts charter schools from statutes governing school districts, not those governing schools. Therefore, Educ. Code section 49405 governs GHC.

Nonetheless, Educ. Code section 49405 does not contain an express statement of intent to fully occupy the field of schoolchildren vaccinations as opposed to smallpox vaccine. LTC argues that the Legislature expressly manifested its intent to fully occupy the area of immunization requirements for schools because there is no limitation to the smallpox vaccine in Educ. Code section 49405’s second clause. Smallpox is mentioned only in the first clause, and the second clause is independent of the first clause.

The plain language of Educ. Code section 49405 concerns only vaccination for smallpox. Educ. Code section 49405’s title is “Smallpox control” and begins with the words “[t]he control of smallpox”. The statute’s express prohibition on school or local authority regulation of vaccinations originated from a 1921 bill (RESP-280) that replaced a 1911 smallpox vaccination law. RESP-276 (“vaccination” refers to assurance of “immunity to smallpox”). Educ. Code section 49405 replaced physician control of smallpox vaccine requirements with control by the State Department of Health. The school vaccination laws do not mention Educ. Code section 49405. The legislative history of SB 277, which amended H&S Code sections 120325, 120335, and 120338 of the school vaccination laws, does not even mention Educ. Code section 49405 in its summary of “existing law” for student vaccinations. RESP-313-15. The court cannot interpret the smallpox statute as expressly occupying the field of vaccinations for disease in school.

(b). The School Vaccination Laws

There is nothing in the language of the school vaccination laws (H&S Code sections 120325, 120335, and 120338) expressly stating a legislative intent to occupy the field of student vaccinations. LTC relies on SB 277's legislative history, the most recent amendment to the school vaccination laws which repealed the personal belief requirements for the ten enumerated diseases in H&S Code section 120325 and 120335 (*Love, supra*, 29 Cal.App.5th at 984), as setting forth the Legislature's establishment of statewide standards and rejection of an alternative of local vaccination policies:

"Some opponents have raised questions as to whether the bill is actually "narrowly tailored" if the issue of public health could be addressed by mandating vaccines on a community by community or school district or school district basis. [Citation.] In response, the authors assert that a statewide approach is the correct approach because:

[t]his legislation aims to prevent outbreaks, and pockets of unimmunized individuals may appear at any district at any time. To provide a statewide standard, allows for a consistent policy that can be publicized in a uniform manner, so districts and educational efforts may be enacted with best practices for each district. While pockets cluster in regionalized area, districts may have one school which does not reach community immunity, and therefore should have a policy which they can easily implement. Further in consultation with various health officers, they believe a statewide policy provides them the tools to protect all children equally from an outbreak. Andelin Decl., Ex. H, p. 18 (emphasis added).

The Assembly's health committee report on SB 277 likewise reflects an understanding that school vaccine requirements are a matter of state law:

"Current state law mandates immunization of school-aged children against 10 specific diseases. Each of the 10 diseases was added to California code through legislative action, after careful consideration of the public health risks of these diseases, cost to the state and health system, communicability, and rates of transmission. The Legislature has a long history of thoughtful consideration for which diseases pose the most serious health risks to the public." Andelin Decl., Ex. I, p. 4 (emphasis added). Pet. Op. Br. at 18.

The legislative history of SB 277 shows that it was intended to eliminate personal beliefs exemptions for the ten enumerated diseases and that local control of this issue would not permit the necessary statewide standard for vaccination from these diseases. The plain language of the school vaccination laws (and SB 277's legislative history) is silent on preemption of local control over any other vaccinations. The school vaccination laws do not expressly show an intent to fully occupy the field of student vaccinations. See *Kirby v. County of Fresno, supra*, 242 Cal.App.4th at 956.

(ii). Implied Intent to Occupy the Field

Where the Legislature has not expressly stated an intent to occupy a field of law, it impliedly does so in three situations: (a) where the subject matter has been fully and completely covered so as to indicate it has become exclusively a matter of state concern; (b) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action, and (c) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of local ordinance on the citizens of the state outweighs the possible benefit to the locality. O'Connell, supra, 41 Cal.4th at 1067-78.

The Legislature's intent to occupy a field of law to the exclusion of local regulation must be determined not by the statutory language alone but by the whole purpose and scope of the legislative scheme. Id. at 1069. When the Legislature has adopted a general scheme for the regulation of a particular subject, local control ceases over the subject covered. Id. "[W]hen local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." Big Creek, supra, 38 Cal.4th at 1149 (emphasis in original).

As GHC notes (Opp. at 24-25), "[c]laims of implied preemption must be approached carefully, because they by definition involve situations in which there is no express preemption. Since preemption depends upon legislative intent, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the Legislature has done many times in many circumstances. Hence the rule has developed that implied preemption can properly be found only when the circumstances 'clearly indicate' a legislative intent to preempt." Cal. Rifle & Pistol Ass'n v. City of West Hollywood, (1998) 66 Cal.App.4th 1302, 1317.

(i). Fully and Completely Covered

LTC argues that the statutory scheme demonstrates the Legislature's intent to occupy the area because the subject matter has been so fully and completely covered -- right down to the exemption forms that must be used and the establishment of a state vaccination database -- as to clearly indicate that it has become exclusively a matter of state concern. Pet. Op. Br. at 19.

The court disagrees. In addressing implied preemption, the paramount concern is the purpose of the school vaccination laws. That purpose is to provide "[a] means for the eventual achievement of total immunization of appropriate age groups against [certain] diseases." ([H&S Code] §120325(a).) Love, supra, 29 Cal.App.5th at 986. It is plain that the school vaccination laws address only specific listed diseases for which "California requires school vaccinations...[as] very serious conditions that pose very real health risks to children". Id. at 987 (citing SB 277 legislative history).

As GHC contends (Opp. at 25), the purpose of the school vaccination laws is to ensure "that all children covered by [H&S Code section 120335] are required by state law to be immunized." Salasguevara v. Frye, (1995) 31 Cal.App.4th 330, 340. H&S Code section 120335 prohibits admission for students who do not comply with the State's minimum vaccination requirements and does not require that schools guarantee daily site access to students who meet these requirements. There is no clear indication that the entire subject of vaccination in schools is exclusively a matter of state concern, particularly where the law addresses the "elimination of

childhood diseases” (H&S Code §120325), not site safety, site access, or pandemic response.

Nor do the statutory catchall of H&S Code section 120325(b)(11) permitting CDPH to add other vaccination requirements upon consultation with expert agencies, and H&S Code section 12038’s requirement that any such additions by CDPH must have medical and personal belief exemptions, affect this purpose or reflect an implied intent to occupy the field. They merely authorize expansion of the required list of vaccines for school children for other serious diseases that pose health risks and do not purport to limit school access policies.

The school vaccination laws set minimum standards and do not imply a general purpose to deprive local entities of their traditional powers. In this circumstance, preemption will not be found. City of Dublin v. County of Alameda, *supra*, 14 Cal.App.4th at 276. Given a charter school’s broad prerogative to implement policies related to site access and program structure, any doubt must be resolved in its favor. Student vaccination has not been fully and complied covered by the school vaccination laws so as to clearly indicate that it is exclusively a matter of state concern.

(ii). Partially Covered and (a) Clearly Indicating a Paramount State Concern That Will Not Tolerate Local Action or (b) the Adverse Effect of Local Ordinance on the State Outweighs the Locality Benefit

LTC argues that the subject matter has been partially covered by the school vaccinations laws and they have been “couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.” O’Connell, *supra*, 41 Cal.4th at 1067-78. In particular, CDPH’s regulations unequivocally direct that schools “shall unconditionally admit or allow continued attendance” to students who have the vaccinations required by state law. 17 CCR §6025 (emphasis added). Pet. Op. Br. at 19.

Alternatively, LTC argues that the subject of school vaccination is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.” As explained in the Assembly health committee report for AB 277, the Legislature has statutorily prescribed a regime of ten childhood vaccinations “after careful consideration of the public health risks of these diseases, cost to the state and health system, communicability, and rates of transmission.” Andelin Decl., Ex. I, p. 4. The Legislature has also established an orderly process for CDPH to add to the list through administrative rulemaking only after “taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians.” H&S Code §120335(b)(11). Schools also must also recognize medical and personal belief exemptions. H&S Code §120338. Pet. Op. Br. at 19.

Implied field preemption cannot be found where “[t]here are various subjects that the legislation deals with only partly or not at all.” Great Western Shows v. County of Los Angeles, (2002) 27 Cal.4th 853, 861. The school vaccination laws do not cover local school policies on site access, mandate site access or a classroom-based course of study for vaccinated students, or address site safety measures during a pandemic. The State may reasonably identify minimum vaccination standards for admission and schools reasonably may identify vaccination standards during a pandemic as conditions for access to a school site. Indeed, the State’s public policy, as expressed by CDPH’s guidance, is that vaccination of all eligible students for COVID-

19 is “crucial.” RESP-197. The State also encourages school COVID-19 vaccination and flu shot programs. RESP-455.

The fact that the school vaccination laws set minimum student vaccination standards and allows CDPH to expand on the minimum list with statewide effect does not preclude individual schools from setting their own post-admission site access policies, particularly during a pandemic. “Even if a legislative scheme is detailed and extensive, if it purports only to set minimum standards and implies no general purpose to deprive local entities of their traditional powers, preemption by implication will also not be found.” City of Dublin v. County of Alameda, (1993) 14 Cal.App.4th 264, 276.

The only school vaccination laws legislative history relied upon by LTC relies is that for SB 277, which eliminated the personal beliefs exemption from the long-existing school vaccination scheme. As discussed, this legislative history concerns whether the personal beliefs exemption should be eliminated statewide or low vaccination rates in schools should be addressed locally and reflects an intent to standardize the minimum vaccination requirements for school admission as the best way to ensure statewide vaccination for childhood diseases. Id. As GHC argues, the Legislature was trying to solve the problem of too many exemptions, not a problem of schools mandating too many vaccinations.

SB 277 also did not abrogate Educ. Code section 49403, which provides that “[i]t is the intent of the Legislature to encourage school-based immunization programs, when feasible, to use the California Immunization Registry to assist providers to track patient records, reduce missed opportunities, and to help fully immunize all children in California” (Educ. Code §49403(e)), and that a school nurse or other health care professional may immunize on programs may administer vaccines against “diseases that represent a current or potential outbreak as declared by a federal, state, or local public health officer.” Educ. Code §49403(b)(2)(C)(iii) (emphasis added). Given that implied preemption should be applied with caution, this statute undermines a legislative intent to preclude pro-vaccination policies.

There are no terms in the school vaccination laws that clearly indicate that a paramount State concern will not tolerate further or additional local action. The paramount state concern in SB 277 was to ensure that children are immunized against at least ten childhood diseases (H&S Section 120325) and to eliminate personal belief exemptions. SB 277’s amendment to the school vaccination laws was not intended to restrict more cautious site access policies by individual schools during a pandemic.

Similarly, there is no adverse effect of a local ordinance on transient citizens of the state that outweighs the possible benefit to the locality. This consideration does not apply to GHC, which is not a municipality and has not enacted a local ordinance. Moreover, a transient student unvaccinated against COVID-19 but vaccinated against the ten listed childhood diseases is eligible for admission to a school in his or her local school district, or to GHC with the options of participating in GHC’s independent study program or else become vaccinated for on-site classroom study.

LTC argues that chaos would ensue if each local school district had its own vaccine requirements, exemptions, and standards for granting exemptions. A student considered fully vaccinated in one district might be considered unvaccinated in a neighboring school district. If the student transfers to a different school, the student would become ineligible. The likelihood of such inconsistencies is especially high for the COVID-19 vaccine, which is still undergoing the

approval process for various age groups. A consistent, statewide standard is required which would be thwarted if each district could impose its own requirements. Pet. Op. Br. at 19-20; Reply at 4. GHC correctly responds that LTC's chaos argument is unsupported by evidence and new students always have options to continue their education elsewhere. Opp. at 27.¹³

F. Conclusion

The Petition is denied. GHC's counsel is ordered to prepare a proposed judgment, serve it on LTC's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for September 13, 2022 at 1:30 p.m.

Dated: July 12, 2022

JAMES C. CHALFANT

Superior Court Judge

¹³ The court is aware that Department 86 (Judge Beckloff) recently decided in G.F. v. Los Angeles Unified School District, 21 STCP03381, that LAUSD's Resolution requiring that students 12 years or older be vaccinated against COVID-19 is impliedly preempted by the school vaccination laws. That ruling is distinguishable in part because LAUSD is expressly precluded from adopting resolutions that are preempted by state law (Educ. Code §35160), a statute which does not apply to charter schools.

At the hearing, the court discussed with counsel whether GHC is bound by LAUSD's Resolution – as recently extended by LAUSD's board through July 1, 2023. The court is satisfied that the Policy only states that its procedures are aligned with LAUSD's Resolution, and it does not bind GHC to follow LAUSD's direction. RESP-466. Since GHC's charter was not presented in the parties' briefs, the court has no opinion whether it binds GHC to follow LAUSD on the vaccination issue.

Exhibit B

Excerpted Pages of the California
Immunization Handbook Published by the
California Department of Public Health

(Downloaded from <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/School/resources-implementation.aspx#>)

Pre-kindergarten (Child Care) and School Immunization Requirements

CALIFORNIA IMMUNIZATION HANDBOOK

For Pre-kindergarten (Child Care) Programs and Schools

Document received by the CA Supreme Court.

11th Edition • January 2021

IMM-365 (1/21)

Introduction

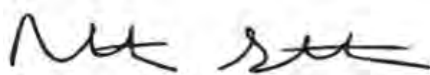
To protect children against serious infections, the California school immunization law requires them to receive immunizations before entry to pre-kindergarten (child care or preschool) and school. In addition, the law requires pre-kindergarten facilities and schools to enforce immunization requirements, maintain immunization records of all children enrolled, and submit reports to public health agencies. Links to the law are located in Appendix D.

The 11th edition of the California Immunization Handbook reviews school immunization requirements, staff responsibilities, procedures for evaluating immunization requirements, and reporting obligations. This handbook supersedes all earlier versions of the California Immunization Handbook. You can access an electronic version at California's school immunization website, www.ShotsforSchool.org.

The California Immunization Registry (CAIR) can help schools meet immunization requirements. We encourage your school to use CAIR. Visit www.CAIRweb.org for more information.

We salute California schools and pre-kindergarten providers for their conscientious efforts to protect the health of the children they educate.

If you have any questions or would like to order more blue California School Immunization Record cards, please contact your [local health department's Immunization Program](#), the health office of your school, or your school district.



Robert Schechter, M.D., Chief
Immunization Branch
California Department of Public Health

www.ShotsforSchool.org
(510) 620-3737



Personal beliefs exemptions (PBEs) filed at a California school or child-care facility before January 1, 2016, will remain valid until the student enrolls in the next grade span, typically at kindergarten (or transitional kindergarten) or 7th grade.

Potential Scenario: Joe is in 5th grade and recently transferred to your school from Texas. A PBE for him was filed at a school in Texas in 2013. Is the PBE valid in California?

No. Even though his PBE was filed before 2016, it was **not** filed in a California school before 2016 and therefore **not** valid. Joe must meet all immunization requirements for his grade.

A child can also meet requirements if his/her parent or guardian submits a medical exemption for one or more required vaccines along with the immunization record showing that the child has met all requirements for age or grade for vaccines not included in the medical exemption.

In addition, starting January 1, 2016, students are no longer required to have immunizations for entry if they attend a home-based private school or an independent study program and do not receive classroom-based instruction. However, parents or guardians must continue to provide immunization records for these students to their schools, and schools must continue to maintain records of immunizations for these students and report their immunization status. The immunization requirements do not prohibit students from accessing special education and related services required by their individualized education programs (IEPs).

See answers to FAQs on [immunizations](#), [transitional kindergarten](#), [conditional admission](#), [exemptions](#), and the All Required Vaccines (ARV) [rate](#) (Appendix A).

¹ [Health and Safety Code, Division 105, Part 2, Chapter 1, Section 120325-120375](#)

² [The California Code of Regulations, Title 17, Division 1, Chapter 4, Subchapter 8, Sections 6000-6075](#)

Exhibit C

Excerpted Pages of the Initial Statement of
Reasons for Regulations Promulgated by the
California Department of Public Health

(Downloaded From <https://www.cdph.ca.gov/Programs/OLS/CDPH%20Document%20Library/DPH-11-004-ISOR.pdf>)

INITIAL STATEMENT OF REASONS

BACKGROUND

Health and Safety Code (HSC) section 131200 authorizes the California Department of Public Health (Department) to adopt and enforce regulations for the execution of its duties. HSC section 120330 authorizes the Department in consultation with the California Department of Education (CDE) to carry out Chapter 1, Educational and Child Care Facility Immunization Requirements (commencing with section 120325 but excluding section 120380). The Department also consulted with the Department of Social Services (DSS) for input on the immunization requirements for pre-kindergarten facilities. Consultation letters from CDE and DSS are included with this package.

Under existing law, HSC sections 120325 through 120375, children are required to receive certain immunizations in order to attend public and private elementary and secondary schools, and various child care facilities (child care centers, family day care homes, nursery schools, day nurseries and developmental centers), hereafter, referred to as “pre-kindergarten facilities.” The immunizing agents and age-appropriate immunization requirements are specified by the Department, in consultation with CDE, pursuant to HSC sections 120330 and 120335, and defined by the Department in Title 17, California Code of Regulations (17 CCR) sections 6020 and 6035.

The Department also specifies the documenting and reporting requirements for governing authorities of pre-kindergarten facilities and schools in 17 CCR sections 6065, 6070, and 6075. In its regulation development, HSC section 120335(b)(11) requires the Department to consider recommendations of the national Advisory Committee on Immunization Practices (ACIP), the American Academy of Pediatrics (AAP), and the American Academy of Family Physicians (AAFP).

National immunization recommendations are developed and harmonized by the federal ACIP in cooperation with the AAP and AAFP, and published yearly. The necessity of updating these recommendations is driven by both the development of new vaccines and advancements in our understanding of currently licensed vaccines and at-risk populations.

School immunization requirements are developed by each state and generally reflect national recommendations. California pre-kindergarten and school immunization requirements are updated less frequently and do not include all nationally recommended vaccines. In 1995, the Legislature added a kindergarten hepatitis B vaccine requirement which was implemented in 1997. In 1997, the Legislature added a 7th grade hepatitis B vaccine requirement to increase coverage for hepatitis B vaccine for children who were not affected by the kindergarten requirement. This 7th grade requirement was implemented in 1999. In 1999, varicella vaccine was required by the Legislature for kindergarten entry and was implemented in 2001.

On September 29, 2010, Assembly Bill (AB) 354 (AB 354, Arambula, 2010) was signed and amended HSC sections 120325 and 120335 as follows:

Federal Statute or Regulations

The regulation does not duplicate or conflict with any existing federal law or regulation.

Discussion of Proposed Regulations

The regulations interpreting, specifying, or implementing HSC sections 120325 through 120380 are in 17 CCR sections 6000 through 6075. The proposed changes are as follows:

Article 1.

Article 1 is proposed to be amended to retitle to “General” for organizational purposes. The heading “Definitions” is moved to section 6000.

Section 6000. Definitions and Abbreviations.

Section 6000 is proposed to be amended to be retitled “Definitions and Abbreviations” and to consolidate, add, alphabetize, and expand upon definitions. Definitions specifically related to schools were developed to be consistent with definitions used in the Education Code and/or CDE regulations. Amendments also include commonly used abbreviations for immunizations.

Subsection (a) is proposed to be amended to replace the term “entry” with “attendance” because of ambiguity caused by the term “entry.” The Department proposes using “attendance” as it is a term that is generally familiar to school and pre-kindergarten staff.

Subsection (a) is proposed to be amended to more clearly organize the definitions of “unconditional admission” and “conditional admission.”

Subsection (b) is proposed to be amended to clarify and provide a practical definition of “governing authority” provided in HSC section 120335(a).

Subsection (c) is proposed to be adopted to provide commonly used abbreviations for immunizations; this helps reduce the number of footnotes needed in the tables in sections 6025 and 6035.

Subsection (d) is proposed to be adopted to ensure schools apply a consistent definition of kindergarten and check pupils’ immunization status at the appropriate time. After pupils fulfill their pre-kindergarten facility immunization requirements, their next immunization checkpoint is at kindergarten.

Subsection (e) is proposed to be adopted to denote an abbreviation used in later sections.

Subsection (f) is proposed to be adopted to clarify the term “licensed physician,” as provided in HSC section 120370.

Subsection (g) is proposed to be adopted to clarify the term “parent or guardian.”

Exhibit D

Attorney General Opinion
38 Ops. Cal. Atty. Gen. 41



1961 Cal. AG LEXIS 14

Office of the Attorney General of the State of California
38 Ops. Cal. Atty. Gen. 41

CA Attorney General Opinions

Reporter

1961 Cal. AG LEXIS 14 *; 38 Ops. Cal. Atty. Gen. 41 **

Opinion No. 61-128

August 23, 1961

Core Terms

pupil, section, has, county health officer, city, health officer, attend, shoot, high school, enrollment, adult, elementary, secondary school, operative date, nursery

Syllabus

[*1]

POLIOMYELITIS IMMUNIZATION -- Various terms in statute requiring, as condition of admission of pupils to public schools, discussed.

Request By: DIRECTOR OF PUBLIC HEALTH

Question

The Honorable Malcolm H. Merrill, M.D., Director of Public Health, has requested the opinion of this office on the following questions relating to Assembly Bill 1940 (now *Health & Saf. Code secs. 3380-3386*, Stats. 1961, ch. 837) which provides for compulsory immunization against poliomyelitis of pupils¹ in public and private elementary or secondary schools prior to admission thereto:

1. In *section 3380 of the Health and Safety Code* what is the meaning of "admission"? Can the meaning of the word "admission" be defined by regulation?

¹ There are certain exemptions in the bill which are not material to this opinion.

2. When does section 3380 become operative? Can the operative date be designated by regulation?
3. In section 3380 what is the meaning of "immunization" ? Can a grace period for obtaining immunization by a pupil be specified by regulation?
4. In section 3380 what is the meaning of "pupil" ? Can the meaning of the word "pupil" be defined by regulation?
5. In section 3382 [*2] what is the meaning of "county health officer" ?

The conclusions are summarized as follows:

In section 3380 of the Health and Safety Code the word "admission" means the enrollment of and examination of the qualifications of the prospective pupil and the permitting of him to become a pupil. The section becomes operative as soon as the regulations promulgated by the State Department of Public Health become effective. The word "immunization" means producing evidence of at least one shot prior to enrollment and the diligent completion of the required series of shots as prescribed by regulations after enrollment. The word "pupil" does not include pre-school age children enrolled in cooperative nursery schools but does include kindergarten pupils and adults attending evening adult elementary or secondary classes. The words "county health officer" do not include "city health officer".

Opinion By: STANLEY MOSK, Attorney General; Robert L. Bergman, Deputy

Opinion

[**42] ANALYSIS

Section 3380 of the Health and Safety Code, as added by the [*3] Statutes of 1961, chapter 837, provides as follows:

"No minor or adult shall be admitted to any public or private elementary or secondary school as a pupil unless such person has, prior to admission, been immunized against poliomyelitis in the manner and with immunizing agents approved by the State Department of Public Health."²

(All section references are to the Health and Safety Code unless otherwise specified.)

In the request for this opinion this office has been informed that the wording of this section creates a problem in administration in that it absolutely prohibits the admission of a pupil who has not been immunized. This statute goes into effect as law on the ninety-first day after the close of the legislative session, that is, on September 15, 1961. The academic year starts in most California schools prior [*4] to September 15. Thus, pupils will be enrolled and will be attending classes before the statute goes into effect. If the word "admission" means the determination of qualifications of the pupil and consent by the school to attend class, then admission in many instances will have taken place prior to the effective date of this section and non-immunized pupils will have been admitted.

This office has been informed that the word "admission" in the field of education generally means the act of examining the qualifications of the prospective pupil and permitting him to become a pupil in the school. It is often referred to as "enrollment" or "registration". Thus, admission for most pupils takes place at the beginning of each academic year. In some districts registration for the next school year occurs at the close of the prior school year rather than at the time attendance begins. If the Legislature had meant admission to be the entry to class each

² Exceptions from the requirement are provided where immunization is contrary to the belief of the pupil or his parent and where immunization is not safe due to the physical condition of the pupil.

morning, it would no doubt have used the words "admitted to class", rather than "admitted to any . . . school as a pupil . . ."

In the opinion of this office, "admission" occurs whenever a person is formally accepted, registered and enters school. [*5] It is thought that it would be proper for the Director of Public Health to so define the term by regulation.

The next question pertains to the operative date of the section. This is not, in the opinion of this office, a matter to be determined by administrative regulation. A statute that is not an urgency measure becomes effective on the ninety-first day after the close of the legislative session (Const., Art. IV, sec. 1; *Gov. Code sec. 9600*). It is well established in California that until a statute becomes [**43] effective it is inoperative and has no effect for any purpose (*Kennelly v. Lowery*, 64 Cal. App. 2d 903, 904-905). Consequently section 3380 does not prohibit an act (admission of non-immunized pupils) which will be performed prior to its effective date.

Section 3380 further provides that the immunization is to be performed in a manner and with immunizing agents approved by the State Department of Public Health. Section 3381 provides that such immunization shall be evidenced on a written form prescribed by the department. Section 3382 provides that immunization performed by a private physician shall [*6] be acceptable if the immunization is performed and the records made in accordance with the rules established by the department. In section 3386 the department is required to adopt rules and regulations necessary to carry out the provisions of the chapter.

The above provisions show that the Legislature did not intend that section 3380 be operative until such time as the State Department of Public Health has had time to promulgate in an orderly fashion the required rules and regulations, to prescribe the required forms, and to approve the immunizing agents. The statute goes into effect September 15, 1961, but its operation is postponed until the State Department of Public Health has performed the duties required thereunder. (See, *Ross v. Board of Retirement*, 92 Cal. App. 2d 188, 195.) All pupils "admitted" to school thereafter are subject to the requirements of the statute. As to those pupils admitted prior thereto, the operation of the statute is postponed until their next admission after the operative date.

It should be noted that section 3382 requires "the county health officer of each county" to "organize and have in operation by January 1, 1962, [*7] an immunization program so that immunization is made available to all persons required . . . to be immunized. "

While it conceivably could develop that the required regulations will not be promulgated and become effective until after January 1, this provision does not, in the opinion of this office, change the operative date of section 3380 to January 1. As seen above, the immunization must be performed in a manner specified by the regulations and must be evidenced on forms prescribed by the department. Thus, the county health officer could not put his program into operation until he has the regulations to guide him.

The next question pertains to the meaning of the word "immunization" . It has been pointed out that actual and complete immunization cannot be accomplished until after the fourth or, possibly, the third shot. This series of shots would take place over a period of, at the minimum, four weeks, and preferably over a longer period. A substantial number of pupils entering school, or their parents, may not have been made aware of the requirements of this statute and will, therefore, probably not have received any shots at the time they present themselves for enrollment. If the [*8] Legislature intended the word "immunization" to mean the entire course of three shots, or perhaps four shots, it would literally result in not allowing pupils who apply for admission after the operative date of the statute [**44] to attend classes for a month or possibly longer. This would be in derogation to the policy of the Legislature to compel school attendance (Ed. Code sec. 12101). It is believed that a reasonable interpretation of the word "immunization" is that the pupil has commenced a course of shots leading toward complete immunization and is diligently pursuing the schedule to completion. Thus, a pupil may be admitted if he produces evidence that prior to such admission he has received one shot, and thereafter he may be allowed to remain in attendance only if he continues with diligence the full course of shots and produces evidence of having received such shots. If the department so defined the word by regulation it would not be exceeding its authority.

In the next question, the meaning of the word "pupil" is requested. Section 3380, by its expressed terms, is limited to pupils (minors and adults) in public or private elementary or secondary schools, with certain exemptions [*9] provided in sections 3384 and 3385. The question arises as to its application to children enrolled in child care centers pursuant to sections 16601-16645.27 of the Education Code, and to cooperative nursery schools conducted for pre-school age children pursuant to Education Code section 16654, and to adult education classes and adult evening classes conducted in high schools pursuant to Education Code sections 6351-6373. Since pre-school children enrolled in child care centers and those attending cooperative nursery schools are not attending an elementary or secondary school, it is not necessary to consider whether they are "pupils". An elementary school comprises the kindergartens and grades 1 to 8, inclusive, unless grades 7 and 8 attend a junior high school (Ed. Code secs. 9301, 17601), and secondary schools include high schools, technical schools and junior colleges (Ed. Code sec. 5552). High schools include "four year high schools, junior high schools, senior high schools, continuation high schools, and evening high schools." (Ed. Code sec. 5553).

The Superintendent of Public Instruction has established standards for child care centers, including [*10] health requirements, for the admission of children (Ed. Code secs. 16611, 16624; 5 Adm. Code sec. 143). The present regulation (5 Adm. Code sec. 143) requires immunization against smallpox, diphtheria and whooping cough, with the exemption provided in Educational Code section 16624. The Superintendent of Public Instruction could also require poliomyelitis immunization.

Parent cooperative nursery schools are required to be licensed by the State Department of Social Welfare (Welf. & Inst. Code sec. 1620) and are subject to the rules and regulations of the State Board and Department of Social Welfare (Welf. & Inst. Code secs. 1621, 1625). All children, except those exempted on religious or health grounds, are required to have a smallpox vaccination, diphtheria, pertussis (whooping cough) and tetanus immunization (Manual of Policies and Procedures -- Day Nurseries -- Sec. DN-211.3). The State Department of Social Welfare could in addition require poliomyelitis immunization.

If the adults are receiving instruction they are "pupils" and the statute is applicable if [*11] they are attending an elementary or secondary school. The term [**45] "pupil" includes adults taking evening courses whether or not they are working toward a high school diploma; in either case they are receiving instruction. Nor is there any epidemiological difference in a class of adults working toward a diploma and those taking a course merely seeking knowledge. If the department so interpreted the word by regulation it would not be improper.

The last question relates to the meaning of the term "county health officer". It is stated that if the term "county health officer" does not include both city and county health officers, then a substantial burden is cast upon the county health officer in those counties containing large cities, for example Los Angeles County. To require the county health officer to provide facilities sufficient to immunize those pupils who have not been immunized in all of the cities of the county would place a heavy burden on the county's funds and facilities.

The terms "city health officer" and "county health officer" have well understood meanings, and the two are not synonymous.

Sections 450-452, 454, 456-460 of the Health and Safety Code [*12] provide for the appointment of a county health officer, specify his duties and qualifications, and provide that he is a county officer. On the other hand, sections 502-504 of the Health and Safety Code provide for the appointment of a city health officer and specify his duties.

There is no overlapping of jurisdictions of the county health officer and the city health officer except by contract between the city and county pursuant to sections 480-485 of the Health and Safety Code, or when provided for by resolution pursuant to sections 476 and 477. When the Legislature has intended that city health officers and county health officers be lumped together in a common designation, it has so provided. For example, in the provisions relating to communicable diseases, the Legislature has stated, in section 3000 of the Health and Safety Code that "health officer" shall include county, city, and district health officers.

1961 Cal. AG LEXIS 14, *12; 38 Ops. Cal. Atty. Gen. 41, **45

For these reasons, it is concluded that the Legislature distinguishes between county and city health officers and considers them together under the [*13] term "health officer" only when it expressly so provides. When the Legislature used the term "county health officer" in section 3382, it meant the health officer for the county, and not both city and county health officers. Therefore, the Legislature has not left any room for the department to interpret by regulation the meaning of those words.

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Document received by the CA Supreme Court.

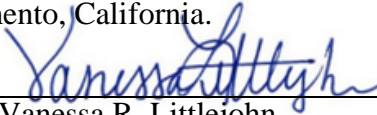
DECLARATION OF SERVICE
State of California, County of Sacramento

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: 655 University Avenue, Suite 150, Sacramento, CA 95825.

On the date set forth below I served the foregoing document described as **REQUEST FOR DEPUBLICATION OF FOURTH DISTRICT APPELLATE OPINION RE LET THEM CHOOSE V. SAN DIEGO UNIFIED SCHOOL DISTRICT** on interested parties in this action addressed as follows:

- (VIA ELECTRONIC TRANSMISSION)** to Supreme Court of California, Sixth Appellate District, using TrueFiling (<https://www.truefiling.com>). All interested parties listed below, registered with TrueFiling, will be electronically served through TrueFiling.
- (VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Sacramento, California with postage thereon fully prepaid. I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 20, 2023 at Sacramento, California.



Vanessa R. Littlejohn

SERVICE LIST

LET THEM CHOOSE V. SAN DIEGO UNIFIED SCHOOL DISTRICT
FOURTH APPELLATE CASE NO.: D079906
SAN DIEGO COUNTY SUPERIOR COURT
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