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January 30, 2023

VIA TRUEFILING

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

Re: Opposition to Depublication of Fourth District Appellate Opinion
Let them Choose, et al. v. San Diego Unified School District;
Court of Appeal Case No. D079906 (Opinion Filed: November 22, 2022)
Supreme Court Case No. S278233

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

This law firm represents Plaintiff/Respondent, S.V., individually, and on behalf of J.D., as guardian ad litem in the matter entitled *Let Them Choose, et al. v. San Diego Unified School District,* Appellate Case No. D079906 (the "**School District Action**"). We write now in opposition to the request made on January 20, 2023, by non-parties Granada Hills Charter and New West Charter (collectively the "**Charter Schools**") to depublish the November 22, 2023 Court of Appeal, Fourth Appellate District, decision in the School District Action, which can be found at *Let Them Choose v. San Diego Unified Sch. Dist.*, (2022) 85 Cal. App. 5th 693 (the "**Appellate Decision**").

A. Introduction

Since at least 1890, the California Legislature (the "**Legislature**") has passed laws controlling what vaccinations are required for school admission. In the 133 years since then, the Legislature has created a comprehensive statutory scheme that occupies the entire field of vaccination mandates for school attendance. Pursuant to California *Health & Safety Code* ("**H&S**") § 120335, every student in California is required to receive 10 specified vaccinations prior to enrolling in school. The Legislature gave the California Department of Public Health ("**CDPH**") the sole authority to add new vaccinations to that list. In its comprehensive statutory scheme, the Legislature never once granted local schools the explicit authority to mandate vaccinations for school attendance, to the contrary, California *Education Code* ("**Ed. Code**") § 49405 directs that "no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities."

Despite this long history of exclusive state control over the issue of vaccine mandates for schools, on September 28, 2021, the Defendant/Appellant, San Diego Unified School District ("**SDUSD**") voted to adopt what it called a Vaccination Roadmap, which mandated the Covid-19 vaccine for students eligible for an FDA-approved Covid-19 vaccine (the "**SD Mandate**"). Under the SD Mandate, if a student did not receive a vaccination, he or she would be expelled from in-person learning and forced to attend SDUSD's independent study program. S.V. was concerned that her child, who had not received the COVID-19 vaccine, could be expelled from in-person learning. She filed a complaint and petition

for writ of mandate in the California Superior Court for the County of San Diego, which was consolidated with a similar action filed by Let Them Choose. On December 20, 2021, the Superior Court granted the petitions for writ of mandate. *Let Them Choose v. San Diego Unified Sch. Dist.*, 2021 Cal. Super. LEXIS 39856 (S.D. Super. Ct. Dec. 20, 2021) (the "**Superior Court Order**"). The Superior Court found that it was compelled to grant the petitions because the SD Mandate is preempted by state law.

SDUSD appealed the Superior Court Order, and in the Appellate Decision, the Court of Appeal affirmed. After it examined the current and historical statutory scheme surrounding the state's school vaccination mandates, the Court of Appeal concluded that the SD Mandate was preempted under both the conflict preemption and the field preemption doctrines. In sum, the court stated that it agreed with the Superior Court's conclusion that the Legislature had established a "'statewide standard for school vaccination,' leaving 'no room for each of the over 1,000 individual school districts to impose a patchwork of additional vaccine mandates.'" 85 Cal. App. 5th at 699 (quoting Superior Court Order, 2021 Cal. Super. LEXIS 39856 at *7).

The Appellate Decision was the first Court of Appeal holding to examine whether a local school district could mandate a vaccination for school attendance. Therefore, the decision easily satisfies multiple criteria for publication pursuant to California Rules of Court ("**CRC**") Rule 8.1105(c), in that it is an important decision that establishes new law on an issue of continuing public interest, which is likely to come up again in the coming years. The Charter Schools ask that this Court depublish this important decision for no reason other than that they believe schools should be allowed to mandate the Covid-19 vaccine. However, a disagreement with a holding is not a sufficient basis for depublication. Furthermore, the issue in this matter is not whether schools *should* mandate the Covid-19 vaccine, rather the issue is who has the authority to decide. Both the Court of Appeal and the Superior Court were compelled to find that the Legislature has reserved that authority for itself and the CDPH. As such, we ask the Court to deny the Charter Schools' request to depublish the Appellate Decision.

B. Interest of the Person Opposing Depublication

Plaintiff/Respondent, S.V., is the parent of J.D., who at the time of the School District Action was a junior who attended Point Loma High School, a public high school in the SDUSD. J.D. has received all vaccines required to attend school in California, meaning J.D. is "fully vaccinated," but J.D. had not received a vaccine for Covid-19. S.V. does not consent to giving J.D. a Covid-19 vaccine. That is why she challenged the SD Mandate in court. J.D. still has not received a Covid-19 vaccine. As such, S.V. has an ongoing interest in ensuring that the Appellate Decision remains good precedent to guarantee that the SDUSD, nor any other school district that J.D. might attend does not implement a revised COVID-19 vaccine mandate in violation of state law.

C. The Appellate Decision Satisfies Multiple Criteria for Publication

CRC Rule 8.1105 instructs the Court of Appeal to publish its opinions if the opinion meets any one of nine criteria set forth in the rule. The Appellate Decision satisfies not one, but at least five of these criteria.

Rule 8.1105(c)(1) Establishes a new rule of law. As noted, before the Appellate Decision, no prior Court of Appeal or California Supreme Court decision had examined whether a local school district could mandate a vaccination for school attendance, without authorization from the Legislature or CDPH. This meant that when the Court of Appeal ruled that such mandates were prohibited under state law, it established a new rule of law in this state.

Rule 8.1105(c)(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions. In addition to being the first decision to examine the issue, the appellate decision was the first California appellate ruling to apply field preemption to the comprehensive vaccination requirements established by the Legislature.

Rule 8.1105(c)(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule. The Appellate Decision was also the first appellate decision to interpret 17 Cal. Code Regs. ("CCR") § 6025. In addition, the Appellate Decision was the first to hold that H&S § 120335 "by negative-but-necessary implication provides that" only the CDPH or the Legislature can add vaccinations to the ten listed in that section as being required for school attendance. *See* Appellate Decision, 85 Cal. App. 5th at 703.

Rule 8.1105(c)(6) Involves a legal issue of continuing public interest. There can be no doubt that Covid-19 vaccination mandates are of continued public interest.[1] Furthermore, as the Charter Schools' case demonstrates, SDUSD was far from the only school district that implemented a vaccination mandate in 2021. As such, this is an issue that is likely to re-surface in the future.

Rule 8.1105(c)(7) Makes a significant contribution to legal literature by reviewing … the legislative or judicial history of a provision of a constitution, statute, or other written law. The Appellate Decision provided a significant analysis of the legislative history of H&S §§ 120335, 120365, and 120370, and the 2015 State Senate Committee on the Judiciary Report concerning amending the vaccination laws. Appellate Decision, 85 Cal. App. 5th at 701 (quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.) as amended Apr. 22, 2015, p. 18.). This is a valuable analysis with regard to understanding the Legislature's intent concerning the states vaccination laws.

As this shows, the Judges of the Court of Appeal were correct in their determination that the Appellate Decision is an important contribution to the state's jurisprudence, worthy of publication. The only reason the Charter Schools are requesting depublication is because they disagree with the holding. However, not only does the Charter Schools' criticism of the decision miss the mark, but also disagreement with a holding should not create a basis for depublication. If disagreement alone warranted depublication, then that would permit collateral attacks on any decision by any outside group, without the usual procedures and safeguards established by the appellate system.

D. The Appellate Decision Reached the Correct Conclusion

"If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." *O'Connell v. City of Stockton*, (2007) 41 Cal. 4th 1061, 1067. Here, after examining the state's vaccination laws and regulations, and the legislative history supporting them, both the Superior Court and the Court of Appeals reached the same conclusion: a local vaccination mandate for school attendance both conflicts with state law and intrudes on a field of law completely occupied by the state. Those courts did not reach their conclusions due to an aversion to the Covid-19 vaccine. To the contrary, the Superior Court stated that a vaccine mandate "appears to be necessary and rational," but it acknowledged that the evidence of preemption was so substantial that it was "compelled to grant the petitions for writ of

[1] *See, e.g.,* David Garrick, *San Diego repeals controversial COVID-19 vaccine mandate for city workers*, The San Diego Union-Tribune, Jan. 24, 2023, *available at* https://www.sandiegouniontribune.com/news/politics/story/2023-01-24/san-diego-repeals-controversial-covid-19-vaccine-mandate-citing-drop-in-cases-hospitalizations; Steve Contorno, *DeSantis pushes to permanently ban Covid-19 mandates in Florida*, CNN, Jan. 18, 2023, *available at* https://www.cnn.com/2023/01/18/politics/desantis-covid-policy-florida/index.html.

mandate." Superior Court Order, 2021 Cal. Super. LEXIS 39856 at *8-9. This was the correct conclusion, which respects the Legislature's primacy in making policy for the state.

1. The SD Mandate Conflicted With Ed. Code § 49405

The SD Mandate conflicts with multiple state laws and CDPH regulations regarding vaccinations mandated for school attendance. "A conflict exists if the local legislation **duplicates, contradicts, or enters an area fully occupied** by general law, either expressly or by legislative implication." *O'Connell,* 41 Cal. 4th at 1067 (internal quotations omitted, emphasis in original). "[L]ocal legislation is 'contradictory' to general law when it is inimical thereto." *Sherwin-Williams Co. v. City of Los Angeles*, (1993) 4 Cal. 4th 893, 898.

The first state law the SD Mandate conflicts with is Ed. Code § 49405, which explicitly prohibits School Districts from adopting rules or regulations concerning vaccination. As the Superior Court recognized, that section states that "**no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities**." Superior Court Order, 2021 Cal. Super. LEXIS 39856 at *3. By creating a local rule on a topic removed from local control by state law, the SD Mandate is by its nature "hostile or inimical" to Ed. Code § 49405. *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles* (2009) 175 Cal. App. 4th 1396, 1410 (holding that where state law permitted landlords to "establish the initial rental rate for a dwelling or unit," a local ordinance requiring a certain number of affordable housing units was preempted). Thus, the text of Section 49405, as written, requires finding preemption. *See Chevron U.S.A., Inc. v. Cnty. of Monterey* (2021) 70 Cal. App. 5th 153, 164-65 (holding that where the language of a state statute plainly lodged with the state all authority to permit all oil drilling practices, any local ordinance would be preempted).

SDUSD previously argued that, when the Legislature enacted Section 49405 in 1921, the only commonly used vaccine was for smallpox, therefore, the Legislature could not have intended the phrase "the subject of vaccination" to apply to any other vaccines. SDUSD, however, ignored that the Legislature began adding required vaccinations beyond just smallpox in 1961. Stats.1961, ch. 847. The history of Section 49405 shows that the Legislature chose to keep using the phrase "the subject of vaccination" long after 1961, establishing that the Legislature intended the phrase to have its modern, common meaning. After the Legislature adopted what is now Ed. Code § 49405, Stats. 1921, ch. 370, p. 550, § 1, that section was then re-numbered in legislation passed in 1943, 1959 and 1968. Stats. 1943, ch. 71, p. 636; Stats. 1959, ch. 2, p. 881, § 11851; Stats.1968, ch. 1048, pp. 2026-27, § 8. The Legislature in 1976 again used the same language as part of a statutory reorganization that created section 49405. Stats. 1976 ch. 1010, p. 3611, § 2. In 1981, the section was slightly amended to take its current form (*i.e.*, by replacing the term "State Board of Health" with the term "State Department of Health Services"). Stats. 1981, ch. 714, p. 2616, § 93. The Legislature then referenced Section 49405 in bills that it passed in 2007 and 2021. 2006 Cal. Legis. Serv. Ch. 241 (S.B. 162) (enacting §131052); 2021 Cal. Legis. Serv. Ch. 666 (A.B. 486). If the Legislature wanted to clarify that the second clause of Section 49405 only applies to the smallpox vaccine, it had had ample opportunity to do so. Its choice not to make such a change strongly supports the plain reading of the statute.

2. The SD Mandate Conflicted With H&S § 120335

Even assuming *arguendo* that the court can ignore Section 49405 (which the Charter Schools do in their letter), the Court of Appeal correctly concluded that the SD Mandate conflicts with the Legislature's vaccination requirements in H&S § 120335. The Legislature carefully selected ten vaccinations that it would require for school admission. The Legislature also requires students to provide proof of receiving a vaccine for "[a]ny other disease deemed appropriate by the department [i.e., 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 at § 120335(b)(11). Absent proof of these vaccinations, a school "shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school[.]" *Id.* at § 120335(b). The Legislature expressly identifies a student who has received vaccinations against all diseases stated in Section 120335(b) as being "fully immunized." *Id.* at § 120335(b).

The Charter Schools pay little attention to H&S § 120335 in their letter, claiming that it merely establishes a minimum standard because it does not explicitly exclude local schools from creating new mandates. However, the regular cannons of statutory interpretation show that it was not necessary for the Legislature to include an explicit limitation on school district authority in H&S § 120335 in order to prevent those school districts from creating new mandates. The "familiar rule of construction, *expressio unius est exclusio alterius*," means that because the Legislature created an explicit exception for CDPH, "other exceptions are not to be implied or presumed." *Mut. Life Ins. Co. v. City of Los Angeles*, (1990) 50 Cal. 3d 402, 410; *Grupe Dev. Co. v. Superior Ct.*, (1993) 4 Cal. 4th 911, 921 ("From the fact that the Legislature specified one class of special [school] taxes that is not subject to the limitations of section 65995, … we may reasonably infer that it intended that all other classes of special taxes fall within the statute. *Expressio unius est exclusio alterius.*"); *California Teachers Assn. v. Governing Bd.*, (1987) 195 Cal. App. 3d 285, 294 (applying the *expressio unius* rule to a school's actions).

The legislative history of H&S § 120335 supports this conclusion. According to the California Assembly Committee on Health: "[e]ach of the 10 diseases [in H&S § 120335(b)] was added to [the] 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.…" *Love v. State Dept. of Education,* (2018) 29 Cal. App. 5th 980, 987 (citing Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.), as amended May 7, 2015, p. 4.) (S.V. Ex. 1).[2] Given this level of review and consideration by the Legislature of the 10 vaccines listed in H&S § 120335, in 2016 the Legislature chose to only permit a narrow medical exemption ("**ME**") and eliminated the personal belief exemption (a "**PBE**") to the vaccines for these 10 diseases. H&S § 120335(g)(3).

In contrast, the Legislature mandated that when CDPH adds to the list of diseases students are required to be fully immunized against, students must be afforded **both** an ME and a PBE. *See* H&S § 120338. The reason for requiring both exemptions can be found in the California Senate Judiciary Committee's 2015 report addressing the need to balance individual rights and states' rights when mandating vaccinations. Sen. Com. on Judiciary., Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.) (April 22, 2015) (S.V. Ex. 2.) ("**Judiciary Committee Report**") Specifically, the Committee wrote that a vaccination law "must strike a reasonable balance that furthers public health and safety without unduly encroaching on the private family sphere." *Id.* at p. 13; *see also Id.* p. 7 (titling section "Liberty rights and parental rights balanced against the police powers of the state.") The Committee had concerns that permitting CDPH to add vaccination requirements had "the potential to dramatically expand the scope of the bill and disrupts the careful balancing of the various rights involved." *Id.* at p. 021.

Thus, the Legislature clearly put great thought into who could add vaccination requirements to its own list, because it wanted to avoid expanding such requirements to the point that they would

[2] References herein to "S.V. Ex." are to the exhibits attached hereto, each of which was previously part of the record before the Court of Appeal. References herein to "Charter School Ex." are to the exhibits to the Charter Schools' January 20, 2023, letter to this Court.

"'disrupt[] the careful balancing of the various rights involved' in the legislative process." Superior Court Order, 2021 Cal. Super. LEXIS 39856 at *6 (quoting Judiciary Committee Report at pp. 17-18). This is why the principal of *expressio unius est exclusio alterius* is particularly apt when analyzing Section 120335. Moreover, it defies logic to conclude that the Legislature thought it necessary to place restrictions on an expert agency like the CDPH, but intended to give over 1,000 individual school districts *cart blanch* to add any vaccine mandate they wanted. As the Court of Appeal correctly concluded, "section 120335 does much more than set statewide minimums. By creating a process by which new immunizations can be added to the statutory list without further legislative action, it expresses a directive that the vaccinations required for school attendance present a statewide issue subject to statewide criteria. In a nutshell, local variations must give way to a uniform state standard." Appellate Decision, 85 Cal. App. 5th at 703.

3. The SD Mandate Conflicted With CCR tit. 17, § 6025

The Court of Appeal also concluded that its interpretation of H&S § 120335 comported with the interpretation applied by the CDPH. Citing Section 120335 as its authority, CDPH regulation 6025 provides in relevant part:

> A school or pre-kindergarten facility shall unconditionally admit or allow continued attendance to any pupil . . . whose parent or guardian has provided documentation . . . for each immunization required for the pupil's age or grade, as defined in Table A or B of this section.

CCR tit. 17, § 6025(a). The Legislature vested the CDPH with the exclusive authority to "adopt and enforce all regulations necessary" to implement, *inter alia*, H&S § 120335. H&S § 120330. Courts "ordinarily defer to an agency's interpretation where it has 'consistently maintained the interpretation in question, especially if it is long[]standing' and contemporaneous with the Legislature's enactment of the relevant statute." Appellate Decision, 85 Cal. App. 5th at 704 (*quoting Yamaha Corp. of America v. State Bd. Of Equalization*, (1998) 19 Cal.4th 1, 12-13). Here, Section 6025, was adopted contemporaneously with the Legislature's 1979 amendment to "former section 3381 to add the key language that is now in section 120335." *Id.* Therefore, the Court of Appeal found that "[t]he plain language in regulation 6025 undermines the [SDUSD's] claim that it can exclude a student who has received all the statutorily required immunizations." *Id.*

The Charter Schools devote a full one-third of their depublication letter to a hyper technical reading of Section 6025, even though the Court of Appeal and Superior Court both treated that section as more of a supporting character than the basis for their holdings. Appellate Decision, 85 Cal. App. 5th at 704 (discussing Section 6025 because it supports the Court's interpretation of Section 120335); Superior Court Order, 2021 Cal. Super. LEXIS 39856 at *6. Under this hyper technical reading, the Charter Schools argue that Section 6025's requirement that schools "shall unconditionally admit or allow continued attendance to any pupil" who is fully vaccinated, does not mean that the school needs to allow the pupil to actually attend school in a classroom, and instead such attendance can be anywhere, including in an independent study. This argument fails for several reasons.

First, the Charter Schools' argument loses the forest for the trees. It again defies logic to argue that the Legislature would carefully balance state and individual rights in selecting its list of vaccinations required for admission and restrict the CDPH's ability to add additional vaccine requirements, but then have a hidden intent to permit school districts to require additional vaccines through the clever loophole of calling its local mandate a requirement for "campus access," rather than an admissions requirement.

Second, the Charter Schools argue that "attendance" does not mean in-classroom attendance because, in 2016, the CDPH's Initial Statement of Reasons for Regulations (the "**Initial Statement**") concerning changes to its vaccination regulations explained that the department changed the term "entry" to the term "attendance" in Section 6000(a)'s definition of "Admission." (Charter Schools Ex. C.) However, this change is not helpful to the Charter Schools. The CDPH did not say it was making the change in order to change the meaning of Admission, but rather to remove an "ambiguity caused by the term 'entry[.]' (*Id.*) The CDPH's concern regarding the ambiguity of the term "entry" referred to the fact that the term could mean many things. Entry could refer to anything from when a student from another district entered campus for a sporting event, to when a student enters a class each day. The CDPH wanted to make clear that "admission" should be defined closer to the latter type of entry, and therefore, the department chose a more specific term like "attendance." Nothing in the Initial Statement indicates that the CDPH changed the term "entry" to permit individual schools to regulate the vaccination requirements for entry into a classroom.

Third, the Initial Statement also asserts that: "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**." (Charter Schools Ex. C (emphasis added).) The Initial Statement does *not* assert that such requirements are "developed by each state" *and locality*. In fact, absolutely nothing in that document states that the Legislature or CDPH intended to permit local school districts to create new requirements. To the contrary, the CDPH's conclusion that California's vaccine "requirements are updated less frequently and do not include all nationally recommended vaccines" supports the statement in the Senate report that the Legislature balanced "[l]iberty rights and parental rights … against the police powers of the state" when it added required vaccines. (S.V. Ex. 2 at p. 7.) The very fact that the Legislature chose only a select few vaccinations to require, is antithetical to the Charter Schools' claim that the Legislature intended to permit every local school to disrupt that balance by adding vaccine requirements.

4. The SD Mandate Enters a Field Entirely Occupied by the State

In addition to conflict preemption, the Court of Appeal and the Superior Court also recognized that the Legislature has created a comprehensive legal structure covering the field of vaccination mandates for school attendance. Appellate Decision, 85 Cal. App. 5th at 705-07; Superior Court Order, 2021 Cal. Super. LEXIS 39856 at *6-8. As such, the SD Mandate was "preempted because it purport[ed] to regulate an area of law that the Legislature has fully occupied." Appellate Decision, 85 Cal. App. 5th at 705. The Court of Appeal recognized that "[t]he Legislature has covered the matter fully and completely, defining the who, what, when, and where of compulsory student vaccination:

1. Who shall receive vaccines. (§ 120335, subd. (b)).
2. Who may administer vaccines. (§§ 120375, subd. (d), 120380).
3. Sources for obtaining immunization. (§ 120345).
4. Proper documentation of vaccination. (§ 120355.)
5. Exemption for community college students. (§ 120360).
6. The diseases for which immunization shall be documented. (§ 120335, subd. (b)(1)–(11)).
7. The role of county health officers in organizing and maintaining a program to make immunizations available. (§ 120350).
8. Who can add diseases to the list of required immunization. (§ 120335, subd. (b)(11)).

9. Medical exemptions and appeal of revoked medical exemptions. (§§ 120370, 120372.05).
10. Conditional admission of students not fully vaccinated. (§ 120340).
11. Excluding unvaccinated students who are exposed to specific diseases. (§ 120370, subd. (b)).”

Appellate Decision, 85 Cal. App. 5th at 705-06; *People v. Nguyen*, (2014) 222 Cal. App. 4th 1168, 1186 (holding that where the state enacted numerous laws regarding sex offenders and expressed an intent “to create a standardized statewide monitoring system for known sex offenders” that was clear evidence that the state intended to occupy the field). The Legislature’s choice to occupy this field is consistent with the fact that it has long “recognized that matters of health and medicine … are of statewide concern” and in such matters “the Legislature has paramount authority[.]” *N. Cal. Psychiatric Socy. v. City of Berkeley* (1986) 178 Cal. App. 3d 90, 106-08. As such, the Charter Schools are incorrect to rely on the general presumption against preemption because “[t]here is no presumption against preemption when a local ordinance regulates in an area historically dominated by state regulation.” *Nguyen* 222 Cal.App.4th at 1187; *see also American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1255 (refusing to apply the presumption against preemption concerning mortgage regulation because there was no history of local regulation regarding that topic).

If the comprehensive structure, and the statement in Ed. Code § 49405 that local regulation is prohibited, were not substantial enough evidence of field preemption, the Judiciary Committee Report explicitly states that the Legislature intended to occupy the field and create a single statewide standard. The report first notes that “[s]ome 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 by school district** basis.” (S.V. Ex. 2 at p. 18 (emphasis added).) The Appellate Decision quotes how the report rejects this local approach and provides the reasons given by the bill’s authors for why “a statewide standard was preferred:”

> ‘… 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. … Further in consultation with various health officers, they believe a statewide policy provides them the tools to protect all children equally from an outbreak.’

Appellate Decision, 85 Cal. App. 5th at 701 (quoting S.V. Ex. 2 at p. 18).

Further evidence of this desire for a single statewide standard can be seen in the Legislature’s choice to carefully ensure that local School Districts have little or no discretion in enforcing the vaccination scheme the Legislature created. For example, H&S § 120335 includes a very circumscribed role for School Districts; it states that the School District “shall not unconditionally admit any person as a pupil” who has not obtained all 10 required vaccinations. H&S § 120335(b). The Legislature gave school districts no choice in this regard. The Legislature also permitted school districts no discretion with regard to the information a district is required to collect regarding the vaccination status of students. H&S §§ 120335, 120340, 120375. When the Legislature required districts to collect information regarding ME’s, it mandated the districts only do so on forms approved by CDPH. *Id.* at § 120372 (a)(1). That information is then reported to CDPH, which makes the ultimate decision whether to permit the requested medical exemption, again cutting out the school district from any decision-making authority. *Id.* at § 120375 (c).

Likewise, the Legislature stated that "a school district shall cooperate with the local health officer… to administer an immunizing agent to a pupil whose parent or guardian has consented in writing to the administration of the immunizing agent," but it then gave the school no authority regarding who can administer vaccines, and what vaccines can be administered. Ed. Code § 49403 (a), (b). Thus, when the Legislature wants to give a school district a role in the overall vaccination program, it knows how to do that. Therefore, the fact that it never explicitly gave school districts permission to mandate vaccinations suggests that no such power was ever intended.

The Charter Schools try to use Section 49403 to show that the Legislature has not occupied the field because that section states "[i]t is the intent of the Legislature to encourage school-based immunization programs[.]" However, their selective quoting of that section is deceptive. As the Court of Appeal stated, Ed. Code § 49403 "does not allow a local school district to mandate new vaccinations; it merely permits the district to administer vaccinations — that is, to give injections — and only if the parent of the student agrees." Appellate Decision, 85 Cal. App. 5th at 708. The Charter Schools also argue that 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." Nevertheless, numerous California court opinions show that where school districts ground their actions in their general discretion and need to keep students safe, in the face of more specific state statutes, it is the specific state statutes that always control and the local ordinance that is preempted. *See, e.g., California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, (1997) 14 Cal. 4th 627, 649 (accepting that the Ed. Code § 35160 "delegated broad discretion," but "[t]hese broad grants of power, however, do not control over the more specific section[s]" of state law); *California School Employees Assn. v. Del Norte County Unified Sch. Dist.*, (1992) 2 Cal. App. 4th 1396, 1404 (refusing to accept that Ed. Code § 35160 permitted a School District to "authorize a contract which is prohibited by other sections of the Education Code").

E. The Unpublished Charter School Superior Court Decision was Wrongly Decided

The Charter Schools assert that in contrast to the Appellate Decision, their unpublished Superior Court decision in *Let Them Choose v. Grenada Hills Charter School*, Case No. 22CHCP00001 (decided July 22, 2022) (the "**Charter School Superior Court Decision**"), correctly concluded that any school can mandate additional vaccination requirements so long as they call them campus access requirements. This decision, however, included several fundamental flaws, only a few of which can be examined here, but any one of which would have reversed the outcome of the case.

First, the Charter School Superior Court Decision dismisses the Judiciary Committee Report by asserting, without any real discussion, that it focused exclusively on the proposal to remove the PBE. (Charter Schools Ex. A at p. 36.) This is incorrect. The Judiciary Committee Report looks at more than just eliminating the PBE because, by eliminating that exemption, the state was effectively overriding individual choice on the issue of vaccination. As discussed above, the report included a lengthy discussion about how "[l]iberty rights and parental rights" must be "balanced against the police powers of the state" with regard to vaccination mandates generally. (S.V. Ex. 2 at p. 7-15). After this broad discussion, the Judiciary Committee Report acknowledges that by affecting such fundamental liberty and parental rights, any vaccine mandate bill needs to pass strict scrutiny, and as such, any mandate must be narrowly tailored. (*Id.* pp. 17-18). As also discussed, it concludes that any CDPH mandate must include a PBE, because otherwise the CDPH's role "has the potential to dramatically expand the scope of the bill and disrupts the careful balancing of the various rights involved." (*Id.* p. 18). Likewise, when viewed in context, the report's foregoing quoted portion regarding the bill's opponents suggestion that the bill could be narrowed by "mandating vaccines on a community by community or school district by school district basis" makes it clear that the statewide standard referenced by the bill's authors concerned

more than just the PBE, but rather refuted the entire idea of permitting communities to mandate vaccines. (*Id*).

Second, the Charter School Superior Court Decision incorrectly concludes that the Charter Schools can require students who are not vaccinated to attend an independent study program. Ed. Code § 51747 (g) requires that independent study be "an **optional** educational alternative in which **no pupil may be required to participate**." (emphasis added). CCR tit. 5, § 11700 defines this requirement to mean, in relevant part: "a pupil's … choice to commence, or to continue in, independent study **must not be coerced**…" CCR tit. 5, § 11700(d)(2)(A) (emphasis added). The Court of Appeal examined these provisions and correctly concluded that the state does not view an independent study program as equivalent to in-person school. Appellate Decision, 85 Cal. App. 5th at 708. Nevertheless, the Charter School Superior Court Decision held that the Charter Schools could force students into independent study programs if they refuse to be vaccinated because those students are "choosing" independent study over in-person learning, even if doing so presents the students with "a Hobson's choice." (Charter Schools Ex. A at p. 22.) This conclusion is inconsistent with the terms used in the CCR. Section 11700 uses the phrase "must not be coerced," which is different from requiring a student have a choice regarding independent study. Coerced means "to persuade someone forcefully to do something that they are unwilling to do." *Cambridge Advanced Learner's Dictionary & Thesaurus* (Cambridge University Press 2023) *available at* https://dictionary.cambridge.org/us/dictionary/english/coerced. Telling a student that he or she will be forced to attend an independent study program if he or she is unwilling to receive a vaccination clearly meets this definition. In fact, the Merriam-Webster.com Thesaurus lists "coercion" as a synonym for a "Hobson's Choice," which is exactly what the Superior Court admitted the students were faced with. *Merriam-Webster.com Thesaurus* (Merriam-Webster 2023) *available at* https://www.merriam-webster.com/thesaurus/Hobson%27s%20choice. Thus, contrary to the holding in the Charter School Superior Court Decision, the SD Mandate and the Charter Schools' plan to use independent study as a cudgel to force vaccination clearly violates state regulations regarding Independent Study.

Third, the Charter School Superior Court Decision adopts the Charter Schools' flawed interpretation of Ed. Code § 49403 as permitting mandatory vaccinations, and the Charter Schools' incorrect hyper technical reading of CCR tit. 17, § 6025, (Charter Schools Ex. A at pp. 27-29.) are both wrong for the reasons stated above. *Supra* § C. 3-4. The Charter School Superior Court Decision then uses these flawed conclusions to hold that there is no conflict between the local vaccination mandates and state law, and to hold that the Legislature has not occupied the entire field because it did not regulate campus-access explicitly. However, the Legislature need not explicitly legislate every conceivable minute detail in order to occupy a field, rather "its intent with regard to occupying the field" is measured "by the whole purpose and scope of the legislative scheme." *O'Connell*, 41 Cal. 4th at 1068 (internal quotations omitted). Here, as shown above, the Legislature has both explicitly and implicitly shown that its purpose is to create a single statewide standard. It is that purpose that the Court of Appeal correctly honored, and that the Charter School Superior Court Decision failed to acknowledge.

Lastly, if the Charter Schools believed that the Charter School Superior Court Decision presented arguments that the parties in the School District Action should have raised, the schools were free to file an amicus brief with the Court of Appeal. The Charter School Superior Court Decision came out in July 2022, more than four months before the Appellate Decision. They should not now be permitted to use the depublication process as an *ex post facto* means to present arguments that could have been presented in the first instance. If the Charter Schools believe that the Appellate Decision failed to take into account non-public schools, like charters or private schools, and that this is an important distinction, they are free to litigate that question in some future litigation, but that alone does not justify depublishing the decision.

F. Conclusion

For the foregoing reasons, the Court should find that the Court of Appeal correctly concluded that the Appellate Decision was worthy of publication and should deny the Charter Schools' motion.

Respectfully Submitted,

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S.V. Exhibit 1

Date of Hearing: June 9, 2015

ASSEMBLY COMMITTEE ON HEALTH
Rob Bonta, Chair
SB 277 (Pan and Allen) – As Amended May 7, 2015

SENATE VOTE: 25-11

SUBJECT: Public health: vaccinations.

SUMMARY: Eliminates non-medical exemptions from the requirement that children receive vaccines for certain infectious diseases prior to being admitted to any public or private elementary or secondary school, or day care center. Specifically, **this bill**:

1) Deletes the exemption based on personal beliefs from the existing immunization requirement for children in child care and public and private schools. Deletes related law requiring a form to accompany a personal belief exemption (PBE).

2) Exempts students enrolled in home-based private schools or in an independent study program from the existing immunization requirement.

3) Permits the California Department of Public Health (DPH) to add diseases to the immunization requirements only if exemptions are allowed for both medical reasons and personal beliefs.

EXISTING LAW:

1) Prohibits the governing authority of a school or other institution from unconditionally admitting any person as a pupil of any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, unless, prior to his or her first admission to that institution, he or she has been fully immunized against diphtheria, *Haemophilus influenzae* type b (Hib meningitis), measles, mumps, pertussis (whooping cough), poliomyelitis, rubella (German measles), tetanus, hepatitis B, and varicella (chickenpox).

2) Permits DPH to add to this list any other disease deemed appropriate, taking into consideration the recommendations of the Centers for Disease Control and Prevention (CDC) Advisory Committee on Immunization Practices (ACIP) and the American Academy of Pediatrics Committee on Infectious Diseases.

3) Waives immunization requirements in 1) above, if the parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances that contraindicate immunization.

4) Waives the above immunization requirements if the parent, guardian, or an emancipated minor, files a letter with the governing authority stating that the immunization is contrary to his or her beliefs.

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5) Requires a separate form prescribed by DPH to accompany a letter or affidavit to exempt a child from immunization requirements on the basis that an immunization is contrary to beliefs of the child's parent or guardian. Requires the form to include:

   a) A signed attestation from the health care practitioner that indicates that the parent, guardian, or emancipated minor, was provided with information regarding the benefits and risks of the immunization and the health risks of the specified diseases to the person and to the community. Requires the attestation to be signed not more than six months before the date when the person first becomes subject to the immunization requirement for which exemption is being sought.

   b) A written statement signed by the parent, guardian, or emancipated minor, that indicates that the signer has received the information provided by the health care practitioner pursuant a) above. Requires the statement to be signed not more than six months before the date when the person first becomes subject to the immunization requirements as a condition of admittance.

6) Permits a local health officer to temporarily exclude from the school or institution a child for whom the requirement has been waived, whenever there is good cause to believe that he or she has been exposed to one of the specified communicable diseases, until the local health officer is satisfied that the child is no longer at risk of developing the disease.

FISCAL EFFECT: None.

COMMENTS:

1) **PURPOSE OF THIS BILL.** According to the author, in early 2015, California became the epicenter of a measles outbreak, which spread in large part because of communities with large numbers of unvaccinated people. According to the CDC, there have been more cases of measles in January 2015 than in any one month in the past 20 years. Between 2000 and 2012, the number of PBEs from vaccinations required for school entry that were filed rose by 337%. In 2000, the PBE rate for kindergartners entering California schools was under 1%. However, by 2013, that number rose to 3.15%. In certain geographic pockets of California, exemption rates are 21% or more, placing our communities at risk for the rapid spread of entirely preventable diseases, according to the author. Given the highly contagious nature of diseases such as measles, vaccination rates of up to 95% are necessary to protect the public health of the community and prevent future outbreaks.

2) **BACKGROUND.** The diseases that vaccines prevent can be dangerous, or even deadly. According to the CDC, vaccines reduce the risk of infection by working with the body's natural defenses to help it safely develop immunity to disease. When bacteria or viruses invade the body, they attack and multiply, creating an infection. The immune system then has to fight the illness. Once it fights off the infection, the body is left with a supply of cells that help recognize and fight that disease in the future. Vaccines contain the same antigens or parts of antigens that cause diseases, but the antigens in vaccines are either killed or greatly weakened. This exposure to the antigens teaches the immune system to develop the same response as it does to the real infection so the body can recognize and fight the disease in the future.

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Public health experts agree that vaccines represent one of the greatest achievements of science and medicine in the battle against disease. Vaccines are responsible for the control of many infectious diseases that were once common around the world, including polio, measles, diphtheria, pertussis, rubella, mumps, tetanus, and Hib meningitis. Vaccine helped to eradicate smallpox, one of the most devastating diseases in history. Over the years, vaccines have prevented countless cases of infectious diseases and saved literally millions of lives.

Vaccine-preventable diseases have a costly impact, resulting in doctor's visits, hospitalizations, and premature deaths. Sick children can also cause parents to lose time from work. CDC recommends routine vaccination to prevent 17 vaccine-preventable diseases that occur in infants, children, adolescents, or adults.

In the U.S., the high vaccination rate for routinely recommended immunizations for infant and childhood diseases has brought about dramatic declines in the incidence of polio, measles, mumps, rubella, *Haemophilus influenza* type b, hepatitis, and chickenpox. In the past decade, recommendations for annual influenza vaccination have been expanded to encompass all children six months to eighteen years of age, and new vaccines have been added to the immunization schedule to help protect infants from rotavirus disease and adolescents from meningitis. As a result of the advances in developing vaccines and including them as standard of care, most diseases that are preventable by vaccination are at record low levels in the U.S.

For years many of these diseases were thought to be ordinary childhood experiences and many older adults had these diseases as children. Nevertheless, they are serious deadly diseases for some. For example, measles in children has a mortality rate as high as about one in 500 among healthy children, higher if there are complicating health factors.

In the past couple of decades, controversy has arisen about vaccines and autism, the best number of injections to be administered during a single visit or over the course of the first years of life, and vaccine ingredients which has prompted parents, the media, policy makers, and others to raise concerns about the safety of recommended immunizations as well as the vaccination schedule. Despite their positive impact on health and well-being, vaccines have had a long history of arousing anxiety. The rapid growth of the Internet and social media has made it easier to find and disseminate immunization-related concerns and misperceptions. According to a 2011 study published in the journal *Health Affairs*, results indicate that although the overwhelming majority of parents surveyed intended to vaccinate their children fully, a majority of parents still had questions or concerns about vaccines.

3) **SCHOOL IMMUNIZATION REQUIREMENTS.** States enact laws or regulations that require children to receive certain vaccines before they enter childcare facilities and school, but with some exceptions, including medical, religious, and philosophical objections. School vaccination requirements are thought to serve an important public health function, but can also face resistance.

An article published in the 2001-02 *Kentucky Law Journal* reviewed historical and modern legal, political, philosophical, and social struggles surrounding vaccination requirements. The authors stated that though school vaccination has been an important component of public health practice for decades, it has had a controversial history in the U.S. and abroad. Historical and modern examples of the real, perceived, and potential harms of vaccination,

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governmental abuses underlying its widespread practice and strongly held religious beliefs have led to fervent objections among parents and other persons who object to vaccines on legal, ethical, social, and epidemiological grounds. The article states that public health authorities argue that school vaccination requirements have led to a drastic decrease in the incidence of once common childhood diseases. Those who object to vaccines tend to view the consequences of mass vaccination on an individualistic basis, focusing on alleged or actual harms to children from vaccinations. As part of their research, the authors compared childhood immunization rates and rates of vaccine-preventable childhood diseases before and after the introduction of school vaccination requirements. The data suggest that school vaccination requirements have succeeded in increasing vaccination rates and reducing the incidence of childhood disease

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. Following is a brief summary of activity related to mandated immunizations for children enrolling in school:

1889: School districts first allowed to exclude a student who is not vaccinated against smallpox, and schools were required to maintain a list of unvaccinated children (SB 92, Briceland, Chapter 24).
1961: Polio immunization added as a requirement, as well as the first appearance of a philosophical exemption (AB 1940, DeLotto and Rumford, Chapter 837).
1977: Diphtheria, pertussis, tetanus, and measles were added to immunization requirements for children entering school (SB 942, Rains, Chapter 1176).
1979: Mumps and rubella were added to the list (AB 805, Mangers, Chapter 435).
1992: *Haemophilus influenzae* type b was added (AB 2798, Floyd, Chapter 1300, and AB 2294, Alpert, Chapter 1320).
1995 and 1997: Hepatitis B was added (AB 1194, Takasugi, Chapter 291, Statutes of 1995 and AB 381, Takasugi, Chapter 882, Statutes of 1997).
1999: The Legislature voted to add Hepatitis A to the list, but it was vetoed by Governor Davis (AB 1594, Florez).
1999: Varicella was added to the list (SB 741, Alpert, Chapter 747).
2007: The Legislature voted to add pneumococcus to the list, but it was vetoed by Governor Schwarzenegger (SB 533, Yee).
2010: Tetanus, diphtheria and pertussis (TDaP) booster was required for 7th graders (AB 354, Arambula, Chapter 434).

All of the diseases for which California requires school vaccinations are very serious conditions that pose very real health risks to children. Most of the diseases can be spread by contact with other infected children. Tetanus does not spread from student to student but because it is such a serious potentially fatal disease, and it is easily preventable by vaccine, the vaccination of children is required prior to enrollment in school.

4) **COMMUNITY IMMUNITY**. Herd immunity occurs when a significant proportion of the population (or the herd) has been vaccinated, and this provides protection for unprotected individuals. The larger the number of people who are vaccinated in a population, the lower

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the likelihood that a susceptible (unvaccinated) person will physically come into contact with the infection. It is more difficult for diseases to spread between individuals if large numbers of people are already immune, and the chain of infection is broken. The reduction of herd immunity places unvaccinated persons at risk, including those who cannot receive vaccinations for medical reasons. Those who cannot receive vaccines include those with compromised immune systems, older adults, small children and babies, all depending on the vaccine.

There the protective effect of herd immunity wanes as large numbers of children do not receive some or all of the required vaccinations, resulting in the reemergence of vaccine preventable diseases in the U.S. Statewide statistics indicate that in 2014-15 school year, 90.4% of kindergartens received all required immunizations. The widespread reporting of statewide numbers, however, potentially mask a better understanding of more relevant data, such as town, city, or county vaccination rates. Because students are not interacting with every individual in the entire state, the local vaccination rate is more relevant to the discussion of community immunity.

The vaccination rate in various communities varies widely across the state. Those areas become more susceptible to an outbreak than the state's overall vaccination levels may suggest. These communities make it difficult to control the spread of disease and make us vulnerable to having the virus re-establish itself.

Studies find that when belief exemptions to vaccination guidelines are permitted, vaccination rates decrease. An analysis by the *New York Times* found that more than a quarter of schools in California have measles-immunization rates below the 92-94% recommended by the CDC. Research shows that people with lower vaccine acceptance tend to group together in communities. A study recently published in the journal *Pediatrics* found that schools with high PBE rates are clustered in suburbs in the peripheral areas of California cities. The same analysis found that schools with low proportion of white students, or a high proportion of students receiving free or reduced lunch, were more likely to have high vaccination rates (less PBEs).

5) **CALIFORNIA MEASLES OUTBREAK**. The authors point to an outbreak of measles linked to Disneyland in in December 2014 as one of the reasons for the introduction of this bill. This outbreak led to 131 confirmed measles cases reported in California as part of this outbreak. The outbreak, now declared over by DPH, led to 19% of those infected requiring hospitalization. The outbreak likely started from a traveler who became infected overseas with measles, then visited the amusement park while infectious; however, no source was identified. Analysis by CDC scientists showed that the measles virus type in this outbreak (B3) was identical to the virus type that caused the large measles outbreak in the Philippines in 2014.

According to the CDC, measles is one of the first diseases to reappear when vaccination coverage rates fall. In 2014, there were over 600 cases reported to the CDC, the highest in many years. Between 2000 and 2007, the average number of cases was 63 per year, less than half the number of the Disney outbreak, which is one of five outbreaks so far this year reported by the CDC.

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Of the confirmed cases, DPH reported:

- Forty-two cases visited Disneyland during December 17-20, 2014 where they are presumed to have been exposed to measles;
- Thirty-one are household or close contacts to a confirmed case;
- Fourteen were exposed in a community setting (e.g., emergency room) where a confirmed case was known to be present;
- Forty-four have unknown exposure source but are presumed to be linked to the outbreak based on a combination of descriptive epidemiology or strain type;
- Five cases are known to have a different genotype from the outbreak strain; and,
- Among measles cases for whom DPH has vaccination documentation, 57 were unvaccinated and 25 had 1 or more doses of measles, mumps, and rubella (MMR) vaccine. A number of those unvaccinated had a personal belief exemption and also include many infants too young to be vaccinated.

6) **NATIONAL CHILDHOOD VACCINE INJURY ACT.** During the mid-1970s, there was an increased focus on personal health and more people became concerned about vaccine safety. Several lawsuits were filed against vaccine manufacturers and healthcare providers by people who believed they had been injured by the TDaP vaccine. Damages were awarded despite the lack of scientific evidence to support vaccine injury claims. In 1976, a preemptive attempt to conduct a nationwide influenza vaccination campaign for the swine flu stoked peoples' fears. The predicted epidemic did not occur and there were some who argued this particular influenza vaccine resulted in serious side effects.

As a result, potential liability costs and vaccine prices soared, and several vaccine manufacturers halted production. A vaccine shortage resulted and public health officials became concerned about the return of epidemic disease.

To reduce liability and respond to public health concerns, Congress passed the National Childhood Vaccine Injury Act (NCVIA) in 1986. The NCVIA established the National Vaccine Program Office (NVPO) to coordinate immunization related activities among various federal agencies and requires health care providers who give vaccines to provide an information statement to the patient or guardian that contains a brief description of the disease as well as the risks and benefits of the vaccine. Additionally, the NCVIA requires health care providers to report certain adverse health events following vaccination to the Vaccine Adverse Event Reporting System (VAERS). The VAERS system remains an important source of information for the CDC and others to monitor the vaccine program, but the system allows self-reporting by any citizen or healthcare provider what they believe to be an adverse vaccine-related event, but the event numbers publicly available have not necessarily been medically verified or scientifically studied. The National Vaccine Injury Compensation Program (NVICP) was created to compensate those injured by vaccines on a "no fault" basis. The NVICP has been loudly criticized by some for inefficient operations, and for providing legal immunity to the pharmaceutical industry.

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The NCVIA established a committee from the Institute of Medicine (IOM) to review the literature on vaccine reactions. This group concluded that there are limitations in our knowledge of the risks associated with vaccines. The group looked at 76 health problems to see if they were caused by vaccines. Of those, 50 (66%) had no or inadequate research to form a conclusion. The IOM identified several specific problems, such as a limited understanding of biological processes that underlie adverse events, incomplete and inconsistent information from individual reports, poorly constructed research studies (not enough people enrolled for the period of time), inadequate systems to track vaccine side effects, and few experimental studies were published in the medical literature. The CDC states that in the time since the publication of the IOM reports in the 1990s, significant progress has been made to monitor side effects and conduct research relevant to vaccine safety. In 2011 the IOM published *Adverse Effects of Vaccines: Evidence and Causality*, representing an extensive study of peer-reviewed vaccine related research to date. The IOM Committee reviewed eight vaccines given to children or adults (MMR, varicella, influenza, hepatitis A, hepatitis B, human papillomavirus, meningococcal, and DTP) and again found that vaccines are generally very safe and that serious adverse events are quite rare.

7) **VACCINES AND AUTISM.** The idea that autism is caused by vaccination is influencing public policy, even though rigorous studies do not support this hypothesis. The hypothesis is based on the observation that the number of autism cases increased in the 1980s, coinciding with a push for greater childhood vaccinations, which increased above recommended levels children's exposure to mercury in the vaccine preservative thimerosal. However, autism diagnosis continued to rise even after thimerosal was removed from US childhood vaccines in 2001. A review by the IOM of over 200 studies concluded that that there was no causal link between thimerosal-containing vaccines and autism. Other studies have found that autism is no more common among vaccinated than unvaccinated children.

8) **EXEMPTIONS TO VACCINE REQUIREMENTS.** There are currently three types of exemptions to the requirement that children be vaccinated before entering school: medical; religious; and, philosophical.

   a) A medical exemption letter can be written by a licensed physician that believes that vaccination is not safe for the medical conditions of the patient, such as those whose immune systems are compromised, who are allergic to vaccines, are ill at the time of vaccination, or have other medical contraindications to vaccines for that individual patient. Every state allows medical exemptions from school vaccination requirements. This determination is entirely up to the professional clinical judgment of the physician. There are no required medical criteria for diagnosing circumstances that contraindicate vaccination. A physician must base that decision on their professional judgment and the standard of practice for their field. According to the Medical Board of California, the "standard of care" (or "standard of practice") for general practitioners is defined as that level of skill, knowledge and care in diagnosis and treatment ordinarily possessed and exercised by other reasonably careful and prudent physicians in the same or similar circumstances at the time in question. Specialists are held to the standard of skill, knowledge and care ordinarily possessed and exercised by other reasonably careful and prudent specialist in the same or similar circumstances.

   b) Religious exemptions allow parents to exempt their children from vaccination if it contradicts their sincere religious beliefs. Many states allow religious exemptions from

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school vaccination requirements, although states interpret the enforcement of them differently. In some states, a parent may simply attest that vaccinations are against their religious beliefs, while in other states the parent must show membership in a church, and that the church's official policy is opposed to vaccination. According to the National Conference of State Legislatures (NCSL), as of June 2014, 48 states allow religious exemptions (all but Mississippi and West Virginia).

c) Philosophical exemption, which is defined differently in different states, generally means that the statutory language does not restrict the exemption to purely religious or spiritual beliefs. For example, Maine allows restrictions based on "moral, philosophical or other personal beliefs," and California allows objections based on simply the parent(s) beliefs. According to NCSL, 20 states (Arizona, California, Colorado, Idaho, Louisiana, Maine, Michigan, Minnesota, Missouri (limited to childcare enrollees), New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin) permit philosophic exemptions.

As of February, several state legislatures had introduced bills that would address non-medical exemptions. In addition to California, legislators in Oregon, Vermont, and Washington proposed to remove philosophical/personal belief exemption this year. The bills were tabled in Oregon and Washington. On May 25, 2015, the Governor of Vermont signed legislation removing philosophical exemptions, but not religious ones, in that state.

9) SPECIAL EDUCATION. Pursuant to the federal Individuals with Disabilities Education Act (IDEA), children with disabilities are guaranteed the right to a free, appropriate public education, including necessary services for a child to benefit from his or her education. Between 1976 and 1984, to meet this federal mandate, California schools provided mental health services to special education students who needed the services pursuant to an Individualized Education Program (IEP). An IEP is a legally binding document that determines what special education services a child will receive and why. IEPs include a child's classification, placement, specialized services, academic and behavioral goals, a behavior plan if needed, percentage of time in regular education, and progress reports from teachers and therapists. A child may require any related services in order to benefit from special education, including (but not limited to): speech-language pathology and audiology services, early identification and assessment of disabilities in children, medical services, physical and occupational therapy, orientation and mobility services; and psychological services.

According to the California Department of Education (CDE), over 700,000, or approximately 11% of, California students received Special Education services in the 2013-14 academic year.

10) INDEPENDENT STUDY. April 22, 2015 amendments to this bill exclude pupils who are enrolled in an independent study program from the immunization requirements of the bill. Independent study is an optional educational alternative, available to students from kindergarten through high school that is meant to respond to the student's specific educational needs, interests, aptitudes, and abilities. Independent study is an alternative to classroom instruction consistent with a school district's regular course of study and is expected to be equal or superior in quality to classroom instruction. Each school district can develop Independent Study options in its own way. Parents and students may also develop

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alternative forms of independent study and propose them to the school board. The options are based on the kinds of students being served. The following are some of the ways in which independent study is organized:

a) School-within-a-school;
b) District or county alternative in a community location;
c) School-based independent study offered part-time and full-time;
d) Countywide home-based independent study offered by the county superintendent of schools;
e) District dropout prevention centers at selected community sites;
f) Curricular enrichment options offered to high school students with special abilities and interests, scheduling problems, or individual needs that cannot be met in the regular program;
g) Alternative school-based independent study, on-or off-site; and,
h) Some combination of the above.

Independent study can be operated on a traditional school calendar, with a summer school option for eligible students, or on a year-round calendar within a year-round school. Students must have the option of a classroom setting for a full program at the time independent study is made available. This option must be continuously available the student decide to transfer from independent study. The classroom setting option can be offered by the county office of education if the district and county have a formal agreement that has the effect of providing the student with a program that is equivalent to what is offered in the school of residence.

a) Seat Time / Average Daily Attendance. Participation in independent study must be voluntary. For students participating in independent study, a contractual agreement is drawn among the certificated teacher, the student, and his or her parent, guardian, or caregiver. Attendance records are based on a student's work within the terms and conditions of his or her written agreement and not on traditional "seat-time." In independent study, the student's performance, measured by the terms in the agreement, is converted by the supervising teacher into school days. The computed school days are reported as if the student were physically in attendance.

b) Legal Enrollment Restrictions. California education law mandates the following for the administration of independent study programs:

i) No pupil shall be required to participate in independent study;
ii) Not more than 10% of the students enrolled in an opportunity school or program, or a continuation high school, shall be eligible for independent study. A student who is pregnant or is a parent and primary caregiver for one or more of his or her children shall not be counted within the 10% cap;
iii) No individual with exceptional needs may participate in independent study unless his or her IEP specifically provides for that participation; and,
iv) No temporarily disabled pupil may receive individual instruction. However, if the temporarily disabled pupil's parents and the district(s) agree, the pupil may receive instruction through independent study instead of the "home and hospital" instruction.

c) Enrollment History. According to CDE, in 2013-14 there were approximately 122,000 independent study students reported by charter schools and 34,000 reported by school

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districts. Independent study enrollment was not collected for the 2009–10 and 2010–11 school years. In October 2008, data collected from schools reported that 128,000 students in kindergarten through grade twelve were enrolled in independent study.

11) **LEGAL CONSIDERATIONS.** Courts have determined that the family itself is not beyond regulation in the public interest and neither rights of religion nor rights of parenthood are beyond limitation. As discussed at length in the Senate Judiciary Committee analysis, extensive case law establishes that the police powers of the state may restrict the parent's control in many ways, such as requiring school attendance and regulating or prohibiting the child's labor. This authority is not nullified because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, a parent cannot claim freedom from compulsory vaccination for their child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. For a further discussion of the legal rights and ramifications of this bill, please see the Senate Judiciary Committee Analysis as published on April 28, 2015.

12) **SUPPORT.** The Superintendent of Public Instruction (SPI), Tom Torlakson, supports this bill, stating that school and child care immunization requirements have proven effective in increasing immunization rates, limiting the spread of disease, and providing an overall public health benefit. He further states that California has seen a dramatic increase in the PBE rate for students entering kindergarten over the past fifteen years, placing other children, and the overall public health of our citizens, at risk of illness or death from preventable diseases. The SPI concludes that education is a fundamental right in California, and this bill provides education choices for families opting not to vaccinate their children.

The California Medical Association, a cosponsor of this bill, states that in 2000, the CDC determined that measles had been eradicated in the U.S. However, since December 2014, California has had 136 confirmed cases of measles across fourteen counties. Almost 20% of those cases have required hospitalization. Efforts to contain the outbreak have resulted in mandatory quarantines and the redirection of public health resources to investigations into exposure. The California Immunization Coalition, writing in support of this bill, notes that in the 2013-14 school year more than 16,800 kindergarteners in California started school with either no vaccinations or only some of their required vaccinations because their parent had chosen to exempt them from vaccinations, representing a 25% increase over the previous two school years.

March of Dimes Foundation and the Medical Oncology Association of Southern California, Inc. state that public participation in immunization programs is critical to their effectiveness. Protection is greatly affected by rates of immunization: the more people immunized, the less the risk of exposure to, and illness from, vaccine-preventable infections.

The Medical Board of California states that vaccines have been scientifically proven to be effective in preventing illnesses. Ensuring that children receive the ACIP recommended vaccination schedule is the standard of care, unless there is a medical reason that the child should not receive the vaccine; this bill would still allow for a medical exemption to address these concerns. The Children's Specialty Care Coalition notes that high vaccine coverage, particularly at the community level, is extremely important for people who cannot be vaccinated, including people who have medical contraindications to vaccinations and those

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who are too young to be vaccinated. Protecting the individual and the community from communicable diseases such as measles, mumps, and pertussis, is important to the public's health.

The Committee notes it has received hundreds of letters in support of this bill. Many letters from individuals in support write to raise similar points regarding reductions in vaccination rates for school children, recent dangerous measles and pertussis outbreaks, concerns for the health of children and medically fragile individuals, and concerns for the safety of communities at large.

13) **OPPOSITION.** Opponents state that this bill is an extreme measure that is not necessary at this time. The California Chiropractic Association states that this bill proffers the notion that health officials will be given the power to nullify the doctor-patient relationship, and veto the judgment of any physician who questions the status quo and believes that a patient should not receive a particular vaccine. A Voice for Choice states that the Legislature should look to alternative approaches that will stop the transmission of disease and continue to allow parents to work with their doctors for the best vaccination schedule for their individual children, and allow their children their constitutional right to a free and public education.

The Committee also notes that it received hundreds of letters in opposition to this bill. A letter from Our Kids Our Choice and many other similar letters argue that the bill removes federally mandated rights of services to students with disabilities under the federal IDEA. This group, like many others, points to the NVIC and the fact that the U.S. government "has paid out more than $3 billion to the victims of vaccine injury" as support for why medical choice is appropriate. "If there is risk of injury or death there must be a choice." In contrast, they argue that "vaccination rates of California schoolchildren are high at 98.64%" and cite the success of recent legislation, AB 2109 (Pan), Chapter 821, Statutes of 2012, which they say has resulted in a 19% decrease in exemptions amongst kindergarteners in just one year. They argue the public health concerns are already adequately addressed with current California laws. Many letters from individuals write to raise relatively similar points regarding various constitutional rights, informed consent, vaccine safety/injuries, absence of a health crisis, lack of educational choice, difficulty in obtaining medical exemptions, and the like.

ParentalRights.Org states that "…while we appreciate the intent of the amendment to exempt homeschoolers from the vaccination requirement, it is not sufficient to protect the rights of parents and children in California. While there are many parents with strong convictions that the risks of vaccines to their child (as reflected in lengthy disclaimers which accompany these products) outweigh the potential benefits, many of these same parents are also deeply convinced that the best educational opportunity they can provide their child is in the public schools. These parents should not be forced to give up their rights in one area to exercise their rights in another. No child should have to forego the best available education for the sake of his best health, nor give up his best health for the sake of a better education."

14) **CONCERNS.** American Civil Liberties Union of California (ACLU-CA) states that "while we appreciate that vaccination against childhood diseases is a prudent step that should be promoted for the general welfare, we do not believe there has been a sufficient showing of need at present to warrant conditioning access to education on mandatory vaccination for each of the diseases covered by this bill for every school district in the state." ACLU-CA

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further states that unlike other states where a vaccination mandate may be more permissible, public education is a fundamental right under the California Constitution. Equal access to education must therefore not be limited or denied unless the State demonstrates that its actions are "necessary to achieve a compelling state interest." The California Association of Private School Organizations states that that association has taken no formal position on the measure, and does not oppose the elimination of the PBEs, they are concerned about the increased administrative burden to which schools will be subjected should this bill become law. The association urges amendments that would create a phase-in period, lengthen the time horizon for compliance as per the existing regulations, or enact such other provisions as may produce a combination of increased compliance and a decreased possibility of mandatory exclusion.

15) RELATED LEGISLATION. SB 792 (Mendoza) prohibits a person from being employed at a day care center or day care home unless he or she has been immunized against influenza, pertussis, and measles. SB 792 was approved by the Senate on May 22, 2015 by a vote of 34-3 and is currently pending committee referral in the Assembly.

16) PREVIOUS LEGISLATION.

a) AB 2109 requires, on and after January 1, 2014, a separate form prescribed by DPH to accompany a letter or affidavit to exempt a child from immunization requirements under existing law on the basis that an immunization is contrary to beliefs of the child's parent or guardian. Required the form to include:

i) A signed attestation from the health care practitioner that indicates that the parent or guardian of the person who is subject to the immunization requirements, the adult who has assumed responsibility for the care and custody of the person, or the person if an emancipated minor, was provided with information regarding the benefits and risks of the immunization and the health risks of the communicable diseases listed above to the person and to the community.

ii) A written statement signed by the parent or guardian of the person who is subject to the immunization requirements, the adult who has assumed responsibility for the care and custody of the person, or the person if an emancipated minor, that indicates that the signer has received the information provided by the health care practitioner pursuant to i) above.

The Governor included a message with his signature on this bill, which stated, in part: "I will direct (DPH) to allow for a separate religious exemption on the form. In this way, people whose religious beliefs preclude vaccinations will not be required to seek a health care practitioner's signature."

b) SB 614 (Kehoe, Chapter 123, Statutes of 2011) allows a pupil in grades seven through 12, to conditionally attend school for up to 30 calendar days beyond the pupil's first day of attendance, if that pupil has not been fully immunized with all pertussis boosters appropriate for the pupil's age if specified conditions are met.

c) AB 354 (Arambula, Chapter 434, Statutes of 2010) allowed DPH to update vaccination requirements for children entering schools and child care facilities and added the

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American Academy of Family Physicians to the list of entities whose recommendations DPH must consider when updating the list of required vaccinations. Requires children entering grades seven through 12 receive a TDaP booster prior to admittance to school.

d) SB 1179 (Aanestad, 2008) would have deleted DPH's authority to add diseases to the list of those requiring immunizations prior to entry to any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center. SB 1179 died in Senate Health Committee.

17) POLICY COMMENTS.

a) Collecting complete data will provide an accurate picture of partial vaccination rates throughout the state. To date, we do not have an exact picture of the vaccination status of every student in California. For the 2014-15 school year, less than 95% of schools reported their vaccination numbers to DPH. Of the schools reporting, DPH found that 90.4% of enrolled kindergarteners had received the complete vaccination schedule. Additionally 6.9% of students were conditionally enrolled because they were lacking some immunizations, and were in the process of completing the required vaccination schedule. For the 2014-15 school year, DPH calculated individual antigen vaccination status (such as DTP, Polio, MMR, etc) based only on the number of fully vaccinated students and vaccinations completed by conditionally enrolled students. DPH did not include in this calculation the individual antigen status for partially vaccinated students with PBEs. Therefore, it is likely that individual antigen immunization coverage may be underestimated. Anecdotal evidence suggests that some percentage of students have some, but not all, required immunizations.

DPH is currently developing new regulations that will implement complete data collection for partially vaccinated students holding PBEs and medical exemptions. This will ensure that reported data are a more accurate reflection of the vaccination rate for each immunization.

b) Identification of partially and non-vaccinated students. Current law requires that parents filing a PBE must provide the school with documentation for "which immunizations have been given and which immunizations have not been given on the basis that they are contrary to his or her beliefs" for the purposes of immediate identification in case of disease outbreak in the community. As drafted, this requirement would be deleted by SB 277. If SB 277 is enacted, schools will still need to know which specific immunizations have or have not been received by all students, including those that are enrolled in independent study. The author may wish to take an amendment to clarify that schools will collect information for all enrolled students, regardless of immunization status.

18) SUGGESTED AMENDMENTS.

a) A physician's professional judgment. As previously discussed, it is entirely within the professional judgment of a physician to determine if vaccination is not recommended due to the medical history of the patient. Opponents of this bill have raised concerns that current law regarding the letter of medical exemption does not adequately make clear that

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the letter may be written based on the best medical judgment of the physician. To that end, the author may wish to consider amending this bill.

> Section 120370. (a)If the parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances ~~that contraindicate~~ ***for which the physician does not recommend*** immunization, that child shall be exempt from the requirements of Chapter 1 (commencing with Section 120325, but excluding Section 120380) and Sections 120400, 120405, 120410, and 120415 to the extent indicated by the physician's statement.

b) Implementation clarification clause. As discussed in the Senate Judiciary Committee analysis, clarification is needed to address the status of students currently enrolled with an existing PBE upon the operative date of this bill.

> ***Section 120335 (g) The governing authority shall allow continued enrollment to pupils who, prior to January 1, 2016, have a letter or affidavit on file in that institution stating beliefs opposed to immunization. On and after July 1, 2016, the governing authority shall not unconditionally admit to that institution for the first time or admit or advance any pupil to the 7th grade level unless the pupil has been immunized as required by this section.***

c) Special education students must have access to services. As previously discussed, under federal and state law disabled children are guaranteed the right to a free, appropriate public education, including necessary services for a child to benefit from his or her education. An amendment should be taken to clarify that students with an IEP will still have access to special education related services as directed by their IEP.

> ***Section 120335 (h) Nothing in this section shall prohibit a pupil that qualifies for an individualized education program, pursuant to federal law and Section 56026 of the Education Code, from accessing any special education and related services required by their individualized education program.***

d) Independent study programs are highly variable. As previously discussed, students enrolled in an independent study program are excluded from the provisions of this bill requiring them to be vaccinated. Independent study courses take many forms and in many places, including both on and off school sites. As currently drafted, there is nothing differentiating classroom based versus non-classroom based independent study instruction. An amendment should be taken to specify that students enrolled in off-campus independent study are not subject to vaccination requirements.

> Section 120335 (f): 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 (commencing with Section 51745) of Chapter 5 of Part 28 of the Education Code ***and does not receive classroom-based instruction.***

REGISTERED SUPPORT / OPPOSITION:

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Support

California Immunization Coalition (cosponsor)
California Medical Association (cosponsor)
Vaccinate California (cosponsor)
Dave Jones, California Insurance Commissioner
Katie Rice, Supervisor, Marin County
Sheila Kuehl, Los Angeles County Supervisor and former State Senator
Tom Torlakson, California Superintendent of Public Instruction
AIDS Healthcare Foundation
Alameda County Board of Supervisors
Albany Unified School District
American Academy of Pediatrics - California
American College of Emergency Physicians California Chapter
American Federation of State, County and Municipal Employees, AFL-CIO
American Lung Association
American Nurses Association\California
Association of California School Administrators
Association of Northern California Oncologists
BIOCOM
California Academy of Family Physicians
California Academy of Physician Assistants
California Association for Nurse Practitioners
California Association of Physician Groups
California Black Health Network
California Children's Hospital Association
California Coverage and Health Initiatives
California Department of Insurance
California Disability Rights, Inc.
California Healthcare Institute
California Hepatitis Alliance
California Hospital Association
California Immunization Coalition
California Optometric Association
California Pharmacists Association
California Primary Care Association
California Public Health Association-North
California School Boards Association
California School Employees Association
California School Nurses Organization
California State Association of Counties
California State PTA
Carlsbad High School Parent-Teacher-Student Association
Child Care Law Center
Children Now
Children's Defense Fund California
Children's Healthcare Is a Legal Duty, Inc.
Children's Hospital Oakland
Children's Specialty Care Coalition
City and County of San Francisco Board of Supervisors
City of Berkeley
City of Beverly Hills
City of Pasadena
Contra Costa County
County Health Executives Association of California
County of Marin
County of Tehachapi
Democratic Women's Club of Santa Cruz County
Donate Life California
First 5 California
Foundation for Pediatric Health
Gilroy Unified School District
Health Officers Association of California
Jay Hansen, Sacramento County School Board Member
Junior Leagues of California
Kaiser Permanente
Los Angeles Community College District
Los Angeles County Board of Supervisors
Los Angeles County Supervisor Sheila Kuehl
Los Angeles Unified School District
March of Dimes California Chapter
Medical Board of California
Medical Oncology Association of Southern California
MemorialCare Health System Physician Society
National Coalition of 100 Black Women Sacramento Chapter
Osteopathic Physicians and Surgeons of California
Pasadena Public Health Department
Project Inform
Providence Health and Services, Southern California

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Reed Union School District
San Dieguito Union High School District
San Francisco Democratic County Central Committee
San Francisco Unified School District
Santa Clara County Board of Supervisors
Santa Cruz County
Santa Cruz County Democratic Party
Santa Monica Malibu Union Unified School District
School for Integrated Academics and Technologies, California
Secular Coalition for California
Silicon Valley Leadership Group
Solano Beach School District
Sonoma County Board of Supervisors
The Children's Partnership
UAW Local 5810, University of California Postdoctoral Researchers
University of California Hastings College of the Law
University of California, Irvine Center for Virus Research
University of California, Irvine School of Medicine
Yolo County Board of Supervisors
Numerous Medical Doctors
Numerous Osteopathic Doctors
Numerous health care professionals, including RNs, PAs and NPs
Hundreds of individuals

Opposition

A Voice for Choice
Alliance of California Autism Organizations
Association of American Physicians and Surgeons (Tucson, AZ)
APLUS+ Network Association
Autism Society
AWAKE California
California Chiropractic Association
California Coalition for Health Choice
California Naturopathic Doctors Association
California Nurses for Ethical Standards
California Nurses for Ethical Standards
California ProLife Council
California Right to Life Committee, Inc.
Canary Party
Capitol Resource Institute
Educate. Advocate.
Educate. Advocate.
Faith and Public Policy
Families for Early Autism Treatment
Foundation for Pediatric Health
Gold Mine Natural Food Co.
Homeschool Association of California
HSC Homeschool Association of California
National Autism Association California
National Vaccine Information Center
Our Kids, Our Choice
Pacific Justice Institute
Pacific Justice Institute Center for Public Policy
ParentalRights.Org
Pediatric Alternatives
SafeMinds
Saint Andrew Orthodox Christian Church
Standing Tall Chiropractic: A Creating Wellness Center
Unblind My Mind
Vaccine Choice Canada (Winlaw, British Columbia)
Vaccine-Injury Awareness League
Weston A. Price Foundation
Numerous Chiropractors
Numerous Medical and Osteopathic Doctors
Hundreds of individuals

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Analysis Prepared by: Dharia McGrew and Paula Villescaz / HEALTH / (916) 319-2097

S.V. Exhibit 2

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2015 - 2016 Regular Session

SB 277 (Pan and Allen)
Version: April 22, 2015
Hearing Date: April 28, 2015
Fiscal: Yes
Urgency: No
RD

SUBJECT

Public health: vaccinations

DESCRIPTION

This bill would eliminate the personal belief exemption from the requirement that children receive specified vaccines for certain infectious diseases (including diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, and chicken pox) prior to being admitted to any public or private elementary or secondary school, child care center, day nursery, nursery schools, family day care home, or developmental centers, and would make other conforming changes. This bill would specify that this mandatory vaccination requirement (for which the bill would only leave a medical exemption) does not apply to a home-based private school or a student enrolled in an independent study program.

This bill would, in certain circumstances, permit a child to be temporarily excluded from the school or institution until the local health officer is satisfied that the child is no longer at risk of developing or transmitting a communicable disease for which immunization is otherwise required by law.

This bill would add to existing notifications that school districts must give to parents, the immunization rates for the school in which a pupil is enrolled for each of the immunizations required.

BACKGROUND

According to the Center for Disease Control and Prevention (CDC), it is always better to prevent a disease than to treat it after it occurs. Immunity is the body's way of preventing disease. The immune system recognizes germs that enter the body as "foreign invaders" (called antigens) and produces proteins called antibodies to fight them. Vaccines contain the same antigens, or parts thereof, that cause diseases, but the antigens in vaccines are either killed or greatly weakened. As such, vaccine antigens are not strong enough to cause disease but they are strong enough to make the immune system produce antibodies against them. Memory cells prevent re-infection when they

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encounter that disease again in the future. According to the CDC, "a vaccine is a safer substitute for a child's first exposure to a disease." (CDC, *Why are Childhood Diseases so Important?* <http://www.cdc.gov/vaccines/vac-gen/howvpd.htm> [as of Apr. 19, 2015].) Vaccines are responsible for the control of many infectious diseases that were once common around the world, including polio, measles, diphtheria, pertussis (whooping cough), rubella (German measles), mumps, tetanus, and Hib. In fact, vaccine eradicated smallpox, one of the most devastating diseases in history. Over the years, vaccines have prevented countless cases of infectious diseases and saved literally millions of lives. (*Id.*) According to the California Department of Public Health (CDPH), implementation of statewide immunization requirements has been effective in maintaining a 92 percent immunization rate among children in child care facilities and kindergartens. (CDPH, *2011-2012 Child Care and School Fact Sheet* (Jul. 2012) <http://www.cdph.ca.gov/programs/immunize/Documents/ChildCareAndSchoolFactSheet2011-2012.pdf> [as of Apr. 19, 2015].)

Recently, California witnessed an outbreak of measles, a vaccine-preventable disease. According to CDPH, "[i]n December 2014, a large outbreak of measles started in California when at least 40 people who visited or worked at Disneyland theme park in Orange County contracted measles; the outbreak also spread to at least half a dozen other states. On April 17, 2015, the outbreak was declared over, since at least two 21-day incubation periods (42 days) have elapsed from the end of the infectious period of the last known outbreak-related measles case." (CDPH, *Measles* <http://www.cdph.ca.gov/HealthInfo/discond/Pages/Measles.aspx> [as of Apr. 19, 2015].)

Under California law, before being admitted to any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or developmental center, a child must be vaccinated for 10 separate diseases (diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, and chicken pox), as well as any other disease deemed appropriate by the California Department of Public Health, as specified. (Health & Saf. Code Sec. 120335(b).) California law also, however, currently recognizes exemptions from the mandatory immunization law for both medical reasons and because of personal beliefs (personal belief exemptions or PBEs). (*See* Health & Saf. Code Sec. 120325(c).) In order to exercise a medical reason exemption, the parent or guardian must obtain a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, and indicating the specific nature and probable duration of the medical condition or circumstances that contraindicate immunization. Once the physician statement is filed with the governing authority, that person (i.e. child) shall be exempt from specified requirements to the extent indicated by the physician's statement. (*See* Health & Saf. Code Sec. 120370.)

In 2012, in response to concerns of increased PBEs, the Legislature passed AB 2109 (Pan, Ch. 821, Stats. 2012) to modify the process for obtaining exemptions to one or more

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immunizations required for child care or school based on personal beliefs. Under that law, PBEs now require documentation that health care practitioners have informed the parents about vaccines and diseases. Notably, that form requires that the parent check one of two boxes: (1) that he or she has received information from an authorized health care practitioner regarding the benefits and risks of immunizations, as well as the health risks to the student and to the community of the communicable diseases for which immunization is required in California; or (2) that he or she is a member of a religion which prohibits seeking medical advice or treatment from authorized health care practitioners.

This bill would now remove the personal belief exemption, thus, requiring all children entering into private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or developmental center to be vaccinated as a condition of entry into those institutions, unless a medical reason exemption applies. This bill would also exempt from mandatory immunization a home-based private school or student enrolled in independent study, as specified.

This bill was triple-referred, with the Senate Health Committee and Senate Education Committee hearing the bill prior to this Committee. Those committees passed out the bill on a vote of 6-2 and 7-2, respectively.

CHANGES TO EXISTING LAW

1. Existing law, the Education Code, requires that certain notifications be made by school districts to parents. (Educ. Code Sec. 48980.)

   This bill would require such notification to include immunization rates for the school in which a pupil is enrolled for each of the immunizations mandated by law.

2. Existing law provides that each person between the ages of 6 and 18 years not exempted, as specified, is subject to compulsory full-time education. Existing law provides that each person subject to compulsory full-time education and each person subject to compulsory continuation education not exempted, as specified, must attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residency of either the parent or legal guardian is located. Existing law requires that each parent, guardian, or other person having control or charge of the pupil send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residence of either the parent or legal guardian is located. (Educ. Code Sec. 48200.)

   Existing law authorizes the governing board of a school district or a county office of education to offer independent study to meet the educational needs of pupils in accordance with specified requirements. (Educ. Code Sec. 51745 et seq.) Existing

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law provides that the independent study by each pupil shall be coordinated, evaluated, and, notwithstanding specified law, shall be under the general supervision of an employee of the school district, charter school, or county office of education who possesses a valid certification document or an emergency credential as required by law. (Educ. Code Sec. 51745.7(a).)

Existing law prohibits the unconditional admission of a student to any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, unless, prior to the child's first admission to that institution, the child has been fully immunized against: diphtheria; haemophilus influenzae type b; measles; mumps; pertussis; poliomyelitis; rubella; tetanus; hepatitis B; varicella; and any other disease deemed appropriate by the California Department of Public Health, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the U.S. DHHS, the American Academy of Pediatrics, and the American Academy of Family Physicians. (Health & Saf. Code Sec. 120335(b).)

Existing law provides the intent of the Legislature to provide exemptions from immunization for medical reasons or because of personal beliefs. (Health & Saf. Code Sec. 120325(b).)

Existing law provides that if a parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances that contraindicate immunization, that child shall be exempt from the immunization requirements to the extent indicated by the physician's statement. (Health & Saf. Code Sec. 120370.)

Existing law requires, on and after January 1, 2014, that a separate form prescribed by the California Department of Public Health accompany a letter or affidavit to exempt a child from immunization requirements on the basis that an immunization is contrary to beliefs of the child's parent or guardian. The form must include:

- A signed attestation from a health care practitioner that indicates that the parent or guardian of the person who is subject to the immunization requirements, the adult who has assumed responsibility for the care and custody of the person, or the person if an emancipated minor, was provided with information regarding the benefits and risks of the immunization and the health risks of the communicable diseases listed above to the person and to the community.
- A written statement signed by the parent or guardian of the person who is subject to the immunization requirements, the adult who has assumed responsibility for the care and custody of the person, or the person if an emancipated minor, that indicates that the signer has received the information provided by the health care practitioner pursuant to the provision above. (Health & Saf. Code Sec. 120365(b).)

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Existing law provides, in relation to children exempted from immunization under the personal belief exemption, when there is good cause to believe that the person (i.e. child) has been exposed to one of the specified communicable diseases, that person may be temporarily excluded from the school or institution until the local health officer is satisfied that the person is no longer at risk of developing the disease. (Health & Saf. Code Sec. 120365(e).)

This bill would repeal the personal belief exemption and provisions relating to the exercise of the personal belief exemption above, leaving only a medical exemption to the immunization requirements above.

This bill would provide that the mandatory immunization provisions above do not apply to a home-based private school or to a student who is enrolled in an independent study program pursuant to the Education Code, as specified.

This bill would provide that when there is good cause to believe that a child whose documentary proof of immunization status does not show proof of immunization against the communicable diseases required has been exposed to one of those diseases, that child may be temporarily excluded from the school or institution until the local health officer is satisfied that the child is no longer at risk of developing or transmitting the disease.

COMMENT

1. Stated need for the bill

According to the authors:

In early 2015, California became the epicenter of a measles outbreak which was the result of unvaccinated individuals infecting vulnerable individuals including children who are unable to receive vaccinations due to health conditions or age requirements. According to the Centers for Disease Control and Prevention, there were more cases of measles in January 2015 in the United States than in any one month in the past 20 years. Measles has spread through California and the United States, in large part, because of communities with large numbers of unvaccinated people. Between 2000 and 2012, the number of Personal Belief Exemptions (PBE) from vaccinations required for school entry that were filed rose by 337 [percent]. In 2000, the PBE rate for Kindergartners entering California schools was under 1 [percent]. However, as of 2012, that number rose to 2.6 [percent]. From 2012 to 2014, the number of children entering Kindergarten without receiving some or all of their required vaccinations due to their parent's personal beliefs increased to 3.15 [percent]. In certain pockets of California, exemption rates are as high as 21 [percent] which places our communities at risk for preventable diseases. Given the highly contagious nature of diseases such as measles, vaccination rates of up to 95 [percent] are necessary to preserve herd immunity and prevent future outbreaks.

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> This bill removes the ability for parents to file a personal belief exemption from the requirement that children receive vaccines for specific communicable diseases prior to being admitted to any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center. It further provides a home school exemption for students who are of a single household or family.

The sponsor of this bill, Vaccinate California, writes that they believe it is "unfair and unreasonable for a small minority to put the rest of us at risk [. . .] Those who can vaccinate their children but refuse are jeopardizing their own children as well as the rest of us. [. . .] We ought to be able to send our kids to daycare and school without fear they will come home with measles or whooping cough."

In support, an individual law professor, writes that "[w]hile California's courts found that education is a fundamental interest under our constitution, that finding has been used in the wealth and race contexts; it has never been applied to prevent the state from regulating to make schools safer, as SB 277 tries to do. Safe schools are a precondition to education; and it's well established that the state can act to obtain that goal: there are few interests more compelling than the health and safety of the students entrusted to our system. SB 277 helps protect this compelling interest, and by increasing herd immunity, would also protect the vaccine-deprived children themselves from disease." This professor adds that the bill does not prevent children from getting an education: the bill "exempts a variety of homeschooling options, some with support from our private schools. If the parents are unwilling to protect children from disease, they have choices—even if those would not be their first choice." Additionally, she adds that school immunization requirements have been upheld as constitutional, even without religious exemptions, "by every court—federal and state—that ruled on the issue, since the seminal case of *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). Most recently, two circuit courts upheld them [in the 4th and 2nd Circuits] [citations omitted]. That's because religious freedom do[es] not justify putting other states at risk of disease. [. . .]"

Multiple supporters, including the California State Association of Counties (CSAC), write that "California has seen an increase in the number of personal belief exemptions (PBE) from vaccinations. In fact, from 2010 to 2012, the number of children entering Kindergarten without receiving some or all of their required vaccinations rose by 25 percent. Vaccine coverage at the community level is vitally important for people too young to receive immunizations and those unable to receive immunizations due to medical reasons. States that easily permit personal belief exemptions from immunizations have significantly higher rates of exemptions and consequently a larger unimmunized population than states with more complex exemption approvals. However, school and child care immunization requirements have been shown to effectively increase immunization coverage, limit the spread of disease, and provide an overall public health benefit." California Hepatitis Alliance (CalHEP) shares similar statistics, adding that "[s]ince 2000, the number of California families requesting a [PBE] from vaccinations required for school entry has risen by 337 [percent]. In 2000, the PBE

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rate for Kindergarteners entering California Schools was under 1 [percent] (0.77 [percent]).” CalHEP writes that “[p]rotecting the individual and the community from communicable diseases such as measles, mumps, and pertussis, is a core function of public health.”

The American Academy of Pediatrics argues that “[i]f there is a single place that children must be kept safe as humanly possible it is at school/child care.” California Academy of Family Physicians writes in support that while AB 2109 (Pan, Ch. 821, Stats 2012) “resulted last year in the first decrease in PBE use in a decade, the recent measles outbreak underscored the need to do more. In 2000, the Centers for Disease Control determined that measles had been eradicated in the United States. However, since December 2014, California has had 134 confirmed cases of measles across [13] counties. Twenty percent of those cases have required hospitalization. Efforts to contain the outbreak have resulted in mandatory quarantines and the redirection of public health resources to investigations into exposure. [. . .] Removing the PBE will protect the most vulnerable, babies too young to be immunized, and people who are immunocompromised, from the risks associated with contracting these diseases. It will also protect the community at large from increased outbreaks of vaccine-preventable disease.” The California School Nurses Association also writes in support that they know “certain schools and school districts have high rates of unvaccinated children [. . .] Having ‘community immunity’ varies by vaccine but it provides protection for those students and staff who for medical reasons are unable to be vaccinated or are immunocompromised.” [Footnote omitted.]

In support, the California Immunization Coalition adds that while AB 2109 “helped to tighten up the [PBE] process—it is not enough. We do not want to see a child die from measles before we take this important step to prevent additional outbreaks and spread of diseases. California needs to take stronger measures to protect children in our schools and in our communities.”

2. Liberty rights and parental rights balanced against the police powers of the state

According to the National Conference of State Legislatures (NCSL), California is one of 20 states that currently provides for a philosophical or personal belief exemption. Almost all states provide a religious exemption. There are also two states, Mississippi and West Virginia, that provide neither a religious, nor a philosophical, exemption. (NCSL, *States with Religious and Philosophical Exemptions from School Immunization Requirements* (Mar. 3, 2015) <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [as of Apr. 19, 2015].)

This bill seeks to repeal California’s personal belief exemption to the state’s mandatory vaccination law as a condition upon entrance into public and private schools, as well as child care centers, and like institutions, leaving only a medical exemption to the existing immunization requirements. For parents electing to not vaccinate their children, the bill would provide that the mandatory immunization requirement does not apply to a

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home-based private school or to a student enrolled in an independent study program, as specified. Additionally, where there is good cause to believe that a child whose documentary proof of immunization status does not show proof of immunization against a communicable disease for which immunization is otherwise required by law and that the child has been exposed to the disease, this bill would allow for the child to be temporarily excluded from the school or institution until the local health officer is satisfied that the child is no longer at risk of developing or transmitting that disease.

Committee staff recognizes that there has been significant public debate over the propriety of mandating vaccinations. That debate has been reflected in both the support and opposition to this bill. Moving beyond the health arguments, and into the legal arguments, on the one hand, many people feel very strongly that they have the right, as parents, to make these medical decisions for their children with their children's doctor, and that any effort to limit their authority to do so would infringe not only upon that right, but the right to education for their children, and potentially even their religious beliefs. On the other hand, many other people believe that parents do not have the right to make choices that place other children and the larger public at risk, particularly when it comes to sending their children to schools where other children are placed at greater risk. This side also tends to believe that the state has both the authority and obligation to ensure the public health and safety against communicable diseases so that their children can safely go to school, as they are required to do. Each side, notably, relies heavily on "rights" and "liberties" in making their arguments against the other side.

As a matter of constitutional law, rights do not exist in a vacuum; in fact, they often clash with other rights, if not the rights of others around them. As such, when assessing whether certain actions are protected as a valid exercise of one's rights—or alternatively, when assessing the validity of limitations inherent to or placed upon that right by the government—the issue is, in actuality, trifold: does a constitutionally or statutorily cognizable right exist, either under federal or state law? Where does the right begin? And where does it end? Further, if the state does have the authority to place limits upon the exercise of that right, how extensive can those limits be? At what point does the state interest outweigh the right?

At the outset, the rights implicated by this bill include the right of the individual (or his or her parent, in the case of minors) to refuse a specific treatment or to exercise religious beliefs against the treatment—namely, vaccinations. Inversely, the bill also implicates the liberty interests of other students and members of the public to be free of harm that could be avoided by way of vaccination. It also implicates the right to education for all involved. With those issues in mind, this bill arguably seeks to exercise the police power authority of the state, and the state's *parens patriae* authority to step in to protect persons legally unable to act on their own behalf in order to prevent the spread of communicable diseases.

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a. Supreme Court has recognized that states' police powers include the power to stop the spread of communicable diseases

In 1905 the U.S. Supreme Court, in the case of *Jacobson v. Massachusett*s (197 U.S. 11), upheld a Massachusetts law mandating vaccinations for adults, holding that the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and safety (such as by stopping the spread of communicable diseases). In that case, the state required in the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, vaccination was necessary for the public health or safety. There, the Court upheld the Massachusetts compulsory vaccination law despite arguments that such laws violate personal liberty rights protected under the 14th Amendment to the U.S. Constitution and that vaccines can cause injuries or dangerous effects. As expressed by the Court, it is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health. "The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." (*Id*. at 35.)

In rendering its decision, the Court recognized the legitimate police power of the state to enact reasonable regulations to protect the public health and public safety in this fashion, but also acknowledged that the regulations cannot contravene the federal Constitution or infringe on rights granted or secured by the Constitution:

> The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. [. . .] According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. [. . .] The mode or manner in which those results are to be accomplished within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. (*Id*. at 24-25.)

In *Jacobson*, the defendant argued that the Massachusetts compulsory vaccination law invaded his liberty rights by subjecting him "to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems

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best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person." (*Id.* at 26.) The Court, however, disagreed, writing that:

> The liberty secured by the Constitution of the United States does not import an absolute right to each person to be at all times, and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . . In *Crowley v. Christenson*, 137 U.S. 86, 89, we said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law." (*Id.* at 26-27.)

While the Court recognized that there is, of course, "a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will," the Court also recognized it is "equally true that in every well-ordered society charged with the duty of serving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." (*Id.* at 29.)

The Court expressed that the power of the judiciary in reviewing legislative action in respect of a matter affecting the general welfare arises when "a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." (*Id.* at 31 (internal citations omitted).) The Court held that this was not such a situation where there was no real or substantial relation between the law to the protection of public health and safety, or that the law was, beyond question, in palpable conflict with the Constitution. (*Id.* at 31-32.) Additionally, the Court declined to hold that "liberty" as secured by the U.S. Constitution dictated that the concerns of one, or of a minority (regarding vaccine safety), could override laws seeking to protect the public health and safety of all others. (*Id.* at 38.)

b. Liberty interests of the individual to refuse treatment post-*Jacobson*

While there is a general right to refuse medical treatment for adults encompassed in the liberty interests protected by the 14th Amendment, that right as noted above, is not absolute and can be regulated by the State. (*See Jacobson v. Massachusetts* (1905) 197 U.S. 11; *see also Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261,

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where the Court held that a competent adult has a fundamental right to accept or reject medical treatment, including the right to withdraw or withhold life-sustaining treatment that may cause or hasten death; *and Washington v. Harper* 494 U.S. 210 (1990) 221-222, 229, recognizing that prisoners have a significant liberty interest under the Due Process Clause of the Fourteenth Amendment to be free of unwanted administration of anti-psychotic medications, but also recognizing that such interests are adequately protected if the inmate has been provided notice and a hearing before a tribunal of medical and prison personnel at which the inmate could challenge the decision to administer the drugs.) Unlike in *Jacobson*, however, the question implicated by this bill involves not the right of the individual to refuse certain medical treatment, but the right of the parent(s) to refuse that treatment on behalf of the child. Whereas competent adults can make even the most reckless of decisions when it comes to their own health care, the same cannot be said of parents or guardians making health care decisions for children. Accordingly, in many instances, the Supreme Court has recognized the authority of the state to step into the family sphere, under the states' inherent *parens patriae* power to protect the health of children and other vulnerable members of society who are legally unable to act on their own behalf. (*See* discussion below for more.)

c. Parental rights

It is well established by U.S. Supreme Court precedent that the federal Constitution prohibits any state or local government from "depriving any person of life, liberty, or property without due process of the law." (U.S. Const., 14th Amend., Sec. 1.) The Supreme Court has interpreted the due process clause as "a promise of the Constitution that there is a realm of personal liberty which the government may not enter," including the right of parents to direct the upbringing of their children. (*Planned Parenthood v. Casey* (1992) 505 U.S. 833, 847; *see also Truxel v. Granville* (2000) 530 U.S. 57, 65: "We have long recognized that the Amendment's Due Process Clause . . . 'guarantees more than fair process.' [Citation omitted.] The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'") As stated by the Court, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests." (*Truxel,* 530 U.S. at 65).)

The Supreme Court first recognized family autonomy and the right of parents to control the upbringing of their children using substantive due process in the 1923 case of *Meyer v. Nebraska* (1923) 262 U.S. 390. That case declared unconstitutional a state law that prohibited teaching in any language other than English in public schools. Two years later, the Court reaffirmed this principle, holding unconstitutional a state law that required children to attend public schools. (*Pierce v. Society of Sisters* (1925) 268 U.S. 510; *see also* Chemerinsky, Constitutional Law Principles and Policies (2011) 4th Edition, p. 829.) And while the Court has given great deference to parents in weighing the competing claims of parents and of the

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state on behalf of children in other cases such as *Wisconsin v. Yoder* (1972) 406 U.S. 205 (holding that Amish parents had a constitutional right based on their right to control the upbringing of their children and based on free exercise of religion, to exempt their 14- and 15-year old children from compulsory school attendance law), such deference is not limitless. In fact, some scholars believe that in both *Yoder* and another case involving the procedural due process rights of children when parents seek to have them committed, the Court undervalued the importance of ensuring the children's education and protecting against unneeded institutionalism (which is a massive curtailment of liberty). (*See* Chemerinsky at pp. 830-831.)

Of specific relevance to this bill, in *Prince v. Massachusetts* (1944) 321 U.S. 158, 166, the Court recognized that this right to make parental decisions regarding the care and upbringing of the child is not absolute, and can be interfered with if necessary to protect a child:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters* [(1925) 268 U.S. 510]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
>
> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States*, 98 U.S. 145; *Davis v. Beason*, 133 U.S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243. (*Id*. at 166-167, (internal footnotes omitted).) (*See* Comment 3 below for more discussion on the issue of religious exemptions.)

As reflected in *Prince*, states have already encroached upon the family sphere by creating compulsory education laws, and child labor laws, which are largely accepted today, despite objections about the rights of parents to make these choices for their children regarding their schooling and work when those laws were first enacted.

Similarly, while this bill may be viewed as an unconstitutional encroachment of parental rights by some, it could arguably be viewed as a valid exercise of its police powers and the power of the state to intervene, under the *parens patriae* doctrine, on

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behalf of children to ensure that all children in public and private schools (and similar institutions, such as child care centers) maintain adequately high levels of immunization. Staff notes that without the recent broadening of the homeschooling exemption and the addition of the independent study option, many parents might not have been able to feasibly exercise any choice, due to the combination of financial constraints and compulsory education laws.

Thus, stated in another way, insofar as police powers must still be "reasonable" regulations, in order to be constitutional, this bill must strike a reasonable balance that furthers public health and safety without unduly encroaching on the private family sphere. Again, such balancing is important because even fundamental rights are not absolute; they do not, in other words, operate as "on/off" switches. Nor do state interests, for that matter. Instead, as one slides up, the other slides down; at some point, the right outweighs the state interest and at another point the state interest outweighs the right. Further, if the courts were to apply strict scrutiny to the bill (as it generally does with laws that impinge upon fundamental rights), the bill would survive if it is found to serve a compelling state interest (to ensure that the school and community vaccination levels overall remain sufficiently high) but at the same time is narrowly tailored to that purpose (it neither requires compulsory vaccination where children might have a medical condition that makes vaccination unsafe for that child, nor when children would otherwise be homeschooled or enrolled in independent study programs).

d. Fundamental interest in education under state law

While under the federal constitution, the U.S. Supreme Court has declined to find a fundamental right in education (*see San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1), pursuant to a state Supreme Court decision, education is recognized as a fundamental right in California, fully protected and guaranteed under the California Constitution. Accordingly, the state must therefore provide children equal access to education subject to the equal protection clause of the state constitution. That being said, as much as education is a fundamental right under California law, it is also a requirement. California's compulsory education laws require that children between six and 18 years of age to attend school, with a limited number of specified exceptions. (*See* Educ. Code Sec. 48200 et seq.; exceptions exist, for example, for children attending private schools; child being tutored by person with state credential for grade being taught; children holding work permits (subject to compulsory part-time classes); among other things).

For individuals on both sides of this larger debate, the bill implicates questions as to the fundamental interests of children, both vaccinated and unvaccinated alike, in education. While parents against vaccination would be forced to choose whether to vaccinate their child and send them to public or private school, or not vaccinate their child and exercise the home school or independent study option, parents who fear their child might be placed at an increased risk of harm as a result of being

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surrounded by unvaccinated children in a fairly confined environment, five days a week, must make a similar choice under existing law.

The American Civil Liberties Union (ACLU) writes a letter of concern, indicating that while it understands "the legitimate concerns that underlie the bill, and the potential harms of highly contagious diseases that present serious public health risks if 'herd immunity' levels are not reached or sustained" and appreciates "that vaccination against childhood diseases is a prudent step that should be promoted for the general welfare," the ACLU "does not believe there has been a sufficient showing of need at present to warrant conditioning access to education on mandatory vaccination for each of the diseases covered by this bill for every school district in the state." The ACLU further cautions that "[u]nlike other states, public education is a fundamental right under the California Constitution. (*Serrano v. Priest*, 5 Cal.3d 584 (1971)["*Serrano I*"]; *Serrano v. Priest*, 18 Cal.3d 728 (1976)["*Serrano II*"].) Equal access to education must therefore not be limited or denied unless the State demonstrates that its actions are 'necessary to achieve a compelling state interest.' [*Serrano*, 18 Cal.3d at 768.]" To this end, ACLU recommends that if there is, in fact, a compelling governmental interest in mandating that students in every school be vaccinated against each of the enumerated diseases except for medical reasons, "the bill should be amended to explain specifically what that interest is, where it exists, and under what conditions and circumstances it exists."

Staff notes, first, that this letter pre-dates the most recent amendments to expand the homeschooling exemption and add an exemption for children enrolled in independent study programs. Second, assuming that the ACLU maintains its concerns with respect to the current version of the bill, while education is indeed recognized as a fundamental interest in California fully protected and guaranteed under the state Constitution pursuant to *Serrano*,[1] and the state must therefore provide access to children equally to education subject to the equal protection clause of the federal and state constitutions, the bill does not facially discriminate against a suspect class. As stated by the *Serrano* court, in the case of legislation involving "suspect classifications," or touching on "fundamental interests," judicial review under the equal protection clause "requires active and critical analysis, subjecting the classification to strict scrutiny." (*Id.* at 597.) Specifically, "[u]nder the strict

[1] As stated by the *Serrano I* court: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.' In dicta, the court relied in part on the recognition of the California Constitution, which states in Article IX, section 1: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (*Id.* at 608.) Note that the Court in "*Serrano II*" recognized that the majority of the U.S. Supreme Court in cases subsequent to *Serrano* I, did not find a fundamental right to education protected, either implicitly or explicitly, under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution; instead the "interest of children in education was explicitly and implicitly protected and guaranteed by the terms of California Constitution" – the state constitution's equal protection provisions under Article IV, sec. 16, and Article I, sec. 7. *See Serrano v. Priest* 18 Cal.3d. 768, 749-750 (including footnotes 19, 20), citing *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1.

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standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest that justifies the law but also that the distinctions drawn by the law are *necessary* to further its purpose." (*Id*. at 597 (internal citations omitted, emphases in original).)

The intent of the bill for all intents and purposes appears to be to protect the health and safety of the public by preventing the spread of communicable diseases that can have devastating, if not potentially fatal effects. At the same time, the bill seeks to provide children with access to education even if their parents elect to not vaccinate them, by way of homeschooling or independent study programs. Opponents argue (*see* Comment 5 for more) that most parents neither have the economic resources to leave gainful employment, nor the academic acumen to teach in the home, "rendering the application of SB 277 particularly punitive for all those not in the highest income brackets." Many of the opponents raise concerns regarding the lack of options that are appropriate for children with exceptional needs or disabilities. To block unvaccinated children from a free, adequate, public education from the viewpoint of the opposition, is discriminatory and in violation of their rights.

As argued by the author, "California public school students have a right to education in California, but also that their schools be clean, safe, and functional. A safe school for many children is a school with a high level of community immunity which would protect them from known diseases. This legislation provides the most comprehensive measure to ensure high vaccination rates- by limiting the presence of those who are not vaccinated from a campus where children mingle and may be at risk of exposure to vaccine-preventable diseases. The students however are not barred from enrolling in a public education, they may do so, with the curriculum and assistance of the school, which allows them this option but strikes the balance of minimizing the exposure of unvaccinated students to a school campus."

As currently drafted, it should be also noted that this bill raises a question as to what happens come January 1, 2016, to the unvaccinated students who are currently enrolled in a private or public elementary or secondary school or other covered institutions pursuant to an existing PBE, if this bill is signed into law. Potentially, these students can be brought into compliance pursuant to existing law, Section 120340 of the Health and Safety Code, which provides that a person who has not been fully immunized against one or more of the diseases may be admitted by the governing authority on condition that within time periods designated by regulation of the department he or she presents evidence that he or she has been fully immunized against all of these diseases. The author states:

> Vaccination requirements under SB 277 should apply to students whose first enrollment in one of the mandated settings or whose 7th grade enrollment is after January 1, 2016. The bill will require some additional clarification, which we are committed to including.

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3. Repeal of statutory personal belief exemption effectively repeals any possible religious exemptions

As noted in Comment 2 above, California is one of 20 states that provide a "philosophical" exemption to its mandatory vaccination law for school age children. All but two states also provide a religious exemption. Most of those states do so separately from the philosophical exemption, whereas some, including California, Minnesota and Louisiana, do not explicitly recognize religion as a reason for claiming an exemption, though it is recognized that, as a practical matter, the non-medical exemption may encompass religious beliefs. (*See* NCSL, *States with Religious and Philosophical Exemptions from School Immunization Requirements* (Mar. 3, 2015) <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [as of Apr. 19, 2015].) Accordingly, while California law does not expressly provide for a religious exemption, any possible claim of religious exemption that might be encompassed within the "personal belief" exemption would hereinafter be eliminated by the repeal of the statutory personal belief exemption. While *Jacobson v. Massachusetts* (see Comment 2a) suggests that it is a valid exercise of police powers to prevent the spread of communicable diseases, that case was decided prior to the application of the First Amendment's Free Exercise Clause to the states. (*See Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).)

An objection has been raised by many of the opponents to this bill that this bill violates the constitutional right to freedom of religion, relying in part on cases such as *Wisconsin v. Yoder*. (*See* Comment 2c above.) The authors point to the case of *Phillips v. City of New York* (2012) 775 F.3d 538 to illustrate why compulsory vaccination laws are valid, even without a religious exemption. In that case, the Second Circuit Court of Appeal held that New York could constitutionally require that all children be vaccinated to attend public school and that the New York law actually "goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs," citing the U.S. Supreme Court decision in *Prince v. Massachusetts*, where the Supreme Court held that "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." (*Id.* at 533.)

Additionally, whereas under pre-1990 Supreme Court precedents, government actions burdening religions would only be upheld if they were necessary to achieve a compelling governmental purpose, in 1990, the Court held in *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 474 U.S. 772, that the free exercise clause cannot be used to challenge neutral laws of general applicability. In that case, the Oregon law prohibiting the consumption of peyote, a hallucinogenic substance, was deemed neutral because it was not motivated by a desire to interfere with religion and it was a law of general applicability because it applied to everyone. Thus, as interpreted in more recent Supreme Court cases, *Smith* "largely repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder* [internal citation omitted] and *Sherbert v. Verner* [(1963) 374 U.S. 398]" where the Court "employed a balancing test that

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considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest." (*Holt v. Hobbs* (2015) 135 S. Ct. 853, 859; *see also Burwell v. Hobby Lobby Inc.* (2014) 134 S.Ct. 2751, 2760.) While Congress has taken actions to supersede *Smith*, as reflected in cases such as *Hobby Lobby*, and thereby ensure that strict scrutiny is applied when the law substantially burdens religion, those later decisions appear based on federal law, the Religious Freedom Restoration Act, to which California has no counterpart.

Staff notes that in Mississippi, one of the two states that does not provide for either a philosophical or religious exemption to its compulsory vaccine law, the Supreme Court of that state has held that, "requiring immunization against certain crippling and deadly diseases particularly dangerous to children before they may be admitted to school serves an override and compelling public interest, and that such interest extends to the exclusion of a child until such immunization has been effected, not only as a protection of that child but as a protection of the large number of other children comprising the school community and with whom he will be in daily close contact in the school room." (*Brown v. Stone* (1979) 378 So.2d 218, 222.) In discussing parental rights and duties, the court warned that "[i]t must not be forgotten that a child is indeed himself an individual, although under certain disabilities until majority, with rights in his own person which must be respected and may be enforced. Where its safety, morals, and health are involved, it becomes a legitimate concern of the state. [. . .] To the extent that [the compelling public purpose of the state law] may conflict with the religious beliefs of a parent, however sincerely, entertained, the interests of the school children must prevail." (*Id.* at 222-223.) Accordingly, the court upheld Mississippi's statute mandating vaccination before entry into school as a reasonable and constitutional exercise of its police power, but struck down the statute's religious exemption. The court wrote that to give effect to the religious exception, "which would provide for the exemption of children of parents whose religious beliefs conflict with the immunization requirements, would discriminate against the great majority of children who have no such religious conviction" in violation of the 14th Amendment's Equal Protection Clause, "in that it would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute" (*Id.* at 223.)

4. <u>Amendment to further narrow the bill to the compelling state interest</u>

As noted above, given the above constitutional issues, it is important that the bill be narrowly tailored to a compelling state interest in the event that reviewing courts apply strict scrutiny in light of the rights that could be potentially impinged upon by this bill. Despite the recent amendments, there is an argument that the bill is too broad with respect to the "catch all" type provision ("paragraph 11") that would require that the child be immunized against "any other disease deemed appropriate by the California Department of Public Health, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the U.S. DHHS, the American

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Academy of Pediatrics, and the American Academy of Family Physicians" before being granted unconditional entry into schools, day care centers, or developmental centers. (Health & Saf. Code Sec. 120335(b)(11).) In other words, paragraph 11 has the potential to dramatically expand the scope of the bill and disrupts the careful balancing of the various rights involved, as discussed above. Accordingly, the following amendment would be suggested to maintain the status quo policy decision made in allowing for this 11th category of vaccines, but limit the bill to only those 10 listed vaccines currently reflected in the Health and Safety Code.

Suggested amendment:

Add a new provision to the Health and Safety Code, following Section 120335, that provides: "Notwithstanding Section 120325 and Section 120335, any immunizations required for diseases added pursuant to paragraph 11 of subdivision (a) of Section 120325 or paragraph 11 of subdivision (b) of Section 120335, may only be mandated prior to a pupil's first admission to any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, if exemptions are allowed for both medical reasons and personal beliefs.

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. (*See* Comment 7 for example). 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.

5. Opposition

Staff notes that the Committee received thousands of letters on this bill. To the extent possible, the following summary seeks to summarize the arguments made in the letters.

Families for Early Autism Treatment (FEAT) writes that "the denial of an effective, appropriate education is damage that cannot be mitigated. The denial of childcare to families will result in economic hardship that will not be overcome by most, and will create segregation based upon a characteristic of an individual's private health record."

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FEAT urges this Committee to consider that: a free public education is a fundamental right provided in the State Constitution; the equal protection clause further upholds a fundamental right to freedom from the threat of bias or discriminatory consequence imposed by government; the right to exercise the free expression of religion and core beliefs is protected by both the State and U.S. Constitutions. FEAT believes that because of these issues, "California Parents are soundly protected to make personal beliefs decisions for vaccinations."

FEAT argues (and other opponents similarly assert) that the majority of parents do not have economic resources to leave gainful employment nor do they possess the academic acumen to teach in the home rendering the application of SB 277 particularly punitive for all those not in the highest income brackets. FEAT also argues, among other things, that independent study under the direction of the public school is voluntary. Specifically, individuals with exceptional needs (as defined under the Education Code to mean a child with a disability as defined under federal law whose impairment requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a free appropriate public education, as specified, and who comes within one of specified age categories, including between the ages of five and 18 years, inclusive) may only participate when indicated in the student's individualized education program.

FEAT raises a host of other arguments that relate to: informed consent and the availability of medical exemptions; religious discrimination; least restrictive environments for those with special needs required under the Education Code and the Federal I.D.E.A. [Individuals with Disabilities Education Act]; the Developmental Disabilities Assistance and Bill of Rights Act of 2000; Welfare and Institutions Code, the Lanterman Act's maximal participation and choice requirements for medical, community, and education services from agencies receiving state funds; home based education misconceptions; absence of public funding of education for student who is excluded or dis-enrolled from school; and issues surrounding necessary approvals to access home-based education.

Homeschool Association of California (HSC) opposes this bill because it "would negatively impact the freedom to homeschool in the state of California and would *make it impossible for many families to choose to homeschool legally*." (Emphasis in original.) HSC comments that while private tutoring is a third legal option, the tutor must hold a currently valid state teaching credential for the grades and subjects taught under California law and hiring such tutors would be very expensive and most parents do not hold such credentials. Thus, "telling families whose children have not been fully vaccinated on schedule that they can homeschool using the tutoring option is not meaningful or realistic." Additionally, HSC contends that the choice of "vaccinate or homeschool" is not true because the bill "prohibits children from attending any private or public school, even if the child spends most education time in the family home." Innumerable letters from individuals write to raise relatively similar points regarding various constitutional rights, inform consent, vaccine safety/injuries, absence of a

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health crisis, lack of real choice for parents/inadequacy of the current exemptions in the bill, and the like. One such letter reflects the following:

- AB 2109 from 2012 is working and that there has already been a 20 percent decline in PBEs, thereby eliminating the need for sweeping legislation that removes a parent's right to informed consent.
- The California Constitution states that a free public education is a right for all children. Even children who are positive for HIV or Hepatitis B are allowed to attend public school. Denying a child this right based upon vaccination status is discriminatory and unconstitutional, adding that there will be social ramifications if vaccinated and under/unvaccinated children are forced to be segregated.
- This bill removes freedom of religion as well as parental rights as they cannot afford to homeschool their children and would otherwise be forced to submit their child to medical procedures with risks or leave the state.
- California vaccination rates are high—higher than the national average for each disease listed on the CDC schedule.
- The U.S. Supreme Court has recognized that vaccines are "unavoidably unsafe," citing the case of *Bruescewitz v. Wyeth LLC* (2011) 131 S.Ct. 1068.
- Parents should have the right to determine for themselves what substances are injected into their child's body without giving up their children's right to a free public education.
- Any law that compels the public "to use a pharmaceutical product which carries an unpredictable risk of injury/death for a minority of vulnerable individuals is not humane."

Californians for Medical Freedom—Tahoe, raises similar points, also arguing that the bill removes federally mandated rights of services to students with disabilities under the federal IDEA. This group, like many others, points to the National Childhood Vaccine Injury Act (NVIC) and the fact that the U.S. government "has paid out more than $3 billion to the victims of vaccine injury" as support for why medical choice is appropriate. "If there is risk of injury or death there must be a choice." In contrast, they argue that "[v]accination rates of California schoolchildren are high at 98.64 [percent]" and cite the success of recent legislation, AB 2109, which they write has resulted "in a 19 [percent] decrease in exemptions amongst kindergarteners in just one year. The public health concern," they write, "is already adequately addressed with current California laws." In other words, as stated by the California Chiropractic Association, "SB 277 is a solution in search of a problem."

Educate.Advocate. raises many similar points and adds that PBEs "DO NOT represent the number of unvaccinated individuals in the state. A PBE must be obtained for any child who misses one dose of a vaccine or is on a staggered vaccine schedule. The state does not keep track of this information; it treats all PBE's equally." Educate.Advocate. writes that the children served by their organization are all in special education and on an individualized education plan. "Many of these children also have pre-existing medical conditions (mitochondrial dysfunction, compromised immune system) making it impossible to vaccinate them without hurting them further. Obtaining a medical

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exemption is very difficult to receive as the CDC's pink book guidelines are incredibly narrow and trump patient and doctor reasons. [. . .] The only option for these children has been the personal belief exemption. Stripping families such as these of the right to get a personal belief exemption is discriminatory and in violation of the Americans with Disabilities Act."

ParentalRights.Org writes in opposition that "[w]hile we appreciate the intent of the amendment to exempt homeschoolers from the vaccination requirement, it is not sufficient to protect the rights of parents and children in California. While there are many parents with strong convictions that the risks of vaccines to their child (as reflected in lengthy disclaimers which accompany these products) outweigh the potential benefits, many of these same parents are also deeply convinced that the best educational opportunity they can provide their child is in the public schools. These parents should not be forced to give up their rights in one area to exercise their rights in another. No child should have to forego the best available education for the sake of his best health, nor give up his best health for the sake of a better education."

6. Oppose unless amended

The California Naturopathic Doctors Association (CNDA) states that it supports immunization for the prevention of disease and the public health objective of achieving high rates of immunity to infectious disease but opposes this bill unless it is amended to include Naturopathic Doctors as providers who can sign medical waivers for vaccination. CNDA argues that as licensed primary care doctors who can diagnose medical conditions such as anaphylaxis and immunodeficiency, reasons outlined in the CDC's list of contraindications to common pediatric vaccinations, naturopathic doctors must also be able to sign medical waivers for vaccination, when such medical conditions exist.

7. Concerns

A San Lorenzo Valley Unified School District (SLVUSD) superintendent writes a letter of concerns, based in large part on points raised in the Senate Health Committee hearing. Noting both the ACLU's letter of concern and recent successes of AB 2109 (*see* Background), SLVUSD comments that "[t]here are some geographic pockets in the state where PBE rates are higher than average. We understand the concerns this raises, but alternatives to SB 277, including 'educate and encourage' efforts could address those concerns." These efforts, they note, are the focus of the federal government's National Adult Immunization Plan, as opposed to mandate. SLVUSD also questions what public health risk these PBE rates represent given that only 0.7 percent of children nationwide are fully vaccinated and that most parents request a PBE to "selectively" vaccinate (for example, choosing to vaccinate against pertussis, tetanus, and measles but opting out of those they consider unnecessary like Hepatitis B.) "PBE rates," it writes, "do not equate to a public health risk for a specific disease. SLVUSD believes the "educate and encourage" efforts used in conjunction with better data on actual vaccination opt-out by

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disease in each area would be a better legislative solution than statewide mandates. SLVUSD is concerned about the education options left for children under SB 277 and the fact that the bill allows parents to homeschool on their own (private school affidavit)—not through public or private school satellite programs.

8. Author's technical and clarifying amendments

This bill currently provides that when there is good cause to believe that a child whose documentary proof of immunization status does not show proof of immunization against a disease listed in subdivision (b) of Section 120335 has been exposed to one of those diseases, that child may be temporarily excluded from the school or institution until the local health officer is satisfied that the child is no longer at risk of developing or transmitting the disease. The first amendment would clarify that this temporary exclusion authority applies only if there is good cause to believe that a student has been exposed to a disease listed under the mandatory vaccination law and his or her documentary proof of immunization status does not show proof of immunization against that specific disease.

The author is also making a second, technical amendment that would place the homeschooling and independent study exemption within a separate subdivision to ensure that the exemption also applies to seventh grade level checks for pertussis.

Author's amendments:

(1) On page 5, strike lines 26-29, inclusive and on line 30 strike "disease," and insert: "(b) When there is good cause to believe that a child has been exposed to a disease listed in subdivision (b) of Section 120335 and the child's documentary proof of immunization status does not show proof of immunization against that disease,"

(2) On page 4, strike lines 16-20 and on page 5 after line 10, insert: "(f) This section does not apply to a home-based private school or a pupil who is enrolled in an independent study program pursuant to Article 5.5 (commencing with Section 51745) of Chapter 5 of Part 28 of the Education Code."

Support: Alameda County Board of Supervisors; American Federation of State, County and Municipal Employees (AFSCME) AFL-CIO; American Academy of Pediatrics; American Lung Association; American Nurses Association\California; Biocom; California Academy of Family Physicians (CAFP); California Association of Nurse Practitioners (CANP); CAPG; California Chapter of the American College of Emergency Physicians (California ACEP); California Children's Hospital Association; California Coverage and Health Initiatives; California Health Care Institute; California Health Executives Association of California (CHEAC); California Hepatitis Alliance (CalHEP); California Immunization Coalition; California Hospital Association; California Medical

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Association; California School Nurses Association; California Pharmacists Association; California Optometric Association; California Primary Care Association; California School Boards Association (CSBA); California School Employees Association (CSEA); California School Nurses Organization; California State Association of Counties (CSAC); California State PTA; Child Care Law Center; Children Now; Children's Defense Fund-California; Children's Specialty Care Coalition; City of Beverly Hills; City of Pasadena; County Health Executives Association of California; County of Los Angeles; County of Santa Clara Board of Supervisors; County of Santa Cruz Board of Supervisors; County of Yolo Board of Supervisors; First 5 Association of California; Health Officers Association of California; Kaiser Permanente; Insurance Commissioner Dave Jones; Kaiser Permanente; Los Angeles County Board of Supervisors; March of Dimes California Chapter; Marin County Board of Supervisors (support if amended); National Coalition of Black Women; Osteopathic Physicians and Surgeons of California (OPSC); Providence Health and Services Southern California; Reed Union School District; San Dieguito Unified School District; San Francisco Unified School District; Secular Coalition for California; Silicon Valley Leadership Group; Solana Beach School District; The Children's Partnership; UAW Local 5810; numerous individuals

Opposition: Alder Grove Charter School – Director; American Civil Liberties Union (concern); Association of American Physicians & Surgeons; Association of Personalized Learning Schools & Services (APLUS); AWAKE California; California Chiropractic Association; California Coalition for Health Choice; California Coalition for Health Choice, the Central Valley and Central Sierra Chapters; California Naturopathic Doctors Association (oppose unless amended); California Nurses for Ethical Standards; California ProLife Council; California Right to Life Committee, Inc.; Californians for Freedom of Choice; Californians for Medical Freedom- Tahoe; Canary Party; Capitol Resource Institute; Children's Healthcare is a Legal Duty, Inc. (CHILD); Connecting Waters Charter School; Educate. Advocate.; Families for Early Autism Treatment (FEAT); Homeschool Association of California; Libertarian Party of Sacramento County; National Autism Association of California; National Vaccine Information Center; Our Kids, Our Choice (OKOC); Pacific Justice Institute Center for Public Policy; ParentalRights.Org; Plumas Charter School's Executive Director; Pro-Parental Rights; Safe Minds; Saint Andrew Orthodox Christian Church – Pastor; San Lorenzo Valley Unified School District – Superintendent (concerns); UnblindMyMind; Vaccine-Injury Awareness League; numerous individuals

HISTORY

Source: Vaccinate California

Related Pending Legislation: SB 792 (Mendoza) would prohibit a person from being employed at a day care center or day care home unless he or she has been immunized against influenza, pertussis, and measles.

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Prior Legislation:

AB 2109 (Pan, Ch. 821, Stats. 2012) *See* Background.

Prior Vote:

Senate Education Committee (Ayes 7, Noes 2)

Senate Health Committee: (Ayes 6, Noes 2)

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RE: California Supreme Court Case No: S278233

PROOF OF SERVICE

I, the undersigned, declare I am over the age of eighteen years and not a party to the within action. My business address is 700 S. Flower Street, Suite 1000, Los Angeles, CA 90017.

On January 30, 2023, I served the following document(s) described as:

Opposition to Depublication of Fourth District Appellate Opinion

On the interested parties in this action as follows:

[X] **BY ELECTRONIC SERVICE VIA TRUEFILING:** I caused a true and correct copy of the above-listed document(s) to be served Supreme Court of California, using TrueFiling (https://www.truefiling.com). All interested parties registered with TrueFiling, will be electronically served through TrueFiling, including the following:

lrosenberg@mycharterlaw.com; sevans@dwkesq.com; mbresee@aalrr.com; aestrada@aalrr.com aruizdeesparza@aalrr.com; lee@aac.law; arie@aac.law

[X] **BY MAIL:** I placed the envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid to:
Clerk of the San Diego Superior Court
Hon. John S. Meyer, Dept. C-64
330 W. Broadway
San Diego, CA 92101

COURT OF APPEAL – FOURTH APPELLATE
DISTRICT, DIVISION ONE
750 B Street, Suite 300
San Diego, CA 92101

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on January 30, 2023, at Concord, California.

/s/ Nicky Tenney
Nicky Tenney