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 13 *as Director of California Department of*  
 14 *Public Health*

13 IN THE UNITED STATES DISTRICT COURT  
 14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
 15 WESTERN DIVISION

17 **ANA WHITLOW, et al.,**

18 Plaintiffs,

19 v.

21 **STATE OF CALIFORNIA,**  
 22 **DEPARTMENT OF EDUCATION et**  
**al.,**

23 Defendants.

3:16-cv-01715-DMS-BGS

**STATE DEFENDANTS’  
 CONSOLIDATED OPPOSITION  
 TO PLAINTIFFS’ MOTION FOR  
 PRELIMINARY INJUNCTION**

**[Filed Concurrently with  
 Declarations of Robert Schechter,  
 M.D., and Deputy Attorney General  
 Jonathan E. Rich]**

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 Makato Sabraw  
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## INTRODUCTION

Plaintiffs’ motion to enjoin the enforcement of a public health statute that was enacted over a year ago should be denied because Plaintiffs are unlikely to prevail on their claims, and the balance of harm weighs substantially against them.

Plaintiffs’ claims are unsupported as a matter of federal and state constitutional law, which for decades has consistently held that (1) a state’s exercise of its police powers in protecting the public from communicable diseases is rationally based; and (2) states have a legitimate, if not compelling, interest in requiring children to be vaccinated before entering school. Moreover, an injunction against the enforcement of the statute in this case would immediately expose millions of California school children and other at-risk individuals to an increased threat of contracting potentially fatal communicable diseases.

As with their First Amended Complaint (FAC), Plaintiffs allege in their motion that the elimination of the personal belief exemption in California’s child-immunization statutes in California Senate Bill 277 (Stats 2015 Ch. 35) (SB 277) violates their federal and state constitutional rights by compelling them, in the absence of a recognized medical justification, to have their children vaccinated against communicable diseases before attending school in California.

In enacting SB 277, the Legislature expressed its intent to provide a means for the eventual achievement of total immunization of school children against a number of deadly, but highly preventable, childhood diseases. Support for SB 277 was given by, among others, the California Medical Association, the California Association for Nurse Practitioners, the California Chapter of the American College of Emergency Physicians, the California Primary Care Association, the California School Boards Association, the California School Nurses Organization, and the Children’s Defense Fund-California.

1 Plaintiffs' claims are predicated on the misguided supposition that their  
 2 subjective personal beliefs against childhood vaccinations outweigh the health and  
 3 safety of the millions of children enrolled in California schools, the health and  
 4 safety of the general public, and the considered judgment of the California  
 5 Legislature in addressing a significant public health issue that embodies a core  
 6 function of government: to protect the health and safety of its citizens against  
 7 preventable harm.

8 Plaintiffs' motion also should be denied because they unduly delayed  
 9 commencing this action and bringing their motion. SB 277 was enacted on June  
 10 30, 2015, *over one year before Plaintiffs filed their initial pleading in this case.*  
 11 And, the statute has been in effect since January 1, 2016, *six months* before  
 12 Plaintiffs instead commenced this action and brought their motion. Rather than act  
 13 promptly upon the enactment or the effective date of the statute, Plaintiffs brought  
 14 their motion within just weeks of the commencement of the school year. Therefore,  
 15 any exigency claimed by Plaintiffs is the product of their own inaction.

16 The public health and welfare must not be allowed to be jeopardized by the  
 17 subjective beliefs and unfounded conspiracy theories of a small minority of  
 18 individuals who, against all recognized scientific and legal authority, stubbornly  
 19 disregard the long-recognized safety and effectiveness of vaccines, and who fail to  
 20 accept the public health threat that their unsupported opinions have on the lives of  
 21 others around them.

22 Respectfully, Plaintiffs' motion for preliminary injunction should be denied.

## 23 **RELEVANT FACTS**

### 24 **I. THE STATE'S CHILD IMMUNIZATION STATUTES**

25 Senate Bill 277 (SB 277) was enacted over one year ago, on June 30, 2015.  
 26 *See Stats 2015 Ch. 35.* In relevant part, SB 277 eliminates the personal belief  
 27 exemption from the statutory requirement that children receive vaccines for certain  
 28 infectious diseases prior to being admitted<sub>2</sub> to any public or private elementary or

1 secondary school, or day care center. *Id.* In so doing, SB 277 revised the  
 2 California Health and Safety Code by amending sections 120325, 120335, 120370,  
 3 and 120375, adding section 120338, and repealing California Health and Safety  
 4 Code section 120365. *Id.*

5 In enacting SB 277, the Legislature reaffirmed its intent “to provide . . . [a]  
 6 means for the eventual achievement of total immunization of appropriate age  
 7 groups” against these childhood diseases. Cal. Health & Saf. Code, § 120325(a).  
 8 SB 277 requires children to be immunized against (1) diphtheria, (2) hepatitis B, (3)  
 9 haemophilus influenzae type b, (4) measles, (5) mumps, (6) pertussis (whooping  
 10 cough), (7) poliomyelitis, (8) rubella, (9) tetanus, (10) varicella (chickenpox), and  
 11 (11) “[a]ny other disease deemed appropriate by the [California Department of  
 12 Public Health (Department)].” Cal. Health & Saf. Code, § 120325(a).<sup>1</sup>

13 SB 277 has been in effect since January 1, 2016. Personal belief exemptions  
 14 have been prohibited since that date. Cal. Health & Saf. Code, § 120335(g)(1).  
 15 And, since July 1, 2016, school authorities may not unconditionally admit for the  
 16 first time any child to preschool, kindergarten through sixth grade, or admit any

17 <sup>1</sup> The inherent dangers of these diseases are chronicled by the World Health  
 18 Organization (WHO) and the Centers for Disease Control (CDC). *Diphtheria* is  
 19 caused by a bacterium that produces a toxin that can harm or destroy human body  
 20 tissues and organs. <http://www.who.int/immunization/topics/diphtheria/en/>.  
 21 “Diphtheria affects people of all ages, but most often it strikes unimmunized  
 22 children.” *Id.* *Hepatitis B* causes liver infection which “can lead to serious health  
 23 issues, like cirrhosis or liver cancer.” <http://www.cdc.gov/hepatitis/hbv/index.htm>.  
 24 *Haemophilus influenzae*, which is not to be confused with influenza (the “flu”) causes severe infection “occurring mostly in infants and children younger than five  
 25 years of age . . . and can cause lifelong disability and be deadly.” <http://www.cdc.gov/hi-disease/index.html>. *Measles* can cause, among other things,  
 26 pneumonia, brain damage, and death. <http://www.cdc.gov/vaccinesafety/vaccines/mmr-vaccine.html>. *Mumps* can cause deafness, inflammation of the brain and/or  
 27 tissue covering the brain and spinal cord, and death. *Id.* *Rubella* could cause  
 28 spontaneous miscarriages in pregnant women or serious birth defects. *Id.* *Varicella (chickenpox)* can lead to brain damage or death. *Id.* *Tetanus* causes  
 painful muscle contractions. <http://www.cdc.gov/tetanus/index.html>. *Pertussis*,  
 also known as whooping cough, is a highly contagious respiratory disease “known  
 for uncontrollable, violent coughing which often makes it hard to breathe,” and can  
 be deadly. <http://www.cdc.gov/pertussis/>. *Polio* is an incurable, “crippling and  
 potentially fatal infectious disease,” which spreads by “invading the brain and  
 spinal cord and causing paralysis.” <http://www.cdc.gov/polio/>.

1 pupil to seventh grade, unless the pupil either has been properly immunized, or  
2 qualifies for other exemptions recognized by statute. Cal. Health & Saf. Code, §  
3 120335(g)(3).

4 There are exemptions to the immunization requirements under SB 277.  
5 Vaccinations are not required for any student in a home-based private school or  
6 independent study program who does not receive classroom-based instruction. Cal.  
7 Health & Saf. Code, § 120335(f). Moreover, a child may be medically exempt  
8 from the immunizations specified in the statute if a licensed physician states in  
9 writing that “the physical condition of the child is such, or medical circumstances  
10 relating to the child are such, that immunization is not considered safe.” Cal.  
11 Health & Saf. Code, § 120370(a). Any other immunizations may only be mandated  
12 “if exemptions are allowed for both medical reasons and personal beliefs.” Cal.  
13 Health & Saf. Code, § 120338. SB 277 also provides an exception relating to  
14 children in individualized education programs. Cal. Health & Saf. Code, §  
15 120335(h).

16 SB 277 further provides that personal belief exemptions on file with a school  
17 or child care center prior to January 1, 2016, will continue to be honored through  
18 each of the designated grade spans (birth to preschool; kindergarten and grades one  
19 to six inclusive; and grades seven to twelve, inclusive), until the unvaccinated pupil  
20 advances to the next grade span. Cal. Health & Saf. Code, § 120335(g).

21 SB 277 was enacted in response to, among other things, a health emergency  
22 beginning in December 2014, when California “became the epicenter of a measles  
23 outbreak which was the result of unvaccinated individuals infecting vulnerable  
24 individuals including children who are unable to receive vaccinations due to health  
25 conditions or age requirements.” *See* Declaration of Jonathan E. Rich (Rich Decl.),  
26 Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg.  
27 Sess.), at 5.

28

1 “According to the Centers for Disease Control and Prevention, there  
 2 were more cases of measles in January 2015 in the United States than  
 3 in any one month in the past 20 years,” and “[m]easles has spread  
 through California and the United States, in large part, because of  
 communities with large numbers of unvaccinated people.”

4 *Id.* (italics added). As further noted in SB 277’s legislative history, “[a]ll of the  
 5 diseases for which California requires school vaccinations are very serious  
 6 conditions that pose very real health risks to children. Rich Decl., Exh. 2, Ass.  
 7 Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 4. “For  
 8 example, measles in children has a mortality rate as high as about one in 500 among  
 9 healthy children, higher if there are complicating health factors.” *Id.*, at 3. “Most  
 10 of the diseases can be spread by contact with other infected children.” *Id.*, at 4.

## 11 **II. THE PROMOTION OF PUBLIC HEALTH THROUGH MANDATORY** 12 **CHILDHOOD VACCINATIONS**

13 State Defendants have submitted the declaration of Robert Schechter, M.D.,  
 14 (Schechter Decl.) in support of this opposition to Plaintiffs’ motion.<sup>2</sup> Dr. Schechter  
 15 is a medical doctor licensed to practice in the State of California, a board-certified  
 16 pediatrician, and a Fellow of the American Academy of Pediatrics. Schechter  
 17 Decl., ¶ 1. He has been Chief of the Clinical and Policy Support Section of  
 18 CDPH’s Immunization Branch since 2003. Schechter Decl., ¶¶ 1, 2.

19 Dr. Schechter informs that the “herd immunity threshold,” or the level of  
 20 immunity required to inhibit sustained transmission among a population, varies for  
 21 each disease depending on its contagiousness. Schechter Decl., ¶ 7. For measles,  
 22 which is highly contagious, the level of immunity in a population necessary to halt  
 23 transmission is estimated to be between 92 - 94%. *Id.* As no vaccine is effective  
 24 for all recipients, immunization rates need to reach even higher levels. *Id.* For

25 \_\_\_\_\_  
 26 <sup>2</sup> State Defendants are Defendants the California Department of Education  
 27 (CDE); the California State Board of Education (SBE); Tom Torlakson, in his  
 28 official capacity as the Superintendent of Public Instruction for the State of  
 California (SPI); the California Department of Public Health (CDPH); and Dr.  
 Karen Smith, in her official capacity as Director of CDPH.



1 example, the recommended regimen of two doses of measles mumps and rubella  
2 vaccine is estimated to be effective for 97% of recipients. *Id.*

3 Contrary to Plaintiffs' assertions, vaccination coverage above 95% in  
4 California has not been achieved for all required vaccines. Schechter Decl., ¶ 12.  
5 Many school children remain unimmunized, and rates in many settings are still  
6 below levels needed to assure community (or herd) immunity. *Id.* When taking  
7 into account all categories of unimmunized children, the rate of receipt of all  
8 required immunizations reported for kindergarten entrants for the 2015-2016 school  
9 year was 92.9%. *Id.* In contrast to a 97% rate for two doses of MMR vaccine that  
10 is consistent with herd immunity statewide if attained uniformly, the reported rate  
11 of two doses of MMR for children entering kindergarten in 2015-2016 was 94.5%.  
12 *Id.*

13 However, these statewide average rates of reported immunization mask lower  
14 levels of immunization at the county, locality or school level that can support local  
15 transmission of disease. Schechter Decl., ¶ 13. Of the 58 California counties, 34%  
16 reported that 5% or more of children entering kindergarten there in 2015-2016 had  
17 received a personal belief exemption (PBE) to one or more required immunizations,  
18 and 10% of counties reported PBE rates of at least 10%. *Id.* The range of  
19 immunization rates reported for kindergarten entrants in 2015-2016 is even broader  
20 at the level of individual schools, as 1,340 schools across the State reported the  
21 PBE rates of kindergarten entrants at 5% or higher, 568 schools had rates at 10% or  
22 higher, and 231 schools had rates at 20% or higher. *Id.* Although PBE rates  
23 reported in California have always been below four percent, those rates increased  
24 significantly over recent decades. Schechter Decl., ¶ 14.

25 Outbreaks of vaccine-preventable diseases have occurred in California since  
26 1961, when the PBE was included in the immunization requirements statute.  
27 Schechter Decl., ¶ 17. But, the multinational outbreak of measles beginning at  
28 Disneyland in December 2014 underscores the vulnerability of unimmunized

1 individuals and their role in transmitting disease. Schechter Decl., ¶ 18. Among  
2 the first 110 California patients in the outbreak, 45% were known to be  
3 unvaccinated and 43% had unknown or undocumented vaccination status. *Id.*  
4 Twelve of the unvaccinated patients were infants too young to be vaccinated. *Id.*  
5 Among the 37 remaining vaccine-eligible patients, 76% were intentionally  
6 unvaccinated because of personal beliefs, and one was on an alternative plan for  
7 vaccination. *Id.* Among the 28 intentionally unvaccinated patients, 18 were  
8 children, and 10 were adults. Among the 84 patients with known hospitalization  
9 status, 20% were hospitalized. *Id.*

10 Earlier, on January 13, 2008, an outbreak of measles occurred in San Diego  
11 when an infected seven-year-old boy (index patient) transmitted the infection to his  
12 nine-year-old unvaccinated sister and three-year-old unvaccinated brother, and  
13 then, after two days of fever and conjunctivitis, attended his charter school.  
14 Schechter Decl., ¶ 19. Forty-one of the 377 students (11%) at the charter school  
15 were unvaccinated for measles because of personal beliefs, and two children  
16 became infected. *Id.* By February 1, 2008, four of the eight secondary case-  
17 patients were already infectious. *Id.* The index patient's sister infected two  
18 schoolmates and exposed an unknown number of children at a dance studio. *Id.*  
19 One infected classmate of the index patient infected his own younger brother and  
20 exposed 10 children at a pediatric clinic, 18 children and adults at a clinical  
21 laboratory, and an unknown number at two grocery stores and a circus. Another  
22 infected classmate of the index patient exposed an unknown number at an indoor  
23 amusement facility. *Id.* As these case studies make clear, the lack of vaccination  
24 has undeniable and real-world consequences.

## 25 STANDARD OF REVIEW

26 A preliminary injunction is an “extraordinary and drastic remedy . . . never  
27 awarded as of right.” *Munaf v. Geren*, 553 U.S. 674 (2008) (internal citations  
28 omitted). “[P]laintiff[s] seeking a preliminary injunction must establish that [they

1 are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm  
 2 in the absence of preliminary relief, that the balance of equities tips in [their] favor,  
 3 and that an injunction is in the public interest.” *Am. Trucking Ass'ns, Inc. v. City of*  
 4 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.2009). Even assuming these four  
 5 elements are met, a preliminary injunction is only appropriate when a plaintiff can  
 6 demonstrate that there are “serious questions going to the merits and a hardship  
 7 balance [] tips sharply toward the plaintiff.” *Alliance for the Wild Rockies v.*  
 8 *Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). If the probability of success on  
 9 the merits is low, preliminary injunctive relief should be denied. *Johnson v.*  
 10 *California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

11 The purpose of a preliminary injunction “is to preserve the status quo ante  
 12 litem pending a determination of the action on the merits.” *Oakland Tribune, Inc.*  
 13 *v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). In this regard, a “long  
 14 delay before seeking a preliminary injunction implies a lack of urgency and  
 15 irreparable harm.” *Id.*, at 1377; accord *Garcia v. Google, Inc.*, 786 F.3d 733 (9th  
 16 Cir. 2015) (holding that the district court did not abuse its discretion in denying a  
 17 preliminary injunction when plaintiff waited months before filing her motion);  
 18 *Whittier College v. ABA*, Case No: CV 07-1817 PA (FMOx), 2007 U.S. Dist.  
 19 LEXIS 43707, \*16 (C.D. May 7, 2007) (“[d]elay in requesting injunctive relief may  
 20 rebut an allegation of irreparable harm,” citing *Miller v. Cal. Pac. Med. Ctr.*, 991  
 21 F.2d 536, 544 (9th Cir. 1993).

## 22 ARGUMENT

### 23 I. PLAINTIFFS ARE NOT SEEKING TO PRESERVE THE STATUS QUO AND 24 UNDULY DELAYED BRINGING THEIR MOTION FOR A PRELIMINARY INJUNCTION

25 Plaintiffs waited until July 15, 2016, to bring their motion for preliminary  
 26 injunction, which is *over one year* after SB 277 was enacted on June 30, 2015, and  
 27 *seven months* after the statute became effective on January 1, 2016.

1 Hence, the status quo as of the filing of Plaintiffs' motion for preliminary  
 2 injunction on July 15, 2016, is that SB 277 has been in force for over six months.  
 3 Plaintiffs now improperly seek to disturb the status quo by attempting to enjoin the  
 4 operation of the statute and have their children admitted to school without being  
 5 properly vaccinated, placing not only their children but other students and school  
 6 personnel at risk of exposure to potentially fatal diseases.

7 Significantly, Plaintiffs' assertion of irreparable harm has the argument  
 8 backward. There can be no greater harm than risking the public health and safety,  
 9 particularly against foreseeable and preventable harm. If a preliminary injunction is  
 10 granted, children and other members of the public who rely on herd immunity will  
 11 be left vulnerable and subject to infection by potentially fatal and preventable  
 12 diseases. It is these children and the public in general, not Plaintiffs, who will be  
 13 irreparably harmed by the issuance of a preliminary injunction. Schechter Decl., ¶  
 14 27.<sup>3</sup>

## 15 **II. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THEIR CLAIMS THAT SB** 16 **277 IS UNCONSTITUTIONAL**

### 17 **A. Immunization Laws Are Long-Recognized Constitutional Public** 18 **Health Measures**

19 The authority of the California Legislature to require students to be vaccinated  
 20 in order to protect the health and safety of other students and the public at large,  
 21 irrespective of their parents' personal beliefs, is firmly embedded in our  
 22 jurisprudence, and embodies a quintessential function of an organized government  
 23 to protect its people from preventable harm. The State has both an unquestionably  
 24 legitimate and compelling interest in protecting public health and safety recognized  
 25 by the U.S. Supreme Court in *Jacobson v. Commonwealth of Massachusetts*, 197

26 <sup>3</sup> In addition to the harm inflicted on other school children and other at-risk  
 27 individuals, an injunction would create substantial confusion among public  
 28 officials, school districts and parents who have, since the enactment of SB 277 one  
 year ago, acted in reliance on its provisions. See Schechter Decl., ¶¶ 21-27.

1 U.S. 11 (1905) (*Jacobson*) and its progeny. Plaintiffs' motion is glaringly devoid  
2 of any reference to this weight of authority, with the exception of a brief citation to  
3 *Jacobson* for the unremarkable proposition that the exercise of state authority  
4 should not be arbitrary, unreasonable and oppressive. Pls.' Mot. 21, ECF No. 13.

5 Not surprisingly, Plaintiffs disregard the central holding of *Jacobson*, which  
6 upheld the constitutionality of a state's smallpox vaccination requirement.  
7 *Jacobson*, 197 U.S. at 12-13. Holding that "the police power of a state must be  
8 held to embrace . . . reasonable regulations established directly by legislative  
9 enactment as will protect the public health and the public safety," (*id.*, at 25-26), the  
10 Supreme Court recognized that "the principle of vaccination as a means to prevent  
11 the spread of smallpox has been enforced in many States by statutes making the  
12 vaccination of children a condition of their right to enter or remain in public  
13 schools." *Id.*, at 32. The Supreme Court's 1905 holding in *Jacobson* remains good  
14 law. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278  
15 (1990).

16 Following *Jacobson*, the Supreme Court in *Zucht v. King*, 260 U.S. 174 (1922)  
17 (*Zucht*), reiterated that "it is within the police power of a state to provide for  
18 compulsory vaccination." *Id.*, at 175-177. And, in *Prince v. Massachusetts*, 321  
19 U.S. 158 (1944) (*Prince*), the Supreme Court further held that "neither the rights of  
20 religion nor rights of parenthood are beyond limitation," and that both can be  
21 interfered with when necessary to protect a child. *Id.*, at 166. In so doing, the  
22 Supreme Court reaffirmed that a parent "cannot claim freedom from compulsory  
23 vaccination for the child more than for himself on religious grounds. The right to  
24 practice religion freely does not include liberty to expose the community or the  
25 child to communicable disease or the latter to ill health or death." *Id.*

26 California courts are in accord. In *Walker v. Superior Court*, 47 Cal.3d 112  
27 (1988), the California Supreme Court agreed that "parents have no right to free  
28 exercise of religion at the price of a child's life, regardless of the prohibitive or

1 compulsive nature of the governmental infringement.” *Id.*, at 140, citing *Jacobson*  
2 and *Prince*. Indeed, California’s approval of immunization laws predates that of  
3 the U.S. Supreme Court. In *Abeel v. Clark*, 84 Cal. 226 (1890) (*Abeel*), the  
4 California Supreme Court upheld the State’s school vaccination requirements,  
5 recognizing that “it was for the legislature to determine whether the scholars of the  
6 public schools should be subjected to [vaccination].” *Id.*, at 230. In *French v.*  
7 *Davidson*, 143 Cal. 658 (1904) (*French*), the Court upheld San Diego’s vaccination  
8 requirement, explaining that “the proper place to commence in the attempt to  
9 prevent the spread of a contagion was among the young, where they were kept  
10 together in considerable numbers in the same room for long hours each day . . .  
11 children attending school occupy a natural class by themselves, more liable to  
12 contagion, perhaps, than any other class that we can think of.” *Id.* at 662, italics  
13 added; *see also Williams v. Wheeler*, 23 Cal. App. 619, 625 (1913) (the state  
14 legislature has the power to prescribe “the extent to which persons seeking entrance  
15 as students in educational institutions within the state must submit to its  
16 [vaccination] requirements as a condition of their admission”); *Love v. Superior*  
17 *Court*, 226 Cal.App.3d 736, 740 (1990) (“[t]he adoption of measures for the  
18 protection of the public health is universally conceded to be a valid exercise of the  
19 police power of the state, as to which the legislature is necessarily vested with large  
20 discretion not only in determining what are contagious and infectious diseases, but  
21 also in adopting means for preventing the spread thereof”).

22 Since *Jacobson*, *Zucht*, *Prince*, *Abeel*, and *French*, *supra*, federal and state  
23 courts have repeatedly upheld mandatory vaccination laws over challenges  
24 predicated on the First Amendment, the Equal Protection Clause, the Due Process  
25 Clause, the Fourth Amendment, education rights, parental rights, and privacy  
26 rights, frequently citing *Jacobson*. *See. e.g., Phillips v. City of New York*, 775 F.3d  
27 538, 543 (2nd Cir. 2015) (holding that “mandatory vaccination as a condition for  
28 admission to school does not violate the Free Exercise Clause”); *Workman v.*

1 *Mingo County Sch.*, 667 F. Supp.2d 679, 690-691 (S.D. W. Va. 2009) (“a  
 2 requirement that a child must be vaccinated and immunized before it can attend the  
 3 local public schools violates neither due process nor . . . the equal protection clause  
 4 of the Constitution”), *affirmed Workman v. Mingo County Bd. of Educ.*, 419 F.  
 5 App’x 348, 353-54 (4th Cir. 2011) (unpublished); *Boone v. Boozman*, 217 F.  
 6 Supp.2d 938, 956 (E.D. Ark. 2002) (“the question presented by the facts of this  
 7 case is whether the special protection of the Due Process Clause includes a parent’s  
 8 right to refuse to have her child immunized before attending public or private  
 9 school where immunization is a precondition to attending school. The Nation’s  
 10 history, legal traditions, and practices answer with a resounding ‘no.’”); *Hanzel v.*  
 11 *Arter*, 625 F. Supp. 1259 (S.D. Ohio 1985) (holding parents’ objections to  
 12 vaccination based on “chiropractic ethics” did not fall under the protection of the  
 13 Establishment Clause); *Maricopa County Health Dept. v. Harmon*, 750 P.2d 1364  
 14 (Ariz. 1987) (holding that the state’s health department did not violate the right to  
 15 public education in Arizona’s Constitution when it excluded unvaccinated children  
 16 from school).

17 Plaintiffs fail to cite to a single case in which a court has struck down a  
 18 mandatory school immunization law. Because the extensive precedent  
 19 *unanimously* supports the constitutionality of SB 277, Plaintiffs’ motion should be  
 20 denied.

21 **B. The Free Exercise Clause Protects Religious, Not Personal**  
 22 **Beliefs**

23 1. Mandatory Vaccination as a Condition for Admission to  
 24 School Does Not Violate the Free Exercise Clause.

25 In their First Cause of Action, six of the seventeen individual Plaintiffs allege  
 26 that SB 277 violates their First Amendment rights because the statute prohibits  
 27 Plaintiffs from “declining certain vaccines derived from or containing ingredients to  
 28 which Plaintiffs object, including aborted fetal cells.” FAC, ¶¶ 11-14, 19, 23, 137,  
 ECF No. 11. Yet, these Plaintiffs fail to specify under which religious doctrine

1 they object and which vaccines contain “aborted fetal cells” (in fact, as discussed  
2 below, *no* vaccination contains aborted fetal cells). The remaining eleven  
3 individual Plaintiffs oppose SB 277 according to their personal beliefs that vaccines  
4 are harmful or unnecessary. Plaintiffs’ alleged beliefs, no matter how sincerely  
5 held, provide no basis for relief under the First Amendment, because the Free  
6 Exercise Clause does not protect subjectively held personal beliefs against  
7 mandatory vaccination laws.<sup>4</sup>

8 Citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (*Yoder*), Plaintiffs argue that  
9 SB 277 “impermissibly impinges on Plaintiffs’ rights to Free Exercise.” Pl.’s Mot.  
10 13, ECF No. 11. However, Plaintiffs disregard the essential holding in *Yoder*, that  
11 “*philosophical and personal . . . belief[s] [do] not rise to the demands of the*  
12 *Religion Clauses.*” *Id.*, at 216 (italics added). In *Hanzel*, plaintiffs objected to the  
13 immunization of their children because they believed that injection of foreign  
14 substances into the body is of no benefit and can only be harmful. *Hanzel*, 625 F.  
15 Supp. at 1260. The *Hanzel* court disagreed, stating, “[a]s made clear by the  
16 Supreme Court in *Yoder*, philosophical beliefs do not receive the same deference in  
17 our legal system as do religious beliefs, even when the aspirations flowing from  
18 each such set of beliefs coincide.” *Id.* at 1265.

19 The conclusory allegations by six Plaintiffs that vaccines contain aborted fetal  
20 cells are wholly unfounded. The American Academy of Pediatrics (AAPA) has  
21 explicitly addressed this internet-fed falsehood and instructs that vaccines do not  
22 contain aborted fetal tissue. AAPA, *Vaccine Ingredients: Frequently Asked*

23 <sup>4</sup> Among the 21 Plaintiffs in the FAC are four organizations that do not have  
24 standing. *See, e.g., Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333,  
25 343 (1977) (holding that an association has standing to sue on behalf of its  
26 members only if (1) the association would have standing to sue in its own right; (2)  
27 the interests it seeks to protect are germane to the organization’s purpose; and (3)  
28 participation by the individual members is not necessary to resolve the claims).  
Here, the organization Plaintiffs have failed to adequately allege that their members  
would have standing to sue in their own right. State Defendants will address the  
lack of standing of these organizations in greater detail in their anticipated motion  
to dismiss the FAC under Rule 12 of the Federal Rules of Civil Procedure.



1 *Questions*, [https://www.healthychildren.org/English/safety-prevention/](https://www.healthychildren.org/English/safety-prevention/immunizations/Pages/Vaccine-Ingredients-Frequently-Asked-Questions.aspx)  
2 [immunizations/Pages/Vaccine-Ingredients-Frequently-Asked-Questions.aspx](https://www.healthychildren.org/English/safety-prevention/immunizations/Pages/Vaccine-Ingredients-Frequently-Asked-Questions.aspx) at 2.  
3 Although, over forty years ago, two cell lines were developed from two fetuses that  
4 were aborted for medical reasons, and not for the purpose of producing vaccines,  
5 “these cell lines have an indefinite life span, meaning that no new aborted fetuses  
6 are ever used.” *Id.* Therefore, “[n]o fetal tissue is included in the vaccines . . .  
7 *children are not injected with any part of an aborted fetus.*” *Id.* (italics added).  
8 The National Catholic Bioethics Center (NCBC) agrees, explaining that, “[t]he cell  
9 lines under consideration were begun using cells taken from one or more fetuses  
10 aborted almost 40 years ago. Since that time the cell lines have grown  
11 independently. *It is important to note that descendent cells are not the cells of the*  
12 *aborted child.*” NCBC, [http://www.ncbcenter.org/resources/frequently-asked-](http://www.ncbcenter.org/resources/frequently-asked-questions/use-vaccines/)  
13 [questions/use-vaccines/](http://www.ncbcenter.org/resources/frequently-asked-questions/use-vaccines/) at 1 (italics added). The Vatican, as well, recognized, in  
14 response to questions raised about the original fetal cells used in developing  
15 vaccines cultures, that “a proportional reason . . . to accept the use of these  
16 vaccines in the presence of the danger of favouring the spread of the pathological  
17 agent, due to the lack of vaccination of children.” Pontifical Academy for Life,  
18 *Moral Reflections on Vaccines Prepared From Cells Derived From Aborted*  
19 *Human Foetuse* (2005), [http://academiavita.org/\\_pdf/documents/pav/](http://academiavita.org/_pdf/documents/pav/moral_reflections_on_vaccines_en.pdf)  
20 [moral\\_reflections\\_on\\_vaccines\\_en.pdf](http://academiavita.org/_pdf/documents/pav/moral_reflections_on_vaccines_en.pdf) at 6. The Vatican concluded that,  
21 notwithstanding the questions raised about the original fetal cells used in  
22 developing vaccines cultures, vaccination is “morally justified . . . to provide for the  
23 good of one’s children and of the people who come in contact with the children.”  
24 *Id.* at 7.

25 In the absence of any recognized religious doctrine, Plaintiffs’ objections to  
26 vaccinations are nothing more than subjective personal beliefs. That they are  
27 entitled to these beliefs, whether or not they are grounded in fact, is without  
28 question. But their personal beliefs cannot impose a legitimate restraint on the

1 State’s authority to protect the public from the spread of communicable diseases.  
2 *Phillips*, 775 F.3d at 543 (“mandatory vaccination as a condition for admission to  
3 school does not violate the Free Exercise Clause”). “A way of life, however  
4 virtuous and admirable, may not be interposed as a barrier to reasonable state  
5 regulation of education if it is based on purely secular considerations; to have the  
6 protection of the Religion Clauses, the claims must be rooted in religious belief.”  
7 *Yoder*, 406 U.S. at 215.

8 2. SB 277 Is Rationally Related to a Legitimate State Interest.

9 Even if some of the Plaintiffs’ objections can be characterized as religious,  
10 rather than personal subjective beliefs, Plaintiffs’ argument that strict scrutiny is the  
11 applicable standard of review for their claims is wrong. Pls.’ Mot. 11, ECF No. 13;  
12 FAC, ¶ 85, EFC. No. 11. “[A] law that is neutral and of general applicability need  
13 not be justified by a compelling governmental interest even if the law has the  
14 incidental effect of burdening a particular religious practice.” *Church of the*  
15 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). SB 277 is  
16 neutral and of general applicability; it applies to all children in day care, public and  
17 private schools. *See* Cal. Health & Saf. Code, § 120325 *et seq.* Thus, rational basis  
18 review is the correct level of scrutiny. *See also Phillips*, 775 F.3d at 543, fn.5  
19 (finding that “no court appears ever to have held” that *Jacobson* now demands strict  
20 scrutiny).

21 “[T]he rational-basis standard . . . employs a relatively relaxed standard.”  
22 *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). A law is  
23 upheld “so long as it bears a rational relation to some legitimate end.” *Romer v.*  
24 *Evans*, 517 U.S. 620, 631(1996). “[C]ourts are compelled . . . to accept a  
25 legislature’s generalizations even when there is an imperfect fit between means and  
26 ends.” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). “[A] legislative choice is  
27 not subject to courtroom fact[-]finding and may be based on rational speculation  
28 unsupported by evidence or empirical data . . . . A statute is presumed

1 constitutional . . . and [t]he burden is on the one attacking the legislative  
2 arrangement to negate every conceivable basis which might support it.” *Id.*, at 320-  
3 21.

4 Plaintiffs cannot plausibly assert their claims because it is well established that  
5 immunization laws, such as SB 277, are rationally related to legitimate state  
6 interests. The U.S. Supreme Court, the California Supreme Court, and numerous  
7 other federal and state courts have uniformly held that state immunization laws  
8 serve a rational, if not a compelling, state interest in protecting the public from the  
9 spread of communicable diseases. This interest was recognized by the U.S.  
10 Supreme Court in *Jacobson* 110 years ago and is consistently affirmed today. *See,*  
11 *e.g., Phillips*, 775 F.3d at 542.

12 SB 277 is rationally related to a legitimate state interest of protecting the  
13 public from the spread of debilitating, and potentially fatal, diseases, as its  
14 legislative history confirms: “Vaccine coverage at the community level is vitally  
15 important for people too young to receive immunizations and [for] those unable to  
16 receive immunizations due to medical reasons.” Rich Decl., Exh. 3, Sen. Jud.  
17 Com., Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 6. “[W]hen belief  
18 exemptions to vaccination guidelines are permitted, vaccination rates decrease.”  
19 *Id.*, Exh. 2, at 5. “Given the highly contagious nature of [these] diseases . . .  
20 vaccination rates of up to 95% are necessary to preserve herd immunity and prevent  
21 future outbreaks.” *Id.*, Exh. 3 at 5.

22 Hence, Plaintiffs’ claim fails as a matter of law because the Legislature’s  
23 removal of the personal beliefs exemption in SB 277 is rationally related to a  
24 legitimate, if not a compelling, state interest in protecting the health and safety of  
25 public school students and the general public.

### 26 **C. SB 277 Does Not Violate the Right to a Public Education.**

27 Plaintiffs wrongly assert that SB 277 violates their right to education under  
28 article IX, sections 1 and 5 of the California Constitution, and California Education

1 Code section 51004 (Section 51004). FAC, ¶¶ 166, 177, ECF No. 11. To the  
2 contrary, the statute operates to *protect* access to education by ensuring that it is not  
3 impaired by the proliferation of otherwise preventable diseases.

4 1. SB 277 Withstands Strict Scrutiny Analysis.

5 The California Constitution provides that the “Legislature shall provide for a  
6 system of common schools by which a free school shall be kept up and supported.”  
7 Cal. Const., art. IX, § 5. In holding that “education is a fundamental interest,” the  
8 California Supreme Court has applied strict scrutiny review to laws affecting the  
9 right to education. *Serrano v. Priest*, 18 Cal.3d 728, 766 (1976), supplemented 20  
10 Cal.3d 25 (1977). Strict scrutiny review is a two-prong test. First, the State “bears  
11 the burden of establishing . . . that it has a [c]ompelling interest which justifies the  
12 law.” *Serrano v. Priest*, 5 Cal.3d 584, 597 (1971). Second, the State must  
13 demonstrate that the law “is ‘tailored’ narrowly to serve legitimate objectives and  
14 that it has selected the ‘less drastic means’ for effectuating its objectives.” *San*  
15 *Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

16 As discussed in detail above, *Jacobson* and its progeny have unequivocally  
17 held that immunization laws are justified because they serve a compelling state  
18 interest in protecting public health and safety. *Jacobson*, 197 U.S. at 35 (“the  
19 legislature has the right to pass laws which, according to the common belief of the  
20 people, are adapted to prevent the spread of contagious diseases”); *see also Sherr v.*  
21 *Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y.  
22 1987) (holding there is a “compelling interest . . . in fighting the spread of  
23 contagious diseases through mandatory inoculation programs”).

24 In enacting SB 277, the Legislature expressed its intent “to provide . . . [a]  
25 means for the eventual achievement of total immunization of appropriate age  
26 groups” against these childhood diseases. Cal. Health & Saf. Code, § 120325(a).  
27 In so doing, the Legislature understood that “[p]rotecting the individual and the  
28 community from communicable diseases . . . is a core function of public health.”

1 Rich Decl., Exh. 3, at 7. Moreover, the enactment of SB 277 was a reasoned  
2 response to escalating numbers of unvaccinated children and further outbreaks of  
3 dangerous communicable diseases. *Id.*, at 5-7.

4 Plaintiffs are unable to cite to a single case where a court has held there is no  
5 compelling interest in protecting the public from the spread of communicable  
6 diseases through vaccination. To the contrary, “[t]he fundamental and paramount  
7 purpose [of school immunization statutes] . . . [is] to afford protection for school  
8 children against crippling and deadly diseases by immunization. That this can be  
9 done effectively and safely has been incontrovertibly demonstrated over a period of  
10 a good many years and is a matter of common knowledge of which [courts] takes  
11 judicial notice.” *Brown v. Stone*, 378 So.2d 218, 220-21 (Miss. 1979).

12 Furthermore, SB 277 is narrowly tailored to serve this compelling interest. It  
13 does not mandate vaccination for all contagious diseases, but only those that the  
14 Legislature determined are “very serious” and that “pose very real health risks to  
15 children.” *See* Rich Decl., Exh. 2 at 4. It contains appropriate but limited  
16 exemptions for children with medical conditions that would make vaccination  
17 unsafe, and children who would otherwise be homeschooled or enrolled in  
18 independent study programs. Cal. Health & Saf. Code, § 120335(f). SB 277 also  
19 provides an exception related to students who attend individualized education  
20 programs. *Id.*, at (h).

21 Plaintiffs’ attempt to suggest various alternatives to mandatory vaccination  
22 disregards the fact that “the legislature is necessarily vested with large discretion  
23 not only in determining what are contagious and infectious diseases, but also in  
24 adopting means for preventing the spread thereof.” *Love*, 226 Cal.App.3d at 740;  
25 *see also e.g., Romer*, 517 U.S. at 631.

## 26 2. SB 277 Promotes the Right to Education.

27 In drafting SB 277, the California Legislature recognized that “[s]afe schools  
28 are a precondition to education.” Rich Decl., Exh. 3 at 6. SB 277 does not violate

1 the right to education; to the contrary, it benefits and supports safe access to  
2 education for all school children by ensuring that the exercise of a right to  
3 education is not impaired by the transmission of serious or potentially fatal disease.  
4 *See also* Cal. Const., art. I, § 28(7) (“the People find and declare that the right to  
5 public safety extends to public and private primary, elementary, junior high, and  
6 senior high school, . . . where students and staff have the right to be safe and secure  
7 in their persons”).

8 Plaintiffs acknowledge that the “California Constitution requires the State to  
9 ensure educational opportunities for every child.” FAC, ¶ 83, ECF No. 11. Their  
10 acknowledgment, however, is made without consideration of the rights of the  
11 millions of school children and their parents who rely on mandatory vaccinations to  
12 ensure that their right to an education is not threatened by the spread of potentially  
13 fatal communicable diseases. “If there is a single place that children must be kept  
14 safe as humanly possible it is at school.” Rich Decl., Exh. 3, at 7. “[S]tudents have  
15 a right to education in California, but also that their schools be clean, safe, and  
16 functional. A safe school for many children is a school with a high level of  
17 community immunity which would protect them from known diseases. [SB 277]  
18 provides the most comprehensive measure to ensure high vaccination rates.” Rich  
19 Decl., Exh. 3, at 15.

20 Indeed, the U.S. Supreme Court has long-recognized that the institutional  
21 interest of schools, as well the rights of the student-body at large, often hold sway  
22 over the rights of individual students. “For their own good and that of their  
23 classmates, public school children are routinely required to submit to various  
24 physical examinations, and to be vaccinated against various diseases.” *Vernonia*  
25 *School District 47J v. Acton*, 515 U.S. 646 (1995) (noting with approval that “all 50  
26 States required public school students to be vaccinated against diphtheria, measles,  
27 rubella, and polio,” and that “[p]articularly with regard to medical examinations and  
28

1 procedures, therefore, ‘students within the school environment have a lesser  
2 expectation of privacy than members of the population generally’’).

3 Moreover, as stated above, SB 277 expressly provides exemptions for students  
4 enrolled in home schooling and independent study programs, thus ensuring the right  
5 to an education for unvaccinated children. *See* Cal. Health & Saf. Code, §  
6 120335(f).

7 SB 277 does not violate the right to education, but instead promotes it.

8 **D. Parental Rights Are Not Impermissibly Infringed by SB 277.**

9 Plaintiffs allege that SB 277 violates their “rights to control upbringing and  
10 education of their minor children according to the religion, system of values and  
11 moral norms they deem appropriate and their rights to the care, custody, education  
12 of and association with their children.” FAC, at ¶ 139, ECF No. 11. Again,  
13 Plaintiffs fail to provide any legal authority to support their contention.

14 To the contrary, the Supreme Court has emphasized, “a state is not without  
15 constitutional control over parental discretion in dealing with children when their  
16 physical or mental health is jeopardized.” *Parham v. J. R.*, 442 U.S. 584, 603  
17 (1979). As explained in *Prince*, “neither the rights of religion nor rights of  
18 parenthood are beyond limitation[;]” both can be interfered with when necessary to  
19 protect a child.” *Prince*, 321 U.S. at 166. A parent’s liberty interest in directing  
20 their child’s education is subject to reasonable government regulation. *Hooks v.*  
21 *Clark County*, 228 F.3d 1036, 1041 (9th Cir. 2000), cert. denied, 532 U.S. 971  
22 (2001).

23 And, in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), the Ninth Circuit  
24 recently re-affirmed that parents’ right to make decisions regarding the care,  
25 custody, and control of their children, “is not without limitations,” citing  
26 specifically to “the health arena, [where] states may require the compulsory  
27 vaccination of children.” *Id.* at 1235, citing *Prince*.

28 ///

1           **E. SB 277 Does Not Affect the Right to Freedom of Assembly.**

2           Plaintiffs also contend that SB 277 violates their First Amendment “right to  
3 freedom of assembly by depriving children of the right to attend secular or religious  
4 private schools of their choosing and by requiring that . . . schools deny admission  
5 and education to children with PBEs.” FAC, at ¶ 138, ECF No. 11. This is largely  
6 a reiteration of Plaintiffs’ claims regarding the right to education and does not fall  
7 under the purview of the First Amendment. “The right of peaceable assembly is a  
8 right cognate to those of free speech and free press and . . . implies a right on the  
9 part of its citizens to meet peaceably for consultation in respect to public affairs.”  
10 *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). Freedom of assembly  
11 pertains to the “holding of meetings for peaceable political action[,]” not school  
12 attendance. *Id.*, at 365.

13           Even if Plaintiffs establish that the right to assemble somehow applies, SB 277  
14 still survives strict scrutiny analysis for the reasons set forth above.

15           **F. Plaintiffs Are Not Likely to Prevail on Their Equal Protection**  
16           **Claims**

17           Plaintiffs allege that SB 277 violates the Equal Protection Clauses under the  
18 Fourteenth Amendment, as well as article I, section 7(a) and article IV, section  
19 16(a) of the California Constitution, “by failing to provide Plaintiffs with basic  
20 educational opportunities equal to those that children in other schools receive.”  
21 FAC, ¶¶ 143, 168, ECF No. 11. In so doing, Plaintiffs attempt to create their own  
22 protected class by contending that SB 277 “is the result of disapproval or animus  
23 against a politically unpopular group” and that SB 277 “singles out children with  
24 PBEs for a disfavored legal status, thereby creating a category of ‘second-class  
25 citizens.’” FAC, ¶ 144, ECF No. 11.

26           Plaintiffs attempt to construct a multitude of “distinctions” to substantiate their  
27 alleged equal protection violations, yet none is availing. FAC, ¶¶ 143, ECF No. 11.  
28 SB 277 is neutral on its face. It does not discriminate on the basis of race, national



1 origin, wealth or age. The Legislature established a system of vaccination  
2 requirements that follows national recommendations and schedules for children and  
3 adolescents. That vaccination schedule dictates when children should receive  
4 which vaccines.

5 Even if this Court entertains Plaintiffs' attempts to create new classifications,  
6 SB 277 survives both rational basis and strict scrutiny review. The rational basis  
7 standard of review is applied to claims of discrimination "caused by economic and  
8 social welfare legislation." *Safeway Inc. v. City & County of San Francisco*, 797 F.  
9 Supp. 2d 964, 972 (N.D. Cal. 2011). "To pass rational basis scrutiny, the equal  
10 protection clause requires only that the classification rationally furthers a legitimate  
11 state interest." *Id.* The strict scrutiny standard of review is employed only "when  
12 the classification impermissibly interferes with the exercise of a fundamental right,"  
13 or where the law at issue draws distinction based on suspect classifications. *See*  
14 *Murgia*, 427 U.S. 313. Even in those cases when strict scrutiny applies, however,  
15 the state law is deemed justified if it is "narrowly tailored to serve a compelling  
16 state interest." *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

17 As discussed in detail above, the U.S. Supreme Court and California Courts  
18 have uniformly held that the state has a rational and a compelling interest in  
19 mandating the vaccinations of children before they are admitted to school. In light  
20 of this overwhelming precedent, Plaintiffs cannot prevail on their equal protection  
21 claim.<sup>5</sup>

22 ///

23 <sup>5</sup> Under the guise of Title VI of the Civil Rights Act of 1964, Plaintiffs allege  
24 that "Defendants' conduct has the effect of depriving students of color or students  
25 whose parents are not native English speakers of basic educational necessities at  
26 disproportionately higher rates than white students without sufficient justification."  
27 FAC, ¶ 164, ECF No. 11. Plaintiffs have failed to include any allegations that  
28 suggest SB 277 has resulted in disparate treatment on the basis of "race, color, or  
national origin." 42 U.S.C. §2000d. Not a single plaintiff alleges anything  
resembling racial animus. SB 277 is neutral on its face and in its application. It  
does not target or exclude any students of color or students whose parents are not  
native English speakers.

1           **G. Plaintiffs’ Due Process Claims Are Outweighed by the State’s**  
 2           **Legitimate and Compelling Interests**

3           Plaintiffs also claim that SB 277 violates the Due Process Clauses of the Fifth  
 4           and Fourteenth Amendments, as well as article I, sections 7(a) and 15 of the  
 5           California Constitution. FAC, at ¶¶ 146, 171, ECF No. 11.

6           As with Plaintiffs’ other constitutional claims, any due process rights “must be  
 7           determined by balancing [Plaintiffs’] liberty interests against the relevant state  
 8           interests.” *Cruzan*, 497 U.S. at 279. In *Cruzan*, the Supreme Court recognized the  
 9           right to refuse unwanted medical treatment. *Id.*, at 269-270. However, in  
 10          explaining the balancing test between state interests and a plaintiff’s liberty interest,  
 11          the Supreme Court cited to *Jacobson* and recognized mandatory vaccination as an  
 12          example where state interests outweigh a plaintiff’s liberty interest in declining a  
 13          vaccine. *Id.*; see also *Boone v. Boozman*, 217 F. Supp.2d at 957 (holding that  
 14          mandatory school vaccination did not violate the Due Process Clause because  
 15          “requiring school children to be immunized rationally furthers the public health and  
 16          safety”).

17          Finally, SB 277 does not stigmatize children as “vectors of disease,” as  
 18          Plaintiffs claim. FAC, ¶ 134, ECF No. 11. A child who is vaccinated is at  
 19          substantially reduced risk of contracting a disease. As explained above, SB 277  
 20          promotes the right to education by affording students a safe environment with a  
 21          minimal risk of transmitting communicable diseases.<sup>6</sup>

22          For the reasons detailed above, Plaintiff’s due process claim is irreconcilable  
 23          with the weight of authority that the state has a compelling interest in mandating the  
 24          vaccinations of children before they are admitted to school.

25          ///

26          <sup>6</sup> Plaintiffs’ claim that SB 277 hinders their “[f]ulfillment of the property  
 27          interest in obtaining a California high school diploma” is contrary to California law.  
 28          FAC, at ¶ 173. There is no property interest in obtaining a high school diploma.  
 See *O’Connell v. Superior Court*, 141 Cal.App.4th 1452, 1478 fn. 17 (2006).

1 **III. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THEIR STATUTORY CLAIMS**

2 Against the weight of constitutional authority in favor of the State's legitimate  
3 and compelling interest to protect the public health, Plaintiffs have seized upon a  
4 scattershot of statutory claims as to which they are unlikely to prevail. None of  
5 these claims is sufficient basis to disturb the status quo by enjoining the continued  
6 operation of SB 277.

7 **A. Plaintiffs' Purported Disability Rights Are Not Infringed**

8 Three of the seventeen individual Plaintiffs claim their children are enrolled in  
9 Individualized Education Plans (IEPs) and that individual schools are allegedly  
10 excluding their unvaccinated children from admission, contrary to the exception for  
11 IEP students under SB 277, thereby violating their children's purported disability  
12 rights under the Individuals with Disabilities Education Act (IDEA), the Americans  
13 with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (Section  
14 504). FAC, ¶¶ 16, 18, 22, ECF No. 11.<sup>7</sup>

15 In making these allegations, these three Plaintiffs readily assert that SB 277  
16 provides an exception related to students with IEPs. Cal. Health & Saf. Code, §  
17 120335(h). Plaintiffs' allegations, therefore, appear to be directed to compliance  
18 with the exception by individual schools (not identified in the FAC), and not to the  
19 constitutionality of SB 277.

20 Plaintiffs' motion for preliminary injunction must therefore be denied because  
21 the alleged actions of individual schools with regard to the IEP exception in SB 277  
22 do not affect the constitutionality of the SB 277, and therefore do not provide a  
23 sufficient basis to enjoin the statute.

24  
25  
26 <sup>7</sup> The IEP is a program adopted under the IDEA, 20 U.S.C. § 1400, *et seq.*,  
27 which "sets out the child's present educational performance, establishes annual and  
28 short-term objectives and describes the specially designed instruction and services  
that will enable the child to meet those objectives." *Honig v. Doe*, 484 U.S. 305,  
311 (1988).

1 In any event, Plaintiffs do not cite to any authority that the State’s legitimate  
 2 and compelling interest in mandating vaccinations for school children is somehow  
 3 superseded by these statutes. Plaintiffs’ IEP-related claims against the State  
 4 Defendants also fail because: (1) Plaintiffs have not plausibly alleged, nor can they,  
 5 that mandatory vaccinations deny their children educational benefits based on their  
 6 alleged disabilities, under Section 504, the ADA or the IDEA; (2) Plaintiffs do not  
 7 have a private right of action against State Defendants under the IDEA; (3) even if  
 8 Plaintiffs had a private right of action against State Defendants under the IDEA,  
 9 and they do not, Plaintiffs have failed to exhaust their administrative remedies.

10 1. Section 504 of the Rehabilitation Act and the Americans with  
 11 Disabilities Act.

12 Section 504 and ADA claims are analyzed together. *Vinson v. Thomas*, 288  
 13 F.3d 1145, 1152 fn.7 (9th Cir. 2002).

14 These three Plaintiffs must establish that “(1) [they are] qualified individual[s]  
 15 with a disability; (2) [they were] excluded from participation in or otherwise  
 16 discriminated against with regard to a public entity’s services, programs, or  
 17 activities, and (3) *such exclusion or discrimination was by reason of [their]*  
 18 *disability.*” *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002) (italics added);  
 19 42 U.S.C. § 12132; 29 U.S.C. §§ 794(a), (b)(2)(B); 34 C.F.R. § 104.4.

20 SB 277 applies to all California children equally; it does not specifically target  
 21 its vaccination requirements at students with disabilities. *See D.A.B. v. New York*  
 22 *City Department of Education (D.A.B.)*, 45 F. Supp.3d 400, 402 (S.D.N.Y. 2014) ),  
 23 *aff’d*, 630 Fed. Appx. 73 (2d Cir. 2015) (rejecting a Section 504 claim against a  
 24 mandatory vaccination statute because “[t]here is no reasonable comparison  
 25 between a vaccination requirement (with appropriate medical exceptions) and the  
 26 exclusion of . . . disabled students”). And, in the event a licensed physician verifies  
 27 that a vaccination would be unsafe directly because of a child’s disability, SB 277  
 28

1 expressly provides for a medical exemption. *See* Cal. Health & Saf. Code, §  
2 120370(a).

3 Accordingly, Plaintiffs' Section 504 and ADA claims fail as a matter of law.

4 2. The Individuals with Disabilities Education Act

5 a. *Plaintiffs do not have a private right of action under the*  
6 *IDEA against State Defendants.*

7 To the extent that Plaintiffs may have any private right of action under the  
8 IDEA, it is not against the State Defendants.

9 The IDEA provides that a state must, in order to receive federal financial  
10 assistance, have policies and procedures in effect that assure all students with  
11 disabilities the right to a free appropriate public education (FAPE). 20 U.S.C. §  
12 1412(a)(1). Each student's special education instruction is based upon an IEP. 20  
13 U.S.C. § 1414(d).

14 California elected to participate in the IDEA, adopted a state plan, and enacted  
15 a series of statutes and regulations designed to comply with the federal  
16 requirements. Cal. Educ. Code, § 56000, *et seq.*; Cal. Code Regs., tit. 5, § 3000, *et*  
17 *seq.* Congress left it to the states to devise systems for the provision of special  
18 education services through "local educational agencies (LEAs)." California law  
19 defines an LEA as a "school district, a county office of education, a charter school  
20 participating as a member of a special education local plan area (SELPA), or a  
21 SELPA." Cal. Educ. Code, § 56026.3. An LEA – *not the State* – is generally  
22 responsible for providing a FAPE to students with disabilities residing within its  
23 jurisdictional boundaries. Cal. Educ. Code, § 48200. The responsibility to identify  
24 children with disabilities, to determine appropriate educational placements and  
25 related services through the IEP process, and to provide needed special education  
26 and related services is placed on an LEA. Cal. Educ. Code, §§ 48200, 56300,  
27 56302, 56340, and 56344(c).

1 Pursuant to the IDEA, *state* educational agencies have only general  
2 supervisory responsibility for the overall provision of special education services in  
3 California. 20 U.S.C. §§ 1412(a)(11)(A) and 1401(32). The IDEA does not require  
4 that a state educational agency directly provide services or guarantee the provision  
5 of services by LEAs with respect to individual students. The Ninth Circuit has held  
6 that private plaintiffs have no express private right of action against state  
7 educational agencies under 20 U.S.C. § 1412(a), the section that contains the  
8 general supervision subsection. *M.M. v. Lafayette Unified Sch. Dist.*, 767 F.3d 842,  
9 860 (9th Cir. 2014). Thus, Plaintiffs do not have a private right of action for their  
10 allegations that any State Defendants are “removing” and “excluding children with  
11 IEPs from school and denying them a free and appropriate education,” because  
12 State Defendants are not the responsible actors for any alleged exclusions of  
13 children with IEPs from school. FAC, ¶ 150, ECF No. 11.

14 In any event, Plaintiffs have not alleged any specific obligation under the  
15 IDEA that State Defendants failed to perform.

16 b. *Local Schools, and Not the State, Are Responsible for*  
17 *Compliance with the IDEA.*

18 Plaintiffs also allege that Defendants “fail[ed] to ensure that school and district  
19 administrators and teachers adhere to the requisite procedural safeguards for  
20 disabled children and their parents and guardians, including prior written notice of  
21 proposed charges, the right to disagree in adequate administrative proceedings and  
22 the right to pendency during those proceedings.” *Id.* Again, none of the Plaintiffs  
23 sets forth any allegations related to notice or due process defects.

24 Whenever there is a disagreement regarding a proposal, or refusal, to initiate  
25 or change the identification, evaluation, or educational placement of an individual  
26 child, or the provision of a FAPE, a parent may request an administrative “due  
27 process” hearing *against an LEA*. 20 U.S.C. § 1415(b)(6)(A); (f)(1)(A); 34 C.F.R.  
28 § 300.507(a); Cal. Educ. Code, § 56501(a), *et seq.*; *Wyner v. Manhattan Beach*

1 *Unified Sch. Dist.*, 223 F.3d 1026, 1028-1029 (9th Cir. 2000), *cert. denied*, 534  
2 U.S. 1140 (2002). Under the IDEA, the person conducting the due process hearing  
3 must be impartial and independent from the state educational agency. 20 U.S.C. §  
4 1415(f)(1)(A); (f)(3)(A). In California, the CDE meets this obligation by  
5 contracting with the Office of Administrative Hearings (OAH) for the services of  
6 Administrative Law Judges. Cal. Educ. Code, § 56504.5(a); Cal. Gov. Code, §  
7 27727.

8 The law contemplates that the proper respondent to a parent's due process  
9 hearing request is typically *the LEA*. Cal. Educ. Code, § 56502(d)(2). The due  
10 process hearing system is designed to address whether a LEA denied FAPE to an  
11 individual student. 20 U.S.C. 1415(f)(3)(E)(i). Although the CDE has general  
12 oversight responsibility for special education in California, it is not usually a proper  
13 respondent in a due process hearing under the IDEA because (1) it is not the agency  
14 "responsible for providing education to [the] children with disabilities[;]" (2) it is  
15 not the agency "involved in any decisions regarding a pupil[;]" and (3) and it is not  
16 the agency "providing special education or related services" to a pupil. 34 C.F.R. §  
17 300.33; Cal. Educ. Code, §§ 56501(a), 56028.5.

18 Plaintiffs fail to make any claims that State Defendants were actually involved  
19 in any student's IEP process, much less any decisions leading to the alleged  
20 exclusion of students with IEPs in a specific school or district.

21 3. Plaintiffs Failed to Exhaust Administrative Remedies.

22 Even assuming that Plaintiffs could otherwise bring claims against the State  
23 Defendants under the IDEA, Section 504 and the ADA (which is disputed herein),  
24 such claims should be dismissed because Plaintiffs have failed to exhaust their  
25 administrative remedies.

26 As a prerequisite to filing suit in federal court on claims under the IDEA,  
27 Section 504 or the ADA that seek relief that could have been provided under the  
28 IDEA, Plaintiffs must first exhaust their administrative remedies through OAH. 20

1 U.S.C. § 1415(l); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir.  
2 2011)(en banc), cert. denied, 132 S. Ct. 1540 (2012), overruled in part on other  
3 grounds, *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (*en banc*). Only a  
4 party aggrieved by an OAH final decision can file such a civil action. 20 U.S.C. §  
5 1415(i)(2).

6 Plaintiffs have not alleged nor otherwise shown that they have even attempted  
7 to pursue their claims through OAH, much less exhausted their remedies. Thus,  
8 Plaintiffs' claims alleging IDEA, ADA and Section 504 violations fail as a matter  
9 of law.

#### 10 **B. SB 277 Does Not Conflict with Medical Privacy**

11 In another four separate claims, Plaintiffs allege that SB 277's medical  
12 exemption procedure (Health & Safety Code section 120370) violates the  
13 California Confidentiality of Medical Information Act, California Information  
14 Practices Act, California Health & Safety Code section 120440, and the Federal  
15 Family Educational Rights and Privacy Act (FERPA). FAC, ¶¶ 180, 185, 189, 195,  
16 ECF No. 11. Plaintiffs base these four medical privacy claims on their belief that  
17 “[a]t the direction of CDPH and in collusion with the State Medical Board . . . local  
18 health departments . . . are . . . engaged in programs to collect and scrutinize  
19 medical exemptions for the express purpose of tracking physicians who write  
20 medical exemptions.” FAC, ¶ 77, ECF No. 11.

21 A medical privacy right is not unlimited and must be balanced against  
22 important state interests in regulation. *Roe v. Wade*, 410 U.S. 113, 154 (1973).  
23 Thus, a student's privacy interest is limited in a public school environment where  
24 the school is responsible for students' health and safety, and students are routinely  
25 subject to vaccinations. *Bd. of Ed. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S.  
26 822, 830-831 (2002); *see also Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d  
27 1071, 1094 (9th Cir. 2008) (citing *Earls*.)



1 But, Plaintiffs do not allege any facts in support of their conclusory statutory  
 2 claims. Rather, through alleged blog posts and “leaked letters,” Plaintiffs piece  
 3 together a conspiracy theory that “CDPH and local health departments are taking  
 4 active steps to mislead . . . and to intimidate physicians into denying medical  
 5 exemptions.” FAC, ¶¶ 72, 73, ECF No. 11. However, Plaintiffs fail to provide a  
 6 single example of a physician who has had his or her license revoked, suspended, or  
 7 even questioned because he or she issued a medical exemption. In fact, CDPH does  
 8 not license physicians or have authority over them; that authority is held by the  
 9 California Medical Board. *See, e.g.*, Cal. Bus. & Prof. Code, § 2220 *et seq.* Nor  
 10 are there any examples of a local health department or CDPH overturning a medical  
 11 exemption issued by a licensed physician.<sup>8</sup>

12 Plaintiffs’ attempts to bolster their conspiracy theory with alleged violations of  
 13 FERPA and California privacy laws are unavailing because SB 277 fully complies  
 14 with these laws.

15 1. Federal Family Educational Rights and Privacy Act (FERPA)

16 Plaintiffs claim that the State Defendants violate FERPA by “collecting [and  
 17 sharing] medical records relating to the exemption without parents’ prior consent.”  
 18 FAC, ¶¶ 193, 195, ECF No. 11. Plaintiffs lack standing because there is no private  
 19 right of action under FERPA.

20 “Congress enacted FERPA to assure parents of students . . . access to their  
 21 educational records and to protect such individuals’ rights to privacy by limiting the  
 22 transferability of their records without their consent.” *Frazier v. Fairhaven Sch.*  
 23 *Comm.*, 276 F.3d 52, 67 (1st Cir. 2002). The U.S. Supreme Court has held that

24 \_\_\_\_\_  
 25 <sup>8</sup> Plaintiffs blatantly misinterpret two letters issued by the Santa Barbara  
 26 County Department of Public Health (SBDPH) concerning its Medical Exemption  
 27 Pilot Program. FAC, at 35-36, ECF No. 11. SBDPH has clarified that its Pilot  
 28 Program “provides procedural support to schools and child care centers, but does  
 not ‘overturn’ medical exemptions issued by a licensed physician” and explicitly  
 stated that “[d]etermining if a ‘physical condition’ or ‘medical circumstance’  
 warrants exemption from vaccination is not part of this review.”

1 FERPA clearly does not confer “the sort of ‘individual entitlement’ that is  
2 enforceable under § 1983.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002).

3 2. California Health & Safety Code Section 120440

4 Plaintiffs contend that Defendants violated California Health and Safety Code  
5 section 120440 (Section 120440) by “requiring or coercing Plaintiffs to permit  
6 sharing of records relating to the exemptions.” FAC, ¶ 189, ECF No. 11.

7 Plaintiffs are unlikely to prevail on their claim because it is facially  
8 implausible. Eight of the seventeen individual plaintiffs allege that they were  
9 denied medical exemptions. FAC, ¶¶ 11, 13, 15, 17, 18, 19, 23, 25, ECF No. 11.  
10 Seven plaintiffs make no mention of medical exemptions. FAC, ¶¶ 12, 14, 16, 20,  
11 24, 26, 27, ECF No. 11. The only two Plaintiffs who have children with medical  
12 exemptions are Plaintiffs Sutton and Murray. FAC, ¶¶ 21, 25, ECF No. 11.  
13 Neither of these Plaintiffs has alleged that they refused to permit, or were required  
14 or coerced into permitting, record-sharing. *Id.*

15 Plaintiff Sutton alleges that her child has a medical exemption that was  
16 initially refused but eventually accepted. FAC, ¶ 21, ECF No. 11. Her sole  
17 complaint is that the school’s process of accepting the medical exemption caused  
18 her child to “miss out on placement opportunities at four different schools.” *Id.*  
19 There are no allegations concerning record-sharing.

20 Plaintiff Murray has six children. FAC, ¶ 25, ECF No. 11. One of her children  
21 has a medical exemption, but like Plaintiff Sutton, Plaintiff Murray has not asserted  
22 any allegations related to the record-sharing of this medical exemption. *Id.* Her  
23 complaint is that her other children have not been able to get medical exemptions  
24 and that two of her children have personal belief exemptions on file but their  
25 respective schools have rejected these personal belief exemptions. *Id.*

26 None of the Plaintiffs has stated any allegations to substantiate a violation of  
27 Section 120440, and they will not be able to do so. Section 120440 permits health  
28 care providers, schools and child care facilities to disclose medical information

1 such as the types and dates of immunizations a child has received to local health  
2 departments. Cal. Health & Saf. Code, § 120440(c). Local health departments and  
3 CDPH may then disclose such information to each other. *Id.*

4 Plaintiffs are correct that a parent “may refuse to permit recordsharing.” Cal.  
5 Health & Saf. Code, § 120440(e). However, Section 120440 also specifies  
6 exceptions for certain agencies to maintain access to such medical records even if  
7 the parents expressly refuse. *See* Cal. Health & Saf. Code, § 120440(e)(4). There  
8 is no violation of Section 120440, because the statute permits State Defendants to  
9 maintain access to a student’s medical exemption information for the purposes of  
10 protecting that child and the public from the spread of communicable diseases.

### 11 3. California Confidentiality of Medical Information Act

12 Plaintiffs also assert that Defendants violated the California Confidentiality of  
13 Medical Information Act (Section 56). FAC, ¶ 180, ECF No. 11. In citing to  
14 California Civil Code section 56.11 as authority for their claim that “schools and  
15 agencies [are prohibited] from gathering medical exemption information to  
16 substantively review those exemptions” (FAC, ¶ 179, ECF No. 11), Plaintiffs are  
17 attempting to rewrite Section 56 and reinterpret all jurisprudence that accompanies  
18 the Act.

19 “Section 56 was originally enacted in 1979 ‘to provide for the confidentiality  
20 of individually identifiable medical information, while permitting certain  
21 reasonable and limited uses of that information.’” *Heller v. Norcal Mut. Ins. Co.*, 8  
22 Cal. 4th 30, 38 (1994). Section 56 specifically focuses on which information *health*  
23 *care providers* are and are not allowed to disclose. It is impossible for any of the  
24 State Defendants to violate Section 56, because *none of the State Defendants is a*  
25 *health care provider*.

26 Moreover, as described above, only two plaintiffs, Plaintiffs Sutton and  
27 Murray, have children with medical exemptions. FAC, ¶¶ 21, 25, ECF No. 11.  
28 Yet, neither Plaintiff alleges any claims that substantiate a Section 56 violation.

1 Plaintiffs’ reliance on California Civil Code section 56.11 is misplaced, since this  
2 section describes the authorization process for the release of medical information; it  
3 makes no mention of what schools or agencies are prohibited from doing. FAC, ¶  
4 179, ECF No. 11; Cal. Civ. Code, § 56.11.

5 Even if this Court finds that Section 56 applies to SB 277, there is still no  
6 unlawful disclosure or gathering of medical exemption information, as Plaintiffs  
7 describe, because a health provider may disclose medical information to a local  
8 health department to prevent or control disease, and for other public health-related  
9 reasons. Cal. Civ. Code, § 56.10(c)(18).

10 4. California Information Practices Act

11 Plaintiffs also claim that the State Defendants have violated the California  
12 Information Practices Act (IPA) by “collecting, maintaining, and distributing the  
13 students’ personal information.” FAC, ¶ 185, ECF No. 11.

14 The IPA “generally imposes limitations on the right of governmental agencies  
15 to disclose personal information about an individual.” *Bates v. Franchise Tax Bd.*,  
16 124 Cal. App. 4th 367, 373 (2004). However, the IPA expressly provides that “[a]n  
17 agency shall not disclose any personal information in a matter that would link the  
18 information disclosed to the individual to whom it pertains *unless the information is*  
19 *disclosed . . . [t]o a governmental entity when required by state or federal law.*”  
20 Cal. Civ. Code, § 1798.24 (italics added).

21 For the same reasons why Plaintiffs’ FERPA claims fail, no personal  
22 information is released or shared without the parent’s written consent, unless there  
23 is a health or safety emergency. *See* 34 C.F.R. § 99.31. Moreover, State  
24 Defendants are permitted to maintain access to medical information related to  
25 students’ immunization records. Cal. Health & Safety Code § 120440(c).

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1 **C. The Implementation of SB 277 Is a Lawful Use of Public Funds**

2 Finally, Plaintiffs allege that State Defendants conducted ultra vires activity  
3 and violated California Code of Civil Procedure section 526a (Section 526a) by  
4 “expend[ing] public funds” “in carrying out” SB 277. FAC, at ¶ 198.

5 “The goal of Code of Civil Procedure section 526a . . . [is] to prevent  
6 irremediable public injury . . . i.e., the unlawful or illegal expenditure of public  
7 funds.” *Connerly v. Schwarzenegger*, 146 Cal.App.4th 739, 749 (2007). Section  
8 526a does not apply here, because Plaintiffs have failed to establish that  
9 implementing SB 277 is an unlawful or illegal expenditure of funds.

10 **IV. THE BALANCE OF HARMS WEIGHS AGAINST PLAINTIFFS**

11 Plaintiffs’ alleged harms, in being compelled to vaccinate their children, are  
12 decidedly outweighed by the public health interest in ensuring that school children  
13 in California are properly vaccinated in high enough numbers and thereby protect  
14 against the transmission of potentially fatal communicable diseases. Indeed,  
15 despite their protests to the contrary, the overwhelming weight of scientific,  
16 medical and legal authority confirms that, if the injunction were to issue, Plaintiffs  
17 would likely expose their school children (and others) to harm.

18 As discussed above, Plaintiffs had ample opportunity over the last year since  
19 the enactment of SB 277 to litigate their alleged rights and/or to otherwise make  
20 suitable alternate arrangements for their children, rather than by way of a  
21 preliminary injunction. That they declined to do so until the eve of the coming  
22 school year was their tactical error, and should not be grounds to now preliminarily  
23 enjoin the enforcement of SB 277 throughout California.

24 **CONCLUSION**

25 For the foregoing reasons, Plaintiffs’ motion for preliminary injunction should  
26 be denied.

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Dated: July 29, 2016

Respectfully Submitted,  
KAMALA D. HARRIS  
Attorney General of California  
RICHARD T. WALDOW  
Supervising Deputy Attorney General  
JACQUELYN Y. YOUNG  
Deputy Attorney General

/s/ Jonathan E. Rich  
JONATHAN E. RICH  
Deputy Attorney General

*Attorneys for Defendants the California Department of Education; the California State Board of Education; Tom Torlakson, in his official capacity as the Superintendent of Public Instruction for the State of California; the California Department of Public Health; and Dr. Karen Smith, in her official capacity as Director of California Department of Public Health*

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**CERTIFICATE OF SERVICE**

Case Name: Ana Whitlow, et al. No. 3:16-cv-01715-DMS-BGS

I hereby certify that on July 29, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**STATE DEFENDANTS' CONSOLIDATED OPPOSITION TO  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH  
CONCURRENTLY-FILED DECLARATIONS OF ROBERT SCHECHTER,  
M.D., AND DEPUTY ATTORNEY GENERAL JONATHAN E. RICH**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 29, 2016, at Los Angeles, California.

Jonathan E. Rich  
Declarant

/s/ Jonathan E. Rich  
Signature

1 KAMALA D. HARRIS  
 Attorney General of California  
 2 RICHARD T. WALDOW  
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 8 *Attorneys for Defendants the California*  
*Department of Education; the California*  
 9 *State Board of Education; Tom Torlakson, in*  
*his official capacity as the Superintendent of*  
 10 *Public Instruction for the State of California;*  
 11 *the California Department of Public Health;*  
 12 *and Dr. Karen Smith, in her official capacity*  
 13 *as Director of California Department of*  
 14 *Public Health*

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
 WESTERN DIVISION

<p><b>ANA WHITLOW, et al.,</b></p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p><b>STATE OF CALIFORNIA,          DEPARTMENT OF EDUCATION et          al.,</b></p> <p style="text-align: right;">Defendants.</p>	<p>3:16-cv-01715-DMS-BGS</p> <p><b>DECLARATION OF ROBERT          SCHECHTER, M.D. IN SUPPORT          OF STATE DEFENDANTS'          CONSOLIDATED OPPOSITION          TO PLAINTIFFS' MOTION FOR          PRELIMINARY INJUNCTION</b></p> <p><b>[Filed Concurrently with State          Defendants' Consolidated          Opposition to Plaintiffs' Motion for          Preliminary Injunction; and          Declaration of Jonathan E. Rich]</b></p> <p>Date: August 12, 2016          Time: 1:30 p.m.          Dept: 13A          Judge: The Honorable Dana          Makato Sabraw          Trial Date: None Set          Action Filed: July 1, 2016</p>
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**DECLARATION OF ROBERT SCHECHTER, M.D., F.A.A.P.**

I, Robert Schechter, M.D., F.A.A.P., declare as follows:

1. I am a medical doctor licensed to practice in the State of California, a board-certified pediatrician, and a Fellow of the American Academy of Pediatrics. I have been Chief of the Clinical and Policy Support Section of the California Department of Public Health (CDPH) Immunization Branch since 2003. As such, I have personal knowledge of the facts stated herein:

2. The CDPH Immunization Branch provides technical assistance on immunizations and vaccine-preventable diseases to public health departments, medical professionals and the public throughout California; analyzes and formulates immunization policy on behalf of CDPH; supports immunization programs for children, adolescents and adults; and assists in responses to outbreaks and pandemics of vaccine-preventable diseases.

3. California Senate Bill 277 (SB 277) was signed by Governor Brown on June 30, 2015. SB 277 amends the process by which children fulfill requirements for immunization prior to enrollment into California schools and child care facilities, which number in the tens of thousands.

4. Immunizations provide at least two levels of protection against dangerous diseases, individual protection and community protection.

5. As to individual protection, immunization directly and substantially reduces the risk of the person who receives the immunization.

6. With regard to community protection, if enough people in a population become immune, the entire population is protected against the sustained transmission of the disease, through what is known as herd immunity or community immunity, whether the population in question is as small as a classroom or as large as a state or nation. Even when herd immunity is present, limited transmission may occur between unprotected close contacts.

1           7. The herd immunity threshold, or the level of immunity required to inhibit  
2 sustained transmission, varies for each disease depending on its contagiousness. For  
3 measles, which is highly contagious, the level of immunity in a population  
4 necessary to halt transmission is estimated to be between 92 - 94%. (Fine et al.,  
5 Community Immunity, (2013) Table 71-2, at p. 1399). As no vaccine is effective  
6 for all recipients, immunization rates need to reach even higher levels. For  
7 example, the recommended regimen of two doses of measles mumps and rubella  
8 vaccine is estimated to be effective for 97% of recipients. ([http://www.cdc.gov/  
9 measles/vaccination.html](http://www.cdc.gov/measles/vaccination.html).) It therefore takes approximately 97% or more of a  
10 population to be immunized with two doses of MMR vaccine to attain a level of  
11 94% ( $0.94 = 0.97$  of the population  $\times$  0.97 effectiveness) estimated to provide  
12 community immunity in that population.

13           8. Children who are not immunized do not receive individual protection  
14 and, unless they survive infection, do not contribute to community protection. Prior  
15 to SB 277, students who had not been immunized included: (1) students who  
16 received exemptions to vaccines otherwise required for school attendance based on  
17 their families' personal beliefs; (2) students whose licensed physician documented  
18 that the physical condition or medical circumstances for the student merit  
19 exemption from otherwise-required vaccines, per Health and Safety Code section  
20 120370 and California Code of Regulations (CCR), title 17, sections 6050 and  
21 6051; and (3) students who caught up during the school year on required vaccines  
22 not yet received, per the conditional admission schedule specified in 17 CCR §  
23 6035. (<http://eziz.org/assets/docs/IMM-1080.pdf>.) Medical exemptions and  
24 conditional admission remain as categories under SB 277.

25           9. Unimmunized individuals, including vulnerable persons with medical  
26 exemptions who should not be immunized and infants too young to begin  
27 immunization, rely instead on community immunity for their safety net to protect  
28 them against dangerous diseases. (See San Francisco Chronicle. February 11,

1 2015, at [http://www.sfgate.com/bayarea/article/Marin-County-parents-of-sick-boy-](http://www.sfgate.com/bayarea/article/Marin-County-parents-of-sick-boy-push-to-end-6073976.php)  
2 [push-to-end-6073976.php](http://www.sfgate.com/bayarea/article/Marin-County-parents-of-sick-boy-push-to-end-6073976.php).)

3 10. A recently published scientific journal confirmed that “Approximately  
4 12.5% of US children and adolescents are susceptible to measles, with the highest  
5 levels of susceptibility being observed in children aged 3 years or younger (24.7%  
6 are susceptible to measles). In sensitivity analyses, we found that a sustained  
7 decrease in measles vaccination coverage from 91.9% (2013 level) to 90.0% (2009  
8 level) would add nearly 1.2 million susceptible children and adolescents (thus  
9 making 14.2% of those aged 17 years or younger susceptible to measles). This  
10 reemphasizes the need for high measles vaccination coverage to support  
11 population-level immunity and prevent reestablishment of indigenous measles  
12 transmission in the United States.” ([http://aje.oxfordjournals.org/content/](http://aje.oxfordjournals.org/content/early/2016/06/22/aje.kwv320.short)  
13 [early/2016/06/22/aje.kwv320.short](http://aje.oxfordjournals.org/content/early/2016/06/22/aje.kwv320.short).)

14 11. California’s immunization requirements are consistent with and follow  
15 the lead of national immunization recommendations. When California’s  
16 immunization requirement began, there were fewer vaccines available to protect  
17 children. Additional requirements have been added as new vaccines have become  
18 available or more broadly recommended or when immunization levels have been  
19 too low to protect children from the spread of disease.

20 12. Contrary to Plaintiffs’ assertions, vaccination coverage above 95% in  
21 California has not been achieved for all required vaccines. Many children remain  
22 unimmunized, and rates in many settings are still below levels needed to assure  
23 community immunity. When taking into account all categories of unimmunized  
24 children, the rate of receipt of all required immunizations reported for kindergarten  
25 entrants for the 2014-15 school year was reported at 92.6%. In the 2015-16 school  
26 year, of 551,123 kindergarten children whose schools reported their status, 511,708  
27 (92.9%) had received all required immunizations. Levels were even lower at  
28 kindergarten entry in prior years, reflecting the status of children who are currently

1 in higher grades and potentially in contact with kindergarteners while attending  
2 school. (See California Department of Public Health, Immunization Branch, 2015-  
3 2016 Kindergarten Immunization Assessment, [http://www.cdph.ca.gov/  
4 programs/immunize/Documents/2015-16\\_CA\\_KindergartenSummaryReport.pdf](http://www.cdph.ca.gov/programs/immunize/Documents/2015-16_CA_KindergartenSummaryReport.pdf), at  
5 Figure 1.) In contrast to a 97% rate for two doses of MMR vaccine that is  
6 consistent with herd immunity statewide if attained uniformly, the reported rate of  
7 two doses of MMR for children entering kindergarten in 2015-2016 was 94.5%.  
8 (*Id.*, at Table 7).

9 13. The statewide average rates of reported immunization mask lower levels  
10 of immunization by county, locality or school that can support local transmission of  
11 disease. Of the 58 California counties, 20 (34%) reported that 5% or more of  
12 children entering kindergarten there in 2015-2016 had received a personal belief  
13 exemption (PBE) to one or more required immunizations, and six (10%) counties  
14 reported PBE rates of at least 10%. (See California Department of Public Health,  
15 Immunization Branch, 2015-2016 Kindergarten Immunization Assessment at  
16 [http://www.cdph.ca.gov/programs/immunize/Documents/2015-  
17 16\\_CA\\_KindergartenSummaryReport.pdf](http://www.cdph.ca.gov/programs/immunize/Documents/2015-16_CA_KindergartenSummaryReport.pdf)). The range of immunization rates  
18 reported for kindergarten entrants in 2015-16 is even broader at the level of  
19 individual schools, as 1,340 schools across the State reported the PBE rates of  
20 kindergarten entrants at 5% or higher, 568 schools with rates at 10% or higher, and  
21 231 schools with rates at 20% or higher. (California Department of Public Health,  
22 Immunization Branch, 2015-16 Immunization Status of Kindergarten Students,  
23 California, at [http://www.cdph.ca.gov/programs/immunize/Documents/2015-  
24 16\\_CA\\_Kindergarten\\_Data.pdf](http://www.cdph.ca.gov/programs/immunize/Documents/2015-16_CA_Kindergarten_Data.pdf).)

25 14. Although Personal Belief Exemption (PBE) rates reported in California  
26 have always been below four percent, those rates increased significantly over recent  
27 decades, exceeding one percent only since 2001.

28

1 15. Moreover, children with PBEs tend to be clustered in vulnerable social  
 2 networks of families with similar beliefs, so that PBE rates are much higher in  
 3 specific populations.

4 16. Indeed, schools associated with or adjacent to the plaintiffs in the  
 5 complaint are amongst those with suboptimal immunization rates:

Facility Name, City	Percentage of kindergarten entrants or child care enrollees reported to have had all required immunizations	
	2015-2016 Year	2014-2015 Year
Ocean Beach Elementary, San Diego	90%	86%
Carpenter Elementary School, Studio City	98%	87%
Burbank Early Childhood Development Center, Altadena	87%	92%
Franklin Elementary School, Loomis	94%	95%
Mattole Valley Charter, Petrolia	35%	38%

15 (Sources: California Department of Public Health, Immunization Branch. 2015-16  
 16 Immunization Status of Kindergarten Students, California.

17 <http://www.cdph.ca.gov/programs/immunize/Documents/2015->  
 18 [16\\_CA\\_Kindergarten\\_Data.pdf](http://www.cdph.ca.gov/programs/immunize/Documents/2015-16_CA_Kindergarten_Data.pdf); California Department of Public Health,  
 19 Immunization Branch. 2014-15 Immunization Status of Kindergarten Students,  
 20 California. <https://www.cdph.ca.gov/programs/immunize/Documents/2014->  
 21 [15%20CA%20Kindergarten%20Data.pdf](https://www.cdph.ca.gov/programs/immunize/Documents/2014-15%20CA%20Kindergarten%20Data.pdf); California Department of Public Health,  
 22 Immunization Branch. 2015-16 Immunization Status of Child Care Enrollees,  
 23 California. <https://www.cdph.ca.gov/programs/immunize/Documents/2015->  
 24 [2016%20CA%20Child%20Care%20Data.pdf](https://www.cdph.ca.gov/programs/immunize/Documents/2015-2016%20CA%20Child%20Care%20Data.pdf); California Department of Public  
 25 Health, Immunization Branch. 2014-15 Immunization Status of Child Care  
 26 Enrollees, California. <https://www.cdph.ca.gov/programs/immunize/>  
 27 [Documents/2014-2015%20CA%20Child%20Care%20Data.pdf](https://www.cdph.ca.gov/programs/immunize/Documents/2014-2015%20CA%20Child%20Care%20Data.pdf).)  
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1 17. Outbreaks of vaccine-preventable diseases have occurred in California  
2 since 1961, when the PBE was included in the immunization requirements statute.

3 18. The multinational outbreak of measles beginning at Disneyland in  
4 December 2014 underscores the vulnerability of unimmunized individuals and their  
5 role in transmitting disease. (Zipprich et al., Centers for Disease Control and  
6 Prevention, Measles Outbreak — California, December 2014–February 2015.  
7 MMWR Morb Mortal Wkly Rep. 2015 Feb 20;64(6):153-4. ([https://www.cdc.gov/  
8 mmwr/preview/mmwrhtml/mm6406a5.htm](https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm)). Among the first 110 California  
9 patients in the outbreak, 49 (45%) were known to be unvaccinated and 47 (43%)  
10 had unknown or undocumented vaccination status. Twelve of the unvaccinated  
11 patients were infants too young to be vaccinated. Among the 37 remaining vaccine-  
12 eligible patients, 28 (76%) were intentionally unvaccinated because of personal  
13 beliefs, and one was on an alternative plan for vaccination. Among the 28  
14 intentionally unvaccinated patients, 18 were children (aged <18 years), and 10 were  
15 adults, for many of whom the decision not to immunize was initially made when  
16 they were children. Among the 84 patients with known hospitalization status, 17  
17 (20%) were hospitalized.

18 19. On January 13, 2008, an outbreak of measles occurred in San Diego  
19 when a seven-year-old boy (index patient) returned from Switzerland,  
20 asymptomatic but incubating measles. He transmitted infection to his nine-year-old  
21 unvaccinated sister and three-year-old unvaccinated brother. On January 24, 2008,  
22 after two days of fever and conjunctivitis, the index patient attended his charter  
23 school. Forty-one of the 377 students (11%) at the charter school were  
24 unvaccinated for measles because of personal beliefs, and 2 children became  
25 infected. *See* [http://pediatrics.aappublications.org/content/pediatrics/early/  
26 2010/03/22/peds.2009-1653.full.pdf](http://pediatrics.aappublications.org/content/pediatrics/early/2010/03/22/peds.2009-1653.full.pdf). By February 1, 2008, when the San Diego  
27 Immunization Branch was notified of the index patient's positive measles serology,  
28 four of the eight secondary case-patients were already infectious. The index

1 patient's sister infected 2 schoolmates and exposed an unknown number of children  
2 at a dance studio. One infected classmate of the index patient infected his own  
3 younger brother and exposed 10 children at a pediatric clinic, 18 children and adults  
4 at a clinical laboratory, and an unknown number at 2 grocery stores and a circus.  
5 Another infected classmate of the index patient exposed an unknown number at an  
6 indoor amusement facility. *Id.*

7 20. Earlier in 2014, outbreaks of measles affecting more than 300 persons  
8 each spread rapidly through communities and schools with low immunization rates  
9 in Ohio and British Columbia. (Ohio: [http://www.cdc.gov/measles/cases-](http://www.cdc.gov/measles/cases-outbreaks.html)  
10 [outbreaks.html](http://www.cdc.gov/measles/cases-outbreaks.html); British Columbia: [http://www.phac-aspc.gc.ca/publicat/ccdr-](http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/15vol41/dr-rm41-07/ar-02-eng.php)  
11 [rmtc/15vol41/dr-rm41-07/ar-02-eng.php](http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/15vol41/dr-rm41-07/ar-02-eng.php).)

12 21. A major checkpoint for immunization requirements in California is  
13 enrollment into kindergarten (approximately 530,000 children in 2015-16 per  
14 <http://dq.cde.ca.gov/dataquest/>.) At many schools, kindergarten enrollment begins  
15 early in the preceding winter to allow districts and schools ample time to process  
16 applications and apportion teachers, classrooms and other resources. (See, e.g.,  
17 [www.fusd.net/enrollment2/kindergarten.pdf](http://www.fusd.net/enrollment2/kindergarten.pdf); [www.dublin.k12.ca.us/Page/77](http://www.dublin.k12.ca.us/Page/77);  
18 [www.rcsdk8.org/apps/pages/index.jsp?uREC\\_ID=95670&type=d&pREC\\_ID=2350](http://www.rcsdk8.org/apps/pages/index.jsp?uREC_ID=95670&type=d&pREC_ID=2350)  
19 35.)

20 22. The timetable for enrollment is further complicated by the summer  
21 vacation schedule, during which many schools have few or no staff to manage  
22 enrollment. In such settings, incomplete or late enrollments are completed during  
23 the hectic start of the school year.

24 23. To accommodate extended enrollment schedules and the large number of  
25 affected institutions, in July 2015, CDPH began notifying public health agencies,  
26 educational agencies and institutions, and the public about SB 277 through its Shots  
27 for School website ([www.shotsforschool.org](http://www.shotsforschool.org)) and multiple other communications.  
28 CDPH has updated information about the law over the last year.

1           24. An injunction on the statutory changes in SB 277 would disrupt the  
2 enrollment process during its later stages, affecting schools and families. Many  
3 families of children who will be enrolling in the 2016-2017 school year have  
4 already made enrollment choices and submitted registration information with the  
5 understanding that SB 277 is in effect. In contrast parents who are later to begin or  
6 complete registration would be held to the interim standards resulting from the  
7 injunction, presumably reflecting the law before the chaptering of SB 277. Staff  
8 reviewing later registrations would have to be retrained and potentially work with  
9 new forms or documentation. The annual process of school reporting of  
10 immunization status by categories might become more complex and less accurate.

11           25. This inconsistency at schools between early and later registrants could  
12 be accompanied by variability between those schools staffed during the summer,  
13 which could communicate the consequences of the injunction more promptly, and  
14 those with no staffing, where notification may be delayed. CDPH would continue to  
15 provide timely updates to the public and its partners whenever possible.

16           26. If an injunction is later lifted, the additional reversal in policy could  
17 further confuse schools and parents while hindering a delayed implementation. For  
18 example, should children enter school in 2016-17 without immunization under an  
19 injunction that is later lifted, either the school will need to track these additional  
20 students until they are caught up with their immunizations, or the children's status  
21 as unimmunized will be grandfathered, increasing the risk of transmitting disease at  
22 schools.

23           27. An injunction also would delay or reduce the proposed health benefits of  
24 SB 277 related to the reduction of disease from increased immunization of children.  
25 CDPH may have challenges in developing in a timely manner the forms and  
26 training materials needed to support the injunction or its reversal. CDPH depends  
27 on school reporting to assess the levels of immunity in the community; these  
28 estimates may be distorted or delayed by abrupt shifts in enrollment standards.



1 I declare under penalty of perjury under the laws of the United States and the  
2 State of California that the foregoing is true and correct and that this declaration  
3 was executed in Sacramento, California on the below date.

4 Dated: July 28, 2016



ROBERT SCHECHTER, Declarant

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 2 RICHARD T. WALDOW  
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*Department of Education; the California*  
 9 *State Board of Education; Tom Torlakson, in*  
*his official capacity as the Superintendent of*  
 10 *Public Instruction for the State of California;*  
 11 *the California Department of Public Health;*  
 12 *and Dr. Karen Smith, in her official capacity*  
 13 *as Director of California Department of*  
 14 *Public Health*

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
 WESTERN DIVISION

**ANA WHITLOW, et al.,**

Plaintiffs,  
 v.

**STATE OF CALIFORNIA,  
 DEPARTMENT OF EDUCATION et  
 al.,**

Defendants.

3:16-cv-01715-DMS-BGS

**DECLARATION OF DEPUTY  
 ATTORNEY GENERAL  
 JONATHAN E. RICH IN SUPPORT  
 OF STATE DEFENDANTS'  
 CONSOLIDATED OPPOSITION  
 TO PLAINTIFFS' MOTION FOR  
 PRELIMINARY INJUNCTION**

**[Filed Concurrently with State  
 Defendants' Consolidated  
 Opposition to Plaintiffs' Motion for  
 Preliminary Injunction; and  
 Declaration of Robert Schechter,  
 M.D.]**

Date: August 12, 2016  
 Time: 1:30 p.m.  
 Dept: 13A  
 Judge: The Honorable Dana  
 Makato Sabraw  
 Trial Date: None Set  
 Action Filed: July 1, 2016

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**DECLARATION OF JONATHAN E. RICH**

I, Jonathan E. Rich, declare the following:

1. I am an attorney licensed to practice law in the State of California and am admitted to practice before this Court. I am a Deputy Attorney General with the Office of the Attorney General, counsel for Defendants the California Department of Education; the California State Board of Education; Tom Torlakson, in his official capacity as the Superintendent of Public Instruction for the State of California; the California Department of Public Health; and Dr. Karen Smith, in her official capacity as Director of California Department of Public Health in this case.

As such, I have personal knowledge of the facts stated herein:

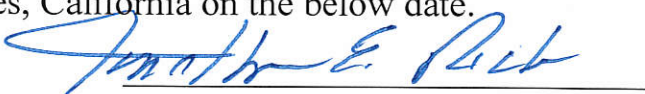
2. Attached hereto and made a part hereof as Exhibit 1 is a true and correct copy of Senate Committee on Education, Analysis of Senate Bill No. 277 (2014-15 Reg. Sess.), from the legislative history of Senate Bill No. 277.

3. Attached hereto and made a part hereof as Exhibit 2 is a true and correct copy of Assembly Committee on Health, Analysis of Senate Bill No. 277 (2014-15 Reg. Sess.), Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), from the legislative history of Senate Bill No. 277.

4. Attached hereto and made a part hereof as Exhibit 2 is a true and correct copy of Senate Judiciary Committee, Analysis of Senate Bill No. 277 (2014-15 Reg. Sess.), from the legislative history of Senate Bill No. 277.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed in Los Angeles, California on the below date.

Dated: July 29, 2016



JONATHAN E. RICH, Declarant

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**EXHIBIT 1**

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**SENATE COMMITTEE ON EDUCATION**

Senator Carol Liu, Chair

2015 - 2016 Regular

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**Bill No:** SB 277  
**Author:** Pan and Allen  
**Version:** April 9, 2015  
**Urgency:** No  
**Consultant:** Lynn Lorber

**Hearing Date:** April 22, 2015  
**Fiscal:** Yes

**Subject:** Public health: vaccinations

**NOTE:** This bill has been referred to the Committees on Health, Education and Judiciary. A "do pass" motion should include referral to the Committee on Judiciary.

**NOTE:** This bill was previously heard by this Committee on April 15, 2015. The authors will present proposed amendments to this bill during the April 22 hearing. The proposed amendments are as follows:

1. Broaden the exemption for home-schools by deleting reference to students being members of the same household or family.
2. Add an exemption for students who are enrolled in an independent study program that meets existing criteria for independent study programs.

**SUMMARY**

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.

**BACKGROUND**

Current law:

***Compulsory education***

1. Provides that each child between the ages of 6 and 18 years is subject to compulsory full-time education, and requires attendance at the public full-time day school or continuation school or classes for the full schoolday.
2. Requires parents and guardians to send the student to school for the full schoolday. (Education Code § 48200)

***Required immunizations***

3. 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. The following are the diseases for which immunizations shall be documented:

- A. Diphtheria.
  - B. Haemophilus influenzae type b.
  - C. Measles.
  - D. Mumps.
  - E. Pertussis (whooping cough).
  - F. Poliomyelitis.
  - G. Rubella.
  - H. Tetanus.
  - I. Hepatitis B.
  - J. Varicella (chickenpox).
  - K. 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 United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians. (Health and Safety Code § 120335)
4. Prohibits schools from unconditionally admitting or advancing any student to grade 7 unless the student has been fully immunized against pertussis, including all pertussis boosters appropriate for the student's age. Current law provides that full immunization against hepatitis B shall not be a condition by which a school admit or advance a student to the 7th grade. (HSC § 120335)
5. Authorizes school districts to permit specified licensed health practitioners to administer an immunizing agent to a student whose parent or guardian has consented in writing to the administration of the immunizing agent. (EC § 49403)

***Personal belief exemption***

6. Provides that immunization is not required for admission to a school or other institution if the parent or guardian files with the school a letter or affidavit that documents which immunizations have been given and which immunizations have not been given on the basis that they are contrary to his or her beliefs.
7. Requires, beginning January 1, 2014, a form prescribed by the California Department of Public Health (CDPH) to accompany the letter or affidavit.

8. Requires the CDPH form to include both of the following:
  - A. A signed attestation from the health care practitioner that indicates that the health care practitioner provided the parent or guardian with information regarding the benefits and risks of the immunization and the health risks of the communicable diseases to the child and the community.
  - B. A written statement signed by the parent or guardian that indicates that the signer has received the information provided by the health care practitioner.
  - C. Authorizes schools or other institutions, when there is good cause to believe that the child has been exposed to one of the communicable diseases, to temporarily exclude the child from attendance until the local health officer is satisfied that the child is no longer at risk of developing the disease. (HSC § 120365)

***Medical exemption***

9. Provides that a child is exempt from immunization requirements if the parent or guardian files with the school or other institution 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 probably duration of the medical condition or circumstances that contraindicate immunization. (HSC § 120370)

***Conditional admission***

10. Authorizes a school or other institution to admit a child who has not been fully immunized against one or more of the communicable diseases on condition that the child presents evidence that he or she has been fully immunized against all of these diseases within time periods designated by regulation of the California Department of Public Health (CDPH). (HSC § 120340)
11. Requires a school or other institution to exclude from further attendance any child who fails to obtain the required immunizations within no more than 10 schooldays following receipt of the notice that the child does not meet immunization requirements, unless the child is exempt for medical reasons or personal beliefs, until the child provides written evidence that he or she has received another dose of each required vaccine due at that time. Regulations require any child so excluded to be reported to the attendance supervisor or to the building administrator. (California Code of Regulations (CCR), Title 17, § 6055)

***Temporary exclusion***

12. Authorizes a child for whom the immunization requirement has been waived, whenever there is good cause to believe that he or she has been exposed to one of the communicable diseases, to be temporarily excluded from the school or other institution until the local health officer is satisfied that the child is no longer at risk of developing the disease. (HSC § 120365)
13. Requires county offices of education and school districts to exclude any student who has not been immunized as required by the Health and Safety Code, and requires the school to notify the parent or guardian that they have two weeks to supply evidence either that the student has been fully immunized, or that the student is exempted from the immunization requirement. (EC § 48216)
14. Provides that an already admitted child who is subsequently discovered not to have received all the immunizations which were required before admission or who is subsequently discovered not to have complied with the requirements for conditional admission is to continue in attendance only if he or she receives all vaccine doses for which he or she is currently due and provides documentation of having received such doses no later than 10 school days after he or she or the parent or guardian is notified. Regulations require a school or other institution to notify the child or the parent or guardian of the time period (no longer than 10 school days) within which the doses must be received. (CCR § 6040)

#### ANALYSIS

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. Specifically, this bill:

1. Deletes the exemption from immunization requirements for personal beliefs and requirement that a parent or guardian:
  - A. File a letter or affidavit stating which immunizations the child has not been given.
  - B. Also provide a form prescribed by the California Department of Public Health including both of the following:
    - (1) A signed attestation from the health care practitioner indicating that the health care practitioner provided information regarding the benefits and risks of the immunization and the health risks of the communicable diseases to the child and the community.
    - (2) A written statement signed by the parent or guardian that the signer has received the information provided by the health care



practitioner.

2. Exempts from immunization requirements a home-based private school if all of the students are residents of the household or are members of a single family.
3. Expands existing annual notification requirements for school districts to include notification to parents or guardians of the immunization rates for each of the required immunizations for the school in which a student is enrolled.

#### STAFF COMMENTS

1. **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%. In 2000, the PBE rate for Kindergartners entering California schools was under 1%. However, as of 2012, that number rose to 2.6%. 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%. In certain pockets of California, exemption rates are as high as 21% 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% are necessary to preserve herd immunity and prevent future outbreaks."
2. **Recent amendments.** This bill was amended on April 9 to include amendments discussed and informally adopted by the Senate Health Committee during the April 8 hearing. The amendments:
  - A. Exempt homeschools if all of the students are residents of the household or are members of a single family.
  - B. Reinsert and relocate current law regarding the authority for schools to temporarily exclude a child with a personal belief exemption when there is good cause to believe that child has been exposed to one of the communicable diseases.
3. **Vaccine safety and related issues.** This bill was heard by the Senate Health Committee on April 8. Please refer to the Senate Health Committee analysis for information regarding vaccine safety, the entities that recommend vaccines, the measles outbreak, and laws in other states.
4. **Vaccination rates and community immunity.** According to the United States Department of Health and Human Services, "when a critical portion of a

community is immunized against a contagious disease, most members of the community are protected against that disease because there is little opportunity for an outbreak. Even those who are not eligible for certain vaccines, such as infants, pregnant women, or immunocompromised individuals, get some protection because the spread of contagious disease is contained. This is known as 'community immunity.'"

According to California Department of Public Health (CDPH's) 2014-15 Kindergarten Immunization Assessment Results, the statewide immunization coverage remained above 92% for each vaccine for all schools since last year. However, CDPH's school level data files show that many individual schools have much lower rates of fully immunized students.

<http://www.cdph.ca.gov/programs/immunize/Pages/ImmunizationLevels.aspx>

The authors and proponents express concern about localized vaccination rates, rather than statewide rates. Some opponents of this bill suggest it would be more appropriate to provide additional resources and/or compliance incentives in geographic areas where community immunity levels have not been achieved.

5. ***Compulsory education, public health and personal rights.*** Current law requires each child between the ages of 6 and 18 years to attend school for the full schoolday, and requires parents to compel children to attend school. Truancy laws provide various levels of intervention and punishment for both students and parents.

The United States Supreme Court has ruled that states may use their "police power" to require vaccinations, including vaccinations for children entering schools. <http://fas.org/sqp/crs/misc/RS21414.pdf>

The American Civil Liberties Union writes with concerns to this bill: "Unlike other states, public education is a fundamental right under the California Constitution. (*Serrano v. Priest*, 5 Cal.3d 584 (1971); *Serrano v. Priest*, 18 Cal.3d 728 (1976).) 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 issues of police power, compelling state interest, and other legal matters may be more appropriately considered by the Senate Judiciary Committee. Considering the jurisdiction of the Senate Education Committee, this Committee may wish to consider issues specific to the role of schools in providing a safe and appropriate educational opportunity for each student.

6. ***What options will parents have?*** It appears that, if this bill were to become law, parents or guardians who do not vaccinate their children as required by the Health and Safety Code would be limited to homeschooling or risk violating truancy laws.

This bill affects private schools. The State compels each student to attend school and provides opportunities for attendance at public schools. Should this

bill be limited to public schools to enable attendance at private schools that may choose to enroll students who are not fully vaccinated?

7. **Reasonable timeline?** This bill will become effective on January 1, 2016, if it becomes law. Will schools immediately require students to be fully vaccinated, or will existing personal belief exemptions be valid for the remainder of this school year? Will students who have no vaccinations have enough time to catch-up to full vaccination? The author may wish to consider a phased-in approach.
8. **Fiscal impact.** To the extent that parents remove their children from public schools, this bill could impose significant costs on school districts, as a portion of school funding is based on average daily attendance. However, to the extent that students are not absent due to illnesses, this bill could create cost savings to school districts.
9. **Personal belief exemption.** Children with a personal belief exemption are not necessarily without any vaccines, but likely are not fully vaccinated.

According to California Department of Public Health (CDPH's) 2014-15 Kindergarten Immunization Assessment Results, the statewide percentage of personal belief exemptions had consistently increased annually among all reporting schools until 2014-15, when there was a 19% decrease compared with last year. While public school personal belief exemption rates decreased by 21% (from 2.92% to 2.31%), private school personal belief exemption rates decreased only 9% (from 5.88% to 5.33%).

<http://www.cdph.ca.gov/programs/immunize/Documents/2014-15%20CA%20Kindergarten%20Immunization%20Assessment.pdf>

California's personal belief exemption covers all beliefs, including religious; there is not a separate exemption specific to religion. Therefore, this bill eliminates the ability of parents or guardians to seek exemption from immunization requirements based on religious beliefs.

Governor Brown included a signing message related to AB 2109 (Pan, Ch. 821, 2012), which reads in part:

***I am signing AB 2109 and am directing the Department of Public Health to oversee this policy so parents are not overly burdened in its implementation. Additionally, I will direct the department 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.***

It is unclear whether California Department of Public Health (CDPH) is working to develop a separate religious exemption.

10. **Medical exemption.** Current law exempts from immunization requirements children whose parent or guardian have filed with the school or other institution a written statement by a licensed physician to the effect

that the physical condition or medical circumstances are such that immunization is not considered safe. Some opponents maintain that a medical exemption is very difficult to obtain, especially if the medical concern is not overtly severe. The decision whether to grant a medical exemption from immunizations is at the discretion of each physician. It is unclear if guidelines for physicians are available.

11. **Vaccination requirements.** The Centers for Disease Control and Prevention recommend a schedule of immunizations for children from birth through age 18. <http://www.cdc.gov/vaccines/schedules/downloads/child/0-18yrs-schedule.pdf>

The California Department of Public Health (CDPH) determines which immunizations children must have, and at what age, before being unconditionally admitted to a private or public school or licensed child care program.

For child care: <http://www.shotsforschool.org/child-care/>

For K-12 schools: <http://www.shotsforschool.org/k-12/>

12. **Hepatitis B.** Some opponents of this bill question the need for the Hepatitis B vaccination, and point to the right of attendance for students who are infected with HIV. According to the Centers for Disease Control and Prevention, children can become infected by contact with blood and body fluids through breaks in the skin such as bites, cuts, or sores; by contact with objects that have blood or body fluids on them such as toothbrushes, razors; by having unprotected sex; and by sharing drug needles. Is there a reasonable analogy between allowing the attendance of a student infected with HIV and allowing the attendance of a student who has not been fully vaccinated against Hepatitis B? Do parents need to worry about students being exposed to Hepatitis B while at school or child care?
13. **Reporting.** This bill requires school districts to include in the annual notification to parents at the beginning of the school year the immunization rates for each of the required immunizations for the school in which a student is enrolled.

Schools and licensed child care providers annually submit rates of immunizations to the CDPH. Data submitted includes the rates for each required vaccine, personal belief exemptions, permanent medical exemptions, and conditional entrants.

<http://www.cdph.ca.gov/programs/immunize/Pages/ImmunizationRatesatCaliforniaSchools.aspx>

The authors may wish to consider instead requiring the annual notification to parents to include a link to the CDPH website and a date when the current data will be available on CDPH's website.

14. **Related and prior legislation.**

RELATED LEGISLATION

SB 792 (Mendoza, 2015) prohibits a person from being employed at a day care center or family day care home, if that person has not been immunized against influenza, pertussis, and measles. SB 792 is scheduled to be heard by the Senate Health Committee on April 15.

*PRIOR LEGISLATION*

AB 2109 (Pan, Ch. 821, 2012) requires, beginning January 1, 2014, a separate form prescribed by the California Department of Public Health (CDPH) to accompany a letter or affidavit from a parent or guardian to exempt a child from immunization requirements on the basis that the immunization is contrary to beliefs of the child's parent or guardian.

SB 614 (Kehoe, Ch. 123, 2011) authorizes a student in grades 7- 12 to conditionally attend school for up to 30 calendar days beyond the student's first day of attendance for the 2011-12 school year, if that student has not been fully immunized with all pertussis boosters appropriate for the student's age if specified conditions are met.

AB 354 (Arambula, Ch. 434, 2010) allows CDPH to update vaccination requirements for children entering schools and child care facilities and adds the American Academy of Family Physicians to the list of entities whose recommendations CDPH must consider when updating the list of required vaccinations. AB 354 requires students entering grades 7-12 to receive a TDaP booster prior to admittance to school.

SB 1179 (Aanestad, 2008) deleted CDPH'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 failed passage in the Senate Health Committee.

AB 2580 (Arambula, 2008) required students entering grade 7 to be fully immunized against pertussis. AB 2580 was held on the Senate Appropriations Committee's suspense file.

SB 676 (Ridley-Thomas, of 2007) required students entering grade 7 to be fully immunized against pertussis. SB 676 was held on the Assembly Appropriations Committee's suspense file.

SB 533 (Yee, 2007) added pneumococcus to the list of required immunizations for children. SB 533 was vetoed by the Governor, whose veto message read:

***While I am a strong proponent of prevention and support efforts to improve vaccine rates for children, I am unable to sign this bill as California's public health experts believe it is not needed. The Department of Public Health can already require that young children receive the pneumococcal vaccine. California's vaccine experts have not established a mandate***

*as they believe it is not needed. Approximately 86 percent of children are already being vaccinated under a voluntary system.*

**SUPPORT (As of April 10; most are specific to the prior version of the bill)**

California Association for Nurse Practitioners  
California Chapter of the American College of Emergency Physicians  
California Coverage & Health Initiatives  
California Medical Association  
California Primary Care Association  
California School Boards Association  
California School Nurses Organization  
CAPG  
Children Now  
Children's Defense Fund-California  
County Health Executives Association of California  
Health Officers Association of California  
Kaiser Permanente  
Los Angeles County Board of Supervisors  
Reed Union School District  
The Children's Partnership  
Vaccinate California  
Numerous individuals

**OPPOSITION (As of April 10; most are specific to the prior version of the bill)**

Association of American Physicians and Surgeons  
AWAKE California  
California Chiropractic Association  
California Coalition for Health Choice  
California Nurses for Ethical Standards  
Californians for Freedom of Choice  
Educate Advocate  
Homeschool Association of California  
National Autism Association of California  
Pacific Justice Institute  
ParentalRights.Org  
Plumas Charter School  
Safe Minds  
Standing Tall Chiropractic  
The Canary Party  
Unblind My Mind  
Numerous individuals

-- END --

**EXHIBIT 2**

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.



- 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.

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,

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 7<sup>th</sup> 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

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.

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.

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 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

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

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



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

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

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

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

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:**

**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  
 BIOCUM  
 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

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

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

**EXHIBIT 3**



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

SB 277 (Pan and Allen)  
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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. Massachusetts* (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*,<sup>1</sup> 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

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<sup>1</sup> 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 14<sup>th</sup> 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. Amendment to further narrow the bill to the compelling state interest

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, informed 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 *Bruesewitz 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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