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Fees Exempt per Gov't Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

DEVON TORREY LOVE; S.L.; ALISON HEATHER GRACE GATES; M.M.; K.M.; A.M.; COURTNEY BARROW; A.B.; MARGARET SARGENT; T.S,; W,S.; and A VOICE FOR CHOICE, INC. on behalf of its members,

Plaintiffs,

v.

STATE OF CALIFORNIA, DEPARTMENT OF EDUCATION; STATE OF CALIFORNIA, BOARD OF EDUCATION; TOM TORLAKSON, in his official capacity as Superintendent of the Department of Education; STATE OF CALIFORNIA, DEPARTMENT OF PUBLIC HEALTH; DR. KAREN SMITH, in her official capacity as Director of the Department of Public Health,

Defendants.

Case No. SCV0039311

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THEIR DEMURRER TO PLAINTIFFS' COMPLAINT; DECLARATION OF JONATHAN E. RICH

[Filed Concurrently with Notice of Demurrer and Demurrer with Supporting Memorandum of Points and Authorities]

Date: June 20, 2017
Time: 8:30 a.m.
Dept: 40
Judge: TBD[1]
Trial Date: None set
Action Filed: April 4, 2017

[1] Plaintiffs and defendants do not stipulate to this request being heard by Commissioner Michael Jacques, to whom this matter has been assigned, or to any other commissioner, and hereby request a reassignment of this matter to a judge of the Placer County Superior Court. The parties will shortly file their written notice indicating they do not stipulate to the Commissioner, pursuant to the Superior Court of Placer County Local Rules, rule 20.2(B).

1 Defendants California Department of Education, State Board of Education, Tom Torlakson,
2 in his official capacity as Superintendent of Public Instruction, California Department of Public
3 Health, and Karen Smith, M.D., in her official capacity as Director of the California Department
4 of Public Health (collectively, defendants), hereby respectfully request that the Court take judicial
5 notice of the following documents attached as exhibits to the Declaration of Jonathan E. Rich
6 (Rich Decl.), in its consideration of defendants' concurrently-filed demurrer to plaintiffs'
7 Complaint:

8 1. California Senate Committee on Education, Analysis of Senate Bill No. 277 (2014-15
9 Reg. Sess.), from the legislative history of Senate Bill No. 277. (Rich Decl., Exh. 1.)

10 2. California Assembly Committee on Health, Analysis of Senate Bill No. 277 (2014-15
11 Reg. Sess.), Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), from the legislative history of
12 Senate Bill No. 277. (Rich Decl., Exh. 2.)

13 3. California Senate Judiciary Committee, Analysis of Senate Bill No. 277 (2014-15
14 Reg. Sess.), from the legislative history of Senate Bill No. 277. (Rich Decl., Exh. 3.)

15 4. Order denying plaintiffs' motion for preliminary injunction, dated August 26, 2016,
16 of the U.S. District Court for the Southern District of California in the matter entitled *Whitlow, et*
17 *al. v. Department of Education et al.*, S.D. Cal. Case No. 3:16-cv-01715-DMS-BGS. (Rich Decl.,
18 Exh. 4.)

19 5. Order of the Los Angeles County Superior Court, dated October 21, 2016, sustaining
20 defendant's demurrer to plaintiff's Second Amended Complaint without leave to amend, and the
21 demurrer incorporated by reference therein, in the matter entitled *Buck v. State of California*, Los
22 Angeles County Superior Court Case No. BC617766. (Rich Decl., Exh. 5.)

23 6. Magistrate's Report and Recommendation dated December 15, 2016, in the matter
24 entitled *Middleton et al. v. Pan et al.*, U.S.D.C., Central District of California Case No. 2:16-cv-
25 05224-SVW-AGR. (Rich Decl., Exh. 6.)

26 7. Order granting defendant's motion to dismiss plaintiffs' complaint, dated January 12,
27 2017, in the matter entitled *Torrey-Love, et al. v. State of California Department of Education et*
28 *al.*, Central District of California Case No. ED CV 16-2410-DMG (DTBx). (Rich Decl., Exh. 6.)

The grounds for this request are that each of the foregoing documents may be judicially noticed by this Court and are relevant to the Court's consideration of defendants' concurrently-filed demurrer to plaintiffs' Complaint.

Dated: May 2, 2017

Respectfully Submitted,

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JENNIFER M. KIM
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JACQUELYN Y. YOUNG
Deputy Attorney General

JONATHAN E. RICH
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MEMORANDUM OF POINTS AND AUTHORITIES

In considering a demurrer, the court will not assume the truth of contentions, deductions or conclusions of fact or law, and the court may disregard allegations that are contrary to law, or are contrary to a fact of which judicial notice may be taken. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Where an allegation "is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) The court "will not close [its] eyes to situations where a complaint contains . . . allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Consistent with the fundamental principle of truthful pleading, a complaint otherwise good on its face can be rendered defective by judicially noticed facts. (*Watson v. Los Altos School Dist.* (1957) 149 Cal.App.2d 768, 771-772; see Code Civ. Proc., § 430.30, subd. (a); see also *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5 [holding that a demurrer may be sustained on the ground that matters properly subject to judicial notice show that the complaint fails to state facts sufficient to constitute a cause of action].)

Evidence Code section 451 provides in relevant part that judicial notice *shall* be taken of the "public statutory law of this state," as well as "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (Evid. Code, § 451, subd. (a), (f).)

Evidence Code section 452 provides that judicial notice may be taken of (1) official acts of the legislative and executive departments of the State; (2) "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute;" and (3) "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subds. (c), (g), (h).) The trial court must take judicial notice of any matter specified in Evidence Code section 452 "if a party requests it and: (a) [g]ives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) [f]urnishes the

1 court with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, §
2 453.)
3 In determining the propriety of taking judicial notice of a matter, the Court may consider
4 "[a]ny source of pertinent information." (Evid. Code, § 454, subd. (a)(1).) In such cases,
5 "[e]xclusionary rules of evidence do not apply except for Section 352 and the rules of privilege."
6 (Evid. Code, § 454, subd. (a)(2).)

7 **I. THE LEGISLATIVE HISTORY OF SENATE BILL 277 SHOULD BE JUDICIALLY NOTICED**

8 Exhibits 1 through 3 are true and correct copies of relevant portions of the legislative
9 history of Senate Bill 277 (SB 277), which is the statute challenged by plaintiffs in this case.
10 Courts have routinely accepted evidence, and have otherwise taken judicial notice, of legislative
11 histories and other public records where the documents are readily available to the public,
12 authentic and relate to the matter at issue. (See, e.g., *Sierra Club v. Superior Court* (2013) 57
13 Cal.4th 157, 171; *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976,
14 992; *Zephyr v. Saxon Mortgage Servs., Inc.*, 873 F. Supp.2d 1223, 1226 (E.D. Cal. 2012).)
15 The legislative analyses of SB 277 are directly relevant to plaintiffs' claims that the State
16 lacks a legitimate or compelling interest in the enactment of the statute. The legislative analyses
17 reveal the data, detailed factual findings and opinions of recognized scientific, educational and
18 legal authorities that were relied on by the California Legislature when it considered SB 277, and
19 thus confirm that the legislation not only served a legitimate and compelling state interest, but
20 was appropriately tailored to address that interest.
21 In particular, but without limitation, the legislative analyses confirm that SB 277 was
22 enacted to protect the public from the spread of debilitating, and potentially fatal, diseases:
23 "Vaccine coverage at the community level is vitally important for people too young to receive
24 immunizations and [for] those unable to receive immunizations due to medical reasons." (Rich
25 Decl., Exh. 3, Sen. Jud. Com., Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 6.)
26 "*[W]hen belief exemptions to vaccination guidelines are permitted, vaccination rates decrease.*"
27 (*Id.*, Exh. 3, at p. 5 (italics added).) "Given the highly contagious nature of [these] diseases . . .
28

vaccination rates of up to 95% are necessary to preserve herd immunity and prevent future outbreaks." (*Id.*, Exh. 3 at p. 5.)

As further noted in SB 277's legislative history, "[a]ll of the diseases for which California requires school vaccinations are very serious conditions that pose very real health risks to children." (Rich Decl., Exh. 2, Ass. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 4.) "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." (*Id.*, at p. 3.) "Most of the diseases can be spread by contact with other infected children." (*Id.*, at p. 4.)

The legislative history further reveals that SB 277 was enacted in response to, among other things, a health emergency beginning in December 2014, when 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." (See Rich Decl., Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 5.)

> "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," and "*[m]easles has spread through California and the United States, in large part, because of communities with large numbers of unvaccinated people.*"

(*Ibid.* (italics added).)

And, the legislative history confirms that SB 277 was enacted with the support of recognized medical, educational and child-advocacy organizations in California, including, among others, the California Medical Association, the California Chapter of the American College of Emergency Physicians, the California Association for Nurse Practitioners, the California Primary Care Association, the California School Boards Association, the California School Nurses Organization, and the Children's Defense Fund-California. (Rich Decl., Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 10.)

Based on the foregoing, there are sufficient grounds for this Court to take judicial notice of the attached relevant portions of the legislative history of SB 277.

II. THE COURT MAY TAKE JUDICIAL NOTICE OF PRIOR DECISIONS IN FEDERAL AND STATE COURT AFFIRMING THE CONSTITUTIONALITY IF SB 277.

Judicial notice shall be taken of "[t]he decisional, constitutional, and public statutory law of this state and of the United States . . . ." (Evid. Code, § 451, subd. (a).)

Exhibit 4 is a true and correct copy of an order of the U.S. District Court for the Southern District of California. Exhibit 5 is a true and correct copy of an order of the Los Angeles County Superior Court and the filing incorporated by reference in the court's order. Exhibit 6 is a true and correct copy of the Magistrate's Report and Recommendation in the Central District of California. Exhibit 7 is a true and correct copy of the Order granting defendant's motion to dismiss plaintiffs' complaint, dated January 12, 2017, in the matter entitled *Torrey-Love, et al. v. State of California Department of Education et al.*, Central District of California Case No. ED CV 16-2410-DMG (DTBx).

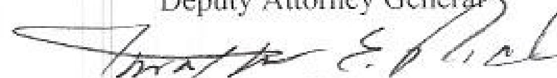
All of these documents are matters of public record, represent the decisional and public statutory law of this state and the United States, and are therefore subject to judicial notice. They are relevant to the issues before this Court because they reflect the holdings and analyses of a federal court and a state court of the same statute at issue in this case, California Senate Bill No. 277, with respect to claims brought by other plaintiffs that are substantially similar to plaintiffs' claims herein.

CONCLUSION

Defendants therefore request that the Court take judicial notice of the documents referenced herein.

Dated: May 2, 2017

Respectfully Submitted,
XAVIER BECERRA
Attorney General of California
JENNIFER M. KIM
Supervising Deputy Attorney General
JACQUELYN Y. YOUNG
Deputy Attorney General



JONATHAN E. RICH
Deputy Attorney General
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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 defendant Karen Smith, in her capacity as the Director of the California Department of Public Health (defendant) 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 California 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 California 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 3 is a true and correct copy of California Senate Judiciary Committee, Analysis of Senate Bill No. 277 (2014-15 Reg. Sess.), from the legislative history of Senate Bill No. 277.

5. Attached hereto and made a part hereof as Exhibit 4 is a true and correct copy of Order denying plaintiffs' motion for preliminary injunction, dated August 26, 2016, of the U.S. District Court for the Southern District of California in the matter entitled *Whitlow, et al. v. Department of Education et al.*, S.D. Cal. Case No. 3:16-cv-01715-DMS-BGS.

6. Attached hereto and made a part hereof as Exhibit 5 is a true and correct copy of Order of the Los Angeles County Superior Court, dated October 21, 2016, sustaining defendant's demurrer to plaintiff's Second Amended Complaint without leave to amend, and the demurrer incorporated by reference therein, in the matter entitled *Buck v. State of California*, Los Angeles County Superior Court Case No. BC617766.

7. Attached hereto and made a part hereof as Exhibit 6 is a true and correct copy of Magistrate's Report and Recommendation dated December 15, 2016, in the matter entitled

Middleton et al. v. Pan et al., U.S.D.C., Central District of California Case No. 2:16-cv-05224-SVW-AGR.

8. Attached hereto and made a part hereof as Exhibit 7 is a true and correct copy of Order granting defendant's motion to dismiss plaintiffs' complaint, dated January 12, 2017, in the matter entitled *Torrey-Love, et al. v. State of California Department of Education et al.*, Central District of California Case No. ED CV 16-2410-DMG (DTBx).

I declare under penalty of perjury under the laws of 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: May 2, 2017

JONATHAN E. RICH, Declarant

EXHIBIT 1

SENATE COMMITTEE ON EDUCATION
Senator Carol Liu, Chair
2015 - 2016 Regular

Bill No:	SB 277		
Author:	Pan and Allen		
Version:	April 9, 2015	**Hearing Date:**	April 22, 2015
Urgency:	No	**Fiscal:**	Yes
Consultant:	Lynn Lorber		

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/sgp/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 schoolyear 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^{1h} 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 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
BIOCOM
California Academy of Family Physicians
California Academy of Physician Assistants
California Association for Nurse Practitioners
California Association of Physician Groups
California Black Health Network
California Children's Hospital Association
California Coverage and Health Initiatives
California Department of Insurance
California Disability Rights, Inc.
California Healthcare Institute
California Hepatitis Alliance
California Hospital Association
California Immunization Coalition
California Optometric Association
California Pharmacists Association
California Primary Care Association
California Public Health Association-North
California School Boards Association
California School Employees Association
California School Nurses Organization
California State Association of Counties
California State PTA
Carlsbad High School Parent-Teacher-Student Association
Child Care Law Center
Children Now
Children's Defense Fund California
Children's Healthcare Is a Legal Duty, Inc.
Children's Hospital Oakland
Children's Specialty Care Coalition
City and County of San Francisco Board of Supervisors
City of Berkeley
City of Beverly Hills
City of Pasadena
Contra Costa County
County Health Executives Association of California
County of Marin
County of Tehachapi
Democratic Women's Club of Santa Cruz County
Donate Life California
First 5 California
Foundation for Pediatric Health
Gilroy Unified School District
Health Officers Association of California
Jay Hansen, Sacramento County School Board Member
Junior Leagues of California
Kaiser Permanente
Los Angeles Community College District
Los Angeles County Board of Supervisors
Los Angeles County Supervisor Sheila Kuehl
Los Angeles Unified School District
March of Dimes California Chapter
Medical Board of California
Medical Oncology Association of Southern California
MemorialCare Health System Physician Society
National Coalition of 100 Black Women Sacramento Chapter
Osteopathic Physicians and Surgeons of California
Pasadena Public Health Department
Project Inform
Providence Health and Services, Southern California

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)
Version: April 22, 2015
Hearing Date: April 28, 2015
Fiscal: Yes
Urgency: No
RD

SUBJECT

Public health: vaccinations

DESCRIPTION

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

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

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

BACKGROUND

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

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

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

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).)

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.

> 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

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

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.

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

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,

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

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

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

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

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

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

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

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.

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

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

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."

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

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

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

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

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

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

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

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

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

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

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.

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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EXHIBIT 4

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANA WHITLOW, Individually and as Parent and Next Friend of B.A.W. and D.M. F.-W., minor children, *et al.*, Plaintiffs, v. STATE OF CALIFORNIA, Department of Education, *et al.*, Defendants.	CASE NO. 16cv1715 DMS (MDD) **ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

This case involves a challenge to California's Senate Bill ("SB") 277, which repealed the personal belief exemption ("PBE") to California's immunization requirements for children entering public and private educational and child care facilities in the State. Plaintiffs are a group of seventeen parents and their children that reside throughout the State of California, and four non-profit corporations. Defendants include the California Department of Education and Department of Public Health, among others. In their First Amended Complaint ("FAC"), Plaintiffs allege SB 277 violates their federal and state constitutional rights and federal and state statutory law.

On July 15, 2016, Plaintiffs filed the present motion seeking to preliminarily enjoin the State from enforcing SB 277. In support of the motion, Plaintiffs allege SB 277 violates their rights to free exercise, equal protection, due process and education, as well as the Individuals with Disabilities in Education Act ("IDEA"), Section 504 of

the Rehabilitation Act of 1973 ("Section 504") and the Americans with Disabilities Act ("ADA"). Defendants filed responses to the motion, and Plaintiffs filed a reply.

The motion came on for hearing on August 12, 2016. James S. Turner, Kimberly Rosenberg, Robert Moxley, Betsy Lehrfeld and Carl Lewis appeared for Plaintiffs, Jonathan Rich and Jacquelyn Young appeared for the State Defendants and Mary Pat Barry appeared for Defendants Takashi Wada, M.D. and Charity Dean, M.D.[1]

I.

BACKGROUND

SB 277 was enacted on June 30, 2015. In enacting SB 277, the California Legislature declared its intent was:

> to provide:
>
> (a) A means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases:
>
> (1) Diphtheria.
>
> (2) Hepatitis B.
>
> (3) Haemophilus influenzae type b.
>
> (4) Measles.
>
> (5) Mumps.
>
> (6) Pertussis (whooping cough).
>
> (7) Poliomyelitis.
>
> (8) Rubella.
>
> (9) Tetanus.
>
> (10) Varicella (chickenpox).

Cal. Health & Safety Code § 120325(a)(1)-(10). SB 277 amended this section of the California Health and Safety Code to declare the Legislature's intent, but otherwise left

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[1] Defendants Wada and Dean are named in their official capacities as employees of the Santa Barbara County Department of Public Health. The present motion does not seek preliminary injunctive relief against those Defendants, and thus the Court does not address Plaintiffs' claims against them in this Order.

1 undisturbed the prior law's vaccination requirements for school-aged children in
2 California. In particular, SB 277 removed a parent's ability under prior law to opt-out
3 of the State's vaccination requirements based on that parent's personal beliefs.[2] The
4 law now provides that if a parent had on file or filed a PBE prior to January 1, 2016,
5 his or her child could be enrolled in school or day care, unless that child was at a
6 "checkpoint," *i.e.*, was a first-time enrollee in day care or kindergarten or was enrolling
7 in the seventh grade. Cal. Health & Safety Code § 120335(g). Those first-time
8 enrollees and students entering seventh grade are no longer allowed admission to the
9 State's public and private schools and day care centers unless they have complied with
10 the vaccination requirements. Cal. Health & Safety Code § 120335(g)(3). Plaintiffs
11 estimate there are 33,000 children that fall into this category, and are being denied
12 enrollment as a result of SB 277.

13 SB 277 provides three exemptions to the vaccination requirements at issue: One
14 for medical reasons, Cal. Health & Safety Code § 120370(a), one for children in a
15 'home-based private school or ... an independent study program[,]" Cal. Health &
16 Safety Code § 120335(f), and one for students who qualify for an individualized
17 education program, or IEP. Cal. Health & Safety Code § 120335(h).

18 **II.**

19 **DISCUSSION**

20 For more than 100 years, the United States Supreme Court has upheld the right
21 of the States to enact and enforce laws requiring citizens to be vaccinated. *Jacobson*
22 *v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905); *Zucht v. King*, 260 U.S.
23 174 (1922). In 1902, the Board of Health in Cambridge, Massachusetts enacted a
24 regulation to that effect, and the State thereafter filed a criminal complaint against Mr.
25 ///

26

27 [2] The law provided, "Immunization of a person shall not be required for admission to school ... if the parent or guardian ... files with the governing authority a
28 letter or affidavit that documents which immunizations required by [law] have been given, and which immunizations have not been given on the basis that they are contrary to his or her beliefs." Cal. Health & Safety Code § 120365 (repealed by SB 277).

1 Jacobson for failing to comply with the regulation. In his defense, Mr. Jacobson
2 argued that the law was unconstitutional. In particular, he argued,

> that his liberty is invaded when the State subjects 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 a way as to him seems 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.

7 197 U.S. at 26. The Court rejected that argument. Speaking for the Court, Mr. Justice
8 Harlan stated,

> the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in 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. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and property of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

Id. (citations omitted). The Court further stated, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members[,]" *id.* at 27, and "it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few." *Id.* at 29. The Court concluded that the statute was a proper exercise of the legislative prerogative and that it did not deprive Mr. Jacobson of his constitutional guarantees of personal and religious liberty.

Seventeen years later, the Court considered another mandatory vaccination law, this time one aimed at schoolchildren. *Zucht*, 260 U.S. 174. There, the plaintiff's children were excluded from a Texas public school because they were not vaccinated. The plaintiff argued that the laws violated her rights to due process and equal

protection under the United States Constitution, but the Court rejected those arguments. Relying on *Jacobson*, the Court stated it was long-ago "settled that it is within the police power of a State to provide for compulsory vaccination." *Id.* at 176.

Even outside the context of vaccination laws, the Supreme Court has reiterated that fundamental rights under the First Amendment to the United States Constitution do not overcome the State's interest in protecting a child's health. Specifically, in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court stated: "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 166-67.

Although the Ninth Circuit has yet to decide a case involving a challenge to a mandatory vaccination law, two other Circuits and the California Supreme Court have decided such cases. *Phillips v. City of New York*, 775 F.3d 538 (2d Cir.), *cert. denied*, ___ U.S. ___, 136 S. Ct. 104 (2015); *Workman v. Mingo County Bd. of Ed.*, 419 Fed. Appx. 348, 356 (4th Cir. 2011); *Abeel v. Clark*, 84 Cal. 226 (1890). In *Workman*, the plaintiff argued that a local school board in West Virginia violated her rights to free exercise, equal protection and substantive due process when it refused to admit her daughter to public school without the immunizations required by state law. The court rejected all of those arguments, relying principally on *Jacobson*, *Zucht* and *Prince*. In *Phillips*, the plaintiffs argued that a New York law requiring mandatory vaccination of school children violated their rights to due process, free exercise and equal protection. As in *Workman*, the court rejected the plaintiffs' substantive due process claim, stating it was "foreclosed by the Supreme Court's decision in *Jacobson*[.]" 775 F.3d at 542. The court also rejected the plaintiffs' free exercise claim, following the reasoning of *Workman*, "that a parent '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.'" *Id.* at 543 (quoting *Prince*, 321 U.S. at 166-67). The court then affirmed the dismissal of the plaintiffs'

equal protection claim for failure to state a claim. In *Abeel,* the California Supreme Court upheld the State's mandatory vaccination law as a proper exercise of police powers under the California Constitution, allowing a public school to exclude a child who had not been vaccinated in accordance with the law. 84 Cal. at 230.

In light of these cases, Plaintiffs here deny they are challenging the State's right to compel vaccination of its schoolchildren. Rather, they assert they are challenging the State's decision to eliminate the PBE. However, reframing the case in those terms does not bolster Plaintiffs' position because it is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements, much less a PBE. *See Phillips*, 775 F.3d at 543 (stating "New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs."); *Workman*, 419 Fed. Appx. at 355 (agreeing with district court that "although a state may provide a religious exemption to mandatory vaccination, it need not do so."); *Wright v. De Witt School Dist.*, 385 S.W.2d 644 (Ark. 1965) (rejecting challenge to mandatory vaccination law on ground it did not include religious exemption).

Finally, the Court notes that although the decision to eliminate the PBE, which had been in existence for decades, raises principled and spirited religious and conscientious objections by genuinely caring parents and concerned citizens, the wisdom of the Legislature's decision is not for this Court to decide. *Jacobson,* 197 U.S. at 30 (stating the existence of medical opinion attaching little or no value to vaccination as a means of preventing spread of smallpox was of no moment; it was for the Legislature, and not the court, to determine the most effective method of protecting the public against disease). The objections and concerns with SB 277 were presented to the Legislature, and it decided to proceed with the law over those objections. Whether those objections were valid is not for this Court to decide. Rather, this Court is concerned only with whether the law is constitutional. With this background in mind, the Court turns to the specific facts and claims in this case, and the important

question of whether Plaintiffs are entitled to a preliminary injunction barring enforcement of SB 277.

A. Legal Standard

A party seeking injunctive relief under Federal Rule of Civil Procedure 65 must show "'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

B. Likelihood of Success

Plaintiffs rely only on constitutional and federal statutory claims in the present motion. Plaintiffs assert they have shown a likelihood of success on each of these claims, which supports the issuance of a preliminary injunction. The Court addresses these claims in the order in which they were pleaded in the First Amended Complaint.

1. Free Exercise

The first claim at issue here is the Parent Plaintiffs' claim that SB 277 violates their right to free exercise of religion under the First Amendment to the United States Constitution.[3] Specifically, Plaintiffs contend SB 277 violates their right to free exercise by (1) failing to provide a religious exemption to the vaccine mandate, (2) forcing parents to choose between the dictates of their faith and their children's

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[3] The Court notes that only Plaintiffs Whitlow, Nicolaisen, Schultz-Alva, Andrade, Crain and Kennedy have religious objections to the vaccine mandate. To the extent any of the other individual Plaintiffs have objections to the mandate based on their personal, as opposed to religious beliefs, those beliefs are not protected by the First Amendment. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular consideration; to have the protection of the Religion Clauses, the claims must be rooted in religious beliefs.")

education, and (3) offering secular exemptions (medical, home schooling and IEP) while refusing to provide a religious exemption.[4]

The cases discussed above, particularly *Workman*, *Phillips*, and by extension, *Prince*, demonstrate that Plaintiffs are unlikely to succeed on the first aspect of their claim. As stated in *Prince*, the right to free exercise does not outweigh the State's interest in public health and safety. 321 U.S. at 166-67 ("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.") Both the Second and Fourth Circuits have explicitly rejected the claim raised here, *see Phillips*, 775 F.3d at 543 (finding "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"); *Workman*, 419 Fed. Appx. at 352-54 (same), as have state courts in Maryland, *Davis v. State*, 294 Md. 370, 379 (1982) (finding state need not "provide a religious exemption from its immunization program."), and Arkansas. *Cude v. State*, 237 Ark. 927, 932 (1964) (stating smallpox vaccine mandate did "not violate the constitutional rights of anyone, on religious grounds or otherwise.") In light of these cases, which this Court finds persuasive, Plaintiffs are unlikely to succeed on their claim that SB 277 violates their right to free exercise because it fails to include a religious exemption.

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[4] The parties disagree on the standard of review for Plaintiffs' free exercise claim, with Plaintiffs arguing for strict scrutiny and Defendants for rational basis. The Supreme Court has stated that "a neutral law of general application need not be supported by a compelling government interest even when 'the law has the incidental effect of burdening a particular religious practice.'" *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir.), *cert. denied*, ___ U.S. ___, 136 S.Ct. 2433 (2016), (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)). Rather, "[s]uch laws need only survive rational basis review." *Id.* at 1076 (citing *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999)). Plaintiffs do not dispute that SB 277 is a neutral law of general application, which would therefore be subject to rational basis review. Instead, they argue they are asserting "hybrid rights," which warrants strict scrutiny. However, "[t]he 'hybrid rights' doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) (citations omitted). Following that directive, this Court declines to apply the "hybrid rights" doctrine to Plaintiffs' free exercise claim, and thus declines to apply strict scrutiny.

1 Plaintiffs are also unlikely to succeed on their claim that SB 277 violates their
2 rights to free exercise because it forces them to choose between exercising their
3 religious beliefs and their children's education. As stated in *Prince,* the right to
4 practice religion does not "include liberty to expose the community or the child to
5 communicable disease or the latter to ill health or death." 321 U.S. at 166-67.

6 The final aspect of Plaintiffs' Free Exercise claim is that SB 277 violates the
7 First Amendment because it provides secular exemptions but fails to provide a
8 religious exemption. In support of this claim, Plaintiffs rely on *Employment Div.,*
9 *Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). However,
10 nowhere in that case does the Supreme Court state that if the government provides a
11 secular exemption to a law or regulation that it must also provide a religious
12 exemption. Indeed, a majority of the Circuit Courts of Appeal have "refused to
13 interpret *Smith* as standing for the proposition that a secular exemption automatically
14 creates a claim for a religious exemption." *Grace United Methodist Church v. City of*
15 *Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006). Thus, Plaintiffs have not shown a
16 likelihood of success on their free exercise claim.

17 2. Equal Protection

18 Next, Plaintiffs allege SB 277 violates their rights to equal protection.
19 Specifically, Plaintiffs allege SB 277 treats children with PBEs differently from other
20 children in denying the former an education, and it treats children with PBEs who have
21 reached "checkpoints" differently from children with PBEs who are not at
22 "checkpoints" in excluding the former from school. Plaintiffs also claim that SB 277
23 treats children with IEPs differently from section 504 children in providing an
24 exemption from the vaccination mandate for the former but not the latter.[5]

25

26 [5] Plaintiffs also raise an as-applied equal protection challenge to the IEP
exemption, arguing that some school districts are admitting children with IEPs while
27 others are not. Based on the facts alleged in the First Amended Complaint, it appears
two of the Plaintiff Children with IEPs may be being denied enrollment because they
28 are advancing to the seventh grade. (*See* FAC ¶¶ 16, 18.) The third Plaintiff Child with
an IEP is not in that situation, but has apparently been denied enrollment. (*Id.* ¶ 22.)

"The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "'Evidence of different treatment of unlike groups does not support an equal protection claim.'" *Wright v. Incline Village Gen. Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011).

Here, none of the disputed classifications supports an equal protection claim. First, children with PBEs are not similarly situated to children without PBEs. Nor are children at "checkpoints" similarly situated to children not at "checkpoints." And the same may be said of children with IEPs versus those without. In each of those categories, the children are not similarly situated, which dooms Plaintiffs' equal protection claim.

Moreover, even if these children were similarly situated, these classifications would not violate the equal protection clause. Plaintiffs have failed to show that children with PBEs, children at "checkpoints," and section 504 children are members of a suspect class.[6] Plaintiffs have also failed to show that these classifications burden a fundamental right.[7] Thus, these classifications would be subject to rational basis review, not strict scrutiny. *Id.* at 1141.

Under the rational basis test,

> the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

These as-applied challenges, however, are not at issue in the present motion. Therefore, the Court does not address them further.

[6] Intellectual disability is not a suspect class. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

[7] Education is not a fundamental right under the United States Constitution. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.")

1 *Nordlinger*, 505 U.S. at 11 (citations omitted). That test is met here for each of the
2 classifications alleged above.

3 First, there is a rational basis for treating children with PBEs differently from
4 other children: The former are not completely vaccinated, if at all, while the latter are
5 fully vaccinated. Allowing the latter to attend school and excluding the former is
6 rationally related to the State's interest in protecting public health and safety.

7 There is also a plausible reason for treating children with PBEs at "checkpoints"
8 differently from children with PBEs outside of "checkpoints." The "checkpoints"
9 provisions provide a grace period for children with PBEs to remain in their grade span
10 while their parents comply with the new law. Rather than drawing legislation that
11 would have immediately impacted all children with PBEs (approximately 200,000,
12 according to Plaintiffs), the legislation has a more limited effect by initially focusing
13 only on those children with PBEs who are advancing to the next grade level
14 (approximately 33,000, according to Plaintiffs). The "checkpoints" provision therefore
15 provides parents with an orderly opportunity to comply with the law and softens the
16 impact of SB 277 through graduated application. That, of course, is rational.

17 Finally, and assuming Plaintiffs have standing to bring this claim on behalf of
18 students protected by section 504, there is also a rational basis for providing an
19 exemption for children with IEPs as opposed to children protected by section 504.
20 Unlike section 504, which is primarily geared toward preventing discrimination in the
21 provision of state services generally to all individuals with disabilities, *A.G. v.*
22 *Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1203, (9th Cir. 2016) (citing
23 *Mark H. v. Lemaheiu*, 513 F.3d 922, 929 (9th Cir. 2008)), the IDEA is designed to
24 provide disabled students with access to special education and related services in
25 schools. *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 818 (9th Cir. 2007) (quoting *Bd.*
26 *of Educ. of Henrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458
27 U.S. 176, 200 (1982)). The exemption for students with IEPs ensures that right of
28 access, and furthers the State's legitimate interest in providing special education and

related services to those students. *Zucht,* 260 U.S. at 176-77 ("A long line of decisions by this court had also settled classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all-embracing.") For these reasons, Plaintiffs have failed to show a likelihood of success on their equal protection claim.[8]

3. Due Process

Next, Plaintiffs' claim that SB 277 violates their rights to due process. Specifically, Plaintiffs allege SB 277 impinges on fundamental liberties by denying children with PBEs the opportunity to attend school and stigmatizing children with PBEs as "vectors of disease," and violating both parental rights regarding decision-making concerning their child's health and education and childrens' rights to bodily integrity. (FAC ¶ 147.)

"The Due Process Clause 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Workman*, 419 Fed. Appx. at 355 (quoting *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997)). Here, however, all of Plaintiffs' arguments are foreclosed by *Zucht,* 260 U.S. at 176 (rejecting due process challenge to permanent exclusion of child from public and private school because child did not have required certificate and refused to submit to vaccination).

[8] Plaintiffs' equal protection argument under the California Constitution fails for the same reasons. As with the federal claim, the Court is not persuaded that heightened scrutiny applies to Plaintiffs' equal protection claim under the California Constitution. While education is a fundamental interest in California, impingement of the right is insufficient to trigger strict scrutiny. Rather, there must be a showing of "disparate treatment" that has a "real and appreciable impact" on that right. *Butt v. State of California,* 4 Cal.4th 668, 686 (1992). The asserted classifications addressed above do not have real and appreciable impact on the right of education and some are foreclosed by law. *See, e.g., French v. Davidson,* 143 Cal. 658 (1904), which forecloses the argument that distinguishing between vaccinated and unvaccinated children violates the equal protection clause. Children attending school "occupy a natural class by themselves, more liable to contagion[,] *id.* at 664, thus there is "no element of class legislation" in precluding unvaccinated children from school but allowing vaccinated children to enroll. *Id.*

Unquestionably, imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process. This case is even one more step removed, as it involves the removal of an exemption that is not required under the law. The removal of the PBE subjects the children to mandatory vaccination, but the State is well within its powers to condition school enrollment on vaccination. Plaintiffs have not demonstrated a likelihood of success on their due process claim.[9]

4. Section 504[10]

Although Plaintiffs allege there are students who require section 504 accommodation, (FAC ¶ 117), they fail to allege those children are not concurrently covered by the IDEA; if those children are covered by the IDEA, they are exempt from vaccination. Thus, Plaintiffs have not shown a likelihood of success on this claim sufficient to warrant a preliminary injunction.

5. Right of Education

The only remaining claim at issue is Plaintiffs' claim that SB 277 violates their right to education under the California Constitution. The parties do not dispute that education is a fundamental interest under the California Constitution. *See Butt*, 4 Cal. 4th at 685-86 (holding education is a "fundamental interest"); *Serrano v. Priest*, 18 Cal. 3d 728, 766 (1976). Thus, if the right is sufficiently implicated it is subject to heightened review. *Serrano*, 18 Cal. 3d at 768. Given Defendants' concession that this claim is subject to heightened review, the Court assumes without deciding that

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[9] Plaintiffs' due process arguments under the California Constitution fail for the same reasons.

[10] In their briefs, Plaintiffs also raised their IDEA and ADA claims as bases for the present motion. However, the IDEA and ADA claims involve as-applied challenges rather than facial challenges. At oral argument, Plaintiffs' counsel stated they were not relying on any as-applied arguments in support of the present motion for any claim. Thus, the Court declines to address whether Plaintiffs have shown a likelihood of success on their IDEA, ADA or any other claims based on as-applied challenges in deciding the present motion.

1 this is the proper standard. Under that standard, Defendants must show a compelling
2 state interest, and that the law is necessary or narrowly tailored to meet that interest.
3 Here, the right to education is implicated only by the removal of the PBE.
4 Defendants assert that eliminating the PBE serves the compelling societal interest in
5 protecting public health and safety. There is no question that society has a compelling
6 interest in fighting the spread of contagious diseases through mandatory vaccination
7 of school-aged children. All courts, state and federal, have so held either explicitly or
8 implicitly for over a century. *See, e.g., Abeel*, 84 Cal. at 230 ("The legislature has
9 power to enact such laws as it may deem necessary, not repugnant to the constitution
10 to secure and maintain the health and prosperity of the state, by subjecting both person
11 and property to such reasonable restraints and burdens as will effectuate such
12 objects."); *Zucht*, 260 U.S. at 176 (stating it is "settled that it is within the police power
13 of a state to provide for compulsory vaccination."); *Jacobson*, 197 U.S. at 11 ("the
14 police power of a State must be held to embrace, at least, such reasonable regulations
15 established directly by legislative enactment as will protect the public health and the
16 public safety."); *Workman*, 419 Fed. Appx. at 356 (quoting *Sherr v. Northport-East*
17 *Northport Union Free Sch. Dist.*, 672 F.Supp. 81, 88 (E.D.N.Y. 1987)) (holding there
18 is a "'compelling interest of society in fighting the spread of contagious diseases
19 through mandatory inoculation programs.'"); *Brown v. Stone*, 378 So.2d 218, 223
20 (Miss. 1979) (holding "protection of the great body of school children attending the
21 public schools" against diseases through mandatory vaccination serves "compelling
22 public purpose"); *Cude*, 237 Ark. at 932 (1964) (holding mandatory vaccination of
23 school children "does not violate the constitutional rights of anyone, on religious
24 grounds or otherwise."); *Bd. of Ed. v. Maas*, 56 N.J. Super. 245, 164 (1959) (similar);
25 *Viemeister v. White*, 88 A.D. 44, 49, 84 N.Y.S. 712 (1903) (similar). And it is evident
26 from the text of SB 277 that this was the Legislature's intent in enacting the law. *See*
27 Cal. Health & Safety Code § 120325 ("In enacting this chapter ... it is the intent of the
28

Legislature to provide: (a) A means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases: ...")

Faced with this line of cases, Plaintiffs argue this case is distinguishable. Plaintiffs assert the vaccine mandates at issue in some of those cases were enacted during times of outbreaks. As Plaintiffs see it, the existence of an actual outbreak gave the States a compelling reason to enact a vaccine mandate. Here, by contrast, and according to Plaintiffs, there was no similar outbreak, and therefore, California did not have a compelling interest in enacting SB 277. However, the State's interest in protecting the public health and safety, particularly the health and safety of children, does not depend on or need to correlate with the existence of a public health emergency. *See Maricopa County Health Dept. v. Harmon*, 156 Ariz. 161, 166 (1987) (rejecting argument that "there is no compelling state interest in taking limited and temporary steps to combat a reasonably perceived risk of the spread of measles absent a serologically confirmed case[.]"); *Sadlock v. Bd. of Ed.*, 137 N.J.L. 85, 90 (1948) (rejecting argument that compulsory vaccination law could not stand "since at the time of its adoption, there was no epidemic or threatened epidemic of smallpox ... and that, therefore the resolution performed no reasonable exercise of the police power."); *Mosier v. Varren County Bd. of Health*, 308 Ky. 829, 831 (1948) ("the health authorities are not required to wait until an epidemic exists before acting, but it is their duty to adopt timely measures to prevent one."). That interest exists regardless of the circumstances of the day, and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases.

The existence of a compelling state interest, however, is not sufficient, by itself, to satisfy the strict scrutiny standard. Defendants must still show that removal of the PBE was necessary or narrowly tailored to serve society's interest.

Plaintiffs argue removal of the PBE is not narrowly tailored. Specifically, they assert the previous law, which allowed for PBEs, served the same purpose as SB 277 and was a less restrictive means of achieving that purpose. Comparing new law to old,

however, has nothing to do with heightened scrutiny analysis. Rather, SB 277's removal of the PBE must be examined to determine if it is narrowly tailored to address the identified interest it sets out, here, "a means for the eventual achievement of total immunization" of appropriate school-aged children. Cal. Health & Safety Code § 120325(a). However effective the previous law may have been in reducing the PBE rate, that is not the purpose of the current law. The objective of total immunization is not served by a law that allows for PBEs, whether the PBE rate is 2% or 25%.

Conditioning school enrollment on vaccination has long been accepted by the courts as a permissible way for States to innoculate large numbers of young people and prevent the spread of contagious diseases. Indeed, "[i]n the 1991-1992 school year, all 50 states required public school students to be vaccinated against diphtheria, measles, rubella, and polio." *Vernonia Sch. Dist 475 v. Acton,* 515 U.S. 646, 656 (1995) (citing U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p.1.) Moreover, States can impose those vaccination requirements without providing religious or conscientious exemptions. While removing the PBE is an aggressive step, so, too, is the goal of providing a means for the eventual achievement of total immunization. An aggressive goal requires aggressive measures, and the State of California has opted for both here.

The right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children. Because a personal belief exemption is not required in the first instance, the State can remove it–and impinge on education rights–in light of the compelling interest here. In this context, removal of the PBE is necessary or narrowly drawn to serve the compelling objective of SB 277. Plaintiffs have not shown they have a likelihood of success on their claim that SB 277 violates the right to education under California law.

/ / /

1 **C. Other Factors**

2 "When, as here, a party has not shown any chance of success on the merits, no
3 further determination of irreparable harm or balancing of hardships is necessary."
4 *Global Horizons, Inc. v. United States Dep't of Labor*, 510 F.3d 1054, 1058 (9th Cir.
5 2007). "This rule applies with equal force to the public interest element of our
6 preliminary injunction analysis." *Id.* Pursuant to this rule, the Court declines to
7 address the other preliminary injunction factors.

8 The Court notes, however, that Plaintiffs' delay in filing this case undercuts
9 any assertion of "urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle*
10 *Publishing Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Although Plaintiffs dispute the
11 effective date of SB 277, the law was approved by the Governor on June 30, 2015, and
12 stated PBEs would not be accepted on or after January 1, 2016. "Where the
13 inevitability of the operation of a statute against certain individuals is patent, it is
14 irrelevant to the existence of a justiciable controversy that there will be a time delay
15 before the disputed provisions will come into effect." *Blanchette v. Connecticut Gen.*
16 *Ins. Corps.*, 419 U.S. 102, 143 (1974). "One does not have to await the consummation
17 of threatened injury to obtain preventive relief. If the injury is certainly impending,
18 that is enough." *Pennsylvania v. West Virginia,* 262 U.S. 553, 593 (1923). Here,
19 Plaintiffs waited until July 1, 2016, to file the present case. That delay appears to have
20 been a tactical decision, and weighs against the issuance of a preliminary injunction in
21 this case.

22 **III.**

23 **CONCLUSION**

24 State Legislatures have a long history of requiring children to be vaccinated
25 as a condition to school enrollment, and for as many years, both state and federal courts
26 have upheld those requirements against constitutional challenge. History , in itself,
27 does not compel the result in this case, but the case law makes clear that States may
28 impose mandatory vaccination requirements without providing for religious or

conscientious objections. Although the removal of the PBE here affects a great many people, this Court,

> is not prepared to hold that a minority, residing or remaining in any city or town where [disease] is prevalent, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population.

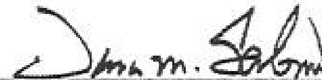
Jacobson, 197 U.S. at 37-38. Over 100 years ago, the Supreme Court was,

> unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.

Id. at 38. In this case, Plaintiffs have not made a showing that they are entitled to the extraordinary remedy of a preliminary injunction. Accordingly, their motion is respectfully denied.

IT IS SO ORDERED.

DATED: August 26, 2016



HON. DANA M. SABRAW
United States District Judge

EXHIBIT 5

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/21/16			DEPT. 36
HONORABLE GREGORY W. ALARCON	JUDGE	C. MASON	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
#7 G. RODRIGUEZ, CA	Deputy Sheriff	NONE	Reporter

11:30 am	BC617766 TAMARA BUCK ET AL VS THE STATE OF CALIFORNIA	Plaintiff Counsel Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court, having previously taken the matter under submission 10/20/16, now rules in accordance with the Ruling Re: sustaining demurrer without leave to amend and placing motion to strike off calendar as moot, consisting of 1 page, filed this date and incorporated herein by reference to the Court file.

Defendant to give notice.

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I am not a party to the Cause herein, and that this date I served a copy of the above minute order and/or Court order reflected above upon each party/counsel named by depositing in the United States mail at the Courthouse in Los Angeles, California, a copy of the original entered herein in a separate sealed envelope for each as shown.

Date: 10/21/16

Sherri R. Carter, Executive Officer/Clerk

By: ______________________ C. Mason

JONATHAN RICH
Office of the Attorney General
300 S. Spring Street
Suite #1702
Los Angeles, CA 90013

MINUTES ENTERED
10/21/16
COUNTY CLERK

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Superior Court of California

County of Los Angeles

Department 36

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Superior Court of California
County of Los Angeles
OCT 21 2016
Sherri R. Carter, Executive Officer/Clerk
By Cher Meson, Deputy

BUCK, Plaintiff(s), v. THE STATE OF CALIFORNIA, Defendant(s).	Case No.: BC617766 Hearing Date: 10/20/16 **RULING RE:** • DEFENDANT KAREN SMITH'S DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT. • MOTION THEREOF TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT.

The demurrer is sustained, without leave to amend, based upon its page numbers 1 through 15.

As to counsel's request for a Statement of Decision, the request is denied.
"As to demurrer rulings, statements of decision may consist of references to appropriate page numbers and paragraphs. CCP §472d."

The motion to strike is ordered off calendar as moot, in light of the ruling upon the demurrer.

Dated: 10/21/16

GREGORY W. ALARCON

Gregory Alarcon
Superior Court Judge

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Fees Exempt per Gov't Code, § 6103

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OF ORIGINAL FILED
Los Angeles Superior Court

AUG 2 2 2016

Sherri R. Carter, Executive Officer/Clerk
By: Moses Soto, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

TAMARA BUCK, SHARON BROWN, SARAH LUCAS, CHARLENE HOUSEN, DAWNIELLE SELDEN, SERGE EUSTACHE, TRICIA EUSTACHE, and NIKKI JENCEN, Plaintiffs, v. **THE STATE OF CALIFORNIA, and DOES 1-99, inclusive,** Defendants.	Case No. BC617766 **DEFENDANT KAREN SMITH'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JONATHAN E. RICH** **[Code Civ. Proc., § 430.10]** **[Filed Concurrently with (1) Notice of Motion and Motion to Strike with Supporting Memorandum of Points and Authorities; and (2) Request for Judicial Notice]** Date: October 6, 2016 Time: 8:30 a.m. Dept: 36 Judge: The Honorable Gregory W. Alarcon Trial Date: None Set Action Filed: April 22, 2016 **RES ID 160189152509-1**

1 TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

2 **PLEASE TAKE NOTICE** that on October 6, 2016, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard, in Department 36 of the above-entitled Court, located at 111 N. Hill
4 Street, Los Angeles, California, 90012, defendant Karen Smith, in her capacity as the Director of
5 the California Department of Public Health (defendant), will bring on for hearing her attached
6 demurrer to plaintiffs' Second Amended Complaint (SAC), without leave to amend.

7 Defendant's demurrer to the SAC is made on the following grounds:

8 1. Plaintiffs' First Cause of Action, asserting a violation of the Free Exercise Clause
9 of article I, section 4 of the California Constitution, fails to state facts sufficient to constitute a
10 cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

11 2. Plaintiffs' Second Cause of Action, asserting a violation of plaintiffs' purported
12 right to an education under article IX, section 5 of the California Constitution, fails to state facts
13 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

14 3. Plaintiffs' Third Cause of Action, asserting a violation of the Equal Protection
15 Clause of article I, section 7 of the California Constitution, on the grounds that California schools
16 allegedly have a legal duty to enroll students regardless of whether they are vaccinated, fails to
17 state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

18 4. Plaintiffs' Fourth Cause of Action, asserting a violation of Health and Safety Code
19 section 24175, subdivision (a), on the grounds that Senate Bill 277 (SB 277) allegedly constitutes
20 a purported prohibited medical experiment, fails to state facts sufficient to constitute a cause of
21 action. (Code Civ. Proc., § 430.10, subd. (e).)

22 5. Plaintiffs' Fifth Cause of Action, asserting a violation of the Due Process Clause
23 of article I, section 7 of the California Constitution, on the grounds that the medical exemption
24 provisions of SB 277 are allegedly unconstitutionally vague, fails to state facts sufficient to
25 constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

26 6. The SAC taken as a whole fails to state facts sufficient to constitute a cause of
27 action. (Code Civ. Proc., § 430.10, subd. (e).)

28 Pursuant to Code of Civil Procedure section 430.41, on June 9, 2016, July 18, 2016,

1 August 9, 2016, and at various other dates and times throughout the months of June, July and
2 August 2016, the parties met and conferred by telephone concerning defendant's objections raised
3 in this demurrer. The parties were unable to reach an agreement on defendant's objections. (See
4 Declaration of Jonathan E. Rich, ¶¶ 2-9.)

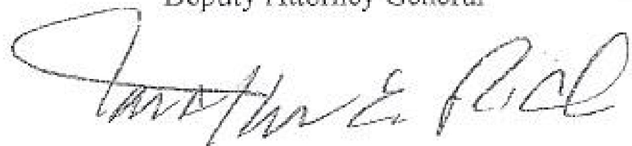
5 This demurrer is based on the pleadings, on this notice and its attached memorandum of
6 points and authorities and the request for judicial notice filed herein; on the documents, pleadings
7 and records on file herein; and on the arguments to be made at the hearing.

8 Dated: August 22, 2016

Respectfully Submitted,

9 KAMALA D. HARRIS
Attorney General of California
10 RICHARD T. WALDOW
Supervising Deputy Attorney General
11 JACQUELYN Y. YOUNG
Deputy Attorney General

12

13 

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15 JONATHAN E. RICH
Deputy Attorney General

16 *Attorneys for Defendant Karen Smith, in her*
capacity as the Director of the California
17 *Department of Public Health*

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1 **DEMURRER**

2 Defendant demurs to each of the causes of action in plaintiffs' Second Amended
3 Complaint (SAC), and to the SAC taken as a whole, on the following grounds:

4 **FIRST GROUND**

5 **First Cause of Action**
Failure to State Facts Sufficient to Constitute a Cause of Action
6 **(Code Civ. Proc., § 430.10, subd. (e))**

7 1. Plaintiffs' First Cause of Action, asserting a violation of the Free Exercise Clause
8 of article I, section 4 of the California Constitution, fails to state facts sufficient to constitute a
9 cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

10 **SECOND GROUND**

11 **Second Cause of Action**
Failure to State Facts Sufficient to Constitute a Cause of Action
12 **(Code Civ. Proc., § 430.10, subd. (e))**

13 2. Plaintiffs' Second Cause of Action, asserting a violation of plaintiffs' purported
14 right to an education under article IX, section 5 of the California Constitution, fails to state facts
15 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

16 **THIRD GROUND**

17 **Third Cause of Action**
Failure to State Facts Sufficient to Constitute a Cause of Action
18 **(Code Civ. Proc., § 430.10, subd. (e))**

19 3. Plaintiffs' Third Cause of Action, asserting a violation of the Equal Protection
20 Clause of article I, section 7 of the California Constitution, on the grounds that California schools
21 allegedly have a legal duty to enroll students regardless of whether they are vaccinated, fails to
22 state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

23 **FOURTH GROUND**

24 **Fourth Cause of Action**
Failure to State Facts Sufficient to Constitute a Cause of Action
25 **(Code Civ. Proc., § 430.10, subd. (e))**

26 4. Plaintiffs' Fourth Cause of Action, asserting a violation of Health and Safety Code
27 section 24175, subdivision (a), on the grounds that SB 277 allegedly constitutes a purported
28 prohibited medical experiment, fails to state facts sufficient to constitute a cause of action. (Code

Civ. Proc., § 430.10, subd. (e).)

FIFTH GROUND

Fifth Cause of Action
Failure to State Facts Sufficient to Constitute a Cause of Action
(Code Civ. Proc., § 430.10, subd. (e))

5. Plaintiffs' Fifth Cause of Action, asserting a violation of the Due Process Clause of article I, section 7 of the California Constitution, on the grounds that the medical exemption provisions of SB 277 are allegedly unconstitutionally vague, fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

SIXTH GROUND

Complaint Taken as a Whole
Failure to State Facts Sufficient to Constitute a Cause of Action
(Code Civ. Proc., § 430.10, subd. (e))

6. The complaint taken as a whole fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

Defendant therefore respectfully requests that her demurrer to the SAC be sustained without leave to amend.

Dated: August 22, 2016

Respectfully Submitted,

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

JONATHAN E. RICH
Deputy Attorney General

Attorneys for Defendant Karen Smith, in her capacity as the Director of the California Department of Public Health

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 Plaintiffs' Second Amended Complaint (SAC) fails to state a claim on which relief may be
4 granted because their claims are unsupported as a matter of federal and state constitutional law,
5 which for decades has consistently held that (1) a state's exercise of its police powers in
6 protecting the public from communicable diseases is rationally based; (2) states have a legitimate
7 and compelling interest in requiring children to be vaccinated before entering school; and (3)
8 personal belief exemptions in mandatory vaccination statutes are not constitutionally protected
9 and, as such, may be eliminated by the Legislature.

10 In enacting Senate Bill 277 (Stats 2015 Ch. 35) (SB 277), the Legislature expressed its
11 intent to provide a means for the eventual achievement of total immunization of school children
12 against a number of deadly, but highly preventable, childhood diseases. Plaintiffs' claims are
13 predicated on the misguided supposition that their subjective personal beliefs against childhood
14 vaccinations outweigh the health and safety of the millions of children enrolled in California
15 schools, the health and safety of the general public, and the considered judgment of the California
16 Legislature in addressing a significant public health issue that embodies a core function of
17 government: to protect the health and safety of its citizens against preventable harm.

18 The authority of the Legislature to require students to be vaccinated in order to protect the
19 health and safety of other students and the public at large, irrespective of their parents' personal
20 beliefs, is firmly embedded in our jurisprudence, and embodies a quintessential function of an
21 organized government to protect its people from preventable harm. The State's legitimate and
22 compelling interest in protecting public health and safety by mandating vaccinations for school
23 children has been *unanimously* recognized by the U.S. Supreme Court, the California Supreme
24 Court, and every other federal and state court that has addressed the issue.

25 By seeking to enjoin the enforcement of SB 277, plaintiffs are asking this Court to
26 disregard decades of federal and state jurisprudence. The public health and welfare must not be
27 jeopardized by the subjective beliefs and unfounded conspiracy theories of a small minority of
28 individuals who, against all recognized scientific and legal authority, stubbornly disregard the

long-recognized safety and effectiveness of vaccines, and who fail to recognize the public health threat that their unsupported opinions have on the lives of others around them.

Because this is plaintiffs' *third* attempt at a cognizable pleading, defendant's demurrer should be sustained without leave to amend.

RELEVANT FACTS

I. THE STATE'S CHILD IMMUNIZATION STATUTES

Senate Bill 277 (SB 277) was enacted over one year ago, on June 30, 2015. (See Stats 2015 Ch. 35.) In relevant part, SB 277 eliminates the personal belief exemption from the statutory 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. (*Ibid.*) In so doing, SB 277 revised the Health and Safety Code by amending sections 120325, 120335, 120370, and 120375, added section 120338, and repealed Health and Safety Code section 120365. (*Ibid.*)

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

SB 277 has been in effect since January 1, 2016. Personal belief exemptions have been prohibited since that date. (Health & Saf. Code, § 120335, subd. (g)(1).) And, since July 1, 2016, school authorities may not unconditionally admit for the first time any child to preschool, kindergarten through sixth grade, or admit any pupil to seventh grade, unless the pupil either has been properly immunized, or qualifies for other exemptions recognized by statute. (Health & Saf. Code, § 120335, subd. (g)(3).)

There are exemptions to the immunization requirements under SB 277. Vaccinations are not required for any student in a home-based private school or independent study program who does not receive classroom-based instruction. (Health & Saf. Code, § 120335, subd. (f).)

Moreover, a child may be medically exempt from the immunizations specified in the statute if a licensed physician states in writing that "the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe." (Health & Saf. Code, § 120370, subd. (a).) Any other immunizations may only be mandated "if exemptions are allowed for both medical reasons and personal beliefs." (Health & Saf. Code, § 120338.) SB 277 also provides an exception relating to children in individualized education programs. (Health & Saf. Code, § 120335, subd. (h).)

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

SB 277 was enacted in response to, among other things, a health emergency beginning in December 2014, when 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." (*See* defendant's concurrently-filed Request for Judicial Notice (RJN), Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 5.)

> "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," and "*[m]easles has spread through California and the United States, in large part, because of communities with large numbers of unvaccinated people.*"

(*Id.* (italics added).) As further noted in SB 277's legislative history, "[a]ll of the diseases for which California requires school vaccinations are very serious conditions that pose very real health risks to children." (RJN, Exh. 2, Ass. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 4.) "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." (*Id.*, at p. 3.) "Most of the diseases can be spread by contact with other infected children." (*Id.*, at p. 4.)

1 The legislative history confirms that SB 277 was enacted with the support of recognized
2 medical, educational and child-advocacy organizations in California, including, among others, the
3 California Medical Association, the California Chapter of the American College of Emergency
4 Physicians, the California Association for Nurse Practitioners, the California Primary Care
5 Association, the California School Boards Association, the California School Nurses
6 Organization, and the Children's Defense Fund-California. (RJN, Exh. 1, Sen. Com. on
7 Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 10.

8 **II. PLAINTIFFS' CLAIMS**

9 Plaintiffs filed their initial complaint on April 22, 2016, and their summons on May 9,
10 2016, against the State of California as the only named defendant. The case was removed to
11 federal court on July 12, 2016, after plaintiffs filed their First Amended Complaint (FAC) in this
12 Court asserting federal claims against newly named defendant Karen Smith, in her capacity as
13 Director of the California Department of Public Health. The case was remanded to this Court
14 after plaintiffs filed their *Second* Amended Complaint (SAC) in federal court, which plaintiffs
15 admit is textually identical to their FAC, except that plaintiffs re-labeled their federal claims as
16 state constitutional claims expressly to avoid federal jurisdiction.

17 The SAC asserts five causes of action: (1) a violation of the Free Exercise Clause of article
18 I, section 4 of the California Constitution; (2) a denial of plaintiffs' purported right to an
19 education under article IX, section 5 of the California Constitution; (3) a violation of the Equal
20 Protection Clause of article I, section 7 of the California Constitution, on the grounds that
21 California schools allegedly have a legal duty to enroll students regardless of whether they are
22 vaccinated; (4) a violation of Health and Safety Code section 24175, subdivision (a), on the
23 grounds that SB 277 allegedly constitutes a purported prohibited medical experiment; and (5) a
24 violation of the Due Process Clause of article I, section 7 of the California Constitution, on the
25 grounds that the medical exemption provisions of SB 277 are allegedly unconstitutionally vague.

26 **STANDARD OF REVIEW**

27 A demurrer is proper when "[t]he pleading does not state facts sufficient to constitute a
28 cause of action." (Code Civ. Proc., § 430.10, subd. (e)). A demurrer tests the legal sufficiency of

1 the complaint. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) The court
2 deems as true all material facts properly pled, and those facts that may be implied or inferred
3 from those expressly alleged. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Marshall v. Gibson,*
4 *Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

5 However, the court will not assume the truth of contentions, deductions or conclusions of
6 fact or law, and the court may disregard allegations that are contrary to law, or are contrary to a
7 fact of which judicial notice may be taken. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th
8 1112, 1126.) Where an allegation "is contrary to law or to a fact of which a court may take
9 judicial notice, it is to be treated as a nullity." (*Fundin v. Chicago Pneumatic Tool Co.* (1984)
10 152 Cal.App.3d 951, 955.) The court "will not close [its] eyes to situations where a complaint
11 contains . . . allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v.*
12 *Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

13 Consistent with the fundamental principle of truthful pleading, a complaint otherwise good
14 on its face can be rendered defective by judicially noticed facts. (*Watson v. Los Altos School*
15 *Dist.* (1957) 149 Cal.App.2d 768, 771-772; see Code Civ. Proc., § 430.30, subd. (a).) Thus, a
16 demurrer may be sustained on the ground that matters properly subject to judicial notice show
17 that the complaint fails to state facts sufficient to constitute a cause of action. (See *Saltarelli &*
18 *Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.)

19
ARGUMENT

20
I. THE SAC FAILS TO STATE A CLAIM FOR RELIEF BECAUSE IMMUNIZATION LAWS ARE LONG-RECOGNIZED CONSTITUTIONAL PUBLIC HEALTH MEASURES.

21 The authority of the California Legislature to require students to be vaccinated in order to
22 protect the health and safety of other students and the public at large, irrespective of their parents'
23 personal beliefs, is firmly embedded in our jurisprudence, and embodies a quintessential function
24 of an organized government to protect its people from preventable harm. The State has an
25 unquestionably legitimate, as well as a compelling interest in protecting public health and safety
26 through mandatory vaccinations, as recognized by the U.S. Supreme Court in *Jacobson v.*
27 *Commonwealth of Massachusetts* (1905) 197 U.S. 11, 32 (*Jacobson*), holding that a state's
28

1 mandatory vaccination statute was a lawful exercise of the state's police power to protect the
2 public health and safety.

3 The Supreme Court's holding in *Jacobson* remains good law. (See, e.g., *Cruzan v.*
4 *Director, Missouri Department of Health* (1990) 497 U.S. 261, 278.) Indeed, since *Jacobson*, the
5 legitimate and compelling state interest in protecting the public health through mandatory
6 vaccinations, especially for school children, has remained unquestioned and been re-affirmed.
7 Courts have repeatedly upheld mandatory vaccination laws over challenges predicated on the
8 First Amendment, the Equal Protection Clause, the Due Process Clause, the Fourth Amendment,
9 education rights, parental rights, and privacy rights, frequently citing *Jacobson*. (See, e.g., *Zucht*
10 *v. King* (1922) 260 U.S. 174, 175-177 ["it is within the police power of a state to provide for
11 compulsory vaccination"]; *Prince v. Massachusetts* (1944) 321 U.S. 158 (1944) [a parent "cannot
12 claim freedom from compulsory vaccination for the child more than for himself on religious
13 grounds"]; *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646 ["[f]or their own good and
14 that of their classmates, public school children are routinely required to submit to various physical
15 examinations, and to be vaccinated against various diseases"]; *Phillips v. City of New York* (2nd
16 Cir. 2015) 775 F.3d 538, 543 [holding that "mandatory vaccination as a condition for admission
17 to school does not violate the Free Exercise Clause"]; *Workman v. Mingo County Sch.* (S.D. W.
18 Va. 2009) 667 F. Supp.2d 679, 690-691 ["a requirement that a child must be vaccinated and
19 immunized before it can attend the local public schools violates neither due process nor . . . the
20 equal protection clause of the Constitution"], *affirmed Workman v. Mingo County Bd. of Educ.*
21 (4th Cir. 2011) 419 F. App'x 348, 353-54; *Boone v. Boozman* (E.D. Ark. 2002) 217 F. Supp.2d
22 938, 956 ("the question presented by the facts of this case is whether the special protection of the
23 Due Process Clause includes a parent's right to refuse to have her child immunized before
24 attending public or private school where immunization is a precondition to attending school. The
25 Nation's history, legal traditions, and practices answer with a resounding 'no.'").

26 California courts are in accord. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 140
27 ["parents have no right to free exercise of religion at the price of a child's life, regardless of the
28 prohibitive or compulsive nature of the governmental infringement"], citing *Jacobson* and *Prince*;

Abeel v. Clark (1890) 84 Cal. 226, 230 (*Abeel*) [upholding the State's school vaccination requirements, recognizing that "it was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination]"]; *French v. Davidson* (1904) 143 Cal. 658, 662 (*French*) [California's mandatory vaccination state "in no way interferes with the right of the child to attend school, provided the child complies with its provisions"]; *Williams v. Wheeler* (1913) 23 Cal.App. 619, 625 [the state legislature has the power to prescribe "the extent to which persons seeking entrance as students in educational institutions within the state must submit to its [vaccination] requirements as a condition of their admission"]; *Love v. Superior Court* (1990) 226 Cal.App.3d 736, 740 ["[t]he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof"].)

In fact, defendant is unaware of any case in which a court has struck down a state's mandatory school immunization law. Because the extensive precedent *unanimously* supports the constitutionality of SB 277, defendant's demurrer should be sustained.

II. PLAINTIFFS FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A VIOLATION OF THE FREE EXERCISE CLAUSE.

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

In their First Cause of Action, plaintiffs allege that SB 277 violates their rights because the statute no longer allows exemptions based on purported "philosophical objections." (SAC, at p. 17:15-20.) These alleged beliefs, no matter how genuinely held by plaintiffs, provide no basis for relief under the Free Exercise Clause. [1]

The Free Exercise Clause protects religious beliefs, not personal beliefs. Citing *Wisconsin v. Yoder* (1972) 406 U.S. 205 (*Yoder*), plaintiffs argue in their SAC that it is a "fundamental interest of parents . . . to guide the religious education of their children." (SAC, at p. 9:13-17.)

[1] California courts review challenges "under the free exercise clause of the California Constitution in the same way we might have reviewed a similar challenge under the federal Constitution." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562.)

1 Yet, the Supreme Court in *Yoder* was clear: "philosophical and personal . . . belief[s] [do] not rise
2 to the demands of the Religion Clauses. (*Yoder, supra,* 406 U.S. at p. 216.)
3 Here, of the eight plaintiffs, only three individuals mention religion. None of the plaintiffs
4 explains how the SB 277-mandated vaccines violate their right to freely exercise their religious
5 beliefs. Plaintiffs Brown, Lucas and Selden allege that they are Christian. (SAC, at pp. 13:23-24,
6 14:1-2, 14:16-17.) However, although Brown and Selden allege that they oppose vaccines that
7 contain aborted fetal cells, they fail to specify which vaccines they oppose as a matter of religion,
8 or the religious doctrine on which their beliefs are based, and fail to specify which vaccines
9 purportedly contain aborted fetal cells. (*Id.*, at pp. 13:17-28, 14:16-24.) Plaintiff Lucas does not
10 explain how vaccination interferes with her Christian beliefs – indeed, she admits that her
11 children have previously been vaccinated. Lucas merely alleges that she believes that "failure to
12 further vaccinate should not impact public school access." (*Id.*, at p. 14:1-8.)
13 The other five plaintiffs make no mention of religion and merely allege purported
14 philosophical and conscientious objections. Plaintiff Buck claims "[h]er philosophy on immunity
15 is that natural immunity is safest." (SAC, at p. 13:5-6.) Plaintiff Housen wants her daughter "to
16 live natural, vaccine-free, organic, and vegetarian." (*Ibid.*, at p. 14:10-11.) Plaintiff Serge
17 Eustache wants to keep "our freedom of choice in the matter of vaccination." (*Id.*, at pp. 15:1).
18 Plaintiff Trishe Eustache "believes that health is best maintained by adhering to an organic diet,
19 high in raw foods, as well as exercise, routine cleansing, and detox." (*Id.*, at p. 15:10-12.)
20 Plaintiff Jeneen "believes that a holistic and organic lifestyle is best for all." (*Id.*, at p. 15:26-27.)
21 Similar to the plaintiffs here, the plaintiffs in *Hanzel v. Arter* (S.D. Ohio 1985) 625 F.
22 Supp. 1259, objected to the immunization of their children on the basis of their belief in "a body
23 of thought which teaches that injection of foreign substances into the body is of no benefit and
24 can only be harmful." (*Id.,* 625 F. Supp. at p. 1260.) The *Hanzel* court disagreed, stating "[a]s
25 made clear by the Supreme Court in *Wisconsin v. Yoder,* philosophical beliefs do not receive the
26 same deference in our legal system as do religious beliefs, even when the aspirations flowing
27 from each such set of beliefs coincide." (*Id.*, at p. 1265; see also *Friedman v. Southern California*
28 *Permanente Medical Group* (2002) 102 Cal.App.4th 39 ["While veganism compels plaintiff to

1 live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious,
2 philosophy"]; *Syska v. Montgomery County Bd. of Ed.* (Md. Ct. Spec. App. 1980) 45 Md.App.
3 626, 632 ["[A]ppellant's objections to the immunization program . . . are based on her own
4 subjective evaluation of and rejection of the benefits to the public safety and to her children
5 derived therefrom. Her beliefs . . . are philosophical and personal rather than religious."].)[2]

6 "A way of life, however virtuous and admirable, may not be interposed as a barrier to
7 reasonable state regulation of education if it is based on purely secular considerations; to have the
8 protection of the Religion Clauses, the claims must be rooted in religious belief." (*Yoder, supra*,
9 406 U.S. at p. 215.) That plaintiffs are entitled to their personal beliefs is without question. But
10 these personal beliefs are not protected under the Free Exercise Clause. Nor are these personal
11 beliefs a legitimate restraint on the State's authority to protect the public from the spread of
12 communicable diseases.

13 **B. SB 277 Is Rationally Related to a Legitimate Interest.**

14 Even if plaintiffs' objections could be characterized as religious, rather than personal
15 subjective beliefs, plaintiffs' argument that strict scrutiny is the applicable standard of review for
16 their claims is wrong. (SAC, at p. 18:1-2.) "[A] law that is neutral and of general applicability
17 need not be justified by a compelling governmental interest even if the law has the incidental
18 effect of burdening a particular religious practice." (*Church of the Lukumi Babalu Aye, Inc. v.*
19 *City of Hialeah* (1993) 508 U.S. 520, 531.) SB 277 is neutral and of general applicability; it
20 applies to all children in day care, public and private schools. (See Health & Saf. Code, § 120325
21 et seq.) Thus, rational basis review is the correct level of scrutiny.

22 "[T]he rational-basis standard . . . employs a relatively relaxed standard." (*Massachusetts*
23 *Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 314.) A law is upheld "so long as it bears a
24 rational relation to some legitimate end." (*Romer v. Evans* (1996) 517 U.S. 620, 631.) "[C]ourts
25

26 [2] Plaintiff Brown also alleges that SB 277 violates her family's privacy rights. (FAC, at p. 13:27-28.) In *Hanzel, supra*, the court held that a statute mandating vaccination for school
27 admission did not violate privacy rights, because "the immunization decision is not encompassed within the right of privacy." (*Hanzel, supra*, 625 F.Supp. at p. 1263.)
28

1 are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit
2 between means and ends." (*Heller v. Doe by Doe* (1993) 509 U.S. 312, 321.)
3 The U.S. Supreme Court, the California Supreme Court, and numerous other federal and
4 state courts have uniformly held that state immunization laws serve a rational, if not a compelling,
5 state interest in protecting the public from the spread of communicable diseases. This interest
6 was recognized by the U.S. Supreme Court in *Jacobson* 110 years ago and is consistently
7 affirmed today. (*See, e.g., Phillips, supra*, 775 F.3d at 542.)
8 SB 277 is rationally related to a legitimate state interest of protecting the public from the
9 spread of debilitating, and potentially fatal, diseases, as its legislative history confirms: "Vaccine
10 coverage at the community level is vitally important for people too young to receive
11 immunizations and [for] those unable to receive immunizations due to medical reasons." (RJN,
12 Exh. 3, Sen. Jud. Com., Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 6.) "[W]hen
13 belief exemptions to vaccination guidelines are permitted, vaccination rates decrease." (*Id.*, Exh.
14 2, at p. 5.) "Given the highly contagious nature of [these] diseases . . . vaccination rates of up to
15 95% are necessary to preserve herd immunity and prevent future outbreaks." (*Id.*, Exh. 3 at p. 5.)
16 Hence, plaintiffs' claims fail as a matter of law because the Legislature's removal of the
17 personal beliefs exemption in SB 277 is rationally related to a legitimate, if not a compelling,
18 state interest in protecting the health and safety of public school students and the general public.[3]
19 **III. SB 277 DOES NOT VIOLATE THE RIGHT TO AN EDUCATION.**
20 Plaintiffs wrongly assert that SB 277 violates the right to education under article IX,
21 section 5 of the California Constitution. (SAC, at pp. 20-22.) To the contrary, the statute
22 operates to *protect* children's access to education by ensuring that it is not impaired by the
23 proliferation of otherwise preventable diseases.
24
25 [3] Plaintiffs' allegations that vaccinations are ineffective and unsafe, and contain aborted
fetal cells, are demonstrably false and improper, and are addressed in defendant's concurrently-
26 filed motion to strike. Indeed, as requested by defendant in her concurrently-filed Request for
Judicial Notice, the Court, respectfully, should take judicial notice that the protection of school
27 children against crippling and deadly diseases by vaccinations is done effectively and safely, and
that such protection and safety are matters of common knowledge.
28

1 The California Constitution provides that the "Legislature shall provide for a system of
2 common schools by which a free school shall be kept up and supported." (Cal. Const., art. IX, §
3 5.) In *French v. Davidson, supra*, the California Supreme Court expressly held that the State's
4 mandatory school vaccination statute "in no way interferes with the right of the child to attend
5 school, provided the child complies with its provisions." (*Id.*, 143 Cal. at p. 662.) Similarly, in a
6 case cited extensively in *Jacobson*, the New York Court of Appeal in *Viemeister v. White* (1904)
7 179 N.Y. 235, 72 N.E. 97, expressly held that New York's mandatory school vaccination statute
8 did not violate that state's constitutional right to a free public education, which is virtually
9 identical to that contained in California's constitution. (*Id.*, 179 N.Y. at p. 238 ["[t]he right to
10 attend the public schools of this state is necessarily subject to some restrictions and limitations in
11 the interest of the public health"].)

12 In asserting their claim, plaintiffs improperly conflate their children's right to a free public
13 education with plaintiffs' corresponding parental obligations under the Education Code to ensure
14 that their children are properly vaccinated, and that they attend school. The Education Code
15 requires all parents to ensure that their children are vaccinated in accordance with the Health and
16 Safety Code. (Ed. Code, § 48216.) In turn, parents face penalties and contempt charges in the
17 event they do not properly enroll their children in school. (Ed. Code, § 48216.) It is to these
18 parental obligations that SB 277 is directed, not to their children's right to an education.

19 To the contrary, plaintiffs' decisions to not vaccinate their children and thereby withhold
20 their children from the school classroom are personal decisions that they, alone, are making, and
21 do not involve any state action that infringes on the right to a free public education.

22 **A. SB 277 Withstands Strict Scrutiny.**

23 Even if SB 277 arguably infringes on children's right to an education (and it does not), the
24 statute survives plaintiffs' constitutional challenge.

25 In holding that "education is a fundamental interest," the California Supreme Court has
26 applied strict scrutiny review to laws affecting the right to education. (*Serrano v. Priest* (1976)
27 18 Cal.3d 728, 766, *supplemented* (1977) 20 Cal.3d 25.) Under strict scrutiny review, the State
28 "bears the burden of establishing . . . that it has a [c]ompelling interest which justifies the law."

1 (*Serrano v. Priest* (1971) 5 Cal.3d 584, 597.) If so, the State must demonstrate the law "is
2 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means'
3 for effectuating its objectives." (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411
4 U.S. 1, 17.)

5 As discussed in detail above, *Jacobson* and its progeny have unequivocally held that
6 immunization laws are justified because they serve a compelling state interest in protecting public
7 health and safety. (See, e.g., *Workman v. Mingo County Sch., supra,* 419 F. App'x at pp. 353-54
8 ("the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling
9 interest"]; *Sherr v. Northport-East Northport Union Free School Dist.* (E.D.N.Y. 1987) 672 F.
10 Supp. at p. 88 [holding there is a "compelling interest . . . in fighting the spread of contagious
11 diseases through mandatory inoculation programs"].)

12 Plaintiffs are unable to cite to a single case where a court has held that there is no
13 compelling interest in protecting the public from the spread of communicable diseases through
14 vaccination.

15 Furthermore, SB 277 is narrowly tailored to serve this compelling interest. It does not
16 mandate vaccination for all contagious diseases, but only those that the Legislature determined
17 are "very serious" and that "pose very real health risks to children." (See Rich Decl., Exh. 2 at p.
18 4.) Indeed, SB 277 only eliminates the personal belief exemption as to the ten specific vaccines
19 presently enumerated in the statute. (Health & Saf. Code, § 120338.) It also contains appropriate
20 but limited exemptions for children with medical conditions for whom vaccinations were
21 medically determined to be unsafe, and children who are homeschooled or enrolled in
22 independent study programs. (Health & Saf. Code, § 120335, subd. (f).) SB 277 also provides an
23 exception related to students who attend individualized education programs. (*Id.*, at subd. (h).)

24 **B. SB 277 Promotes Children's Right to Education.**

25 In enacting SB 277, the Legislature recognized that "[s]afe schools are a precondition to
26 education." (RJN, Exh. 3 at 6.) SB 277 does not violate the right to education; to the contrary, it
27 benefits and supports safe access to education for all school children by ensuring that the exercise
28 of the right to education is not impaired by the transmission of serious or potentially fatal

1 diseases. (See also Cal. Const., art. I, § 28(7) ("the People find and declare that the right to
2 public safety extends to public and private primary, elementary, junior high, and senior high
3 school, . . . where students and staff have the right to be safe and secure in their persons").

4 Plaintiffs acknowledge that "society has a compelling interest in affording children an
5 opportunity to attend school." (SAC, at p. 9:4-6, citing *Serrano, supra*, 5 Cal.3d at p. 606.) Their
6 acknowledgment, however, is made without consideration of the rights of the millions of school
7 children and their parents who rely on mandatory vaccinations to ensure that their right to an
8 education is not threatened by the spread of potentially fatal communicable diseases.

9 Indeed, the U.S. Supreme Court has long recognized that the institutional interest of
10 schools, as well the rights of the student body at large, often hold sway over the rights of
11 individual students. "For their own good and that of their classmates, public school children are
12 routinely required to submit to various physical examinations, and to be vaccinated against
13 various diseases." (*Vernonia School District 47J v. Acton, supra,* 515 U.S. 646 [noting with
14 approval that "all 50 States required public school students to be vaccinated against diphtheria,
15 measles, rubella, and polio," and that "[p]articularly with regard to medical examinations and
16 procedures, therefore, 'students within the school environment have a lesser expectation of
17 privacy than members of the population generally'"].)

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

21 **IV. PLAINTIFF'S EQUAL PROTECTION AND DUE PROCESS CLAIMS ARE WITHOUT MERIT**

22 **A. Plaintiffs Fail to Plead a Valid Equal Protection Claim**

23 Plaintiffs' claim under the Equal Protection Clause hinges on their assertion, made without
24 any supporting legal authority, that "[s]chools must treat all students the same regardless of
25 whether they are vaccinated." (SAC, at p. 23:10-11.)

26 Plaintiffs' attempt to construct a vaccination-based distinction to substantiate alleged equal
27 protection violations is unavailing. SB 277 is neutral on its face. It does not discriminate on the
28 basis of race, national origin, wealth or age. The Legislature established a system of vaccination

1 requirements that follows national recommendations and schedules for children and adolescents.
2 That vaccination schedule dictates when children should receive which vaccines.

3 Even if this Court were to entertain plaintiffs' attempts to create a new classification, SB
4 277 survives both rational basis and strict scrutiny review. The rational basis standard of review
5 is "the basic and conventional standard for reviewing economic and social welfare legislation in
6 which there is a 'discrimination' or differentiation of treatment between classes or individuals."
7 (See *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 645 (*Vergara*).) Strict scrutiny
8 is employed only when the "distinction drawn by a statute rests upon a so-called 'suspect
9 classification' or impinges upon a fundamental right." (*Vergara, supra*, 246 Cal.App.4th at p.
10 645.) However, even when a statutory classification impinges a fundamental right (and does not
11 involve a suspect classification), strict scrutiny will not apply "if the effect on the fundamental
12 right is merely 'incidental,' 'marginal,' or 'minimal.'" (*Id.*, citing *Fair Political Practices Com.*
13 *v. Superior Court* (1979) 25 Cal.3d 33, 47.)

14 Even in those cases when strict scrutiny applies, however, the state law is deemed justified
15 if the state has "a compelling interest which justifies the law [and] that the distinctions drawn by
16 the law are necessary to further its purpose." (*Vergara, supra*, 246 Cal.App.4th at p. 645.)

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

21 **B. SB 277's Medical Exemption Is Not Unconstitutionally Vague.**

22 Due process claims under California and federal law are analyzed under the same
23 principles. (See, e.g., *Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 486.) A statute is void
24 for vagueness only "where a person of 'common intelligence must necessarily guess at its
25 meaning and differ as to its application.'" (*Davidovich v. City of San Diego* (S.D. Cal. Dec. 1,
26 2011) Case No. 11 cv 2675 WQH-NLS, 2011 U.S. Dist. LEXIS 138319, *17, citing *Connally v.*
27 *General Const. Co.* (1926) 269 U.S. 385, 391.) Moreover, "the Constitution does not require
28 impossible standards; all that is required is that the language conveys sufficiently definite warning

as to the proscribed conduct when measured by common understanding and practices." (*Id.*, citing *Roth v. United States* (1957) 354 U.S. 476, 491.)

Plaintiffs admit in their pleading that the plain language of the medical exemption requires "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, including, but not limited to, family medical history, for which the physician does not recommend immunization." (SAC, p. 34:5-17, quoting Health & Saf. Code, § 120370, subd. (a).)

On its face, SB 277 sufficiently conveys what is required for a medical exemption under SB 277.[4]

In sum, defendant's demurrer should be sustained without leave to amend because plaintiffs' claims run counter to over a century of jurisprudence in the U.S. and California Supreme Courts, and the rest of the nation – jurisprudence that (1) has consistently affirmed the states' legitimate and compelling interest to require school children to be vaccinated to protect their health; (2) rests upon the overwhelming great weight of scientific evidence confirming the transformative public health benefits of vaccination; and (3) ensures their children's right to a safe and healthy environment for their education.

CONCLUSION

Because this is plaintiffs' third attempt at a cognizable pleading, for the foregoing reasons defendant Karen Smith respectfully requests that the Court sustain its demurrer to plaintiffs' SAC without leave to amend.

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[4] Plaintiffs also cannot prevail on their Fourth Cause of Action, in which they assert that vaccinations constitute "medical experiments" prohibited by Health and Safety Code section 24174. (SAC, at pp. 27-32.) That statute is limited to medical procedures "in or upon a human subject in the practice or research of medicine *in a manner not reasonably related to maintaining or improving the health of the subject or otherwise directly benefiting the subject.*" (Health & Saf. Code, § 24174 (italics added); see also *Perez v. Nidek Co.* (9th Cir. 2013) 711 F.3d 1109 [holding that the informed consent provisions of section 24174 apply only to procedures done in furtherance of pure research, and not to therapeutic treatments].) Beyond dispute, vaccinations are designed to maintain or improve the health of the subject, by preventing the transmission of communicable, and potentially disabling or fatal, diseases.

Dated: August 22, 2016

Respectfully Submitted,

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

JONATHAN E. RICH
Deputy Attorney General

Attorneys for Defendant Karen Smith, in her capacity as the Director of the California Department of Public Health

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DECLARATION OF JONATHAN E. RICH

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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 defendant Karen Smith (defendant) in this case. As such, I have personal knowledge of the facts stated herein:

2. Pursuant to Code of Civil Procedure section 430.41, at various dates and times throughout the months of June, July and August 2016, the parties met and conferred by telephone concerning defendant's objections raised in this demurrer. The parties were unable to reach an agreement on defendant's objections.

3. Specifically, on June 9, 2016, the parties' counsel met and conferred in detail concerning defendant's objections and anticipated demurrer to the allegations and causes of action raised in plaintiffs' initial Complaint, in which plaintiffs named the State of California as the only identified defendant.

4. On June 28, 2016, before the State of California responded to the initial Complaint, plaintiffs filed a First Amended Complaint and a new Summons, in which plaintiffs replaced the State of California with a new defendant, Karen Smith in her capacity as the Director of the California Department of Public Health. Plaintiffs asserted five causes of action against defendant Smith in their First Amended Complaint: (1) violation of the First Amendment (Free Exercise Clause), (2) violation of the California Constitution, article 9, section 5, (3) violation of the Equal Protection Clause of the Fourteenth Amendment, (4) violation of California Health and Safety Code section 24175, subdivision (a); and (5) violation of the Due Process Clause of the Fourteenth Amendment.

5. Defendant timely filed her notice of removal on July 12, 2016, pursuant to 28 U.S.C. § 1446(b).

6. Thereafter, on July 18, 2016, in anticipation of defendant's motion to dismiss the First Amended Complaint in federal court under Rule 12(b) of the Federal Rules of Civil Procedure,

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Tamara Buck, et al. v. The State of California**
Case No.: **BC617766**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 22, 2016, I served the attached **DEFENDANT KAREN SMITH'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JONATHAN E. RICH** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

T. Matthew Phillips, Esq.
Attorney at Law
10040 West Cheyenne Avenue, #170
Las Vegas, NV 89129

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 August 22, 2016, at Los Angeles, California.

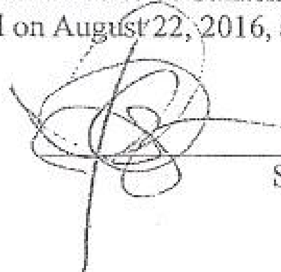
Yesenia Caro	
Declarant	Signature

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EXHIBIT 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRAVIS MIDDLETON, et al., Plaintiffs, v. RICHARD PAN, et al., Defendants.	NO. CV 16-5224-SVW (AGR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The court submits this Report and Recommendation to the Honorable Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the magistrate judge recommends that the Defendants' motions to dismiss be granted and that the First Amended Complaint be dismissed with leave to amend under the terms and conditions set forth below.

1 I.

2 **SUMMARY OF PROCEEDINGS**

3 On August 10, 2016, the remaining Plaintiffs[1] Travis Middleton, Eric Durak,
4 Jade Baxter, Julianna Pearce, Candyce Estave, Denise Michele Derusha,
5 Melissa Christou, Andrea Lewis, Rachil Vincent, Don Demanlevesde, Jessica
6 Haas, Paige Murphy, Lori Strantz, Anwanur Gielow, Lisa Ostendorf, JuliaAnne
7 Whitney, Alice Tropper, Bret Nielsen, Brent Haas, Muriel Rosensweet and Marina
8 Read, proceeding *pro se*, filed a First Amended Complaint ("FAC") against the
9 following remaining two categories of defendants:[2] (1) Legislative Defendants
10 Richard Pan, Win-Li Wang, Martin Jeffrey "Marty" Block, Gerald A. "Jerry" Hill,
11 Holly Mitchell, Catharine Baker, Christina Garcia, Adrin Nazarian, Jim Wood, Ben
12 Allen, Kevin de Leon, Hannah-Beth Jackson, Jeff Stone, Richard Bloom, Bill
13 Quirk, Lorena Gonzalez, Reginald Jones-Sawyer, Isadore Hall, Mark Leno, Bob
14 Wieckowski, David Chiu, Evan Low, Anthony Rendon, Jim Beall, Robert
15 Hertzberg, Mike McGuire, Lois Wolk, Bruce Wolk, Jim Cooper and Mark Stone;
16 and (2) State Defendants Governor Brown, Ann Gust and the State of California.
17 On October 26, 2016, the Legislative Defendants and State Defendants
18 filed motions to dismiss the FAC. (Dkt. No. 103, 105.) On November 16, 2016,
19

20 [1] Five plaintiffs have filed notices of voluntary dismissal. (Dkt. No. 20
21 (Andy Taft); Dkt. No. 71 (Jackie Kozak); Dkt. No. 73 (Pam Corner); Dkt. No. 74 (Christie Macias); Dkt. No. 93 (Jodie Tiserrand).)

22 [2] Plaintiffs filed notices of voluntary dismissal without prejudice of the
23 following defendants: Kevin McCarthy and Judy McCarthy (Dkt. No. 102). Plaintiffs have been unable to serve the following defendants: Dan Baker (Dkt.
24 No. 22), Robbie Black (Dkt. No. 23), Cindy Block (Dkt. No. 24), Candace Chen (Dkt. No. 25), Kristen Cooper(Dkt. No. 26), George Eskin (Dkt. No. 27), Douglas
25 Jackson (Dkt. No. 28), Annie Lam (Dkt. No. 29), Sue Lemke (Dkt. No. 30), Erika McGuire (Dkt. No. 31), Diana Nazarian (Dkt. No. 32), Laura L. Quirk (Dkt. No.
26 33), Kathy Stone (Dkt. No. 34), Jane Wood (Dkt. No. 35), Pat or Pak Lafkas (Dkt. No. 92), Robbie Block (Dkt. No. 120) and Sky Hill (Dkt. No. 121). Plaintiffs
27 previously indicated that they do not intend to pursue defendants who are the subject of "Non Service Reports" filed by Plaintiffs. (Dkt. No. 96.)
28 It is recommended that the court dismiss all of these defendants without prejudice.

Plaintiffs filed documents entitled "Notice to the Court to Obey Its Oath to the Constitution for the United States of America" and "Plaintiffs' Refusal for Fraud Pursuant to Fed. R. Civ. P. 1(b), UCC 1-103.6."[3] (Dkt. Nos. 110, 112.) On November 29, 2016, the State Defendants filed a reply (Dkt. No. 118) and the Legislative Defendants filed a joinder (Dkt. No. 119). The matter came on for hearing on December 13, 2016 and was taken under submission.

II.

FIRST AMENDED COMPLAINT

Plaintiffs object to California's Senate Bill ("SB") 277, which repealed the personal belief exemption ("PBE") to California's immunization requirements for children entering public and private educational and child care facilities in California.

A. SB 277

In enacting SB 277, the California Legislature declared that its intent was to provide a "means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases:

(1) Diphtheria.

(2) Hepatitis B.

(3) Haemophilus infuenzae type b.

(4) Measles.

(5) Mumps.

(6) Pertussis (whooping cough).

(7) Poliomyelitis.

(8) Rubella.

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[3] Plaintiffs also filed a Verified Petition for Writ of Mandamus. (Dkt. No. 111.) The Petition was denied by the District Judge on November 22, 2016. (Dkt. No. 116.)

(9) Tetanus.

(10)Varicella (chickenpox).

Cal. Health & Safety Code § 120325(a)(1)-(10). Under the current version of the law, a student who had a PBE on file before January 1, 2016 is allowed enrollment until the student entrolls in the next "grade span" as defined in the statute. Cal. Health & Safety Code § 120335(g). First time enrollees and students entering the 7th Grade are no longer allowed admission unless they have complied with the vaccination requirements. *Id.* § 120335(g)(3).

SB 277 provides for three exemptions to the vaccination requirements: (1) students who have on file "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, including, but not limited to, family medical history, for which the physician does not recommend immunization," *Id.* § 120370(a); (2) students who are in a home-based private school or enrolled in an independent study program and do not receive classroom-based instruction, *Id.* § 120335(f); and (3) students who qualify for an individualized education program, *Id.* § 120335(h).

The FAC attaches Governor Brown's transmittal dated June 30, 2015. (Exh. A to FAC.)

B. Allegations

Plaintiffs allege that immunizations contain a "toxic list of ingredients" including aluminum, formaldehyde and mercury thimerosol. (FAC at 5, 8-10.) According to Plaintiffs, Defendants have removed "the ability of parents to invoke their natural rights of self-preservation and or opt out of this criminal assault on their children's lives by being coerced, intimidated, and forced into compliance under this dark cloud of medical and political tyranny." (*Id.* at 12.)

Plaintiffs allege nine claims: (1) violation of RICO (Racketeering Influenced and Corrupt Organizations Act) claim under 18 U.S.C. § 1961, against all Defendants; (2) violation of RICO under 18 U.S.C. § 1962(a), (d), against all defendants; (3) conspiracy to promote the sale and use of biological weapons on California citizens in violation of 18 U.S.C. § 175, against the Legislative Defendants; (4) conspiracy to promote the sale and use of chemical weapons on California citizens in violation of 18 U.S.C. § 178, against Legislative Defendants; (5) violation of 18 U.S.C. § 241 against Legislative Defendants; (6) violation of 18 U.S.C. § 242 against Legislative Defendants; (7) violation of 42 U.S.C. § 1983 against Legislative Defendants; (8) violation of 42 U.S.C. § 1986 against Legislative Defendants; and (9) intentional infliction of emotional distress against all Defendants. Plaintiffs seek damages, declaratory judgment and an injunction against enforcement of SB 277.

III.

DISCUSSION

A. Fed. R. Civ. P. 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (citations omitted).

[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the

1 elements of a cause of action, supported by mere conclusory statements, do not
2 suffice. *Id.* at 678; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "In
3 sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual
4 content,' and reasonable inferences from that content, must be plausibly
5 suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*,
6 572 F.3d 962, 969 (9th Cir. 2009) (citation omitted).

7 As a general rule, the court must limit its review to the operative complaint.
8 *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Materials that
9 are the subject of judicial notice and materials submitted as part of the complaint
10 are not "outside" the complaint and may be considered. *Id.*; *Hal Roach Studios,*
11 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
12 Even if documents are not physically attached to the complaint, they may be
13 considered if their authenticity is uncontested and the complaint necessarily relies
14 on them. *Lee,* 250 F.3d at 688.

15 A *pro se* complaint is to be liberally construed. *Erickson v. Pardus*, 551
16 U.S. 89, 94 (2007) (per curiam). Before dismissing a *pro se* civil rights complaint
17 for failure to state a claim, the plaintiff should be given a statement of the
18 complaint's deficiencies and an opportunity to cure them unless it is clear the
19 deficiencies cannot be cured by amendment. *Eldridge v. Block*, 832 F.2d 1132,
20 1135-36 (9th Cir. 1987). Nevertheless, "[u]nder Ninth Circuit case law, district
21 courts are only required to grant leave to amend if a complaint can possibly be
22 saved. Courts are not required to grant leave to amend if a complaint lacks merit
23 entirely." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

24 **B. Legislative Immunity**

25 The claims in the FAC clearly seek to impose liability on the Legislative
26 Defendants and Governor Brown for introducing, sponsoring, voting for,
27 persuading others to vote for or signing into law SB 277.

28

"[F]ederal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (§ 1983 action); *Chappell v. Robbins*, 73 F.3d 918, 920, 924 (9th Cir. 1996) (civil RICO). Legislative immunity is parallel to the immunity provided by the Speech or Debate Clause in the United States Constitution.[4] *Id.* at 920.

"Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. Allegations that legislators had improper purposes or motives do not destroy legislative immunity. *Id.*; *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Chappell*, 73 F.3d at 921 (legislative immunity applies despite allegation that legislator sponsored and pushed legislation because he received bribes).

The acts of introducing, voting for, persuading colleagues to vote for, and signing legislation constitutes legislative activities entitled to absolute immunity. *Bogan*, 523 U.S. at 46, 55-56 (immunity applies regardless of whether officials are members of legislative or executive branch); *Community House, Inc. v. City of Boise*, 623 F.3d 945, 959-60 (9th Cir. 2010); *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 750 (9th Cir. 2003) (applying legislative immunity to passage of legislation deregulating energy market); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 476 (9th Cir. 1998); *Chappell*, 73 F.3d at 921 (sponsoring and pushing for legislation are "quintessential legislative acts"); *see also Gravel v. United States*, 408 U.S. 606, 625 (1972) (legislative acts encompass "deliberative and communicative processes by which Members participate in . . . the consideration and passage or rejection of proposed legislation"; immunity extends to legislative aides and assistants).

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[4] The Speech or Debate Clause of the United States Constitution provides in pertinent part that senators and representatives are privileged "for any Speech or Debate in either House." Art. I, § 6, Cl. 1; *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) ("The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session.").

Legislative immunity applies to actions for damages and injunctive relief. *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732-33 (1980); *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012) (§ 1983).

Legislative immunity also applies to California state law claims. *Id.* at 1138-39 (claims based on California Constitution).

It is recommended that Plaintiffs' claims against all individual Defendants be dismissed. Plaintiffs' injury results from passage of the legislation. Plaintiffs cannot a state a claim upon which relief could be granted because the conduct that caused their injuries is legislative and therefore immune. *See Chappell*, 73 F.3d at 921.

C. Eleventh Amendment Immunity

The Eleventh Amendment bars suits in federal court for damages or injunctive relief against California. *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013).

Plaintiffs also name Governor Brown. In his official capacity, the Eleventh Amendment bars suits for damages. Under certain circumstances, prospective injunctive relief for federal claims is available against a state official under the *Ex Parte Young* exception.[5] *Id.* at 943. The state official ""must have some connection with the enforcement of the act""" that "'must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.'" *Id.* (citations omitted).

---

[5] The *Ex Parte Young* exception does not apply to state claims such as Plaintiffs' ninth claim for intentional infliction of emotional distress.

1 Governor Brown is entitled to Eleventh Amendment immunity because his
2 only connection to SB 277 is his general duty to enforce California law.[6]
3 Defendant Gust, as First Lady, is not alleged to have any connection to the
4 enforcement of SB 277.[7]

5 **D. Leave to Amend the Complaint**

6 The FAC seeks an injunction prohibiting enforcement of SB 277 against
7 Plaintiffs or their offspring. (FAC at 66.) This relief is not available against the
8 named defendants for the reasons discussed above.

9 It is recommended that the complaint be dismissed against the named
10 defendant with prejudice. The question is whether leave to amend is appropriate
11 to give Plaintiffs an opportunity to name the correct defendant(s) and attempt to
12 state viable claims. As discussed above, a *pro se* plaintiff generally should be
13 given a statement of the complaint's deficiencies and an opportunity to cure them
14 by amendment. *Eldridge*, 832 F.2d at 1135-36. Defendants correctly respond
15 that a court need not grant leave to amend when amendment would be futile.
16 *Lopez*, 203 F.3d at 1129. Nevertheless, it is recommended that the court grant
17 leave to amend. In the event Plaintiffs choose to file a First Amended Complaint,
18 the court provides the following guidance.

19 Plaintiffs allege that SB 277 is unconstitutional. (FAC at 57 ¶ 14.) In an
20 action in the Southern District of California, a group of plaintiffs, represented by
21 counsel, challenged SB 277 on constitutional grounds. *Whitlow v. State of*
22

23 [6] Plaintiffs' citation to *Scheuer v. Rhodes* is not to the contrary. In that
24 case, the claims were based on the Governor's deployment of the Ohio National Guard on the Kent State campus. 416 U.S. at 235-36. Plaintiffs did not seek
25 prospective injunctive relief. *Id.* at 237-38. As to claims for damages, a state official in his or her individual capacity may argue for qualified immunity. *Brown*
26 *v. Oregon Dep't of Corr.*, 751 F.3d 983, 989 (9th Cir. 2014).

27 [7] To the extent Gust is not shielded by Eleventh Amendment immunity, her alleged acts in support of SB 277 would be shielded by the *Noerr* doctrine and
28 the First Amendment. *See Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000) (lobbying of government protected by *Noerr* doctrine).

California, CV 16-1715 DMS.[8] The court issued a well reasoned order denying Plaintiffs' motion for a preliminary injunction and the case was subsequently dismissed by the plaintiffs. *Whitlow v. State of California*, 2016 WL 6495512 (S.D. Cal. Aug. 26, 2016). This court finds the reasoning in *Whitlow* persuasive.

1. Constitutional Challenges

In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), the Supreme Court addressed a contention that a statute requiring vaccination was unconstitutional on the grounds of "injurious or dangerous effects of vaccination." *Id.* at 23. Jacobson contended that vaccination quite often causes serious and permanent injury to the person vaccinated and sometimes results in death; that vaccine matter is dangerous; and that he had contracted a disease produced by vaccination when he was a child, as did his son. *Id.* at 36. Jacobson argued 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 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 rejected that argument:

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in 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. On any other basis organized society could not exist with safety to its members.

[8] The defendants in the *Whitlow* case included the Superintendent of the Department of Education in his official capacity, and the director of the Department of Public Health in her official capacity.

> Society based on the rule that each one is a law onto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Id. The Court concluded that Jacobson could not claim exemption because of his beliefs about the dangers of vaccination. *Id.* at 37. The Court acknowledged that a state may exercise its power "in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression." *Id.* at 38. However, "we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death. No such case is here presented. It is the case of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination." *Id.* at 39.

The Supreme Court addressed a mandatory vaccination law that prevented children from attending school without a certificate of vaccination. *Zucht v. King*, 260 U.S. 174, 175 (1922). The Court noted *Jacobson* had established that "it is within the police power of a State to provide for compulsory vaccination." *Id.* at 176. The Court rejected challenges based on due process. A State could delegate to municipal authorities "to determine under what conditions health regulations shall become operative" and a municipal authority could vest in officials "broad discretion in matters affecting the application and enforcement of a health law." *Id.* Moreover, "in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing." *Id.* at 177.

1 In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court
2 addressed a defense to a conviction for violation of state child labor laws. The
3 Court noted that a parent "cannot claim freedom from compulsory vaccination for
4 the child more than for himself on religious grounds. The right to practice religion
5 freely does not include liberty to expose the community or the child to
6 communicable disease or the latter to ill health or death." *Id.* at 166-67 (footnotes
7 omitted); *see also Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir.)
8 (per curiam), *cert. denied*, 136 S. Ct. 104 (2015) (due process, free exercise of
9 religion and equal protection); *Workman v. Mingo Cnty. Bd. of Ed.*, 419 Fed.
10 Appx. 348, 356 (4th Cir. 2011) (free exercise of religion, equal protection and
11 substantive due process).
12 The California Supreme Court rejected a constitutional challenge to a
13 mandatory vaccination law that excluded children who were not vaccinated from
14 enrolling in school. *Abeel v. Clark*, 84 Cal. 226 (1890). The Court concluded that
15 vaccination is within the scope of a state's police power. *Id.* at 230.
16 The court in *Whitlow* summarized these decisions and noted:
17 > [A]lthough the decision to eliminate the PBE, which had been
18 > in existence for decades, raises principled and spirited
19 > religious and conscientious objections by genuinely caring
20 > parents and concerned citizens, the wisdom of the
21 > Legislature's decision is not for this Court to decide.
22 > *Jacobson*, 197 U.S. at 30 [] (stating the existence of medical
23 > opinion attaching little or no value to vaccination as a means
24 > of preventing spread of smallpox was of no moment; it was
25 > for the Legislature, and not the court, to determine the most
26 > effective method of protecting the public against disease).
27 > The objections and concerns with SB 277 were presented to
28 > the Legislature, and it decided to proceed with the law over

1 those objections. Whether those objections were valid is not
2 for this Court to decide. Rather, the Court is concerned only
3 with whether the law is constitutional.
4 *Whitlow*, 2016 WL 6495512 at *4.
5 **a. Free Exercise of Religion**
6 Plaintiffs in this case argue that the First Amendment protects both
7 religious and personal freedoms. (FAC at 60 ¶ 181.) The *Whitlow* court properly
8 held that personal beliefs, as distinguished from religious beliefs, are not
9 protected by the First Amendment. *Wisconsin v. Yoder*, 406 U.S. 205, 215
10 (1972) ("A way of life, however virtuous and admirable, may not be interposed as
11 a barrier to reasonable state regulation of education if it is based on purely
12 secular consideration; to have the protection of the Religion Clauses, the claims
13 must be rooted in religious belief.").
14 Plaintiffs allege that SB 277 requires them "to waive their rights under their
15 deeply held spiritual beliefs and training to comply with SB 277." (FAC at 60 ¶
16 181.) The court assumes that this allegation refers to a religious belief. As
17 discussed above, the Supreme Court has stated that "[t]he right to practice
18 religion freely does not include liberty to expose the community or the child to
19 communicable disease or the latter to ill health or death." *Prince*, 321 U.S. at
20 166-67 (footnote omitted). The Second Circuit has held that "mandatory
21 vaccination as a condition for admission to school does not violate the Free
22 Exercise Clause." *Phillips*, 775 F.3d at 543. Although New York law allows an
23 exemption for parents with genuine and sincere religious beliefs, the *Phillips* court
24 acknowledged that, in this respect, "New York law goes beyond what the
25 Constitution requires." *Id.* The unpublished Fourth Circuit case on which *Phillips*
26 relied held that "the West Virginia statute requiring vaccinations as a condition of
27 admission to school does not unconstitutionally infringe Workman's right to free
28 exercise." *Workman*, 419 Fed. Appx. at 353-54 (collecting cases).

1 Plaintiffs also assert a claim under the California Constitution as a basis for
2 relief under § 1983. (FAC at 60-61 ¶ 182.) To state a claim under § 1983, a
3 plaintiff must allege a violation of "a right secured by the Constitution or laws of
4 the United States." *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.
5 2006). Moreover, the California Supreme Court reaffirmed *Abeel* in *French v.*
6 *Davidson*, 143 Cal. 658, 661-62 (1904) (affirming denial of writ of mandate to
7 compel enrollment of children to schools without vaccinations).

8 **b. Fourth Amendment**

9 The Fourth Amendment protects "the right of the people to be secure in
10 their persons, houses, papers, and effects, against unreasonable searches and
11 seizures." It is not clear how Plaintiffs believe SB 277 violates the Fourth
12 Amendment. To the extent Plaintiffs allege violation of a right to medical privacy,
13 the Supreme Court has held that: "A student's privacy interest is limited in a
14 public school environment where the State is responsible for maintaining
15 discipline, health, and safety. Schoolchildren are routinely required to submit to
16 physical examinations and vaccinations against disease." *Bd. of Ed. v. Earls*, 536
17 U.S. 822, 830-31 (2002) (upholding school drug testing policy requiring students
18 who participate in competitive extracurricular activities to submit to drug testing).

19 **c. Due Process**

20 Plaintiffs allege that SB 277 requires them to submit to "unwanted
21 injections of poisons" that constitute "felony assault with intent to do serious
22 harm, including but not limited to maiming and or killing the individual" without
23 due process of law. (FAC at 61-62 ¶ 185.) Plaintiffs assert a right of self
24 defense. (*Id.* at 62 ¶ 186.) As discussed above, Plaintiffs' due process claims
25 are foreclosed by *Zucht*. 260 U.S. at 176 (rejecting due process challenge to
26 exclusion from schools of children who did not have certificates and refused to
27 submit to vaccination); *Phillips*, 775 F.3d at 542-43 (rejecting substantive due
28 process challenge; "Plaintiffs argue that a growing body of scientific evidence

1 demonstrates that vaccines cause more harm to society than good, but as
2 *Jacobson* made clear, that is a determination for the legislature, not the individual
3 objectors."); *Workman*, 419 Fed. Appx. at 355-56 (rejecting substantive due
4 process challenge to mandatory vaccination statute); *Whitlow*, 2016 WL 6495512
5 at *7 (rejecting substantive due process challenge to SB 277).

6 **d. Equal Protection**

7 Plaintiffs allege that SB 277 discriminates against their children "due to the
8 status of their vaccination schedules not their state of health at the time of
9 entering school." (FAC at 63 ¶ 188.) It appears Plaintiffs are attempting to state
10 an equal protection claim.

11 The Equal Protection Clause "is essentially a direction that all persons
12 similarly situated should be treated alike." *City of Cleburne v. Cleburne Living*
13 *Center*, 473 U.S. 432, 439 (1985). Children who are vaccinated are not similarly
14 situated to children who are not vaccinated. *Whitlow*, 2016 WL 6495512 at *6;
15 *see Wright v. Incline Village Gen. Improvement Dist.*, 665 F.3d 1128, 1140 (9th
16 Cir. 2011) ("Evidence of different treatment of unlike groups does not support an
17 equal protection claim."). Plaintiffs have not alleged that children with PBEs are a
18 suspect class and or that the classifications burden a fundamental right. *San*
19 *Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education .
20 . . is not among the rights afforded explicit protection under our Federal
21 Constitution. Nor do we find any basis for saying it is implicitly so protected.").
22 Thus, the classifications are subject to rational basis review. *Whitlow*, 2016 WL
23 6495512 at *6. "[T]here is a rational basis for treating children with PBEs
24 differently from other children: The former are not completely vaccinated, if at all,
25 while the latter are fully vaccinated. Allowing the latter to attend school and
26 excluding the former is rationally related to the State's interest in protecting public
27 health and safety." *Id.*
28

1 **e. 42 U.S.C. § 1986**

2 Section 1986 imposes liability on a person who knows of an impending
3 violation of § 1985 but neglects or refuses to prevent it. *Karim-Panahi*, 839 F.2d
4 at 626. "A claim can be stated under section 1986 only if the complaint contains
5 a valid claim under section 1985." *Id.*; *see also McCalden v. California Library*
6 *Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990) (same). Plaintiffs' failure to allege a
7 claim under § 1985 is fatal to any claim under § 1986.

8 **f. Other Amendments**

9 Plaintiffs cannot state a claim under the Ninth Amendment, which "has not
10 been interpreted as independently securing any constitutional rights for purposes
11 of making out a constitutional violation." *Schowengerdt v. United States*, 944
12 F.2d 483, 490 (9th Cir. 1991); *see also San Diego Cnty. Gun Rights Comm. v.*
13 *Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996).

14 Plaintiffs allege no facts supporting a claim of involuntary servitude under
15 the Thirteenth Amendment.

16 **g. Criminal Statutes**

17 Plaintiffs assert violations of various criminal statutes. 18 U.S.C. §§ 175,
18 178, 241, 242. Private individuals may not prosecute others for alleged crimes.
19 As explained succinctly by the First Circuit:

> 20 Not only are we unaware of any authority for permitting a private
> 21 individual to initiate a criminal prosecution in his own name in a United
> 22 States District Court, but also to sanction such a procedure would be
> 23 to provide a means to circumvent the legal safeguards provided for
> 24 persons accused of crime, such as arrest by an officer on probable
> 25 cause or pursuant to a warrant, prompt presentment for preliminary
> 26 examination by a United States Commissioner or other officer
> 27 empowered to commit persons charged with offenses against the
> 28 United States, and, in this case, indictment by a grand jury.

1 *Keenan v. McGrath*, 328 F2d. 610, 611 (1st Cir. 1964).

2 The Supreme Court has not inferred a private right of action from the
3 existence of a criminal statute. *Central Bank of Denver v. First Interstate Bank of*
4 *Denver*, 511 U.S. 164, 190 (1994) ("we have not suggested that a private right of
5 action exists for all injuries caused by violations of criminal prohibitions").

6 When, as here, the criminal statutes do not expressly provide for a private
7 right of action, the court examines four factors: (1) whether the plaintiff is one of
8 the class for whose especial benefit the statute was enacted; (2) whether
9 Congress explicitly or implicitly indicated an intent to create a private remedy; (3)
10 whether an implied private right of action would be consistent with the statute's
11 underlying purposes; and (4) whether an implied cause of action would be in an
12 area traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

13 The "central inquiry remains whether Congress intended to create, either
14 expressly or by implication, a private cause of action." *Touche Ross v.*
15 *Redington*, 442 U.S. 560, 575 (1979). If Congress did not intend to create a
16 private right of action, a court need not consider the other factors. *Logan v. U.S.*
17 *Bank NA*, 722 F.3d 1163, 1170-71 (9th Cir. 2013). Plaintiffs have not argued any
18 basis for finding a private right of action under these criminal statutes. *Aldabe v.*
19 *Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam) (no private right of
20 action under §§ 241-42).

21 **h. Civil RICO**

22 Plaintiffs allege RICO claims under 18 U.S.C. § 1961 and § 1962(a),
23 (d) based on enactment of SB 277. (FAC at 47 ¶¶ 140-41.) As explained above,
24 Plaintiffs' claims are barred by legislative immunity.

25 The court is hard pressed to see any way in which Plaintiffs' challenge
26 to SB 277 could plausibly fall within RICO. Section 1961 contains only the
27 definitions. In the event Plaintiffs attempt to amend the RICO claims, Plaintiffs
28 are advised that they must allege injury to their business or property by reason of

1 a violation of § 1962. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97
2 (1985). The FAC does not contain allegations of injury to Plaintiffs' business or
3 property.

4 Section 1962(a) provides that it is unlawful "for any person who has
5 received any income derived, directly or indirectly, from a pattern of racketeering
6 activity . . . to use or invest . . . any part of such income . . . in . . . operation of . . .
7 any enterprise." The FAC contains no such allegations. Moreover, under §
8 1962(a), Plaintiffs must "allege facts tending to show that he or she was injured
9 by the use or investment of racketeering income." *Nugget Hydroelectric, L.P. v.*
10 *Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992). Injury from alleged
11 racketeering acts that generated the income is not sufficient. *Id.*

12 Absent allegations of a viable RICO violation, Plaintiffs' allegations of a
13 conspiracy to violate RICO under § 1962(d) also fail to state a claim. *Sanford v.*
14 *MemberWorks*, 625 F.3d 550, 559 (9th Cir. 2010).

15 IV.

16 **RECOMMENDATION**

17 For the reasons discussed above, it is recommended that the district court
18 issue an order (1) accepting this Report's findings and recommendation; (2)
19 dismissing without prejudice under Fed. R. Civ. P. 4(m) the following defendants:
20 Dan Baker, Robbie Black, Robbie Block, Cindy Block, Candace Chen, Kristen
21 Cooper, George Eskin, Sky Hill, Douglas Jackson, Annie Lam, Sue Lemke, Kevin
22 McCarthy, Judy McCarthy, Erika McGuire, Diana Nazarian, Laura L. Quirk, Kathy
23 Stone, Jane Wood and Pat or Pak Lafkas; (3) granting Defendants' motion to
24 dismiss the First Amended Complaint; (4) dismissing the First Amended
25
26
27
28

1 Complaint against the remaining defendants with prejudice; and (5) granting with
2 leave to amend within 30 days after the District Judge's Order.
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4

5 DATED: December 15, 2016

ALICIA G. ROSENBERG
6 United States Magistrate Judge
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EXHIBIT 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **ED CV 16-2410-DMG (DTBx)** Date January 12, 2017

Title ***Torrey-Love, et al. v. State of California Department of Education, et al.*** Page 1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS - ORDER RE DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [29, 31]

On November 21, 2016, Plaintiffs Devon Torrey-Love, S.L., Courtney Barrow, A.B., Margaret Sargent, M.S., W.S., and A Voice for Choice, Inc. ("VFC"), filed a Complaint against various State of California entities and officials seeking to challenge sections 120325, 120335, 120338, 120370, and 120375 of California's Health and Safety Code (collectively referred to as "Section 120325 *et seq.*"), which repealed the personal belief exemption to the state's requirement that children entering the California school system be immunized for certain communicable childhood diseases. [Doc. # 1.] Plaintiffs allege that in repealing the personal belief exemption, Defendants violated (1) their substantive due process rights under the Fourteenth Amendment; (2) the Equal Protection Clause of the Fourteenth Amendment; and (3) 42 U.S.C. § 1983.

On December 8, 2016, Plaintiffs filed a motion for preliminary injunction. [Doc. # 29.] On December 15, 2016, Defendants filed a motion to dismiss. ("MTD") [Doc. # 31.] For the reasons discussed below, the Court **GRANTS** Defendants' motion to dismiss and **DENIES** Plaintiffs' preliminary injunction motion as moot.

I.
FACTUAL BACKGROUND

On June 30, 2015, the California legislature enacted Senate Bill 277 ("SB277"). In enacting this law, the legislature declared its intent to provide a "means for the eventual achievement of total immunization" for school-aged children against childhood diseases like measles, Hepatitis B, and pertussis (whooping cough), among others. Cal. Health & Safety Code § 120325(a). SB277 did not create new vaccination requirements. Instead, it repealed the

personal belief exemption, which had allowed parents to opt their child out of the vaccination requirements on the basis of their personal beliefs. *See id.* § 120365 (repealed by SB277).

SB277 went into effect on January 1, 2016. *Id.* at § 120335(g)(1). Since July 1, 2016, Section 120325 *et seq.* has prohibited California schools from unconditionally admitting students who have not been immunized in accordance with the state's vaccination requirements. *Id.* at § 120335(g)(3).

Plaintiffs are children who wish to attend, or parents who wish their child to attend, California K-12 public schools without having to comply with the State's vaccination requirements. Compl. ¶ 37. During the fall of 2016, Plaintiff parents were denied, or knew they would be denied, the ability to enroll their children in public school because their children did not receive the required immunizations under Section 120325 *et seq.* *Id.* ¶ 38. According to Plaintiffs, Section 120325 *et seq.* forces them to choose between their right to a public education and their right to refuse medical treatment. *Id.* ¶ 42.

II.
JUDICIAL NOTICE

Federal Rule of Evidence 201 permits a court to take judicial notice of facts not subject to reasonable dispute and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 824, n.3 (9th Cir. 2011) (citing Fed. R. Evid. 201(b)). "A court may take judicial notice of 'matters of public record.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (internal citation omitted). Defendants have submitted a request for judicial notice of the following documents in support of their motion to dismiss:

1. California Senate Committee on Education, Analysis of Senate Bill No. 277 (2014–15 Reg. Sess.), from the legislative history of Senate Bill No. 277;

2. California Assembly Committee on Health, Analysis of Senate Bill No. 277 (2014–15 Reg. Sess.), from the legislative history of Senate Bill No. 277;

3. California Senate Judiciary Committee, Analysis of Senate Bill No. 277 (2014–15 Reg. Sess.), from the legislative history of Senate Bill No. 277;

4. U.S. District Court for the Southern District of California's August 26, 2016 Order in the matter entitled *Whitlow, et al. v. Department of Education et al.*, Case No. 3:16-cv-01715-DMS-BGS; and

5. Los Angeles County Superior Court's October 21,2016 Order in the matter entitled *Buck v. State of California*, Case No. BC617766.

RJN, Declaration of Jonathan E. Rich, Exs. 1, 2, 3, 4, 5 [Doc. # 32]. Because they are public records, the Court **GRANTS** Defendants' request and takes judicial notice of Exhibits 1 though 5.

III.
LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, a complaint must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a pleading need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Id.* (citing *Twombly*, 550 U.S. at 555). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id.*

Should a court dismiss certain claims, "[l]eave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)).

IV.
DISCUSSION

A. Threshold Matters

1. Standing

As an initial matter, this Court must determine whether the plaintiff organization VFC has standing to sue Defendants. Because Defendants mount a facial attack , the Court will consider only the allegations in the Complaint pertaining to standing. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335–1336 (11th Cir. 2013) ("Facial attacks to subject matter jurisdiction require the court merely to look and see if the plaintiff's complaint has sufficiently alleged a basis of subject matter jurisdiction" unlike factual challenges where "a district court can 'consider extrinsic evidence such as deposition testimony and affidavits.'"); MTD at 7 n.2.

An organization "has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000). Individual members can establish standing by demonstrating: (1) an "injury in fact" (2) that is fairly traceable to the challenged conduct of the defendants and (3) the injury is likely to be redressed by a favorable court decision. *Natural Res. Def. Council v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (citing *Friends of the Earth*, 528 U.S. at 181). Moreover, the interests sought to be protected must arguably be within "the zone of interests" protected by the constitutional guarantee in question. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970).

Here, Plaintiffs' allegations are insufficient to establish VFC's standing. For instance, Plaintiffs fail to allege facts demonstrating why VFC's members would have standing to sue in their own right. It is simply not enough to allege the organization's "focus" and Plaintiff's allegation that it has members who have been "unconstitutionally impacted" by Section 120325 *et seq.* is conclusory. *See* Compl. ¶¶ 9, 18. Plaintiffs also fail to allege why individual VFC members' participation in the lawsuit is unnecessary to the resolution of the claims.

As such, the Court finds that VFC has not alleged sufficient facts to confer standing to sue.[1]

2. Eleventh Amendment

Defendants argue that claims against the Governor, the State Attorney General, and the stage agencies named as defendants in this case are barred by the Eleventh Amendment and the doctrine of sovereign immunity. Plaintiffs agree. Opp. at 12 n.9 [Doc. # 44].

As such, the Court **GRANTS** Defendants' motion to dismiss all claims against the California Department of Education, the California Board of Education, the California Department of Public Health, Governor Edmund Brown, and Attorney General Kamala Harris with prejudice. Thus, only two Defendants remain: Department of Education Superintendent Tom Torlakson and Department of Public Health Director Karen Smith, both of whom are sued in their official capacity. These two defendants may be sued on the federal claims for prospective injunctive relief, but they are immune from suit in federal court on state law claims. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100–106 (1984).

B. Substantive Due Process

The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. State action that "neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights" will violate substantive due process only if the action is "not rationally related to a legitimate governmental purpose." *Matsuda v. City and County of Honolulu*, 512 F.3d 1148, 1155-56 (9th Cir. 2008). When the alleged state action infringes on a fundamental right, however, strict scrutiny applies and the state must establish that the law in question is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Here, Plaintiffs contend that Section 120325 *et seq.* infringes upon their (1) right to refuse medical treatment, i.e., immunization and (2) right to a public education.

[1] Plaintiffs attach a declaration from the founder and president of VFC in their opposition that appears to cure the standing defect. But for the purposes of this facial attack on VFC's standing, the Court will only consider factual allegations in the operative pleading. *See supra*.

1. Right to Refuse Immunization

In considering whether an asserted right is a fundamental right for the purposes of a substantive-due-process analysis, courts must (1) determine whether the right is "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty"; and (2) provide a "careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation marks and citations omitted).

Here, contrary to Plaintiffs' allegations, the issue is not simply one of whether children have a fundamental right to refuse medical treatment or whether parents have a "fundamental right to control what types of medications are put into [their] child's body." Compl. ¶¶ 1, 42. Rather, the linchpin of Plaintiffs' due process claim is whether the right to refuse immunization before attending a public school that requires immunization is a fundamental right subject to heightened protection. "The Nation's history, legal traditions, and practices answer with a resounding 'no.'" *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) (upholding student immunization statute) (citing cases). The Supreme Court long ago declared that a state can require children to be vaccinated as a precondition for school attendance without running afoul of the Due Process Clause in the interests of maintaining the public health and safety. *Zucht v. King*, 260 U.S. 174, 176 (1922) ("it is within the police power of a state to provide for compulsory vaccination" of public school children); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27–29 (1905) (upholding compulsory vaccination law, stating that a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members . . . and not permit the interests of the many to be subordinated to the wishes or convenience of the few"). Though Plaintiffs assail these cases for their age, they have not been overturned and are still good law and binding upon this Court.[2]

[2] Plaintiffs cite to the Ninth Circuit's decision in *Coons v. Lew*, where the court acknowledged an individual's "fundamental rights to determine one's own medical treatment . . . and to refuse unwanted medical treatment, . . . and . . . a fundamental liberty interest in medical autonomy." 762 F.3d 891, 899 (9th Cir. 2014) (citations omitted). *Coons* is distinguishable. It does not involve mandatory vaccinations in the school setting, where the Court must weigh the interests of the few against the health interests of the broader community. Indeed, the Ninth Circuit has recently stressed that parents' "constitutionally protected right to make decisions regarding the care, custody, and control of their children . . . is not without limitations . . . . In the health arena, states may require the compulsory vaccination of children." *Pickup v. Brown*, 740 F.3d 1208, 1235 (9th Cir. 2014) (internal quotation marks and citations omitted).

Accordingly, to the extent that Plaintiffs' due process claim is premised on the right to refuse immunization, the Court **GRANTS** Defendants' motion to dismiss because Section 120325 *et seq.* was enacted to protect public health and safety and satisfies the rational basis review standard.

2. Right to Public Education

Federal law does not recognize the right to public education as a fundamental right. *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 35 (1973). Thus, Plaintiffs' claim that section 120325 *et seq.* violated their right to public education is subject only to rational basis review.[3] As discussed above, Defendants have satisfied this standard. *See supra*, section IV.B.1.

The Court therefore **GRANTS** Defendants' motion to dismiss Plaintiffs' due process claim to the extent it is based on the right to a public education.

B. Equal Protection

To establish a claim under the Equal Protection Clause of the Fourteenth Amendment, Plaintiffs must show that Defendants "acted in a discriminatory manner and that the discrimination was intentional." *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). Plaintiffs have not identified a fundamental right under federal law that has been impinged by Section 120325 *et seq.* Nor is immunization status a suspect class for equal protection purposes. Nevertheless, the constitutional requirement of equal protection "protects not only groups, but individuals who would constitute a 'class of one.'" *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (quoting *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*)), *overruled on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). "Where . . . state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a 'class of one' equal protection claim by demonstrating that it 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Id.* (quoting *Olech*, 528 U.S. at 564).

Here, the statute in question is a neutral law of general applicability and therefore Plaintiffs have not been discriminated against or treated differently from others similarly situated. In fact, it is Plaintiffs who seek to be treated differently due to their personal beliefs.

[3] While Plaintiffs refer to their right to a public education under state law throughout their Complaint, the Court's analysis of Plaintiffs' *federal* due process claim must be based on *federal* law.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

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Thus, the "class of one" analysis does not apply. Accordingly, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' equal protection claim.

D. Section 1983 Claim

Plaintiffs' section 1983 claim is premised on their Fourteenth Amendment allegations. Because Plaintiffs' substantive due process and equal protection claims fail, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' section 1983 claim.

V.
CONCLUSION

In light of the foregoing, Defendants' motion to dismiss Plaintiffs' Complaint is **GRANTED** with leave to amend, except as to Defendants the California Department of Education, the California Board of Education, the California Department of Public Health, Governor Edmund Brown, and Attorney General Kamala Harris. Because the operative complaint has been dismissed, the Court **DENIES** Plaintiffs' preliminary injunction motion as moot.

Plaintiff shall file any First Amended Complaint within 21 days from the date of this Order, and Defendants shall file their response within 21 days after the service and filing of an amended complaint. The January 13, 2017 hearing on the motions is **VACATED**.

IT IS SO ORDERED.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Love, Devon Torrey, et al. v. The State of California, et al.**

Case No.: **SCV0039311**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On May 2, 2017, I served the attached **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THEIR DEMURRER TO PLAINTIFFS' COMPLAINT; DECLARATION OF JONATHAN E. RICH** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT**, addressed as follows:

Brad A. Hakala, Esq.
Jeffrey B. Compangano, Esq.
Ryan N. Ostrowski, Esq.
The Hakala Law Group, P.C.
One World Trade Center, Suite 1870
Long Beach, California 90831

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 May 2, 2017, at Los Angeles, California.

Yesenia Caro	
Declarant	Signature

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