

COMMISSION ON STATE MANDATES

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May 8, 2013

Mr. Arthur M. Palkowitz
Stutz Artiano Shinoff & Holtz
2488 Historic Decatur Road, Suite 200
San Diego, CA 92106

And Affected State Agencies and Interested Parties (See Mailing List)

Re: **Final Staff Analysis and Proposed Statement of Decision,
and Notice of Hearing**
Immunization Records - Pertussis, 11-TC-02
Health & Safety Code Sections 120325 and 120335
Statutes 2010, Chapter 434 (AB 354)
Twin Rivers Unified School District, Claimant

Dear Mr. Palkowitz:

The final staff analysis and proposed statement of decision for the above-named matter is enclosed.

Hearing

This matter is set for hearing on **Friday, May 24, 2013**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey
Executive Director

ITEM 4
TEST CLAIM
FINAL STAFF ANALYSIS
AND
PROPOSED STATEMENT OF DECISION

Health and Safety Code Sections 120325 and 120335

Statutes 2010, Chapter 434 (AB 354)

Immunization Records - Pertussis

11-TC-02

Twin Rivers Unified School District, Claimant

Attached is the proposed statement of decision for this matter. This proposed statement of decision also functions as the final staff analysis, as required by section 1183.07 of the Commission on State Mandates' (Commission) regulations.

EXECUTIVE SUMMARY

Overview

This test claim seeks reimbursement for costs incurred by school districts for activities pertaining to a new pertussis (whooping cough) immunization requirement for adolescent students. Claimant, Twin Rivers Unified School District (claimant) seeks reimbursement for the costs of the following activities:

- Informing parents and students of pertussis immunization requirements;
- Training staff regarding immunization requirements;
- Reviewing and maintaining immunization records;
- Excluding students from school if they have not been fully vaccinated against pertussis; and
- Related activities.

The Health and Safety Code sections pled in this test claim were intended to provide a “means for the eventual achievement of total immunization of appropriate age groups against...” diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis, poliomyelitis,

rubella, tetanus, and varicella.¹ The 2010 amendments were “needed to allow [the Department of Public Health (DPH)] to require pertussis booster vaccines for students prior to the start of the seventh grade.”² Accordingly, section 120335 was amended to prohibit school districts from unconditionally admitting or advancing pupils to the 7th through 12th grade levels during the 2011-2012 fiscal year, and to the 7th grade for every school year beginning in fiscal year 2012-2013, unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil’s age.³

In 2011, DPH adopted emergency regulations implementing the test claim statute at issue here.⁴ These regulations became effective on June 30, 2011, three months before the filing of this test claim, but were not pled or identified in the test claim filing.

Procedural History

Claimant filed the test claim on September 26, 2011. Based on the September 26, 2011 filing date, the potential period of reimbursement for this test claim begins on July 1, 2010. On October 5, 2011, Commission staff deemed the filing complete and numbered it 11-TC-02. No state agencies or interested parties have submitted comments on the test claim. On February 13, 2013, Commission staff issued the draft staff analysis and proposed statement of decision. On March 6, 2013, the claimant submitted a request for an extension of time to comment on the draft analysis and for a continuance of the hearing of this matter, both of which were granted for good cause. On March 28, 2013, the claimant submitted comments expressing disagreement with the conclusion in the draft staff analysis that the Commission does not have jurisdiction to make findings on regulations that were adopted to implement the 2010 test claim statute since those regulations were not pled in the test claim. Alternatively, the claimant requests that the test claim be amended to include the regulations on the theory that Government Code section 17554 permits the parties to agree to waive the application of any procedural requirement.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies, including school districts, are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class

¹ Health and Safety Code section 120325.

² Assembly Third Reading Bill Analysis, Assembly Bill 354, as amended April 28, 2009.

³ See Health and Safety Code section 120335 operative until July 1, 2012; see also Health and Safety Code section 120335 operative July 1, 2012.

⁴ California Code of Regulations, Title 17 sections 6020, *et seq.* (Register 2011, No. 26, eff. 6/30/11).

actions: all members of the class have the opportunity to participate in the test claim process, and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Claims

The following chart provides a summary of the claims and issues raised and staff's recommendation.

Subject	Description	Staff Recommendation
<u>Health and Safety Code section 120325, as amended by Statutes 2010, chapter 434.</u>	Health and Safety Code section 120325 recites the Legislature's intent to provide a means for the eventual achievement of total immunization of certain childhood diseases, including pertussis. Statutes 2010, chapter 434 amended section 120325 to add the American Academy of Family Physicians to the list of entities whose recommendations DPH should consider when determining whether to update the list of required vaccinations contained in sections 120325 through 120375. The test claim statute did not otherwise amend section 120325.	<i>Deny</i> – the plain language of section 120325 does not impose any state-mandated activities on school districts.
<u>Health and Safety Code section 120335, as amended by Statutes 2010, chapter 434.</u>	Commencing July 1, 2011, Health and Safety Code section 120335(d) prohibits a school district from unconditionally admitting or advancing any pupil to the 7th through 12th grade levels of any private or secondary school unless the pupil has been fully immunized against pertussis. Beginning July 1, 2012, Health and Safety Code section 120335(d) prohibits a school district from unconditionally admitting or advancing any pupil to the 7th grade unless the pupil has been fully immunized against pertussis.	<i>Deny</i> – the plain language of section 120335(d), contains a prohibition, but does not impose any state-mandated activities on school districts.
California Code of Regulations, Title 17, sections 6020,	These regulations were adopted by DPH to implement the 2010 test claim statute.	<i>The Commission does not have jurisdiction over</i>

6035, 6040, 6051, 6055, 6065, 6070, and 6075. (Register 2011, No. 26, eff. 6/30/11)	The claimant requests that the test claim be amended to include these regulations.	<i>these regulations.</i> These regulations were not properly pled in the test claim, and the claimant’s request to include them in the claim now is not timely.
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Analysis

Staff recommends that the Commission deny this test claim. Health and Safety Code section 120325 is a statement of legislative intent, and does not require school districts to perform any activities. Health and Safety Code section 120335, as amended and replaced by Statutes 2010, chapter 434, adds subdivision (d), which prohibits school districts from “unconditionally admit[ing] or advance[ing]” pupils to grades 7 through 12 unless they are fully immunized against pertussis. Section 120335(d), itself, does not direct or obligate school districts to engage in any activity or task. Although the activities identified by the claimant are addressed in emergency regulations adopted by DPH in June 2011, those regulations were not identified or specifically pled in the test claim as required by Government Code sections 17521, 17551, and 17553. The Commission does not have jurisdiction to make findings on regulations that are not properly pled in a test claim.

In addition, the claimant can no longer amend the test claim to add the DPH regulations. Pursuant to Government Code section 17557(e), a test claim may not be amended once it has been set for hearing. This matter was set for hearing when the draft analysis was issued on February 13, 2013. Moreover, the DPH regulations at issue became effective on June 30, 2011, more than 12 months from the date of the claimant’s March 28, 2013 comments on the draft analysis that requested the amendment. Allowing claimant to add the DPH regulations to the test claim now would improperly allow claimant to circumvent the 1-year statute of limitations for filing test claims.⁵ These time limits in the Government Code establish the Commission’s jurisdiction over test claim amendments, which cannot be waived by an agreement of the parties as suggested by the claimant. Government Code section 17554 allows all parties to a claim to waive *procedural* requirements, including procedural requirements relating to consolidating existing claims or for shortening time periods established in the law. However, section 17554 cannot be used to waive *jurisdictional* requirements.⁶

⁵ Government Code section 17551(c).

⁶ *Harrington v. Superior Court* (1924) 194 Cal. 185, 188; *Western States Petroleum Ass’n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1006.

Conclusion and Staff Recommendation

Accordingly, staff concludes that the test claim statute, which amended and replaced Health and Safety Code sections 120325 and 120335, does not impose a state-mandated program on school districts.

Staff further finds that the Commission does not have jurisdiction to make any findings on California Code of Regulations, title 17, sections 6020, 6035, 6040, 6051, 6055, 6065, 6070, and 6075. (Register 2011, No. 26, eff. 6/30/11).

Staff recommends that the Commission adopt the proposed statement of decision to deny this test claim.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Health and Safety Code Sections 120325 and 120335, as amended and replaced by Statutes 2010, Chapter 434 (AB 354)

Filed on September 26, 2011

By the Twin Rivers Unified School District,
Claimant.

Case No.: 11-TC-02

Immunization Records - Pertussis

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT
CODE SECTION 17500 ET SEQ.;
TITLE 2, CALIFORNIA CODE OF
REGULATIONS, DIVISION 2,
CHAPTER 2.5, ARTICLE 7.

(Adopted May 24, 2013)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 24, 2013. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

This test claim addresses a 2010 test claim statute that responded to a recent pertussis (whooping cough) epidemic in California. The test claim statute prohibits schools from admitting or advancing pupils to the 7th through 12th grade levels during the 2011-2012 fiscal year and, beginning in fiscal year 2012-2013, pupils entering or advancing to the 7th grade level, unless the pupil is fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age. Under prior law, immunization against pertussis was, and continues to be required prior to the *first* admission to school, typically in kindergarten.

The Commission denies this test claim. Health and Safety Code section 120325 is a statement of legislative intent, and does not require school districts to perform any activities. Health and Safety Code section 120335, as amended by Statutes 2010, chapter 434, adds subdivision (d), which prohibits school districts from “unconditionally admit[ing] or advance[ing]” pupils to grades 7 through 12 unless they are fully immunized against pertussis. Section 120335(d), itself, does not direct or obligate school districts to engage in any activity or task. Although the activities identified by the claimant are addressed in emergency regulations adopted by the Department of Public Health (DPH) in June 2011, those regulations have not been pled. The Commission does not have jurisdiction to make findings on regulations that are not properly pled in a test claim. In addition, the claimant’s request to amend the test claim to include the regulations has not been timely filed.

Accordingly, the Commission finds that the test claim statute, which amended and replaced Health and Safety Code sections 120325 and 120335, does not impose a state-mandated program on school districts. The Commission further finds that it does not have jurisdiction to make any findings on California Code of Regulations, title 17, sections 6020, 6035, 6040, 6051, 6055, 6065, 6070, and 6075. (Register 2011, No. 26, eff. 6/30/11). Accordingly, this test claim is denied.

COMMISSION FINDINGS

I. Chronology

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|------------|--|
| 09/26/2011 | Claimant, Twin Rivers Unified School District, filed the test claim with the Commission. |
| 10/05/2011 | Commission staff deemed the filing complete and issued a notice of complete test claim filing and schedule for comments. |
| 02/13/2013 | Commission staff issued the draft staff analysis and proposed statement of decision, setting the matter for the April 19, 2013 hearing. |
| 03/06/2013 | Claimant requested an extension of time to file comments and a postponement of the hearing. |
| 03/08/2013 | Claimant’s request for an extension of time and postponement of hearing was granted and this matter was set for hearing on May 24, 2013. |
| 03/28/2013 | Claimant submitted written comments on the draft staff analysis. |

II. Background

A. Test Claim Statute

This test claim seeks reimbursement for costs incurred by the Twin Rivers Unified School District (claimant) for activities pertaining to immunization against pertussis (whooping cough) for adolescent students. Amendments of sections 120325 and 120335 were “needed to allow [the Department of Public Health] to require pertussis booster vaccines for students prior to the

start of the seventh grade.”⁷ Pertussis is a highly communicable disease that lasts for many weeks and can be fatal in infants. Children, adolescents, and adults alike become susceptible and can contract pertussis when immunity from infection by the vaccine wanes. Therefore, a booster shot against pertussis is recommended in early adolescence to reduce pertussis infection rates.⁸ After the test claim statute was enacted, DPH adopted emergency regulations relating to pertussis vaccination and reported the following information in its statement of reasons:

California is in the midst of a pertussis epidemic. In 2010, there were 10 infant deaths and more than 9,000 cases of pertussis reported to the Department; the most cases reported in one year in California since 1947. The infants who died were too young to begin their immunizations and were most likely infected by adolescents and adults with pertussis disease. Routine childhood immunization against pertussis does not provide lasting immunity. The first pertussis-containing vaccines for adolescents and adults were licensed in 2005 as a combination tetanus toxoid, reduced diphtheria toxoid, and acellular pertussis vaccine (Tdap). Tdap vaccine is recommended by ACIP, AAP, and AAFP to protect adolescents and adults against pertussis. Based on recent survey data, many adolescents have not received a recommended pertussis booster. The 7th through 12th grade pupils are at highest risk of waning pertussis immunity and without intervention will continue to prolong the pertussis epidemic.⁹

i. Health and Safety Code Section 120325

Health and Safety Code section 120325 was originally enacted in 1977 and contains the Legislature’s statement of intent regarding Health and Safety Code sections 120325 through 120375. Section 120325 states that sections 120325 through 120375 were enacted to provide “[a] means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases: [diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox)].” The Legislature also intended the law to provide that:

- Persons required to be immunized be allowed to obtain immunization from whatever medical source they desire, subject only to the condition that the immunization be performed in accordance with the regulations of the DPH and that a record of the immunization is made in accordance with the regulations;
- Exemptions from immunization be available for medical reasons or because of personal beliefs; and that

⁷ Assembly Third Reading Bill Analysis, Assembly Bill 354, as amended April 28, 2009, p. 2.

⁸ *Id.* at pp. 2-3.

⁹ Exhibit B, DPH Initial Statement of Reasons for “School Immunization Requirements: Grades 7 through 12” dated May 19, 2011, pages 2 and 3 (internal citations omitted).

- Adequate records of immunization be kept so that health departments, schools, and other institutions, parents and guardians, and the persons immunized will be able to ascertain that a child is fully or only partially immunized, and that appropriate public agencies will be able to ascertain the immunization needs of groups of children in schools.¹⁰

The test claim statute did not alter the childhood diseases included in section 120325 or the Legislature's statement of intent contained in section 120325. The code section was amended, however, to add the American Academy of Family Physicians to the list of entities whose recommendations the Department of Public Health must consider when determining whether to update the list of required vaccinations contained in sections 120325 through 120375.

ii. Health and Safety Code Section 120335

Health and Safety Code section 120335 incorporates the list of childhood diseases contained in section 120325 and prohibits school districts from admitting students unless they are fully immunized.¹¹ The test claim statute did not alter the childhood diseases listed in section 120335. However, with respect to pertussis immunization, the test claim statute added subdivision (d) to section 120335, which prohibited school districts, during the period from July 1, 2011 until June 30, 2012, from admitting or advancing any student to the 7th through 12th grade levels unless the pupil was fully immunized, with appropriate boosters for the pupil's age. Subdivision (d) states:

Commencing July 1, 2011, the governing authority shall not unconditionally admit or advance any pupil to the 7th through 12th grade levels, inclusive, of any private or public elementary or secondary school unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age.¹²

Section 3 of the bill then replaced section 120325 with a new code section, effective July 1, 2012, to prohibit school districts from admitting or advancing any pupil to the 7th grade unless the pupil is fully immunized against pertussis, including all age appropriate boosters. Section 120325 subdivision (d) as of July 1, 2012 states:

The governing authority shall not unconditionally admit or advance any pupil to the 7th grade level of any private or public elementary or secondary school unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age.

Claimant has alleged that Health and Safety Code sections 120325 and 120335 have caused it to incur reimbursable costs to notify parents of the pertussis vaccination requirements for students

¹⁰ Health and Safety Code section 120325(b)(c)(d).

¹¹ Health and Safety Code section 120335(b).

¹² *Ibid.*

entering the 7th through 12th grades, to perform activities not required by prior law including training staff, notifying parents and students, and reviewing and keeping immunization records.

B. Prior Law and Prior Related Test Claim Decisions

1. Prior Law

Under the law immediately prior to the enactment of the test claim statute, Health and Safety Code section 120335(b) prohibited the “governing authority”¹³ of schools from unconditionally admitting a pupil to “...any public or private 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 the institution he or she has been fully immunized.” In determining whether a student is fully immunized, section 120335(b) further required that the following diseases be documented: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, and varicella.

The immunizing agents and age appropriate immunization requirements for each disease are specified by DPH, in consultation with the California Department of Education (CDE), pursuant to Health and Safety Code sections 120330 and 120335, and California Code of Regulations, title 17, sections 6020 *et seq.* (DPH regulations). These regulations lay out the process by which school districts are required to receive documentation that the student was fully immunized. Health and Safety Code section 120345 and section 6065 of the Title 17 regulations, for example, require that a written record be given to the person immunized by the physician or agency performing the immunization that includes the child’s name, birthdate, type of vaccine administered, the date the vaccine was administered, and the name of the physician or agency administering the vaccine. Under existing regulations, school districts are also required to record each student’s immunization information on a form supplied by DPH, which becomes part of each student’s mandatory pupil record. Pursuant to Health and Safety Code section 120375 and section 6070 of the Title 17 regulations, each student’s immunization record shall contain the child’s name, birthdate, date of unconditional or conditional admission, type of vaccine administered, the date the vaccine was administered, date and type of exemption, if any.

The immunizations required by Health and Safety Code sections 120325 *et seq.* may be obtained from any private or public source desired as long as the immunization is administered and records are made in accordance with regulations of DPH.¹⁴ In addition, pursuant to Health and Safety Code section 120365 and section 6051 of the Title 17 regulations, a parent or guardian may exercise the right to refuse required immunizations by asserting either a medical or personal belief exemption, which allows the student to be admitted unconditionally. A permanent

¹³ Health and Safety Code section 120335(a) defines “governing authority” as “the governing board of each school district or the authority of each other private or public institution responsible for the operation and control of the institution or the principal or administrator of each school or institution.”

¹⁴ Health and Safety Code section 120345.

medical exemption shall be granted upon the filing with the school a written statement from a licensed physician to the effect that the physical condition of the pupil or medical circumstances relating to the pupil are such that immunization is permanently not indicated.¹⁵ A personal beliefs exemption shall be granted upon the filing of a letter or affidavit from the pupil's parent or guardian or adult who has assumed responsibility for his or her care and custody in the case of a minor, or the person seeking admission if an emancipated minor, that such immunization is contrary to his or her beliefs.¹⁶

Any student who lacked documentation of all immunizations required by prior law, and did not have a permanent medical exemption or personal beliefs exemption to immunization, could be admitted *conditionally* under specified circumstances pursuant to section 6035 of the Title 17 regulations; for example if the student had a temporary medical exemption or was in the process of receiving doses of the required vaccines. However, schools are required to prohibit from further attendance any student admitted conditionally who fails to obtain the required immunizations within the 10 school days time limit set forth in the Title 17 regulations and is not otherwise exempted from immunization requirements.¹⁷ These requirements remain in the law.

2. Prior Test Claim SB 90-120: Immunization Records

Under test claim SB 90-120 regarding immunizations, Statutes of 1977, Chapter 1176, which added former Health and Safety Code section 3380, now renumbered as Health and Safety Code section 120325, required that persons under 18 years of age were immunized against poliomyelitis, measles, diphtheria, pertussis, and tetanus prior to unconditional first admission to a public or private elementary or secondary school, child care center, day nursery, nursery school, or development center. Regulations adopted to implement this act required school districts to maintain records of immunization of all school age children and to report periodically to the state on the immunization status of all new entrants into the schools. The Board of Control, as predecessor to the Commission, found that these requirements constituted a reimbursable state mandate, finding prior law did not require school districts to engage in record keeping, record review, parent notification, or reporting activities related to the specified pupil immunizations.

3. Prior Test Claim 98-TC-05: Immunization Records – Hepatitis B

A second test claim, 98-TC-05, regarding immunizations for Hepatitis B, sought reimbursement for costs incurred as a result of amendments to Health and Safety Code section 120335 and legislation amending other statutes and regulations adopted by DPH relating to monitoring, record keeping, reporting, and parent notification requirements, and enforcement of pupil

¹⁵ California Code of Regulations, title 17, section 6051(a); Health and Safety Code section 120370.

¹⁶ *Id.* at section 6051(b).

¹⁷ Health and Safety Code section 120375; California Code of Regulations, title 17, section 6055.

immunization requirements for Hepatitis B.¹⁸ The Commission found that, as amended, Health and Safety Code section 120335 and other related legislation and regulations imposed new requirements regarding immunizations for Hepatitis B, documentation and reporting of immunizations, mandatory pupil exclusion and parent notification requirements. The Commission found that these activities were not contained in prior law and thus constituted a new program or higher level of service and a reimbursable state mandate.

III. Position of Claimant and Interested Parties

A. Claimant's Position

Claimant alleges that the test claim statute constitutes a reimbursable state-mandated program or higher level of service within an existing program. Specifically, claimant requests reimbursement for the following activities, which it alleges must be done to comply with Health and Safety Code sections 120325 and 120335:

- (1) Informing parents/students of the immunization requirements regarding pertussis; developing procedures; training staff; obtaining, reviewing, and maintaining student immunization records; and contacting parents and legal guardians for non-compliance;
- (2) Periodically reporting to the state on the immunization status of all entrants into schools;
- (3) Requesting and reviewing lawful exemption or proof of immunization against pertussis from each pupil seeking admission to the school in the state for the first time;
- (4) Recording and maintaining in each pupil's permanent record the pupil's immunization or exemption from immunization against pertussis;
- (5) Requesting and reviewing lawful exemption or proof of immunization against pertussis from each pupil advancing to the seventh grade;
- (6) Periodically reviewing each pupil's immunization record until the pupil is fully immunized against pertussis;
- (7) Documenting vaccine doses on each pupil's immunization record as immunizations are administered;
- (8) Notifying parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunizations are not timely presented;

¹⁸ Test claim 98-TC-05 arose from amendments and additions to Education Code section 48216, Health and Safety Code sections 120325, 120335, 120340, and 120375, and California Code of Regulations, Title 17 sections 6020, 6035, 6040, 6055, 6065, 6070, and 6075.

- (9) Referring the parents or guardians to a physician, nurse, or county health department for review of immunization records and provision of required immunizations;
- (10) Excluding pupils from school attendance when written evidence of additional doses is not presented within ten days of parental notification; and
- (11) Collecting data and preparing reports annually on immunization status for the Department of Health Services, and preparing follow-up or additional reports upon request by county health departments and the state.

In comments submitted in response to the draft staff analysis, claimant objected to the conclusion that the DPH regulations implementing the test claim statute were not properly pled. Although claimant's comments admit that the activities listed above are set forth in the DPH regulations rather than the test claim statute, claimant asserts that the Commission has jurisdiction over the DPH regulations because the test claim noted that the Commission previously issued a decision regarding test claim 98-TC-05, which addressed, among other things, prior versions of the DPH regulations. Claimant further argues that the Commission has jurisdiction over the DPH regulations because the test claim statute specifically stated that DPH is authorized to adopt emergency regulations implementing the test claim statute. Although claimant did not discuss this emergency authorization to adopt regulations in the test claim, claimant believes that including a copy of the test claim statute which includes this emergency authorization is sufficient to meet the Commission's pleading requirements. Claimant further argues that it was not required to specifically cite to any regulations which claimant intended to plead as part of a test claim, nor was it required to attach copies of such regulations to the test claim.

The claimant alternatively requests that its test claim be amended to include the DPH regulations (Cal. Code Regs., tit. 17, §§ 6020, 6035, 6040, 6051, 6055, 6065, 6070, and 6075; Register 2011, No. 26, eff. 6/30/11) as part of the claim. Pursuant to Government Code section 17554, the claimant further requests that the Commission waive any "procedural requirement" allowing the proposed amendment to be timely filed as part of the original test claim filing.¹⁹

Claimant alleges that the activities listed above caused the claimant to incur \$25,000 in costs during the 2011-2012 fiscal year and will cause the claimant to incur \$25,000 in costs for each year thereafter. Claimant also alleges that the statewide cost estimate to all affected school districts to implement the test claim statutes will be \$6,000,000 per year.

B. Position of State Agencies and Interested Parties

No state agency or other interested party has filed a response to this test claim.

¹⁹ Government Code section 17554 states: "With the agreement of all parties to the claim, the commission may waive the application of any procedural requirement imposed by this chapter or pursuant to section 17553. The authority granted by this section includes the consolidation of claims and the shortening of time periods."

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:

- (1) Legislative mandates requested by the local agency affected.
- (2) Legislation defining a new crime or changing an existing definition of a crime.
- (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”²⁰ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”²¹

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.²²
2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.²³
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.²⁴

²⁰ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

²¹ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

²² *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, 874.

²³ *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.²⁵

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.²⁶ The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.²⁷ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”²⁸

A. Health and Safety Code Section 120325 Does Not Impose any State-Mandated Activities on School Districts.

Health and Safety Code section 120325 contains the Legislative intent with respect to childhood immunizations. The claimant pled section 120325 in its test claim and appears to suggest, although not directly, that section 120325 directs school districts to engage in a reimbursable state-mandated program or higher level of service relating to immunization against pertussis.²⁹ However, claimant’s written narrative and supporting declaration of Robert Roach, Mandate Analyst for the claimant, fail to specify what, if anything, section 120325 directs school districts to do.

The Commission finds that the plain language of section 120325 does not impose any specific activities on schools regarding immunizations against pertussis. Accordingly, Health and Safety Code section 120325, as amended by Statutes 2010, chapter 434, does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6.

²⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

²⁵ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

²⁶ *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

²⁷ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

²⁸ *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose*, *supra*].

²⁹ Exhibit A, test claim, dated September 22, 2011, section 4 (“TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED”), p. 1, and section 5, p. 6.

B. The Plain Language of Health and Safety Code Section 120335 Does Not Impose any State-Mandated Activities on School Districts

In 2010, the test claim statute added subdivision (d) to section 120335 for fiscal year 2011-2012 to state the following:

Commencing July 1, 2011, the governing authority shall not unconditionally admit or advance any pupil to the 7th through 12th grade levels, inclusive, of any private or public elementary or secondary school unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age. [Emphasis added.]

Statutes of 2010, Chapter 434, section 3 then repealed and replaced section 120335 subdivision (d) with a new section 120335(d), which became operative July 1, 2012 and which states the following:

The governing authority shall not unconditionally admit or advance any pupil to the 7th grade level of any private or public elementary or secondary school unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age. [Emphasis added.]

The claimant contends that section 120335(d) requires school districts to perform a number of tasks including the following:

- (1) Informing parents/students of the immunization requirements regarding pertussis; developing procedures; training staff; obtaining, reviewing, and maintaining student immunization records; and contacting parents and legal guardians for non-compliance;
- (2) Periodically reporting to the state on the immunization status of all entrants into schools;
- (3) Requesting and reviewing lawful exemption or proof of immunization against pertussis from each pupil seeking admission to the school in the state for the first time;
- (4) Recording and maintaining in each pupil's permanent record the pupil's immunization or exemption from immunization against pertussis;
- (5) Requesting and reviewing lawful exemption or proof of immunization against pertussis from each pupil advancing to the seventh grade;
- (6) Periodically reviewing each pupil's immunization record until the pupil is fully immunized against pertussis;
- (7) Documenting vaccine doses on each pupil's immunization record as immunizations are administered;

- (8) Notifying parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunizations are not timely presented;
- (9) Referring the parents or guardians to a physician, nurse, or county health department for review of immunization records and provision of required immunizations;
- (10) Excluding pupils from school attendance when written evidence of additional doses is not presented within ten days of parental notification; and
- (11) Collecting data and preparing reports annually on immunization status for the Department of Health Services, and preparing follow-up or additional reports upon request by county health departments and the state.

The plain language of section 120335(d), however, does not require school districts to perform any activities. Section 120335(d) states that schools “shall not unconditionally admit or advance” pupils to the 7th through 12th grade levels during the 2011 school year and to the 7th grade thereafter unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil’s age. Section 120335 *prohibits* school districts from doing something; more specifically, from unconditionally admitting or advancing pupils unless the pupil has been fully immunized against pertussis.

This interpretation is supported by the legislative history of the test claim statute. The Assembly Floor analysis on the last amended version of the bill states the following:

Since potential costs to the bill would occur only if DPH made a decision to promulgate regulations to update its immunization requirements, the fiscal years in which potential costs and savings would occur are unknown and would depend on when DPH regulations went into effect.³⁰

Accordingly, Health and Safety Code section 120335 does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

C. The Commission does not have jurisdiction to consider the Title 17 regulations adopted by DPH regarding the pertussis vaccination

As noted in legislative history of the 2010 test claim statute, the activities identified by the claimant are addressed by DPH regulations that exist to implement and interpret Health and Safety Code sections 120325 through 120375. In 2011, DPH adopted emergency regulations implementing the test claim statute at issue here.³¹ These regulations became effective on

³⁰ Assembly Floor Analysis, Concurrence in Senate Amendments to AB 354 on August 17, 2010 (AB 354, 2009-2010 Reg.Sess.)

³¹ California Code of Regulations, Title 17 sections 6020, 6035, 6040, 6051, 6055, 6065, 6070, and 6075. (Register 2011, No. 26, eff. 6/30/11). (See also, DPH’s Initial Statement of Reasons, dated May 19, 2011.)

June 30, 2011, three months before the filing of this test claim, but have not been pled by the claimant.

The Commission does not have jurisdiction to make findings on statutes and executive orders unless those statutes or executive orders are pled in a test claim. Government Code section 17521 defines test claim to mean “the first claim filed with the commission alleging that *a particular statute or executive order* imposes costs mandated by the state...” An executive order is defined to include regulations.³² Government Code section 17553(b)(1) further requires that all test claims contain at least “a written narrative that *identifies the specific sections of statutes or executive orders* and the effective date *and register number of regulations* alleged to contain a mandate...” In addition, the statutes and executive orders pled for any given test claim are required to be listed in box 4 of the test claim form and are then included in the caption on page one of the Notice of Complete Test Claim Filing, draft staff analysis, final staff analysis and Statement of Decision, as well as on the notice and agenda. Statutes and executive orders not included in box 4 are not pled.³³ The DPH regulations are not included in box 4 and are not discussed in the written narrative of the test claim. Although claimant cites to prior test claims to support reimbursement for the regulations at issue here, prior Commission decisions are not controlling and did not include findings on the 2011 regulations at issue here. In addition, unlike this claim, the prior test claim on *Hepatitis B* (98-TC-05) properly pled the regulations that implemented the school immunization program for hepatitis B.

In addition, the claimant can no longer amend the test claim to add the DPH regulations. Pursuant to Government Code section 17557(e), a test claim may not be amended once it has been set for hearing and this matter was set for hearing when the draft analysis was issued on February 13, 2013.³⁴ Moreover, the DPH regulations at issue became effective on June 30, 2011, more than 12 months from the date of the claimant’s March 28, 2013 comments on the draft analysis that requested the amendment. Allowing claimant to add the DPH regulations to the test claim now would improperly allow claimant to circumvent the 1-year statute of limitations for filing test claims.³⁵ These time limits in the Government Code establish

³² Government Code section 17516.

³³ Sections 1183, subdivision (d) and 1183.02, subdivision (c) of the Commission’s regulations; and, Commission on State Mandates Test Claim Form adopted pursuant to Government Code section 17553, box 4.

³⁴ Government Code section 17557(e) states: “A test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. The claimant may thereafter amend the test claim at any time, but before the test claim is set for a hearing, without affecting the original filing date as long as the amendment substantially relates to the original test claim.”

³⁵ Government Code section 17551(c); California Code of Regulations, title 2, section 1183(c) [which requires “any test claim or amendment filed with the commission must be filed not later than 12 months following the effective date of a statute or executive order”].

the Commission's jurisdiction over test claim amendments, which cannot be waived by an agreement of the parties as suggested by the claimant. Government Code section 17554 allows all parties to a claim to waive *procedural* requirements, including procedural requirements relating to consolidating existing claims or for shortening time periods established in the law. However, section 17554 cannot be used to waive *jurisdictional* requirements.³⁶

Based on the foregoing, the Commission finds that it does not have jurisdiction to make findings on DPH regulations that were not pled.

V. Conclusion

Based on the foregoing, the Commission concludes that Health and Safety Code sections 120325 and 120335, as amended by Statutes 2010, chapter 434 do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission further finds that it does not have jurisdiction to make any findings on California Code of Regulations, title 17, sections 6020, 6035, 6040, 6051, 6055, 6065, 6070, and 6075. (Register 2011, No. 26, eff. 6/30/11).

³⁶ *Harrington v. Superior Court* (1924) 194 Cal. 185, 188; *Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1006.

Commission on State Mandates

Original List Date: 9/27/2011
Last Updated: 5/8/2013
List Print Date: 05/08/2013
Claim Number: 11-TC-02
Issue: Immunization Records - Pertussis

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