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Commission on  
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**LATE FILING**

June 27, 2013

Heather Halsey  
Executive Director  
Commission on State Mandates  
980 9th Street, Suite 300  
Sacramento, CA 95814

**Re: Health and Safety Code sections 120325 and 120335  
Statutes 2010, Chapter 434 (AB 354)  
Immunization Records - Pertussis (11-TC-02)**

Dear Ms. Halsey:

The following comments are submitted in response to the Commission requesting further briefing on Health and Safety Code section 120335 imposing a reimbursable state-mandated program.

**1. Legislative intent to control the spreading of the disease.**

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.<sup>1</sup> After the test claim statute was enacted, DPH 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.<sup>2</sup>

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<sup>1</sup> Assembly Third Reading Bill Analysis, Assembly Bill 354, as amended April 28, 2009, p. 2-3.

<sup>2</sup> Exhibit B, DPH Initial Statement of Reasons for "School Immunization Requirements: Grades 7 through 12" dated May 19, 2011, pages 2 and 3.  
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**2. Test claim statute “prohibits” schools from admitting or advancing pupils.**

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. 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." <sup>3</sup>Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] ..." <sup>4</sup>

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 test claim statute requires or "mandates" local agencies or school districts to perform an activity. <sup>5</sup>

For schools to prevent the spreading of the disease and prohibit students from admitting or advancing pupils unless the pupil is fully immunized against pertussis, schools are *legally* and *practically* compelled to perform the following activities:

Request and review lawful exemption or proof of immunization from each pupil seeking admission to school in the state for the first time.

- Record each pupil's immunization for, or exemption from immunization record and maintain the form in the pupil's permanent record.
- Request and review lawful exemption or proof of immunization from each pupil advancing to the seventh grade.
- Periodically review the pupil's immunization record until the pupil is fully immunized.
- Document vaccine doses on the pupil's immunization record as they are administered.

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<sup>3</sup> County of San Diego v. State of California (1997) 15 Cal.4th 68, 81.

<sup>4</sup> County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.

<sup>5</sup> San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.) (2004) 33 Cal.4th 859, 874.

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- Notify parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunizations are not timely presented.
- Refer the parents or guardians to a physician, nurse, or county health department for review of immunization records and provision of required immunizations.
- Exclude pupils from school attendance when written evidence of additional doses is not presented within ten days of parental notification.
- Collect data and prepare reports annually on immunization status for the Department of Health Services, and prepare follow-up or additional reports upon request by county health departments and the state.<sup>6</sup>

The above required activities impose a state-mandated program on school districts.

**3. Prior Health & Safety Code section 120335 (Immunization Records – Hepatitis B)  
Test Claim Approved**

Prior Test Claim 98-TC-05: Immunization Records – Hepatitis B was approved as a reimbursable mandate 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 immunization requirements for Hepatitis B.

“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.”<sup>7</sup>

**4. Commission May Take Judicial Notice of the Regulations.**

The Commission need only take judicial notice of the regulations. California Evidence Code Section 452 (b) permits judicial notice with, “Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States,” (g) “facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute,” (h) “facts and propositions that are

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<sup>6</sup> “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.” (DSA, p.15)

<sup>7</sup> FSA, p.12.

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not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”<sup>8</sup> The analysis fails to provide a rational basis, as there is none, for not taking judicial notice of the regulations.

**CONCLUSION**

Based on the test claim filed timely and complete, no state agency or other interested party filing a response to the test claim, test claim statute referencing regulations along with the doctrine of judicial notice, the test claim statute is a reimbursable state mandated program.

**CERTIFICATION**

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.



Arthur M. Palkowitz  
Attorney for the Claimant

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<sup>8</sup> Cal. Evidence Code Section 452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

- (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
- (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
- (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
- (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
- (h) Facts 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.