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.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted July 26, 2013*) (*Served August 5, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 26, 2013. Mr. Arthur Palkowitz represented claimant, Twin Rivers Unified School District. Ms. Susan Geanacou and Ms. Laurie Carney appeared on behalf of the Department of Finance (Finance).

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 the revised final staff analysis and proposed statement of decision to partially approve the test claim at the hearing by a vote of 6 to 1.

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 Commission approves this test claim with respect to Health and Safety Code section 120335(d), as added and replaced by the test claim statute. Section 120335(d) 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 plain language of section 120335(d) prohibits schools from unconditionally admitting or advancing students unless they are properly immunized, and does not affirmatively identify any activities required to comply with the prohibition. However, an interpretation of the statute that finds schools are not required to act would improperly ignore the pupils' constitutional right to education and frustrate the manifest purpose of section 120335 and the statutory scheme of which it is a part. Section 120335 must be interpreted under the rules of statutory construction, which requires that the statute be construed and make sense in context with the entire statutory scheme. Using these rules, the Commission finds that school districts must receive documentary evidence of the pertussis immunization, as described below, in order to properly comply with the prohibition in section 120335(d) against admitting or advancing a student to the 7th through 12th grade levels, unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age.

The Commission concludes that Health and Safety Code section 120335(d), as added and replaced by Statutes 2010, chapter 434 imposes the following mandated activities on school districts:

A. For fiscal year 2011-2012 only, and for students entering the 7th through 12th grade levels:

   (1) Unconditionally admit students who are fully immunized against pertussis based on records provided by the student's physician or agency performing the immunization, or who have documented a permanent medical exemption or a personal belief exemption to immunization against pertussis.

   (2) Conditionally admit students that have not been fully immunized against pertussis and have not obtained a permanent medical exemption or a personal belief exemption to immunization if that pupil has a temporary medical exemption or is in the process of receiving doses of the required vaccines.

   (3) For any student found not to have received all immunizations for pertussis which are required before admission or advancement to grades 7 through 12, or who is found not to have complied with requirements for conditional admission, notify that student's parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunization for pertussis, or lawful exemption therefrom, is not obtained within 10 school days.

   (4) Exclude from further attendance any pupil who fails to obtain the required immunizations within 10 school days following notice, unless the pupil is exempt for medical reasons or personal beliefs, until the pupil provides written evidence that he or she has received the pertussis immunization required.

B. Beginning July 1, 2012, for students entering the 7th grade:

   (1) Unconditionally admit students who are fully immunized against pertussis based on records provided by the student's physician or agency performing the immunization, or who have documented a permanent medical exemption or a personal belief exemption to immunization against pertussis.

   (2) Conditionally admit students that have not been fully immunized against pertussis and have not obtained a permanent medical exemption or a personal belief exemption

to immunization if that pupil has a temporary medical exemption or is in the process of receiving doses of the required vaccines.

(3) For any student who is found not to have complied with requirements for conditional admission, notify that student's parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunization for pertussis, or lawful exemption therefrom, is not obtained within 10 school days.

(4) Exclude from further attendance any pupil who fails to obtain the required immunizations within 10 school days following notice, unless the pupil is exempt for medical reasons or personal beliefs, until the pupil provides written evidence that he or she has received the pertussis immunization required.

The Commission also finds that these activities are new with respect to the pertussis immunization for pupils entering the 7th through 12th grade levels, and provide a service to the public in an effort to protect public health and safety, and, thus, impose a new program or higher level of service. In addition, evidence has been submitted supporting the finding that the claimant has incurred increased costs mandated by the state. Accordingly, the Commission finds that Health and Safety Code section 120335(d), as added and replaced by the 2010 test claim statute, imposes a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

All of other code sections pled and allegations made are denied. Health and Safety Code section 120325 is a statement of legislative intent, and does not require school districts to perform any activities. In addition, the Commission does not have jurisdiction to make mandate 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), which were adopted by the Department of Public Health to implement the 2010 test claim statute.

COMMISSION FINDINGS

I. Chronology

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.
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.
05/08/2013	Commission staff issued the final staff analysis and proposed statement of decision.
05/15/2013	Claimant submitted late written comments on the draft staff analysis.

05/24/2013	The Commission heard and continued this matter, directing staff to draft an alternative proposed statement of decision analyzing whether the prohibition in Health and Safety Code section 120335(d) imposes any state-mandated activities on school districts.
05/24/2013	Commission staff issued a notice continuing the hearing to July 26, 2013 and providing a June 11, 2013 deadline to file comments regarding whether the prohibition contained in section 120335(d) imposes a reimbursable state-mandated program.
06/27/2013	Claimant submitted late written comments regarding whether the prohibition contained in section 120335(d) imposes a reimbursable state-mandated program.

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 (whopping 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."[1] 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.[2] 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.[3]

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[1] Exhibit 1E, Assembly Third Reading Bill Analysis, Assembly Bill 354, as amended April 28, 2009, p. 2.

[2] *Id*. at pp. 2-3.

[3] Exhibit 1B, DPH Initial Statement of Reasons for "School Immunization Requirements: Grades 7 through 12" dated May 19, 2011, pages 2 and 3 (internal citations omitted).

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 (whopping 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
- 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.[4]

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.[5] 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.

[4] Health and Safety Code section 120325(b)(c)(d).

[5] Health and Safety Code section 120335(b).

Section 3 of the bill then replaced section 120335 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 120335 (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 entering the 7th through 12th grades, train staff, , and review and keep 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"[6] 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.

[6] 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."

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.[7] 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 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.[8] 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.[9]

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.[10] 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.

[7] Health and Safety Code section 120345.

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

[9] *Id*. at section 6051(b).

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

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 immunization requirements for Hepatitis B.[11] 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;

[11] 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.[12]

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 comments have been submitted on this matter by any state agencies or interested parties. Finance supports a decision denying the test claim on the ground that the test claim statute does not impose a state-mandated program on school districts and that the Commission does not have

[12] 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."

jurisdiction to make findings on the Title 17 regulations adopted by the Department of Public Health in 2011 to implement the test claim statute.[13]

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."[14] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[15]

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.[16]
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.[17]
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.[18]

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[13] Hearing before the Commission on State Mandates, Reporter's Transcript of Proceedings, May 24, 2013, page 52, testimony of Susan Geanacou, Department of Finance.

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

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

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

[17] *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.[19]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[20] 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.[21] 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."[22]

A. The Commission Does Not Have Jurisdiction to Determine if the Title 17 Regulations Adopted by DPH to Implement the 2010 Test Claim Statute Require Reimbursement under Article XIII B, Section 6.

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.[23] These regulations became effective on 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 determine if statutes and executive orders require reimbursement under the Constitution 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.[24] 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

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[18] *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.

[19] *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.

[20] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

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

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

[23] 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.)

[24] Government Code section 17516.

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.[25] 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.[26] 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.[27] 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.[28]

Based on the foregoing, the Commission finds that it does not have jurisdiction to determine whether the DPH regulations require reimbursement under article XIII B, section 6.

B. 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

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[25] 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.

[26] 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."

[27] 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"].

[28] *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.

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

C. Health and Safety Code Section 120335 Imposes a Reimbursable State-Mandated Program 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(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;

[29] Exhibit 1A, test claim, dated September 26, 2011, section 4 ("TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED"), p. 1, and section 5, p. 6.

(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) prohibits schools from unconditionally admitting or advancing students unless they are properly immunized, and does not affirmatively identify any activities required to comply with the prohibition. However, an interpretation of the statute that finds schools are not required to act would improperly ignore the pupils' constitutional right to education and frustrate the manifest purpose of section 120335 and the statutory scheme of which it is a part. Section 120335 must be interpreted under the rules of statutory construction. Under these rules, the meaning of a statute may not be determined from a single word or sentence. The words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear so as to make sense of the entire statutory scheme.[30] In addition, the courts presume that every word, phrase, and provision of a statute was intended to have meaning and perform a useful function.[31] Using these rules the Commission finds that Health and Safety Code section 120335(d), as added and replaced in 2010, imposes state-mandated duties on school districts.

In California, the right to public education for all pupils is a fundamental right fully protected by the California Constitution.[32] The Education Code requires compulsory education, whereby all children between the ages of six and eighteen are required to be enrolled and attend full-time day school or continuation school or classes in the district where the parent or guardian resides for the full length of the school day established by law.[33] Thus, under these provisions, school districts are required to admit all students residing in their district.

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[30] *Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 992.

[31] *Clements v. T.R. Bechtel Co*. (1954) 43 Cal.2d 227, 233.

[32] California Constitution, article IX, section 5; *Serrano v. Priest* (1971) 5 Cal.3d 889, 604-610.

[33] Education Code section 48200.

For public health and safety purposes, Health and Safety Code section 120335 was originally enacted in 1977 to provide an exception to the unconditional admission of a student who is not fully immunized against the list of childhood diseases identified.[34] As originally enacted, subdivision (b) provided that the governing authority of a school "shall not unconditionally admit any person as a pupil" to the school unless, prior to the pupil's first admission to that school [typically in kindergarten], the pupil was fully immunized from the list of diseases and "for which immunization shall be documented." Thus, prior law, in subdivision (b), requires immunization documentation for the school to initially admit the student.

Subdivision (d), relating to the pertussis immunization for students enrolling or advancing into the 7th through 12th grades, was added in 2010 to address a pertussis epidemic. As described in the background, it was believed that pupils in the 7th through 12th grades were at the highest risk of waning pertussis immunity and without intervention, would continue to prolong the epidemic. Subdivision (d) as amended by test claim statute, provides that the school "shall not unconditionally admit or advance any pupil [in these grades]. . . unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age." Subdivision (d), however, does not expressly require school districts to receive documentation showing that the pupil received all appropriate pertussis immunizations. Nevertheless, when read in the context of the statutory scheme, the Legislature enacted the 2010 test claim statute intending to require that documentation be presented to the school for all required immunizations, including the pertussis immunization required before a pupil's advancement to grades 7 through 12.

Health and Safety Code section 120355 provides that "any person or organization administering immunizations shall furnish each person immunized, or his or her parent or guardian, with a *written record of immunization* given in a form prescribed by the department." Several other code sections, which also are part of the statutory scheme on immunizations, cross reference and affect the meaning and implementation of section 120355. Section 120340 states that "a person who has not been fully immunized against one or more of the diseases listed in Section 120335 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." Health and Safety Code section 120365 also incorporates section 120335 by reference to address exemptions to the immunization requirements based on a letter or affidavit filed with the school. That statute addresses the personal belief exemption and states in relevant part the following:

> Immunization of a person shall not be required for admission to a school or other institution listed in Section 120355 if the 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, *files with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs*. . . .

[34] Health and Safety Code section 120335 derives from former section 3381, added by Statutes 1977, chapter 1176.

Section 120370 refers to a physical or medical exemption and provides that "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, … that person shall be exempt from the requirements of Chapter 1, (commencing with Section 120325. . ."

Health and Safety Code section 120375 then requires, in pertinent part, that the governing authority or each school "shall require documentary proof of each entrant's immunization status," and that "the immunization record of each new entrant admitted conditionally shall be reviewed periodically by the governing authority to ensure that within the time periods designated by regulation of the department he or she has been fully immunized against all diseases listed in Section 120335, and immunization received subsequent to entry shall be added to the pupil's immunization record."

These statutes refer to documents, records, statements, letters and affidavits filed with the district with respect to a student's immunization records. Sections 120340, 120355, 120365, 120370, and 120375 were enacted in 1995, and incorporated section 120335 by reference at the time when immunizations were required when a pupil first enrolled in school. However, the statutory scheme can be interpreted based on changes made by the 2010 test claim statute and as the statute currently reads. Under the rules of statutory construction, laws referred to in a statute that have been amended over time, may be interpreted in their contemporary form as long as there is no time restriction or limitation provided in the original statutes.[35] Thus, in this case, it may be presumed that the Legislature, when it enacted the test claim statute, intended school districts to receive and review all immunization records of a pupil, including those records relating to the pertussis immunization, or letters or affidavits in support of an exemption from the immunization requirements. When read with the statutory scheme, school districts must receive documentary evidence of the pertussis immunization in order to properly comply with the prohibition in section 120335(d) from admitting or advancing a student to the 7th through 12th grade levels, unless the pupil has been fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age. This interpretation is consistent with the regulations adopted by DPH in 2011.[36]

As noted above, these regulations have not been pled by the claimant and the Commission does not have jurisdiction to make mandate findings on these regulations. However, the regulations may properly be considered as DPH's interpretation of what is required by section 120335 as that statute was amended in 2010. An agency's interpretation of the meaning and legal effect of a statute it is required to implement is entitled to consideration and respect by the courts.[37]

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[35] *In re Jovan B.* (1993) 6 Cal.4th 801, 816.

[36] 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.)

[37] *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7; *Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357, 368-369.

In particular, the portion of the regulations addressing the documentary evidence required is relevant to the issue of what is required to comply with the statutory prohibition against admitting or advancing unimmunized students. Under the regulations, a written record is required to 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 pursuant to Title 17, section 6065. Section 6070 of the Title 17 regulations requires school districts to record each student's immunization information on a form supplied by DPH, which becomes part of each student's mandatory pupil record. 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. In addition, pursuant to 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 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.[38] 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.[39] Any student who lacks documentation of all immunizations required by law, including the pertussis immunization and boosters, and does not have a permanent medical or personal beliefs exemption to the immunization, can 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 vaccine. 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, after notice to the parent or guardian.[40]

Based on the above analysis, the Commission finds that Health and Safety Code section 120335(d), as added and replaced by the 2010 test claim statute, imposes a state-mandated program on school districts within the meaning of article XIII B, section 6 as follows.

A. For fiscal year 2011-2012, only for students entering the 7th through 12th grades:

(1) Unconditionally admit students who are fully immunized against pertussis based on records provided by the student's physician or agency performing the immunization,

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[38] California Code of Regulations, title 17, section 6051(a).

[39] California Code of Regulations, title 17, section 6051(b).

[40] California Code of Regulations, title 17, sections 6040 and 6055. The due process clause of the U.S. and California Constitutions also require that notice be provided before a child is denied a fundamental right, including the right to receive a public education. (*Abella v. Riverside Unified School Dist.* (1976) 65 Cal.App.3d 153, 168-169.)

or who have documented a permanent medical exemption or a personal belief exemption to immunization against pertussis.

(2) Conditionally admit students that have not been fully immunized against pertussis and have not obtained a permanent medical exemption or a personal belief exemption to immunization if that pupil has a temporary medical exemption or is in the process of receiving doses of the required vaccines.

(3) For any student found not to have received all immunizations for pertussis which are required before admission or advancement to grades 7 through 12, or who is found not to have complied with requirements for conditional admission, notify that student's parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunization for pertussis, or lawful exemption therefrom, is not obtained within 10 school days.

(4) Exclude from further attendance any pupil who fails to obtain the required immunizations within 10 school days following notice, unless the pupil is exempt for medical reasons or personal beliefs, until the pupil provides written evidence that he or she has received the pertussis immunization required.

B. Beginning July 1, 2012, only for students entering the 7th grade:

(1) Unconditionally admit students who are fully immunized against pertussis based on records provided by the student's physician or agency performing the immunization, or who have documented a permanent medical exemption or a personal belief exemption to immunization against pertussis.

(2) Conditionally admit students that have not been fully immunized against pertussis and have not obtained a permanent medical exemption or a personal belief exemption to immunization if that pupil has a temporary medical exemption or is in the process of receiving doses of the required vaccines.

(3) For any student who is found not to have complied with requirements for conditional admission, notify that student's parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunization for pertussis, or lawful exemption therefrom, is not obtained within 10 school days.

(4) Exclude from further attendance any pupil who fails to obtain the required immunizations within 10 school days following notice, unless the pupil is exempt for medical reasons or personal beliefs, until the pupil provides written evidence that he or she has received the pertussis immunization required.

These requirements are new and provide a service to the public by protecting the health and safety of the public and the students attending California schools. Thus, the requirements of Health and Safety Code section 120335(d), as added and replaced in 2010, constitute a new program or higher level of service within the meaning of article XIII B, section 6.

The Commission also finds that the test claim statute imposes costs mandated by the state. Government Code section 17514 defines costs mandated by the state as "any increased cost which a local agency or school district is required to incur after July 1, 1980, as a result of a

statute…which mandates a new program or higher level of service…" Government Code section 17564 requires that reimbursement claims must exceed $1,000 to be eligible for reimbursement.

Claimant filed a declaration from Robert Roach, Mandated Cost Analyst for the Twin Rivers School District, asserting that claimant has incurred increased costs in connection with the test claim statute. Claimant estimates costs of "approximately $25,000" during the 2011-2012 school year to implement all duties that claimant alleges are mandated by the state and $25,000 in costs for each year thereafter.

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if the statute, executive order, or an appropriation in a Budget Act or other bill that includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. Here, there is no evidence that any funds, in an amount sufficient to cover the costs of the mandated activities, have been specifically appropriated for the cost of the state-mandated activities found in this test claim.

Based on the above discussion, the Commission finds that Health and Safety Code section 120335(d), as added and replaced in 2010, imposes a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code sections 17514.

V. Conclusion

Based on the foregoing, the Commission concludes that Health and Safety Code section 120335(d), as added and replaced by Statutes 2010, chapter 434 imposes 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 as follows.

A. For fiscal year 2011-2012, only for students entering the 7th through 12th grades:

   (1) Unconditionally admit students who are fully immunized against pertussis based on records provided by the student's physician or agency performing the immunization, or who have documented a permanent medical exemption or a personal belief exemption to immunization against pertussis.

   (2) Conditionally admit students that have not been fully immunized against pertussis and have not obtained a permanent medical exemption or a personal belief exemption to immunization if that pupil has a temporary medical exemption or is in the process of receiving doses of the required vaccines.

   (3) For any student found not to have received all immunizations for pertussis which are required before admission or advancement to grades 7 through 12, or who is found not to have complied with requirements for conditional admission, notify that student's parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunization for pertussis, or lawful exemption therefrom, is not obtained within 10 school days.

   (4) Exclude from further attendance any pupil who fails to obtain the required immunizations within 10 school days following notice, unless the pupil is exempt for medical reasons or personal beliefs, until the pupil provides written evidence that he or she has received the pertussis immunization required.

B. Beginning July 1, 2012, only for students entering the 7th grade:

(1) Unconditionally admit students who are fully immunized against pertussis based on records provided by the student's physician or agency performing the immunization, or who have documented a permanent medical exemption or a personal belief exemption to immunization against pertussis.

(2) Conditionally admit students that have not been fully immunized against pertussis and have not obtained a permanent medical exemption or a personal belief exemption to immunization if that pupil has a temporary medical exemption or is in the process of receiving doses of the required vaccines.

(3) For any student who is found not to have complied with requirements for conditional admission, notify that student's parents or guardians of the requirement to exclude the pupil from school if written evidence of the required immunization for pertussis, or lawful exemption therefrom, is not obtained within 10 school days.

(4) Exclude from further attendance any pupil who fails to obtain the required immunizations within 10 school days following notice, unless the pupil is exempt for medical reasons or personal beliefs, until the pupil provides written evidence that he or she has received the pertussis immunization required.

All other code sections pled and allegations made do not result in a reimbursable state-mandated program and are, therefore, denied.

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

RE: **Adopted Statement of Decision**

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

On July 26, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: August 5, 2013