



## GARY G. KREEP

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**Attorney at Law Retired Judge**  
932 D Street, Ramona, CA92065  
(760) 803-4029  
gary@ggkmail.us

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Parents and Educators across California,

QUESTION: Whether California School Districts have a choice in requiring COVID-19 vaccinations for students attending schools in their respective districts, given that California Governor Newsom has added the COVID-19 vaccine to the list of state required school vaccines.

On October 1, 2021, Governor Newsom directed the California Department of Health “to add the COVID-19 vaccine to other vaccinations required for in-person school attendance ... pursuant to the Health and Safety Code sections 120325 - 120380.”<sup>1</sup> Since this new vaccination requirement is being implemented through regulation, and not legislation, it, “must be subject to

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<sup>1</sup> [California Becomes First State in Nation to Announce COVID-19 Vaccine to List of Required School Vaccinations; https://www.gov.ca.gov/wp-content/uploads/2021/10/California-Becomes-First-State-in-Nation-to-Announce-COVID-19-Vaccine-to-List-of-Required-School-Vaccinations.pdf](https://www.gov.ca.gov/wp-content/uploads/2021/10/California-Becomes-First-State-in-Nation-to-Announce-COVID-19-Vaccine-to-List-of-Required-School-Vaccinations.pdf)

exemptions, “for both medical reasons and personal beliefs.” (California Health and Safety Code section 120338).”<sup>2</sup> Additionally, in the Governor’s announcement, he stated that, “While individual counties and schools may accelerate vaccine requirements, the state requirement will create a statewide standard to ensure all staff and students will be vaccinated.”<sup>3</sup> , “[s]tudents will be required to be vaccinated for in person learning **starting the term following FDA full approval of the vaccine for their grade span (7-12 and k-6).**”<sup>4</sup>

This directive by the Governor indicates that School Districts have the option of implementing the vaccination requirement earlier, or not at all, while the vaccine continues to remain under Emergency Use Authorization. However, once the vaccine is granted full FDA approval for their grade span (7-12 and K-6) those grade span students will be required to be vaccinated with the COVID-19 vaccine.

According to the governor, the timing for the vaccination regulations to take effect is, “... at the start of the following term [following full FDA approval], meaning either January 1st or July 1st, whichever comes first. (Education Code 37200).”<sup>5</sup> Moreover, according to the

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> [California Becomes First State in Nation to Announce COVID-19 Vaccine to List of Required School Vaccinations; https://www.gov.ca.gov/wp-content/uploads/2021/10/California-Becomes-First-State-in-Nation-to-Announce-COVID-19-Vaccine-to-List-of-Required-School-Vaccinations.pdf](https://www.gov.ca.gov/wp-content/uploads/2021/10/California-Becomes-First-State-in-Nation-to-Announce-COVID-19-Vaccine-to-List-of-Required-School-Vaccinations.pdf)

Governor, “[b]ased on current projections for full [FDA] approval for ages 12+, we anticipate the requirement would apply to grades 7-12 starting on July 1, 2022.”<sup>6</sup>

Vaccinations for California schoolchildren are currently regulated by Senate Bill 277, which passed in June, 2015.<sup>7</sup> Senate Bill 277 amended California Health and Safety Code Sections 120335, 120325, 120370, 120375, and repealed Section 120365. Pursuant to California Health and Safety Code § 120335(b) “[t]he governing authority **shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school**, child care center, day nursery, nursery school, family day care home, or development center, unless, prior to his or her first admission to that institution, he or she has been fully immunized.” A “governing authority” is defined 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.” California Health and Safety Code § 120335(a). Moreover, California Health and Safety Code § 120335(b)(1)-(10) lists the diseases for which immunizations shall be documented.

California Health and Safety Code § 120335(b)(11) is a catchall for “[a]ny other disease deemed appropriate by the department, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and

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<sup>6</sup> *Id.*

<sup>7</sup> [Can California School Districts Independently Mandate COVID-19 Vaccines For Students? - capradio.org; https://www.capradio.org/articles/2021/09/29/can-california-school-districts-independently-mandate-covid-19-vaccines-for-students/](https://www.capradio.org/articles/2021/09/29/can-california-school-districts-independently-mandate-covid-19-vaccines-for-students/)

Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians.”

In reading the Governor’s October 1st directive, as well as Senate Bill 277, it appears that once the COVID-19 vaccine receives full FDA approval for all school age children, then the school districts will no longer be allowed to unconditionally admit students into public or private schools who are not vaccinated against COVID-19, based on California Health and Safety Code § 120335(b)(11), in that, although COVID-19 is not a listed disease to be immunized against, it can be deemed appropriate to be added to the list. The School Districts may fight the COVID-19 vaccination mandate and not require school age children to receive them, however, the school districts could then be found in violation of California Health and Safety Code § 120335 (b)(11), which, in essence, gives “the California Department of Health” the power to add “any other disease [it] deem[s] appropriate,” to ten diseases already listed in this code.

We have yet to find any case law regarding school districts violating the California Health and Safety Codes. Therefore, the School Districts not wanting to implement this vaccine as a requirement to attend school may have to challenge it in court.

In *Zucht v. King*, public officials excluded Rosalyn Zucht from a public school because she did not have the required certificate of vaccination and refused to submit to vaccination, pursuant to ordinances of the City of San Antonio Texas. *Zucht v. King*, 260 U.S. 174, 175 (1922). The Supreme Court found that, *Jacobson v. Massachusetts* “had settled that it is within the police power of a state to provide for compulsory vaccination.” *Id.* at 176. The court also found that a state may, consistent with the federal Constitution, “delegate to a municipality

authority to determine under what conditions health regulations shall become operative.” *Id.* (quoting *Laurel Hill Cemetery v. San Francisco*, 216 358, 366 (1910)). It was also settled that, “the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Zucht*, 260 U.S. at 176. (quoting *Lieberman v. Van de Carr*, 199 U. S. 552, 562 (1905)). The Court concluded that the vaccination ordinances, requiring a child to present a certificate of vaccination, did not confer “arbitrary power, but only that broad discretion [is] required for the protection of the public health.” *Zucht*, 260 U.S. at 177.

Although the *Zucht* case seems to be in favor of school vaccination mandates, the argument can be made that *Zucht* supports the fact that local school districts, like local municipalities, have the authority to determine “under what conditions health regulations shall become operative.” Here, the local school districts have decided that the COVID-19 vaccination shall not be a requirement in their school district, and it can be asserted that the school districts have the authority and broad discretion in protecting the public health at the schools located in their district, through the application and enforcement of health laws, to do so.

CONCLUSION: Until such time as the Covid vaccines for minors have received full FDA approval, California school districts have the legal right to refuse to mandate such vaccinations in their school districts.

When Covid vaccinations for students have been FDA approved, and where, here, California Health and Safety Code §120335 requires the “governing authority” to not unconditionally admit students into schools without them being fully immunized, an argument can be made, under *Zucht*, that the school districts have the authority and broad discretion to

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determine when health regulations will be applied and enforced in their own school districts, and, even then, refuse to mandate such vaccinations.

**Gary G. Kreep,**

**Drafted by:** Amanda Perez  
Provisionally Licensed Attorney

**Edited by:** Gary G. Kreep  
Attorney at Law - Lead Attorney for the Parents and Educators of Freedom  
Retired Judge

**California Civil Rights Foundation (CCRF)**  
**CACRF.org**

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932 D Street Suite 1 Ramona, CA 92065 | (760) 803-4029 Gary@GGKMail.us

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