

## LEGISLATION

### **Avoiding controversy, California declines to clarify vaccination law and special ed**

By [Jane Meredith Adams](#) | May 9, 2016 | [No Comments](#)

Let the courts decide.

That appears to be the stance of the California Department of Education as state regulators have so far declined to answer pleas from school districts to clarify what California's new vaccination law means for the 700,000 students who receive special education services.

Known as [Senate Bill 277](#), the state law makes California one of [three](#) states to permit exemptions to school vaccinations only for medical reasons. Gone are exemptions based on religious or personal beliefs. The law says all public and private school students must be vaccinated against 10 communicable diseases unless they have a medical exemption, they are home-schooled or they are enrolled in independent study with no classroom instruction.

With school districts beginning to enforce the law on July 1, legal experts say a conflict is likely to arise between the state mandate and the federal Individuals with Disabilities Education Act, which says students who qualify for special education services, such as intensive reading interventions that are provided in

general classrooms, must receive those services. A conflict also has the potential to unite two impassioned groups of parents — those who oppose vaccinations and those who insist on the right of students to receive special education services in mainstream classrooms, attorneys said.

But what if the special education student is unvaccinated? Would that student be allowed to attend school? Or would an unvaccinated special education student have to receive services at home? Lawyers have lined up on both sides of the issue, offering conflicting opinions on how the state law intends school districts to carry out its mandate. It's an argument that lawyers on both sides say is likely to end up in court.

The California Department of Education has said it will not be providing guidance on interpreting the new law, although it typically does so with new legislation, said Greg Rhoten, chairman of the Special Education Local Plan Area Administrators of California, which represents special education programs in the state. Rhoten said he asked two experts — Fred Balcom, the director of the special education division of the California Department of Education who retired last year, and Chris Drouin, now the interim director of special education — for guidance from the department and was told by both that none would be forthcoming.

He said he was told to follow guidance from the California Department of Public Health. “That wasn't helpful to us,” Rhoten said, noting that public health department officials are not likely to be well-versed in special education law.

“I assume the state is trying to be careful about assuming risk for interpretation of the law,” which could make the department a party to a lawsuit, Rhoten said. “In the end, it's the implementers,” he said, referring to the school districts. “They're

the ones who have to make the calls and do their best.”

In lieu of state guidance, districts have hired lawyers or turned to their general counsel for advice on how to proceed. Los Angeles Unified School District, which serves more than 640,000 K-12 students, said that on the advice of legal counsel, the district [will not require](#) students in special education to comply with required immunizations if that requirement would prevent them from getting services, including instruction in general education classrooms, to which they are legally entitled.

The California Department of Education referred media inquiries about the vaccination law to the California Department of Public Health, which in turn, referred questioners to its [Senate Bill 277 Frequently Asked Questions](#) web page. Last month, the department quietly posted [an update](#) that had been long anticipated by districts, but the information fell short of providing helpful guidance, some lawyers said.

In describing students who have individualized education programs through special education, the update explained in words underlined for emphasis that “parents or guardians must continue to provide immunization records for these students to their schools, and schools must continue to maintain and report records of immunizations that have been received for these students.”

But does “continue to provide immunization records” mean that students in special education must be vaccinated? Ronald Wenkart, general counsel for the Orange County Office of Education, says it does. “You wouldn’t have a record if you were not immunized,” said Wenkart, who has become a bit of a Kremlinologist in trying to decipher the text of the law and the public health department updates. His office

has advised districts that the intention of the law — to improve immunization rates — calls for all students who receive special education services to be vaccinated, unless they have a medical exemption.

“This is about the same guidance we got to begin with,” said Paul Lavigne, executive director of the Greater Anaheim Special Education Local Plan Area. “The law is vague on it. It says students need to receive IEP services but it also says they need to be vaccinated. More guidance would be great.”

“I would have hoped that if the state were to clarify this, they would provide a little more specific clarification than that,” said Jonathan Read, a partner at the law firm Fagen Friedman & Fulfrost.

At the same time, a March 1 revision to the California Department of Education Audit Guide, which instructs auditors how to monitor district compliance with the law, states that auditors who are checking on immunization compliance **should exclude** students who have individualized education programs and receive special education services.

Wenkart said the audit guidance would create further confusion. “That will give people the false impression that these kids don’t have to be vaccinated,” he said.

With this much uncertainty, the issue will likely make its way to court, said Rhoten of the statewide special education association. “What happens is that case law gets made,” he said.

Rhoten offered this scenario: A district decides that an unvaccinated special education student must be taught at home. The student’s parents file a complaint, arguing that their child is not receiving a “free and appropriate education” in the

least restrictive environment. The matter goes before an administrative judge in a due process hearing. The judge considers the student's right to special education services as well as the school's obligation to protect the health and safety of other students and staff. One way or another, a ruling is made.

“Then things get decided,” Rhoten said.