

# JD SUPRA® BUSINESS ADVISOR

## SB 277 This Time We Got It Right



Colin Murphy and



Gregory Rolan | Haight Brown & Bonesteel LLP

In a bold legislative move that likely caused Charles Darwin to smile from the great beyond, Gov. Jerry Brown signed Senate Bill 277 (“SB 277”) eliminating the Personal Belief Exemption (“PBE”) which allowed parents to “opt-out” of the vaccinations required for enrollment in public school. State Senator Richard Pan (D-Sacramento) who sponsored the bill toiled against slander, political attacks, misinformation and most of all fear to do what he thought best for California’s children and families. Now, schools must implement and enforce this controversial health safety law. That means school employees..., or stated differently,... people. What Senator Pan’s crusade has taught us is that laws matter, they really matter, but the people who must ultimately enforce the laws are infinitely complex, fragile and unpredictable beings. California’s long journey towards full vaccination is a study of the law and science. But more importantly, it is a sociological study of the frailty of the human condition, and our ultimate interconnectedness.

### California Law, the Personal Belief Exemption and Undervaccination

California law requires that children entering kindergarten must be vaccinated against: polio, diphtheria-tetanus and pertussis (DTaP), measles-mumps, and rubella (MMR), Hepatitis B and chickenpox. However, until only recently parents who did not want their children vaccinated could opt-out of the mandate by filing a PBE form, a simple signed statement that vaccines are against their personal beliefs, religious or otherwise. Although California has allowed PBEs since 1961, the vast majority of parents elected to comply with the public health mandate and provide their children with potentially life-saving vaccinations. In the 2007-2008 school year, the statewide PBE rate was 1.56%. However, by 2013-2014 the rate had more than double the jumping to an alarming 3.15%

It was becoming apparent that California’s vaccination laws are

notoriously forgiving compared to other states. “On a scale of 1 to 10, California is 8.9, 10 being the most lenient,” said Tony Yang, a health policy professor at George Mason University. All fifty states have school entry vaccination requirements, California was only 1 of 20 states that allowed PBEs, including religious exemptions. By contrast, states perceived by many Californians to be archaic, Mississippi and West Virginia, allowed no exemptions beyond those for medical reasons. In Mississippi, 99% of kindergartners are fully immunized for measles as are 96% of West Virginia kindergartners. Neither state has had a measles outbreak in over twenty years.

Furthermore, a growing number of California’s school children are attending school under-vaccinated. Approximately 35,000 students, or 6.5% of all new students, enter school on a conditional basis, which means their parents represent they intend to have them immunized but they have missed at least one of the required shots. These children are not only at an increased risk, but also place others at an increased risk. State regulations require tracking students to ensure they are fully immunized. Schools notify parents that children need to be fully immunized before school begins. However, due to other budget priorities, attendance-based school funding and a shocking shortage of school nurses, enforcement can be hit and miss.

Senator Pan saw something had to change. He successfully sponsored legislation that became effective January 1, 2014, which required parents who did not want their children vaccinated to provide proof that they had met with a health care provider and discussed the risks and benefits of vaccines. The provider must sign a form that the conversation had occurred. Modeled after a 2011 law passed in Washington State, the theory was that with more legitimate information about vaccines, parents would readily comply. Unfortunately, Senator Pan soon learned that much like other divisive social issues, the facts just aren’t enough. Opt-out rates dropped

Haight

negligibly and California faced multiple public health crises. This prompted California lawmakers to take the next step. SB 277 now allows only medical exemptions to the mandatory vaccination requirement.

#### **Opt-out Rates, Herd Immunity and California's Public Health Crises That Led to SB 277**

Recent outbreaks of vaccine-preventable diseases brought the issue of vaccinations front and center for Californians. In 2010, California had 9,100 reported cases of whooping cough which resulted in ten infant deaths. In 2014, the epidemic continued with approximately 8,000 reported cases, and more than two-thirds of those hospitalized were infants younger than four months old. That same year there were sixty-one cases of measles in California. California improved upon that in the first month of 2015 with the measles outbreak linked to Disneyland which ultimately sickened 131 Californians.

Epidemiologists believe that these outbreaks coincide with high PBE opt-out rates. For example, in 2012, Marin County had a 7.8% opt-out rate. Only 84% of Marin County students entering kindergarten are fully vaccinated, and 6.5% of the students' parents relied on the PBE. In 2012-2013 at Sausalito's New Village School, only 26% of incoming kindergartners arrived fully vaccinated.

Marin County officials stated that opt-out rates bring some localities below the "herd immunity" threshold at which a community can be considered safe against communicable diseases. "Between 85% and 95% of a community should be vaccinated against a disease for us to be considered safe as a community from an outbreak," said Matt Willis, a county public health officer. Dr. James Watt of the California Division of Communicable Disease Control believes the biggest concern is not the statewide opt-out rate but instead herd immunity. "When those exemptions congregate in settings... that's where the risk of disease transmission is greatest," said Watt.

Unfortunately for us all, the public health officials were right. Ignoring vaccinations and the unassailable science of "herd immunity" puts our most vulnerable citizens in grave danger. The very human face of this debate is eight-year-old Rhett Krawitt. When Rhett was two years old he was diagnosed with leukemia and went through three years of chemotherapy. Although Rhett is in remission he cannot be vaccinated for medical reasons. As a student at Reed Elementary School in Tiburon, Rhett is extraordinarily susceptible to communicable diseases because the opt-out rates in his community are almost triple the state average. Young Rhett, on top of

everything else he was dealing with, unwillingly became the single most compelling spokesperson for the elimination of PBEs. Although he may feel like it, Rhett is not alone. Many of our neighbors have weakened immune systems from cancer treatments or other illnesses and rely on herd immunity for protection.

How can we turn our back on Rhett? When you consider other state laws, their positive results, the science, and the very real and human consequences of refusing vaccinations you would think that Senator Pan's bill would pass easily. It didn't. In fact, it was one of the most hotly contested legislative battles in recent history. Senator Pan was often escorted by capital security officers to and from hearings and floor votes on the bill. Why? On closer analysis, the genesis of the opposition is almost as troubling as the epidemics themselves.

#### **Denialism, the Power of Celebrity, and the Anti-Vaccination Movement**

The most recent, and by far the most insidious anti-vaccination vitriol is spawned from mistrust and misinformation caused by a phenomenon known as "denialism." Denialism can manifest itself in many ways, but most scholars agree that simply raising doubt about an issue can undercut the credibility of an entire body of scientific evidence. By way of example, approximately 66% of Americans believe climate change is occurring, but fewer than 50% believe it is caused by humans. Just 15% of Americans believe human beings evolved over millions of years, while 46% believe God created man, as we know him today, within the last 10,000 years. Americans have also fallen prey to a similar rejection of science concerning vaccinations... 18% of Americans think vaccines cause autism. That's right, 18%!

The scientific consensus is that 18% of Americans are just wrong. Much like the rejection of global warming and evolution there is simply no scientific basis. However, the belief's roots can be identified. In 1998, the *Lancet Medical Journal* published a study linking the MMR vaccine to autism. The *Journal* subsequently retracted the paper when its author, Andrew Wakefield, was found to have had financial conflicts of interests and to have committed several ethical violations while conducting his research. Wakefield's article is believed to be the cause of increased refusal rates for MMR and the resurgence of a measles and mumps epidemic in England. In 2010, after losing his medical license, he said, "I never made the claim at the time, nor do I still make the claim that MMR is a cause of autism." No other studies have

## Haight

found a link between vaccines and autism and at least thirteen well-defined studies have definitively disproved a link between MMR vaccine and autism exists.

However, Wakefield's misinformation became an epidemic in and of itself. In "The Tipping Point," Malcolm Gladwell offers thoughts on why ideas, products and messages spread in the same manner as viruses. Gladwell writes, "the success of any kind of social epidemic is heavily dependent on the involvement of people with a particular and rare set of social gifts." Wakefield, and the anti-vaccination movement found such spokespeople, ironically enough, in comedians.

Comedians can be glib, highly intelligent and most of all... famous. Former Saturday Night Live cast member Rob Schneider, a vocal opponent to vaccines, perpetuated Wakefield's myth by stating that autism was, "nearly unheard of in the 1930s." That's funny, but he must not realize that the syndrome was not even described until 1943. Jim Carrey, another anti-vaccination crusader, believes that a vaccine preservative, Thimerosal, is connected to autism. Again, there is no scientific support whatsoever, although Carrey was great in "Liar Liar." Finally, comedian Jenny McCarthy who became famous as an outspoken proponent of the belief that there is a link between vaccines and autism was named a cohost on "The View." Clearly, notoriety provides a "bully pulpit," but it does not make you right. I guess there's a reason we go to comedians to laugh and go to doctors when we are sick.

But sadly, this is not a joke. This movement has demonstrated a fascinating ability to do what our most talented politicians cannot... bring together ideologues on all ends of the political and socioeconomic spectrum. Only Abraham Lincoln himself could assemble such a "Team of Rivals" able to challenge many of our preconceived notions on intellectualism, provincialism and politics. Consider this: Mississippi and West Virginia allow only medical exemptions while California has traditionally had religious opt-out loopholes. The PBE rates at private schools tend to be higher than at public schools. In 2014, Marin County, one of California's most affluent areas, had a 7.5% PBE rate, while Alameda County (Oakland) had a 1.78% PBE opt-out rate. The anti-vaccination movement has brought together Hollywood glitterati, right-wing libertarians and liberal counter-culturists. Mind-boggling.

However, the movement's real vulnerability is revealed by its hyperbolic personal attacks. A common tactic of guerrilla advocacy is when you cannot attack the message, attack the messenger. This is what the anti-vaccinationists have done to Senator Pan. He has received anonymous death threats.

Assemblywoman Lorena Gonzalez (D-San Diego) stated, "when parents threatened him, bullied him, compared him to Hitler, Dr. Pan didn't back down." According to the National Institute on Money in State Politics, Pan's Senate campaign raised \$1.4 million, \$100,000 of which came from pharmaceutical and health product companies. Which prompted San Jose chiropractor Keith Howe to say, "he's a sellout and a crook." Lastly, Dr. Robert Sears argued that only 70 of 120 State legislators put up for the bill, "If vaccines were so good that they should be forced on everyone, 120 legislators would have voted yes." Wow! Are those their best arguments? At best, they fail to address the issues being debated. At worst, intentional character assassination to deflect public attention from the facts and science.

### **Politics, Fear, and Connectedness**

With the recent passage of SB 277, the debate on vaccinations and PBEs is not over, it is just beginning. The California Secretary of State reports that anti-vaccination advocates had begun collecting signatures in Sacramento and Yolo Counties to recall Senator Pan. A separate statewide ballot initiative that would invalidate the law has also been cleared to collect signatures. Brace yourself for another ugly political battle. What both sides need to recognize is that they need each other, and, they are both motivated by fear. Fear of what is known and what is not.

The scientific community needs to recognize that anti-vaccinationists only want what is best for their children and it is a scary proposition to voluntarily give your child a toxin to protect them from that very toxin; especially when celebrities you like are telling you not to. Those leading the fight against Senator Pan and vaccines need to recognize that it is a terrifying reality that measles or whooping cough can take a child in 2015, the same way it did in the 1600s. They must understand that vaccines are not the enemy, disease is the enemy. What Rhett Krawitt and the science of herd immunity shows us is that we all need each other and we are ultimately connected. Simply put, if anti-vaccinationists do not participate we can all be vulnerable to deadly diseases. That is why reason must triumph over fear. Reason dictates that vaccines are neither perfect nor 100% effective. However, they are the best option we have right now. The only choice is returning to a time when pestilence decimated our populations and life expectancy was half of what it is now. Until we have a better option, the passage of SB 277 was the right decision. We got this one right.

## Haight