

**Final Statement of Reasons
Supplement to Audits of K-12 LEAs
Fiscal Year 2011-12**

SECTIONS 19816, 19816.1, 19824, 19824.1, 19841, 19850, 19851, 19851.1, 19854, 19854.1.

The Initial Statement of Reasons is included in the file. The information contained therein is supplemented as set forth below.

At the January 23, 2012, meeting of the Education Audit Appeals Panel (EAAP), the Panel considered regulations to supplement the audit guide for K-12 local education agency (LEA) audits for the 2011-12 fiscal year. The Panel adopted emergency regulations and authorized staff to begin the regular rulemaking process for the eventual adoption of the same text as permanent regulations. The emergency regulations took effect on filing with the Secretary of State on February 9, 2012.

The Notice of Proposed Rulemaking for the permanent regulations was published in the California Notice Register on February 3, 2012. No public hearing was held. Two written comments were submitted within the 45-day comment period which ended March 19, 2012. The written comments are included in this rulemaking file.

At the March 26, 2012, EAAP meeting, the Panel considered the comments and adopted final supplemental audit guide regulations for fiscal year 2011-12.

Technical, Theoretical, or Empirical Studies, Reports, or Documents

All of the documents referenced in the Initial Statement of Reasons were available upon request directly from EAAP for public review and comment during the public comment period. In this Final Statement of Reasons, EAAP also cited the Education Data Partnership (Ed-Data) web page as the source for the number of charter schools and their enrollment in 2010-11 (see page 6). No other technical, theoretical, or empirical studies, reports, or documents were relied on in proposing the adoption of these regulations.

Request That Regulations Become Effective Upon Filing

EAAP requests that the regulations in the current rulemaking file become effective upon filing. Education Code Section 14502.1 requires EAAP to adopt audit guide regulations pursuant to the rulemaking procedures of the Administrative Procedure Act by July 1 of the fiscal year to be audited. These regulations will replace the emergency audit guide regulations that became effective February 9, 2012. Together with the remainder of Chapter 3, Division 1.5, of Title 5 of the California Code of Regulations, these regulations constitute the audit guide for the 2011-12 fiscal year.

Alternatives Determination

The Education Audit Appeals Panel has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome than the proposed regulations.

Local Mandate Determination

The proposed regulations do not impose any mandate on local agencies or school districts.

**Response to Comments Received During the Public Notice Period:
February 3, 2012, to March 19, 2012**

The following persons submitted written comments during the comment period:

Eric Premack, Executive Director of the Charter Schools Development Center

Dr. Frances Sassin, Charter School Administrative Consultant

Both commenters addressed the proposed amendments to Section 19850. No one commented on the proposed amendments to sections 19816, 19816.1, 19824, 19851, and 19854, or on the proposed new sections 19824.1, 19841, 19851.1, and 19854.1. The comments have been summarized by topic and then numbered to facilitate review.

§ 19850. Contemporaneous Records of Attendance.

1) Comment: Mr. Premack (March 19, 2012 letter, first page, first bold heading) contended that the proposed amendments are “beyond the statutorily-specified scope of charter school audits.” He cited the provisions of Education Code Section 47610¹ that charter schools are generally exempt from “the laws that govern school districts,” and the provisions of Section 47634.2(d) that made charter schools subject to the laws governing local education agency audits “*but only for a specifically limited scope*” (emphasis in original),² but that matters in the Health and Safety Code are beyond the scope of the specified audits. He further stated that reference to the fact that subdivision (c) of Section 47612.5 refers to subdivision (a) is an attempt to “bootstrap” the matters in subdivision (a), and that subdivision (c) addresses the calculation of penalties for failure to offer the minimum number of instructional minutes.

Dr. Sassin (March 19, 2012 Memo, page 3, numbered paragraph 4) contended that Section 19850 of the audit guide “was intended to address a completely different section of the law governing charter schools” and the amendments regarding immunization requirements are out of place.

EAAP Response: No change is made. The proposed amendments to Section 19850 are within the scope of the audit requirement of Section 47634.2(d). That statute specifies that charter schools are subject to audits conducted pursuant to Section 41020³ “with regard to subdivisions (c) and (d) of Section 47612.5 and this section [47634.2].” Section 47612.5(c) states, in part, “A reduction in apportionments made pursuant to subdivision (a) shall be proportional to the magnitude of the exception that causes the reduction.” Subdivision (a) states, in part, “Notwithstanding any other provision of law and as a condition of apportionment, a charter school shall do all of the following...¶(2) Maintain written contemporaneous records that document all pupil attendance and make these records available for audit and inspection.” Subparagraphs (a) and (b) of Section 19850

¹ Statutory references are to the Education Code unless otherwise noted.

² § 47634.2(d) provides, “Notwithstanding any other provision of law, charter schools shall be subject, with regard to subdivisions (c) and (d) of Section 47612.5 and this section, to audits conducted pursuant to Section 41020.”

³ § 41020 requires the audit guide that is the subject of these regulations; see subdivisions (d) and (g)(A)).

(effective October 11, 2005) direct auditors to determine whether charter school reports of Average Daily Attendance (ADA) are supported by contemporaneous documentation, and to include a statement in the audit report of any identified units of ADA that were inappropriately reported along with the dollar value. The proposed amendments to Section 19850 (subparagraphs (c) through (f)) direct the auditor to review documentation of pupil attendance and verify, for the pupils in the selected sample, that evidence was on file of compliance with the pertussis immunization requirement for any pupil for whom attendance was claimed and if not, to include a statement of that fact, along with the dollar value of the inappropriately reported ADA, in the audit report.

Subdivision (c) of Section 47612.5 does not address only paragraph (1) of subdivision (a) (required instructional minutes), but applies to all of subdivision (a), as the first sentence of subdivision (c), quoted above, makes clear. The remainder of subdivision (c) prescribes the calculation of penalties for failure to offer the minimum number of instructional minutes.⁴

2) Comment: Mr. Premack (second page, first bold heading on the page) stated that, “Immunization is not a condition of apportionment nor does law specify or authorize a financial penalty.” Mr. Premack noted that the proposed amendments call on auditors to review attendance records to determine whether students were properly immunized and then report the number of units of ADA inappropriately reported for apportionment. Mr. Premack acknowledged that both Section 47634.2 and Section 47612.5 specify conditions of apportionment, but asserted that no law authorizes withholding apportionment for failure to comply with any applicable immunization laws.

Dr. Sassin (page 3, numbered paragraph 2) stated, “Immunizations may be required for all public school students, but immunization compliance has never been included as a ‘condition of apportionment’ and therefore charter schools should not be fiscally penalized. There is not language in the immunization laws that create a fiscal penalty for non-compliance.”

EAAP Response: No change is made. As explained below, immunization is a condition of admission and attendance. Pupils are required to be excluded from attendance if they do not have the required immunizations within the time periods specified in law. Pupils who are not in attendance are not counted toward apportionments based on ADA.⁵ Pupils who are in attendance when the law requires them to be excluded are not eligible to be counted in the calculation of ADA. Documented immunization or legal exemption being a condition for attendance and attendance being the basis for apportionment make the immunization requirements a condition of apportionment.

Health & Safety Code Section 120340 provides for conditional admission of pupils who are not fully immunized:

⁴ This part of subdivision (c) of § 47612.5 states, “For purposes of paragraph (1) of subdivision (a), for each charter school that fails to offer pupils the minimum number of minutes of instruction specified in that paragraph, the Superintendent shall withhold from the charter school’s apportionment for average daily attendance of the affected pupils, by grade level, the sum of that apportionment multiplied by the percentage of the minimum number of minutes of instruction at each grade level that the charter school failed to offer.”

⁵ § 47612.5(e).

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.

Regulations promulgated by the California Department of Public Health (CDPH) as part of Title 17, California Code of Regulations, provide the list of required immunizations and the time tables:

§ 6020(a) The required immunizations for admission to and attendance at a public or private elementary or secondary school, child care center, day nursery, nursery school, family day care home, or developmental center shall be those set forth, according to age, in Table 1.⁶

§ 6035(a) Any pupil seeking admission to a given public or private elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center who lacks documentation of having received all the required vaccine doses against poliomyelitis, diphtheria, tetanus, pertussis, measles, rubella, Haemophilus influenzae type B, mumps, hepatitis B and varicella (chickenpox) as specified in Table 1, Section 6020, and has not obtained a permanent medical exemption or a personal beliefs exemption to immunization in accordance with Section 6051, may be admitted conditionally if:

(1) he or she has not received all the immunizations required for his or her age group but has commenced receiving doses of all the vaccines in accordance with Table 2, is not currently due for any doses at the time of admission (if he or she is due for any doses at this time they must be obtained before admission), and the pupil's parent or guardian is notified of the date by which the pupil must complete all the required immunizations in accordance with Table 2;⁷

Health and Safety Code § 120375(b) requires the exclusion of those pupils who fail to obtain the required immunizations in the time allowed:

The governing authority of each school or institution included in Section 120335 shall prohibit from further attendance any pupil admitted conditionally who failed to obtain the required immunizations within the time limits allowed in the regulations of the department, unless the pupil is exempted under Section 120365 or 120370,⁸ until that pupil has been fully immunized against all of the diseases listed in Section 120335.

⁶ Table 1, which is a part of Title 17, § 6020 and is titled "Immunization Requirements," is omitted.

⁷ Table 2, which is a part of Title 17, § 6035 and is titled "Conditional Admission Immunization Schedule," is omitted.

⁸ The exemptions are the medical or personal beliefs exemptions that are incorporated into the proposed audit regulations.

Health and Safety Code Section 120335(a) defines the term “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.” Charter schools are public schools⁹ and are subject to these requirements.

3) Comment: Mr. Premack (third page, bold heading near the bottom of the page), contended, “Charter schools are exempt from the law that requires documentation of immunization as a condition of admission.” Mr. Premack (fourth page, bold heading in the center of the page) further contended, “Applicability of immunization exclusion laws to charter schools is unclear.” With regard to both of these contentions, Mr. Premack made a number of similar or identical statements in support of each in the third through the fifth pages of his letter. To facilitate summarization, citation will not be made here to each reference or quotation.

Mr. Premack stated that Section 47610 provides that charter schools are “exempt from laws governing school districts,” with specified exceptions, and that this “presumably includes” the Health and Safety Code Section 120335 prohibition on unconditionally admitting students without documentation of immunizations.¹⁰ Mr. Premack referred to portions of the charter school law regarding the content of the charter petition and stated that the omission of reference to immunization laws “lends strong support to the notion that the legislature purposefully ... did not include charter schools in the immunization laws.” Mr. Premack noted that Section 48216 specifically applies, by its terms to school districts but not charter schools in requiring the exclusion of pupils who have not been immunized properly. Mr. Premack contended that there is no explicit requirement that charter schools exclude students in the case of lack of documentation of immunizations.

Mr. Premack further stated that “Charter schools are also subject to unique, charter-specific admissions and related laws. Among other things, the law requires that ‘a charter school shall admit all pupils who wish to attend the school.’ (Education Code section 47605(d)(2)(A)). Thus, if the Health and Safety Codes requiring immunization did reach to charter schools, the schools would need to choose among and between these competing statutes when implementing them.”

EAAP Response: No change is made. As explained above, charter schools are public schools and are subject to the requirements of the Health and Safety Code governing immunization against certain childhood diseases (Chapter 1, Educational and Child Care Facility Immunization

⁹ § 47601 provides that charter schools are authorized to “operate independently from the existing school district structure” to accomplish various purposes including increased pupil learning opportunities, encouragement of innovative teaching methods, creation of new professional opportunities for teachers, expansion of parental choice, and provision of vigorous competition “within the public school system.”

¹⁰ Pertinent to these proposed regulations is subdivision (d) of Health and Safety Code § 120335, which provides, “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.”

Requirements (commencing with Section 120325), of Part 2, Immunizations, of Division 105, Communicable Disease Prevention and Control).

Documentation of the required immunizations is addressed in Health and Safety Code Section 120375(a):

The governing authority of each school or institution included in Section 120335 shall require documentary proof of each entrant's immunization status. The governing authority shall record the immunizations of each new entrant in the entrant's permanent enrollment and scholarship record on a form provided by the department. 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 of the diseases listed in Section 120335, and immunizations received subsequent to entry shall be added to the pupil's immunization record.

EAAP agrees that Section 48216 does not apply to charter schools.

The Legislature specifically referenced charter schools in providing for the conditional admission of pupils who did not have the required pertussis booster immunization:

Notwithstanding Section 120335, the county office of education, the governing board of a school district of attendance, *or the governing body of a charter school* may allow a pupil, advancing to or enrolled in any of grades 7 to 12, inclusive, to conditionally attend school for up to 30 calendar days,..." (Health and Safety Code § 120335.1(a), emphasis added.)

The specific application to charter schools of this 30-day conditional attendance provision would be unnecessary if charter schools were not subject to the exclusion requirements of Health and Safety Code sections 120335(d) and 120375(b). There were 919 charter schools in California in 2010-11 with an enrollment of 375,358 children.¹¹ It is not reasonable to "presume" a blanket exemption of charter schools from public health laws intended to provide for "the eventual achievement of total immunization of appropriate age groups against [certain specified] childhood diseases." (Health & Safety Code § 120325(a).)

Finally, there is no conflict between the requirement that charter schools admit "all pupils who wish to attend the school" and the provisions of the Health and Safety Code that require exclusion of pupils who are not fully immunized (or do not have a medical or personal beliefs exemption).¹² The public health exclusion laws provide for conditional admission in some

¹¹ The Education Data Partnership (Ed-Data), which includes the California Department of Education and provides fiscal, demographic, and performance data on California's K-12 schools, displays this question on its home page: "How many charter schools does the state have?" A click on this question links to a chart displaying the cited data. <http://www.ed-data.k12.ca.us>

¹² The requirement to admit all students is not unique to charter schools. All school-aged children in California have a constitutional right to attend public school (California Constitution, Article IX, Sec. 5, known as the "free schools guarantee"), and are required by law to attend school (§ 48200). The exclusion provision of § 48216 is not in conflict with these laws.

instances and exclusion in others only until such time as pupils are fully immunized or have a proper exemption on file with the school.

4) Comment: Mr. Premack (second page, last bold heading on the page) stated, “Typical immunization record format is not auditable.” Mr. Premack referred to the proposed amendment which directs auditors to verify “that evidence [of immunization] was on file by the 30th calendar after the pupil’s first day of attendance” for the 2011-12 school year. He also referred to the recordkeeping advice given by the CDPH in its “California Immunization Handbook for Schools and Child Care Agencies,” currently posted on the CDPH web site. As quoted by Mr. Premack, that handbook advises that one complete immunization card must be maintained and that others may be discarded or stapled behind the new card. (This instruction is at page 5 of the Handbook.)

Dr. Sassin (page 3, numbered paragraph 3) stated, “It is extremely difficult to document the dates that information was received and to correlate the dates that documents were processed relative to the dates information was actually received from the parents. Therefore, auditing for evidence of an exact date that the verification documents were on file is not reasonable.”

EAAP Response: No change is made. The Handbook to which Mr. Premack refers is dated July 2003. A new subparagraph was added to Title 17, Section 6070 effective July 1, 2011, specifying the recordkeeping requirement for the new pertussis booster:

(f) For pupils who are being admitted or are advancing into the 7th through 12th grades beginning July 1, 2011, the governing authority shall record each pupil's Tdap dose, given on or after the 7th birthday, on the supplemental sticker form Tdap (Pertussis Booster) Requirement [PM 286 S (01/11)]. This form is hereby incorporated by reference. The governing authority shall affix the PM 286 S (01/11) to the front of the pupil's California School Immunization Record, PM 286 (01/02).

CDPH explained the new requirement in its initial statement of reasons in proposing the amendment to Title 17, Section 6070.¹³ CDPH stated that, “The sticker form was developed in consultation with [California Department of Education] and is added to make complying with the documentation and reporting requirements less burdensome for the governing authority.” (DPH ISOR 5-19-11, at page 11.) It is reasonable to assume that, in updating its files, a school would not discard a mandatory record that is the only record of this immunization, but that the school would keep the card with the affixed sticker and staple it behind any newer card that may be created later in the year.

The proposed audit regulations do not specify which forms auditors must review, but instead direct the auditors to verify that evidence was on file by the 30th calendar day after the pupil’s first

¹³ Initial Statement of Reasons, School Immunization Requirements: Grades 7 through 12: FY 2011-12, May 19, 2011, Department of Public Health (Office of Administrative Law File No. 2011-0621-03 E) (“DPH ISOR 5-19-11”), at pages 10 and 11. This document is available on the California Department of Public Health web site: http://www.cdph.ca.gov/services/DPOPP/regs/Documents/ISOR_SOD_FINAL_5-19-11.doc

attendance in 2011-12. If the expected documentation is not available, the auditor will exercise his or her professional judgment and inquire further.¹⁴

5) Comment: Dr. Sassin (page 2, first paragraph) stated that, “These charter schools pay attention to the audit guide in order to be sure that they have ‘clean’ audits without findings. ... compliance with immunization requirements has never been part of any charter audit guide in the past. ... When asking about any possible audits for compliance, the only audits mentioned anywhere were those to be conducted by the public health agencies, NOT anything that would be part of the school’s annual independent audit. The regulations now under consideration were not included into the audit guide until early 2012, well after the fact for the schools’ window to collect immunization records for most students in question. This means that schools do not have any opportunity to improve their processes, add additional resources to implementation, or to correct possible errors.” She further stated (page 2, second paragraph), that the “retroactive” application of these audit procedures would “impose an additional burden and possibly fiscal penalty...”

EAAP Response: No change is made. Audit regulations do not create program rules or provide technical assistance to local education agencies in the operation of programs. Audit regulations provide direction to accountants in the auditing of compliance with statutory or regulatory requirements. All audits, being a review of documentation to verify compliance, are necessarily “retroactive.” Section 14502.1(b) directs EAAP to adopt the annual audit guide “by July 1 of the fiscal year to be audited,” and provides that “A supplemental audit guide may be adopted to address legislative changes to the conditions of apportionment” before March 1 of the audit year. The proposed amendments to Section 19850 address the changes made by Health and Safety Code sections 120335 and 120335.1 which are applicable only to fiscal year 2011-12.

Comments unrelated to these proposed regulations:

Comment: Dr. Sassin (page 1, second paragraph) stated that charter schools acted to comply with the new pertussis immunization requirements “despite the fact that it created a new and significant administrative burden on the schools.” She stated that “implementing this new law cost the schools a significant amount of money.”

EAAP Response: These statements refer to implementation of the Health and Safety Code and Title 17 regulatory requirements and not to the proposed audit regulations.

Comment: Dr. Sassin (page 1, third paragraph) stated that, “Charter schools are not able to re-coup mandated costs...” Mr. Premack (fifth page, fourth full paragraph) stated that, “...unlike school districts, charter schools do not receive state-mandated cost reimbursement for the immunization outreach and documentation activities.” Mr. Premack further stated, “The Commission on State Mandates (the agency responsible for establishing the validity of test claims) has found that charter schools are not eligible to submit mandated cost claims.”

¹⁴ Section 19814 of the audit guide provides, “For each state compliance requirement, the auditor shall follow the procedures included in this audit guide, unless, in the exercise of his or her professional judgment, the auditor determines other procedures are more appropriate in particular circumstances.”

EAAP Response: Neither the fact that charter schools have incurred costs in compliance with the Health and Safety Code requirements, nor the fact that charter schools are not eligible for reimbursement of mandated costs is relevant to the proposed amendments to the audit guide.

Comment: Dr. Sassin (page 1, third paragraph) stated that, "...and in addition to the already poor fiscal climate, [charter schools] had an additional fiscal hit with the adoption of SB81 which gave an across the board cut to charters which they were not able to recover via transportation funding."

EAAP Response: Senate Bill 81 (Statutes of 2012, Chapter 2, effective February 10, 2012) made an across the board cut, not only to charter schools, but also to school districts and county offices of education, and restored transportation funding for school districts that had been cut as part of the current budget act. These budget reductions are not relevant to the proposed amendments to the audit guide.

Comment: Dr. Sassin (page 2, numbered paragraph 1) stated, "Charter schools who use non-classroom based instruction, especially virtual schools, can allow students to continue their education outside the classroom without exposing other students to potential health hazards. These students generate ADA based on the work they do, not based on showing up to school each day and going to classes. It therefore is not reasonable to deprive the students of their education while the school is attempting to retrieve immunization records from the parents, since the student can continue to complete school work on outside of a classroom environment. Therefore, schools providing this type of education should not be penalized for collecting ADA if students were continuing to do their assigned work while the immunization records were being collected. Some of the informational websites on the Tdap immunization requirements mention schools should exclude students from 'classroom activities' but do not necessarily address excluding students from ALL school related activities such as non-classroom based school work. This issue was very unclear as the new law was being implemented, and therefore non-classroom based charter schools should not be penalized retroactively for their interpretation of this issue."

EAAP Response: This comment addresses the Health and Safety Code requirements, not the proposed audit regulations. The Health and Safety Code provisions for conditional admission and for exclusion of pupils lacking proper immunizations do not make exceptions for pupils based on the mode of instruction. Nonclassroom-based instruction (independent study) is an optional alternative to classroom attendance in which pupils and their parents may choose to participate and may choose to discontinue and return to the classroom at any time.¹⁵ The immunization laws are public health requirements applicable to all persons under the age of 18.

¹⁵ Nonclassroom-based instruction by charter schools is subject to the laws and regulations governing independent study (§ 47612.5(b), Title 5, § 11963.1). See § 51747(c)(7) and Title 5, § 11700, subparagraphs (c) and (d).