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# NEWS RELEASE

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## Herrera, SFUSD Sue State for Refusing to Reimburse Health Care for School Kids

***Defiant state bureaucracy continues to stiff local schools for health care costs for children covered by Medi-Cal, lawsuit alleges***

SAN FRANCISCO (May 21, 2009)—Defiant state officials are violating California law by refusing to reimburse local schools for the costs of providing diagnostic and treatment services to school children covered by Medi-Cal, according to a lawsuit filed today by City Attorney Dennis Herrera on behalf of the San Francisco Unified School District.

Medi-Cal, which is California’s version of the state- and federally-funded program that provides medical services to low-income individuals and families, is obligated under state law to reimburse local educational agencies’ costs for providing basic health care and screenings to school children covered by the program. Yet despite the unambiguous legal requirements—and despite published admissions by a senior state health official that the state’s refusal to reimburse is illegal—the California Department of Health Care Services has continued to shift its Medi-Cal responsibilities to school districts already struggling with chronic budget shortfalls. Without the state reimbursements rightfully owed to school districts through Medi-Cal, the complaint argues, San Francisco’s public schools will be irreparably harmed by having to withhold basic medical services, or to reduce vital educational programs and services.

“San Francisco schools are already grappling with enormous challenges in the current budget environment, and it is simply unconscionable for a defiant state bureaucracy to be stiffing local school districts over basic health care services,” said Herrera. “Without the state reimbursements to which our schools are rightfully entitled, it will be school children who ultimately pay the price. I’m grateful to Superintendent Carlos Garcia and others from the San Francisco Unified School District who are working to ensure that the state follows the law, and to get our schools the funding they’re owed.”

“At the end of the day, this case is about protecting the interests of San Francisco school children,” said Carlos Garcia, superintendent of the San Francisco Unified School District. “SFUSD officials have worked hard to reach a resolution with the California Department of Health Care Services over Medi-Cal reimbursements, but the department has not been responsive. I’m thankful to the City Attorney’s office for being capable and aggressive partners with us to make sure justice is done, and to get San Francisco schools the funding they deserve for the health services they have provided.”

[MORE]

According to the complaint filed in San Francisco Superior Court this morning, state officials have attempted to justify their non-reimbursement practice under the “Free Care Principle,” a long-defunct federal policy that once denied financial assistance if services provided to Medicaid-eligible individuals were also provided to others free of charge. That principle was formally invalidated in 2004 after administrators from the Bush Administration’s Department of Health and Human Services found it unsupported by federal law or regulation. Repeated efforts by officials of the San Francisco Unified School District to reach an agreement with the state over its reimbursement obligations have been either ignored or tersely rebuffed.

The civil complaint names the State of California, the California Department of Health Care Services and its director, as defendants. Because of the ongoing irreparable harm caused by the state’s illegal non-reimbursement policy, the civil action seeks a judicial determination of the legality of that policy as soon as possible. While the lawsuit will ultimately seek to recover money that the state has unlawfully withheld from the school district in past years, the school district’s petition for a writ of mandate applies only to prospective relief. The school district estimates that it spends well over \$100,000 per year on these services. A favorable ruling could benefit school districts across the state, which are also being unlawfully denied reimbursement for provision of these vital health services.

The case is *San Francisco Unified School District v. the State of California et al*, San Francisco Superior Court, filed May 21, 2009.

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11 COUNTY OF SAN FRANCISCO  
12 UNLIMITED JURISDICTION

13 SAN FRANCISCO UNIFIED SCHOOL  
14 DISTRICT,

15 Plaintiff and Petitioner,

16 vs.

17 THE STATE OF CALIFORNIA, THE  
18 CALIFORNIA DEPARTMENT OF  
HEALTH CARE SERVICES, DAVID  
19 MAXWELL-JOLLY, in his official  
Department of Health Care Services, and  
20 DOES 1 to 10,

21 Defendants and Respondents.

Case No.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF AND PETITIONER SAN  
FRANCISCO UNIFIED SCHOOL  
DISTRICT'S *EX PARTE*  
APPLICATION FOR ALTERNATIVE  
WRIT OF MANDAMUS**

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1 justified because the federal government has in the past denied states financial assistance if services  
2 provided to Medicaid eligible individuals were also available to others without charge or  
3 reimbursement. This federal policy was known as the "Free Care Principle."

4 The State's reliance on the Free Care Principle to deny Medi-Cal reimbursements to the  
5 District is unjustified. Although the federal government at one time relied on the Free Care  
6 Principle, it has been established since at least 2004 that the Free Care Principle is not valid or  
7 consistent with Medicaid's requirements. That year, the Departmental Appeals Board ("DAB"), the  
8 administrative body responsible for hearing appeals of the United States Department of Health and  
9 Human Services ("H.H.S.") component-agency decisions, formally invalidated the Free Care  
10 Principle because it is not supported or justified by any federal statute or regulation.

11 The State is well aware that its reliance on the Free Care Principle to deny the District  
12 reimbursements is not consistent with the law. Indeed, Stan Rosenstein, then the Deputy Director  
13 for Medical Care Services at DHCS, has repeatedly acknowledged in writing that the Free Care  
14 Principle lacks any legal justification, and that the State's Denial is contrary to the law. (Pet. Exs. B  
15 & C.) Nonetheless, the State arbitrarily continues to rely on the Free Care Principle to deny  
16 reimbursement to local school districts.

17 The State's admittedly unlawful Denial inflicts irreparable harm on the District and the tens  
18 of thousands of children who attend school there. Without reimbursement from the State under  
19 Medi-Cal, the District is forced either to stop providing certain medical services to children enrolled  
20 in the District or to spend less money on other programs or services for children in the District  
21 because it must spend its own money on these health care services. This causes irreparable harm to  
22 the District and its students.

23 Because the State's Denial is contrary to the law and causes irreparable harm, the Court  
24 should issue an alternative writ compelling the State either to reimburse the District going forward  
25 for EPSDT services provided to children covered by Medi-Cal, or show cause by June 23, 2009, or  
26 as soon thereafter as possible, why a peremptory writ of mandamus should not issue. (See C.C.P.  
27 § 1087.) Although this lawsuit also seeks recovery of money that the State unlawfully withheld  
28 from the District in the past under the State's Denial, the District only seeks a writ with respect to

1 the District's claim for prospective relief at this time. Given the District's urgent need for a judicial  
2 determination of the legality of the State's Denial with respect to the District's entitlement to receive  
3 reimbursements going forward, the District is addressing only that claim at this time to simplify the  
4 issues before the Court on the alternative writ of mandamus and to allow a speedy resolution of that  
5 purely legal claim.

## 6 BACKGROUND

### 7 I. THE FEDERAL MEDICAID PROGRAM

8 The federal Medicaid program – established by Congress in 1965 through the enactment of  
9 title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v ("Medicaid Act") – is a cooperative  
10 endeavor in which the federal government provides federal financial participation ("FFP") to  
11 participating states to assist them in providing medical care to individuals with insufficient income  
12 or resources to purchase health care. The purpose of the program is to enable states to furnish  
13 "medical assistance on behalf of families with dependent children and of aged, blind, or disabled  
14 individuals, whose income and resources are insufficient to meet the costs of necessary medical  
15 services . . . ." (42 U.S.C. § 1396-1.) The Centers for Medicare and Medicaid Services ("CMS")  
16 administers the Medicaid program.

17 States choose whether to participate in Medicaid. But once a state decides to participate, it  
18 must comply with all the requirements imposed by the Medicaid Act and implementing federal  
19 regulations. (*Alexander v. Choate* (1995) 469 U.S. 287, 289 n.1.) California has elected to  
20 participate in the federal Medicaid program through its implementation of the California Medical  
21 Assistance Program, Medi-Cal. (Welf. & Inst. Code §§ 14000-14198 ("Medi-Cal").)

22 To participate in Medicaid, a state must submit and have approved by the Secretary of  
23 Health and Human Resources a state plan for medical assistance. (42 U.S.C. § 1396.) To be  
24 approved, a state plan must guarantee that the state will provide certain types of assistance –  
25 including EPSDT services – to all individuals who qualify. (42 U.S.C. §§ 1396a(a)(10),  
26 1396d(a)(4)(B); *Katie A. v. Los Angeles County* (9th Cir. 2007) 481 F.3d 1150, 1154.)

27 Specifically, to receive Medicaid funding, the State is required to provide EPSDT services,  
28 including an assessment of physical and mental health development, a comprehensive physical

1 exam, vision, hearing, and dental services, appropriate immunizations, laboratory tests, and lead  
2 toxicity screening to all qualifying children. (42 U.S.C. § 1396d(r); Cal. Welf & Inst. Code  
3 § 14132.06; Cal Code Regs. tit. 22 § 51360.) These services must be provided "at intervals which  
4 meet reasonable standards of medical and dental practice . . . and at such other intervals, indicated  
5 as medically necessary, to determine the existence of certain physical or mental illnesses or  
6 conditions." (42 U.S.C. § 1396d(r)(1)(A).) The State must also provide certain "other necessary  
7 health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects  
8 and physical and mental illnesses and conditions discovered by the screening services, whether or  
9 not such services are covered under the State plan." (*Id.* § 1396d(r)(5).) In short, "California, like  
10 all other states participating in Medicaid, is required to provide EPSDT care to eligible children  
11 under the age of 21." (*Katie A.*, 481 F.3d at p. 1154.)

## 12 **II. MEDI-CAL AND THE STATE'S DENIAL**

13 California's Medi-Cal program provides assistance to individuals and families who are, by  
14 definition, among California's poorest residents. Because children in California are particularly  
15 vulnerable when their families' financial hardships prevent them from receiving basic medical care,  
16 one of the central purposes of Medi-Cal is to provide necessary health care and preventative  
17 services to needy children. (Cal. Welf & Inst. Code § 14001.1; see also S. Rep. No. 90-744 (1967),  
18 reprinted in 1967 U.S.C.C.A.N. 2834, 3032 [requiring states to make "vigorous efforts to screen and  
19 treat children"].) To fulfill this purpose and to comply with Medicaid's requirements, the State's  
20 Medi-Cal Plan guarantees coverage for eligible children to receive EPSDT services. (California  
21 State Plan, Limitations on Attachment 3.1 –A, Page 9a.)

22 In California, Medi-Cal eligible children typically receive EPSDT services from LEAs (*i.e.*,  
23 local school districts). (Pet. ¶ 3.) Prior to 2006, the State routinely reimbursed the District for  
24 EPSDT services provided to students covered by Medi-Cal. (*Id.*) Beginning in 2006, however, the  
25 State started refusing to reimburse local school districts for the cost of providing EPSDT services to  
26 general education students covered by Medi-Cal if the District does not also seek reimbursement  
27 from third-party, private insurance providers for the cost of providing EPSDT services to children  
28 not covered by Medi-Cal. Even though the District satisfies all requirements for reimbursement

1 under Medi-Cal, the State refuses to reimburse the District for Medi-Cal covered expenses under its  
2 Denial. (Pet. ¶ 18.)

3 Pursuant to its Denial, the DHCS's Audits and Investigations group ("A & I") in 2006  
4 conducted a six-month audit of the District's Medi-Cal claims to determine if the District's prior  
5 claims violated the State's Denial. The audit concluded that the District improperly billed the State  
6 for "free care" services during the prior three years in the amount of \$301,537. The State recovered  
7 that money by withholding other valid reimbursements that the District was entitled to receive.  
8 (Pet. ¶ 22.)

9 Despite its obligation to reimburse the District for EPSDT services under state law, the State  
10 contends that its Denial is justified because the federal government has in the past denied states  
11 federal financial participation under the Free Care Principle for services provided to covered  
12 individuals, if those same services were available to all other individuals without charge or  
13 reimbursement. The State's reliance on the Free Care Principle to deny Medi-Cal reimbursements  
14 to the District is unjustified because the Free Care Principle is not valid or consistent with  
15 Medicaid's requirements.

16 Indeed, the DAB formally invalidated the Free Care Principle in 2004 under facts nearly  
17 identical to those presented here. (See DAB 1924 (2004), 2004 WL 1764718 (H.H.S.)). In DAB  
18 1924, the State of Oklahoma appealed a CMS decision to disallow federal funds for EPSDT  
19 services where school district providers in Oklahoma did not bill third-party insurers for services  
20 provided to non-Medicaid eligible students.<sup>1</sup> (*Ibid.*) Concluding that there was no statutory or  
21 regulatory authority for the Free Care Principle, the DAB held it invalid and reversed the federal  
22 funds disallowance. (*Id.* at \*15.) In 2005, CMS requested that the DAB reconsider its ruling, but  
23 the DAB re-affirmed its original position. (DAB 1924 (2005), 2005 WL 293793 (H.H.S.))  
24 Therefore, CMS cannot deny FFP to the State under the Free Care Principle merely because the

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25 <sup>1</sup> Oklahoma explained that it did not seek third-party reimbursement because its past  
26 experience and independent surveys demonstrated that third-party insurance providers typically did  
27 not pay for EPSDT services provided by school districts. (DAB 1924 (2004), 2004 WL 1764718  
28 \*4.) Thus, it was not cost-effective for the school districts to seek third-party insurance  
reimbursement. (*Ibid.*)

1 District provides services to non-Medicaid eligible children without seeking reimbursement from  
2 third-party providers.

3 The State is well aware that the Free Care Principle is not consistent with the law. Stan  
4 Rosenstein, then the Deputy Director for Medical Care Services at DHCS, sent letters to CMS on  
5 stating that the Free Care Principle lacks any legal justification. (Pet. Exs. A, B.) In addition,  
6 Rosenstein has acknowledged in internal emails that the "free care issue is wrong and there is no  
7 basis for it in federal rules." (Pet. Ex. C.) He also has admitted that the State's Denial is not  
8 "supported by state or federal law" and lacks "any legal basis." (Pet. Ex. D.) DHCS nonetheless  
9 ignored the District's pleas that the Denial was unjustified, even as Stan Rosenstein repeatedly  
10 informed DHCS that its policy was unlawful.

### 11 **III. THE DISTRICT'S EFFORTS TO RESOLVE THIS DISPUTE**

12 In light of the State's ministerial duty to reimburse the District for providing EPSDT services  
13 to eligible children and the State's admission that its Denial violates the law, the District has  
14 attempted on numerous occasions to resolve this dispute without requiring Court intervention. The  
15 State has failed to respond to or has rejected each of the District's attempts.

16 On July 22, 2008, counsel for the District contacted Elizabeth Touhey of DHCS to inform  
17 her that the District was considering filing a lawsuit against the State challenging its failure to  
18 reimburse the District for providing EPSDT services, but that the District wished to give the State  
19 an opportunity to explain the legal basis for its position first. (Pet. Ex. E.) DHCS did not respond.

20 On August 25, 2008, the District sent a formal demand letter setting forth in detail the State's  
21 legal duty to reimburse the District and demanding that the State (1) refund to the District the  
22 \$305,000 improperly withheld by DHCS in 2006 on the ground that EPSDT services were not  
23 reimbursable and (2) formally commit to reimbursing the District for the provision of EPSDT  
24 services going forward, beginning with the 2008-2009 school year. (Pet. Ex. E.) The demand letter  
25 explained that reliance on the Free Care Principle was unavailing given DAB's ruling invalidating  
26 the Free Care Principle. (*Id.*)

27 The State did not respond to that letter until October 2, 2008. In its two-paragraph response,  
28 the State stated that "CMS has clearly stated that the 'free care principle' requires the disallowance

1 of [EPSDT services] and therefore will disallow FFP in those situations.” On that basis alone, the  
2 State asserted that the District was not entitled to reimbursement. (Pet. Ex. F.)

### 3 ARGUMENT

4 A court may issue a writ of mandamus to “compel the performance of an act which the law  
5 specially enjoins, as a duty resulting from an office, trust, or station.” (C.C.P. § 1085.) An  
6 Alternative Writ of Mandamus is proper where (1) the respondent has a clear, present duty to act,  
7 (2) the petitioner has a beneficial right to performance of that duty, and (3) petitioner has no plain,  
8 speedy and adequate alternative remedy. (*Conlan v. Bonta* (2002) 102 Cal. App. 4th 745, 752.)  
9 “The alternative writ must command the party to whom it is directed immediately after the receipt  
10 of the writ, or at some other specified time, to do the act required to be performed, or to show cause  
11 before the court at a time and place then or thereafter specified by court order why he has not done  
12 so.” (C.C.P. § 1087.) A writ “must be issued, in all cases where there is not a plain, adequate  
13 speedy remedy in the ordinary course of law” and a verified petition is submitted by a “beneficially  
14 interested” party. (C.C.P. § 1086.)

#### 15 I. THE STATE HAS A CLEAR, PRESENT DUTY TO REIMBURSE THE DISTRICT 16 FOR PROVIDING EPSDT SERVICES TO MEDI-CAL BENEFICIARIES.

17 By refusing to provide coverage for EPSDT services, the State is violating California law,  
18 which unambiguously requires the State to reimburse LEAs, such as the District, for EPSDT  
19 services provided to Medi-Cal eligible children.

20 The State’s duty to reimburse LEAs for providing medical care to children is clear from the  
21 State’s own Medi-Cal plan and its implementing statutes and regulations. The State is required by  
22 law to follow its Medi-Cal plan. (See Cal. Code Regs., Tit. 22 § 50004(b)(1); *California Ass’n for*  
23 *Health Serv. at Home v. Dep’t of Health Serv.* (2007) 148 Cal. App. 4th 696, 706 [violation of State  
24 Medi-Cal plan is a violation of state law].) The State’s Medi-Cal Plan unambiguously provides that  
25 “LEA services are covered when provided to, or directed exclusively toward the treatment of, a  
26 Medicaid eligible student under 21 years of age.” (California State Plan, Limitations on Attachment  
27 3.1 –A, Page 9a.) The State’s Medi-Cal Plan does not condition receipt of Medi-Cal benefits on  
28 whether the District seeks reimbursement from third party insurance carriers for EPSDT services

1 provided to non-Medi-Cal eligible children. Thus, by adding a new limitation on benefits not found  
2 within the State Plan, the State's Denial violates state law.

3 Statutes and regulations binding on DHCS similarly confirm that the District is entitled to  
4 reimbursement for services provided to Medi-Cal beneficiaries. Cal. Welf. & Inst. Code  
5 § 14132.06(a) provides that services provided by LEAs "are covered Medi-Cal benefits." (See also  
6 Cal. Welf. & Inst. Code § 14132.06 (f).) Likewise, California regulations provide that "the cost of  
7 periodic health assessments provided to Medi-Cal beneficiaries shall be reimbursed by the State,"  
8 (Cal. Code Regs. tit. 17 § 6832), and that screening, diagnostic and treatment services provided by  
9 LEAs "are covered" by Medi-Cal, (Cal Code Regs. tit. 22 § 51360; Cal. Code Regs. tit. 22  
10 § 51340). None of these statutes or regulations conditions the receipt of Medi-Cal benefits on  
11 whether the District seeks reimbursement from third party insurance providers for the cost of  
12 providing EPSDT services to children not covered by Medi-Cal. Accordingly, the District, as a  
13 qualified LEA, is entitled under California law to be reimbursed for EPSDT services provided to  
14 Medi-Cal eligible children.

15 Despite this clear authority, the State refuses to reimburse the District for EPSDT services  
16 provided to Medi-Cal eligible children solely because the District provides those same services to  
17 children who are not eligible for Medi-Cal without seeking reimbursement from third party  
18 insurance providers. According to the State, the District is not entitled to reimbursement because  
19 the State need only reimburse the District where federal financial participation is "available" under  
20 Medicaid (Cal. Welf. & Inst. Code § 14132.06), and CMS's Free Care Principle renders federal  
21 financial participation unavailable. Thus, in the State's view, CMS's Free Care Principle relieves  
22 the State of any obligation to reimburse the school districts for the cost of providing EPSDT  
23 services.

24 Even assuming that the State is only required to reimburse the District when federal  
25 financial participation is available, the State cannot demonstrate that federal financial participation  
26 is indeed unavailable here. As explained above, the DAB invalidated the Free Care Principle and  
27 held that Oklahoma was entitled to receive federal financial participation for EPSDT services under  
28 facts nearly identical to those presented here. The DAB, like other quasi-judicial bodies, follows its

1 own precedent. Therefore, if the State sought federal financial participation for EPSDT services as  
2 the Oklahoma did, the DAB would require CMS to provide federal financial participation to the  
3 State. The fact that the State has chosen not to pursue its options to receive Medicaid  
4 reimbursement simply because federal bureaucrats at H.H.S. told them, contrary to the law, that the  
5 illegal Free Care Principle barred federal financial participation does not mean that the District is  
6 not entitled to reimbursement. California law conditions the State's duty to compensate the District  
7 on the *availability* of federal financial participation, not on the State's decision to pursue it. Indeed,  
8 the State's failure to diligently seek federal financial participation violates State law, which requires  
9 the State to pursue all available avenues to ensure that LEAs are reimbursed for the medical  
10 services they provided. (See Cal. Welf. & Inst. Code § 14115.8(a)(1), (e).) Therefore, it is the State  
11 – not the District – that should bear the consequences of the State's failure to diligently pursue  
12 federal financial participation.

13 In short, the State cannot rely on the Free Care Principle to deny coverage for EPSDT  
14 services provided by local school districts. To the contrary, the State has a clear and present duty to  
15 reimburse the District for EPSDT services provided to Medi-Cal eligible children.

16 **II. THE DISTRICT IS A BENEFICIALLY INTERESTED PARTY.**

17 "A beneficial interest means the petitioner has a special interest over and above the interest  
18 of the public at large." (*California Ass'n for Health Serv.*, 148 Cal. App. 4th at p. 706.) It is well  
19 established that healthcare providers, such as the District, have a beneficial interest in ensuring that  
20 the State provides Medi-Cal reimbursements in accordance with state law because they "have a  
21 direct monetary interest in ensuring that they are paid for their services." (*Id.* at p. 707.) Thus, the  
22 District clearly is a beneficially interested party.

23 **III. THE DISTRICT HAS NO ADEQUATE REMEDY AT LAW.**

24 The District does not have an adequate remedy at law because the State's Denial imposes  
25 irreparable harm on the District and the approximately 55,000 children who attend school in the  
26 District each year. Because the State refuses to reimburse the District for EPSDT services covered  
27 under Medi-Cal as required by law, the District must pay for those services. As a result, the District  
28 expends large sums of taxpayer money to provide EPSDT services and has less money to spend on

1 other necessary programs and services for students in the District. If the State provided funding for  
2 EPSDT services as it is required to do by law, the District would have more money to use to attract  
3 and retain qualified teachers, provide teacher training programs, improve technology and other  
4 support resources and otherwise improve the educational experience of students in the District.

5 In addition, if the State continues its Denial, the District may be forced to stop providing  
6 EPSDT services to general education students not covered by Medi-Cal at great harm to the District  
7 and its students. EPSDT services are vital for children's development. Children who do not receive  
8 adequate screenings and medical care are vulnerable to poor health and development, low  
9 educational attainment and productivity, and related problems that may plague them throughout  
10 their lives. Regular screening exams and health care are necessary to identify promptly any health  
11 problems and provide intervention when it can be most effective. The broad range of physical,  
12 mental, and developmental examinations through the EPSDT program allows for the identification  
13 of potential illnesses, special health care needs, and disabilities that, if not treated early, can impair  
14 childhood growth and development. Children with undiagnosed or untreated special needs often  
15 pose disciplinary problems in schools and are more expensive to educate. Thus, if the State's policy  
16 forces the District to stop providing EPSDT services to all students who attend school in the  
17 District, the District and its students would suffer irreparable harm.

18 Accordingly, unless the Court takes immediate action, the State will continue to cause the  
19 District and its students irreparable harm. There is no legal remedy that can compensate the District  
20 and its students for the harm caused by the State's Denial.

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**CONCLUSION**

For the forgoing reasons, the District respectfully requests that this Court issue an alternative writ compelling the State either to reimburse the District going forward for EPSDT services provided to children covered by Medi-Cal or show cause by June 23, 2009, or as soon thereafter as possible, why a peremptory writ of mandamus should not issue.

Dated: May 21, 2009

DENNIS J. HERRERA  
City Attorney  
WAYNE SNODGRASS  
VINCE CHHABRIA  
TARA M. STEELEY  
Deputy City Attomeys

By: 

TARA M. STEELEY

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SAN FRANCISCO UNIFIED SCHOOL DISTRICT  
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
12 UNLIMITED JURISDICTION

13 SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT,

14 Plaintiff and Petitioner,

15 vs.

16 THE STATE OF CALIFORNIA, THE  
17 CALIFORNIA DEPARTMENT OF  
HEALTH CARE SERVICES, DAVID  
18 MAXWELL-JOLLY, in his official capacity  
as Director, California Department of Health  
19 Care Services, and DOES 1 to 10,

20 Defendants and Respondents.

Case No.

**VERIFIED PETITION FOR WRIT  
OF MANDAMUS AND VERIFIED  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 Plaintiff and Petitioner San Francisco Unified School District ("the District") hereby  
2 petitions this Court for an alternative writ of mandamus and a peremptory writ of mandamus under  
3 C.C.P. § 1085, directed to Respondents and Defendants the State of California ("State" or  
4 "California"), the California Department of Health Care Services ("DHCS"), David Maxwell-Jolly  
5 ("Maxwell-Jolly"), and DOES 1 to 10, and hereby complains against Respondents and Defendants  
6 as follows:

### 7 INTRODUCTION AND SUMMARY OF ALLEGATIONS

8 1. California's Medi-Cal program provides assistance to individuals and families who  
9 are, by definition, among California's poorest residents. Because children in California are  
10 particularly vulnerable when their families' financial hardships prevent them from receiving basic  
11 medical care, one of the central purposes of Medi-Cal is to provide necessary diagnostic and  
12 treatment services to children. To fulfill this purpose, the State guarantees Medi-Cal coverage for  
13 eligible children to receive basic vision, hearing, and physical screenings and basic medical care,  
14 known as "early and periodic screening, diagnostic, and treatment" ("EPSDT") services. When  
15 EPSDT services are provided by local educational agencies ("LEAs") such as school districts,  
16 EPSDT services are also referred to as "LEA services."

17 2. EPSDT services are vital for children's development. Children who do not receive  
18 adequate screenings and medical care are vulnerable to poor health and development, low  
19 educational attainment and productivity, and related problems that may plague them throughout  
20 their lives. Regular screening exams and health care are necessary to identify promptly any health  
21 problems and provide intervention when it can be most effective. The broad range of physical,  
22 mental, and developmental examinations through the EPSDT program allows for the identification  
23 of potential illnesses, special health care needs, and disabilities that, if not treated early, can impair  
24 childhood growth and development.

25 3. In California, Medi-Cal eligible children typically receive EPSDT services from their  
26 school. Prior to 2006, the State routinely reimbursed the District for EPSDT services provided to  
27 students covered by Medi-Cal. Beginning in 2006, however, the State decided that it would no  
28 longer reimburse local school districts for EPSDT services provided to general education students

1 covered by Medi-Cal if the districts do not also seek reimbursement from third-party insurance  
2 providers for the cost of providing EPSDT services to children not covered by Medi-Cal. (This  
3 arbitrary decision to deny reimbursement to LEAs is referred to herein as the State's "Denial.")  
4 Thus, because the District provides EPSDT services to all children enrolled in District schools, the  
5 State decided that it would no longer reimburse the District for EPSDT services provided to general  
6 education students covered by Medi-Cal going forward. In addition, the State conducted an audit to  
7 calculate the value of prior reimbursements for services provided to general education students  
8 covered by Medi-Cal. On the basis of that audit, the State required the District to repay over  
9 \$300,000. Pursuant to its Denial, the State has also refused to reimburse other school districts in  
10 California for EPSDT services provided to general education students covered by Medi-Cal. On  
11 information and belief, the other school districts in California also object to the State's Denial.

12 4. By refusing to provide coverage for EPSDT services and by forcing the District to  
13 repay over \$300,000 in prior reimbursements, the State violated and continues to violate state law  
14 which unambiguously requires the State to reimburse LEAs, such as the District, for EPSDT  
15 services provided to Medi-Cal eligible children. The State is not relieved of its obligation to  
16 reimburse the District for providing EPSDT services to Medical eligible children merely because  
17 the District provides services to non-Medicaid eligible children without seeking reimbursement  
18 from third-party providers. Indeed, the State has no legal basis for denying reimbursement to the  
19 District for providing EPSDT services to Medical eligible children.

20 5. The State's Denial forces the District to provide necessary medical care to needy  
21 youths at the District's own expense even though the cost of that care should be covered by the  
22 Medi-Cal program. Without reimbursement from the State under Medi-Cal, the District may be  
23 forced to stop providing certain medical services to children or cut other programs or services for  
24 children in the District.

25 6. This action seeks: (1) a declaration that the State's Denial violates state law; (2) a  
26 declaration that the State withheld reimbursements from the District in violation of state law, (3) an  
27 order preliminarily and permanently enjoining the State from continuing its Denial, (4) a writ of  
28 mandamus ordering the State to end its Denial and to ensure that all children receive the Medi-Cal

1 benefits to which they are entitled by law, and (5) an order requiring the State to pay to the District  
2 the unlawfully withheld money, along with interest.

### 3 **THE PARTIES**

4 7. The San Francisco Unified School District is a local education agency in San  
5 Francisco, organized and existing under the Constitution and laws of the State of California. The  
6 District educates approximately 55,000 of San Francisco's pre-school, elementary, middle and high  
7 school students at 34 preschools, 102 K-12 schools, 8 county/court schools, and 9 charter schools.

8 8. The State is a state organized and existing under the California and United States  
9 Constitutions.

10 9. DHCS is the state agency charged with administering the State's Medi-Cal program  
11 and ensuring that the program is operated in conformity with all state and federal laws.

12 10. Defendant and Respondent David Maxwell-Jolly is the director of DHCS. In that  
13 capacity, Maxwell-Jolly is responsible for ensuring that DHCS and the State's Medi-Cal program  
14 operate in conformity with all state and federal laws. Maxwell-Jolly is sued herein only in his  
15 official capacity.

16 11. Defendants and Respondents Does 1-10 are entities and/or persons who are charged  
17 by law with the duty of administering the Medi-Cal program in conformity with applicable federal  
18 and state laws and/or who are enforcing the State's Denial. The District will amend this Complaint  
19 and Petition for Writ of Mandate to substitute their true names as their identities become known.

### 20 **MEDICAID AND MEDI-CAL**

21 12. The federal Medicaid program – established by Congress in 1965 through the  
22 enactment of title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v ("Medicaid Act") – is a  
23 cooperative endeavor in which the federal government provides federal financial participation  
24 ("FFP") to participating states to assist them in providing medical care to individuals with  
25 insufficient income or resources to purchase health care. The purpose of the program is to enable  
26 states to furnish "medical assistance on behalf of families with dependent children and of aged,  
27 blind, or disabled individuals, whose income and resources are insufficient to meet the costs of  
28 necessary medical services . . . ." (42 U.S.C. § 1396-1.) Medicaid is a critical source of health care

1 coverage for children. Indeed, Medicaid's EPSDT coverage was designed to be a "comprehensive  
2 child health program of prevention and treatment." (CMS, U.S. Dep't of Health & Human Serv.,  
3 Pub. No. 45, *State Medicaid Manual* § 5010(B).) The Center for Medicare and Medicaid Services  
4 ("CMS") administers the federal Medicaid program.

5 13. States choose whether to participate in Medicaid. But once a state decides to  
6 participate, it must comply with all the requirements imposed by the Medicaid Act and  
7 implementing federal regulations. California has elected to participate in the federal Medicaid  
8 program through its implementation of the California Medical Assistance Program, Medi-Cal, Welf.  
9 & Inst. Code, §§ 14000-14198 ("Medi-Cal"). In electing to do so, the State has agreed to abide by  
10 all requirements imposed by the Medicaid Act and implementing federal regulations.

11 14. To participate in Medicaid, a state must submit and have approved by the Secretary  
12 of Health and Human Resources a state plan for medical assistance. (42 U.S.C. § 1396.) To be  
13 approved, a state plan must guarantee that the state will provide certain types of assistance –  
14 including EPSDT services – to all individuals who qualify. (42 U.S.C. §§ 1396a(a)(10),  
15 1396d(a)(4)(B).) Specifically, to receive Medicaid funding, the State is required to provide EPSDT  
16 services including an assessment of physical and mental health development, a comprehensive  
17 physical exam, vision, hearing, and dental services, appropriate immunizations, laboratory tests, and  
18 lead toxicity screening to all qualifying children. (42 U.S.C. § 1396d(r); Cal. Welf & Inst. Code  
19 § 14132.06; Cal Code Regs. tit. 22 § 51360.) These services must be provided "at intervals which  
20 meet reasonable standards of medical and dental practice . . . and at such other intervals, indicated  
21 as medically necessary, to determine the existence of certain physical or mental illnesses or  
22 conditions." (42 U.S.C. § 1396d(r)(1)(A).) The State must also provide certain "other necessary  
23 health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects  
24 and physical and mental illnesses and conditions discovered by the screening services, whether or  
25 not such services are covered under the State plan." (*Id.* § 1396d(r)(5).)

26 15. As required, the State's plan guarantees coverage for EPSDT services. Because the  
27 State's plan contemplates that EPSDT services will often be provided by school districts or other  
28 LEAs, the State's plan states that "LEA services are covered when provided to, or directed

1 exclusively toward the treatment of, a Medicaid eligible student under 21 years of age." (California  
2 State Plan, Limitations on Attachment 3.1 –A, Page 9a.)

3 16. Regulations binding on DHCS similarly confirm that "the cost of periodic health  
4 assessments provided to Medi-Cal beneficiaries shall be reimbursed by the State," Cal. Code Regs.  
5 tit. 17 § 6832, and that EPSDT services provided by LEAs "are covered" by Medi-Cal. Cal. Code  
6 Regs. tit. 22 § 51340, Cal Code Regs. tit. 22 § 51360. Thus, the District, as a qualified LEA, is  
7 entitled under California law to be reimbursed for EPSDT services provided to Medi-Cal eligible  
8 children.

### 9 **THE STATE'S DENIAL**

10 17. Prior to 2006, the State reimbursed the District for EPSDT services provided to  
11 children covered by Medi-Cal and did not contest its obligation to provide that reimbursement.

12 18. Starting in 2006, however, the State has refused to reimburse the District for EPSDT  
13 services even though the District has complied with all requirements for receiving reimbursement  
14 for LEA services under Medi-Cal and its implementing regulations. Upon information and belief,  
15 the State refuses to reimburse the District for EPSDT services provided to Medi-Cal eligible  
16 children solely because the District provides those same services to non-Medicaid eligible children  
17 without seeking reimbursement from third-party providers. The State contends that reimbursing the  
18 District under these circumstances would violate a policy originally announced by the federal  
19 Centers for Medicare and Medicaid Services that denied federal financial participation for services  
20 provided to Medicaid-eligible individuals if those same services were available to other students  
21 without charge or reimbursement. This policy is known as the "Free Care Principle."

22 19. The State's reliance on the Free Care Principle to deny Medi-Cal reimbursements to  
23 the District is contrary to the law. Although the federal government at one time relied on the Free  
24 Care Principle, it has been established since at least 2004 that the Free Care Principle is not valid or  
25 consistent with Medicaid's requirements. Indeed, the Departmental Appeals Board ("DAB"), the  
26 administrative body responsible for hearing appeals of HHS component-agency decisions, formally  
27 invalidated the Free Care Principle in 2004. As the DAB held, the Free Care Principle is not  
28

1 codified in any federal statute or regulation and no federal statute conditions Medicaid  
2 reimbursement on whether non-Medicaid eligible individuals also receive health services.

3 20. Similarly, no state statute or regulation conditions the receipt of Medi-Cal benefits  
4 on whether the District seeks reimbursement from third party insurance providers for the cost of  
5 providing EPSDT services to children not covered by Medi-Cal. Indeed, DHCS knew at the time it  
6 decided to stop reimbursing the District for EPSDT services provided to Medi-Cal beneficiaries that  
7 its decision was not supported by state or federal law. As Stan Rosenstein, the Deputy Director for  
8 Medical Care Services at DHCS, acknowledged, the State's and DHCS's Denial lacks any legal  
9 basis and is not in compliance with the law. (Exs. A, B, C, & D.)

10 21. Because the Free Care Principle is not valid or consistent with either Medicaid or  
11 Medi-Cal requirements, the State cannot rely on the Free Care Principle to deny coverage for  
12 EPSDT services provided by local school districts. Thus, the State has no valid basis on which to  
13 refuse to reimburse the District for EPSDT services provided to Medi-Cal eligible children.

#### 14 **UNLAWFUL AUDIT AND WITHHOLDING OF REIMBURSEMENT**

15 22. Pursuant to its Denial, the DHCS' Audits and Investigations group ("A & I") in 2006  
16 conducted a six-month audit of the District's Medi-Cal claims to determine if the District's prior  
17 claims violated the Free Care Principle. The audit concluded that the District improperly billed the  
18 state for "free care" services during the prior three years in the amount of \$301,537. The State  
19 recovered that money by withholding other valid reimbursements that the District was entitled to  
20 receive.

21 23. DHCS's audit and its decision to withhold valid reimbursements from the District on  
22 the basis of the Free Care Principle were without any legal basis. Indeed, DHCS knew that its audit  
23 of the District was unjustified at the time it conducted the audit. On April 27, 2006, Stan  
24 Rosenstein, the Deputy Director for Medical Care Services at DHCS, stated in an email that "If A&I  
25 issues the audit it will neither be supported by state or federal law. A&I makes decisions about  
26 what audits and demands to issue, but if you proceed here it will be very controversial and without  
27 any legal basis." Likewise, in a February 15, 2007 email, Stan Rosenstein explained that DHCS's  
28

1 audit of the District was not "in compliance with federal rules" because the "free care issue is wrong  
2 and there is no basis for it in federal rules."

3 24. Thus, the State audited and withheld money from the District knowing that it had no  
4 legal basis for doing so.

5 **HARMS CAUSED BY THE STATE'S DENIAL**

6 25. The State's Denial and wrongful withholding of valid reimbursements has imposed  
7 significant burdens on the District and the approximately 55,000 children who attend school in the  
8 District each year. Because the State has refused to reimburse the District for EPSDT services  
9 covered under Medi-Cal as required by law, the District must pay for those services. As a result,  
10 the District expends large sums of taxpayer monies to provide EPSDT services and has less money  
11 to spend on other necessary programs and services for students in the District.

12 26. If the State provided funding for EPSDT services as it is required to do by law, the  
13 District would have more money to use to attract and retain qualified teachers, provide teacher  
14 training programs, improve technology and other support resources and otherwise improve the  
15 educational experience of students in the District. Similarly, if the State returned the over \$300,000  
16 that it wrongfully withheld from the District, the District could use that money to improve the  
17 educational environment for the thousands of children who attend school in the District.

18 In addition, if the State continues its Denial, the District may be forced to stop providing  
19 EPSDT services to general education students not covered by Medi-Cal at great harm to the District  
20 and its students. EPSDT services are vital for children's development. Children who do not receive  
21 adequate screenings and medical care are vulnerable to poor health and development, low  
22 educational attainment and productivity, and related problems that may plague them throughout  
23 their lives. Regular screening exams and health care are necessary to identify promptly any health  
24 problems and provide intervention when it can be most effective. The broad range of physical,  
25 mental, and developmental examinations through the EPSDT program allows for the identification  
26 of potential illnesses, special health care needs, and disabilities that, if not treated early, can impair  
27 childhood growth and development. Children with undiagnosed or untreated special needs often  
28 pose disciplinary problems in schools and are more expensive to educate. Thus, if the State's policy

1 forces the District to stop providing EPSDT services to all students who attend school in the  
2 District, the District and its students would suffer irreparable harm.

3 27. By shifting its financial responsibilities under the Medi-Cal program to the District,  
4 the State has harmed the District and the tens of thousands of children who attend school in the  
5 District.

#### 6 **THE DISTRICT'S EFFORTS TO RESOLVE THIS DISPUTE**

7 28. In light of the State's duty to reimburse the District for providing EPSDT services to  
8 eligible children and the State's admission that its Denial violates the law, the District has attempted  
9 on numerous occasions to resolve this dispute without requiring Court intervention. The State has  
10 failed to respond to or has rejected each of the District's attempts.

11 29. On July 22, 2008, counsel for the District contacted Elizabeth Touhey of DHCS to  
12 inform her that the District was considering filing a lawsuit against the State challenging its failure  
13 to reimburse the District for providing EPSDT services, but that the District wished to give the State  
14 an opportunity to explain the legal basis for its position first. (Pet. Ex. E.) DHCS did not respond.

15 30. On August 25, 2008, the District sent a formal demand letter setting forth in detail  
16 the State's legal duty to reimburse the District and demanding that the State (1) refund to the District  
17 the \$305,000 improperly withheld by DHCS in 2006 on the ground that EPSDT services were not  
18 reimbursable and (2) formally commit to reimbursing the District for the provision of EPSDT  
19 services going forward, beginning with the 2008-2009 school year. (Pet. Ex. E.) The demand letter  
20 explained that reliance on the Free Care Principle was unavailing given DAB's ruling invalidating  
21 the Free Care Principle. (*Id.*)

22 31. The State did not respond to that letter until October 2, 2008. In its two-paragraph  
23 response, the State stated that "CMS has clearly stated that the 'free care principle' requires the  
24 disallowance of [EPSDT services] and therefore will disallow FFP in those situations." On that  
25 basis alone, the State asserted that the District was not entitled to reimbursement. (Pet. Ex. F.)  
26  
27  
28

**FIRST CAUSE OF ACTION**

**(WRIT OF MANDAMUS AGAINST ALL DEFENDANTS AND RESPONDENTS – CODE OF CIVIL PROCEDURE SECTION 1085)**

32. The District incorporates by reference each and every allegation contained in paragraphs 1 through 26.

33. The State and DHCS have a clear, present, and ministerial duty to administer the Medi-Cal program in conformity with state law and to ensure that all children eligible for Medi-Cal benefits receive those benefits in a prompt and efficient manner. The State and DHCS also have a clear, present, and ministerial duty to reimburse school districts that provide services covered under Medi-Cal to children eligible to receive Medi-Cal benefits.

34. State law, as provided by California's Medi-Cal Plan, Cal. Welf. & Inst. Code § 14132.06, Cal. Cal. Code Regs. tit. 17 § 6832, Cal. Code Regs. tit. 22 § 51340, and Cal Code Regs. tit. 22 § 51360, requires that the State and DHCS reimburse the District for EPSDT provided to children who are Medi-Cal beneficiaries.

35. The State and DHCS, however, continue to refuse to pay for EPSDT services provided to general education students covered by Medi-Cal. In doing so, the State and DHCS have breached and continue to breach their legal duties under state law.

36. The State and DHCS also continue to withhold past reimbursements from the District in violation of state law.

37. As the provider of necessary medical services that have not been and are not being reimbursed by Medi-Cal, the District has a direct interest in ensuring that children receive all the Medi-Cal benefits that they are entitled to receive under state law.

38. The District has no plan, speedy, and adequate remedy in the ordinary course of law.

39. To resolve this controversy, the District requests, pursuant to Code of Civil Procedure section 1085, that this Court issue a writ of mandamus instructing the State and DHCS to cease their Denial, to provide reimbursement for Medi-Cal services provided by the District to Medi-Cal eligible students, and to pay the District the money wrongfully withheld in the past based on the State's and DHCS's Denial and improper audit along with interest.

**SECOND CAUSE OF ACTION**  
**(DECLARATORY AND INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS AND RESPONDENTS – CODE OF CIVIL PROCEDURE SECTION 1060)**

40. The District incorporates by reference each and every allegation contained in paragraphs 1- 33.

41. The District contends that the State's Denial violates state law, as provided by California's Medi-Cal Plan, Cal. Welf. & Inst. Code § 14132.06, Cal. Cal. Code Regs. tit. 17 § 6832, Cal. Code Regs. tit. 22 § 51340, and Cal Code Regs. tit. 22 § 51360, by failing to cover EPSDT services for eligible children who receive EPSDT services from the District. The District also contends that, pursuant to the State's Denial, the State illegally withheld \$301,537 from the District in response to an improper audit.

42. The State contends that its Denial is lawful despite state and federal laws requiring the State to cover EPSDT services for children who qualify for Medi-Cal. The State also contends that it permissibly withheld \$301,537 from the District pursuant to the State's Denial.

43. Accordingly, an active controversy has arisen and now exists between the District and the State concerning their respective rights, duties, and responsibilities. The controversy is definite and concrete, and touches on the legal relations of the parties, as well as thousands of children not before this Court whom the District and the State are legally bound to serve.

44. The District requests, pursuant to Code of Civil Procedure section 1060, that this Court declare the respective rights and duties of the parties and declare that the State's Denial violates state law. The District also requests an order preliminarily and permanently enjoining the State from refusing to reimburse the District for EPSDT services provided to Medi-Cal eligible children who attend school in the District, and an order requiring the State to reimburse the District for money wrongfully withheld pursuant to the State's Denial, along with interest.

**PRAYER FOR RELIEF**

For the reasons set forth above, the District prays that the Court enter judgment against Defendants and Respondents as follows:

1. For an alternative Writ of Mandamus to be issued pursuant to C.C.P. § 1087, *ex parte* under the seal of this Court, ordering:

1 a) the State and DHCS to cease their policy of refusing to reimburse the District  
2 for the cost of providing EPSDT services, and

3 b) the State and DHCS to provide reimbursement for Medi-Cal services  
4 provided by the District to Medi-Cal eligible students, or

5 c) the State and DHCS to show cause before this Court, by June 23, 2009, or as  
6 soon thereafter as possible, at a time and place specified by order of this Court, why the State and  
7 DHCS have not done so and why a peremptory writ should not issue;

8 2. On return of the alternative writ and hearing on the order to show cause, for a  
9 peremptory writ of mandamus to be issued under the seal of this court ordering:

10 a) the State and DHCS to cease their policy of refusing to reimburse the District  
11 for the cost of providing EPSDT services, and

12 b) the State and DHCS to provide reimbursement for Medi-Cal services  
13 provided by the District to Medi-Cal eligible students, and

14 c) the State and DHCS to pay the District \$301,537, which is the amount  
15 wrongfully withheld based on the State's and DHCS's Denial and improper audit, and interest on  
16 said sum.

17 3. For a declaration that the State's policy of refusing to reimburse for EPSDT services  
18 provided by the District violates state law.

19 4. For an order preliminarily and permanently enjoining the State from refusing to  
20 reimburse the District for EPSDT services provided to Medi-Cal eligible children who attend school  
21 in the District.

22 5. For an order requiring the State and DHCS to reimburse the District for EPSDT  
23 services that have been or will be provided to Medi-Cal eligible children who attend school in the  
24 District.

25 6. For an order requiring the State and DHCS to pay the District \$301,537.00, the  
26 amount wrongfully withheld based on the State's and DHCS's Denial and their improper audit, and  
27 interest on said sum.

28 7. For costs, including but not limited to attorneys' fees; and

1           8.       For any and all such other relief to which the District may be justly entitled.  
2

3 Dated: May 21, 2009  
4

5                   DENNIS J. HERRERA  
6                   City Attorney  
7                   WAYNE SNODGRASS  
8                   VINCE CHHABRIA  
9                   TARA M. STEELEY  
10                  Deputy City Attorneys

11                  By:   
12                  TARA M. STEELEY

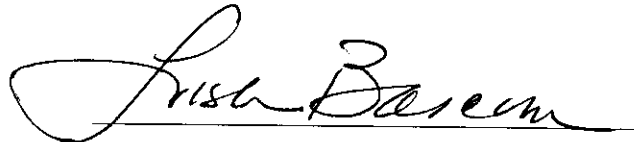
13                  Attorneys for Plaintiff  
14                  CITY AND COUNTY OF SAN FRANCISCO  
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1 **VERIFICATION**

2 I, Trish Bascom, the undersigned, declare:

3 I am the Associate Superintendent, Student Support Services Division, of the San  
4 Francisco Unified School District. I have read the above Verified Petition for Writ of Mandamus;  
5 *Ex Parte* Application for Alternative Writ, and Verified Complaint for Declaratory and Injunctive  
6 Relief and know its contents. I am informed and believe and based on said information and allege  
7 the matters stated therein are true.

8 I declare under penalty of perjury under the laws of the State of California that the  
9 above is true and correct and that this verification is executed on May 21, 2009 in San Francisco,  
10 California.

11 

12 Trish Bascom

# **EXHIBIT A**

State of California—Health and Human Services Agency  
Department of Health Services



California  
Department of  
Health Services

SANDRA SHEWRY  
Director



ARNOLD SCHWARZENEGGER  
Governor

March 6, 2006

Ms. Linda Minamoto  
Associate Regional Administrator  
Division of Medicaid & Children's Health  
Department of Health & Human Services  
Centers for Medicare and Medicaid Services  
75 Hawthorne Street, Suite 408  
San Francisco, CA 94105

Dear Ms. Minamoto:

The California Department of Health Services (CDHS) received your letter of September 27, 2005, denying its request for a waiver of free-care-principle requirements for the Local Educational Agency (LEA) Medi-Cal Billing Option program. CDHS requests that the Centers for Medicare and Medicaid Services (CMS) reconsider this waiver request.

The reason CMS provides for the waiver denial is the President's 2006 budget, which proposes (in part) "codifying in regulation CMS reimbursement policies for services provided free of charge to the public." However, this text has since been removed from the budget bill and should no longer be considered a basis for denying this request.

CDHS waiver request cited the January 25, 2005, decision by the Departmental Appeals Board (DAB), Number 1924, *Oklahoma Health Care Authority*, which overturned a CMS disallowance of federal financial participation for school-based Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services provided to Medicaid beneficiaries. The DAB decision on *Oklahoma* should be a basis for approving CDHS request. The denial letter did not address this basis of the request.

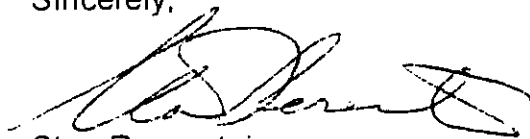
CDHS referenced its method to ensure that reimbursement of the costs of services provided through the LEA Medi-Cal Billing Option do not exceed actual costs of providing those services. The denial letter did not address this methodology, even though it had been approved by CMS through State Plan Amendment 03-024.

Ms. Linda Minamoto  
Page 2

CDHS is resubmitting its initial request as an attachment to this letter. Your consideration in this matter is much appreciated. CDHS requests that a formal response be provided within 60 days of this letter. CMS is requested to respond to this letter based upon current federal rules rather than upon rules that might or might not be adopted in the future. If CMS should deny this request, please provide the rationale CMS staff use, and explain why CMS staff believe they are not legally required to follow the decision reached by the DAB.

If you have questions, please contact Elizabeth Touhey, Acting Chief, Medi-Cal Benefits Branch, at (916) 552-9615 or [etouhey@dhs.ca.gov](mailto:etouhey@dhs.ca.gov).

Sincerely,



Stan Rosenstein  
Deputy Director  
Medical Care Services

Enclosure

cc: ✓ Ms. Elizabeth Touhey, Acting Chief  
Medi-Cal Benefits Branch  
California Department of Health Services  
MS 4601  
1501 Capitol Avenue, Suite 71.4001  
Sacramento, CA 95814

Hon. Juan Arambula  
Assemblymember, Thirty-First District  
P.O. Box 942649  
Sacramento, CA 94249-0031

Ms. Nancy Grace, Esq.  
Office of Legal Services  
California Department of Health Services  
MS 0010  
1501 Capitol Avenue, Suite 71.5001  
Sacramento, CA 95814

# **EXHIBIT B**

State of California—Health and Human Services Agency  
Department of Health Services



California  
Department of  
Health Services

SANDRA SHEWRY  
Director



ARNOLD SCHWARZENEGGER  
Governor

August 1, 2006

Ms. Linda Minamoto  
Associate Regional Administrator  
Division of Medicaid—Region IX  
Department of Health and Human Services  
Centers for Medicare and Medicaid Services  
75 Hawthorne Street, Fourth Floor  
San Francisco, CA 94105-3903

Dear Ms. Minamoto:

The purpose of this letter is to address an audit finding related to the federal "free care" policy. The Medical Review Branch of the Audits and Investigations (A&I) Division, California Department of Health Services (CDHS), reviewed paid claims data for San Francisco Unified School District (SFUSD) covering the period of January 3, 2005, to June 30, 2005. A&I determined that SFUSD was being reimbursed by Medi-Cal for the costs of services that may be viewed as free care services by CMS.

CMS's forthcoming Notice of Proposed Rulemaking regarding payments for Services Provided without Charge (CMS-2489-P) is, at this time, still a proposal. The Federal Register entry for CMS-2489-P also notes that the Legal Authority and CFR Citation are "Not Yet Determined." Thus, the Notice of Proposed Rulemaking does not validate the free care policy, nor does it constitute a basis for the denial of our request to waive the free care policy for the LEA Medi-Cal Billing Option program.

CDHS continues to request a waiver of the free care policy for the Local Education Agency (LEA) Medi-Cal Billing Option program. First, there is no *legal basis* for the policy. The decision by the Departmental Appeals Board (DAB), Number 1924, Oklahoma Health Care Authority, is a legitimate basis for allowing the waiver. DAB No. 1924 emphasized CMS's lack of legal basis for its free care policy. Your letter of May 25, 2006, states that CMS was not permitted to take the disallowance in the Oklahoma case due to a unique set of circumstances applying only to that state. CDHS maintains its position that the DAB No. 1924 decision, which found that there is no legal basis for the free care policy, is applicable to all states against which CMS asserts the policy. Second, CDHS continues to request a waiver based on the factors cited in DAB No. 1924:

Ms. Linda Minamoto  
Page 2  
August 1, 2006

- There exists a low recovery rate for third-party reimbursement of the cost of services to Medi-Cal eligibles.
- Survey results demonstrate that most health insurers will not cover or reimburse for school-based services.
- CMS has waived third-party liability requirements in the past.

Because the free care policy is not supported by law, CDHS will not authorize A&I to mandate recovery for past reimbursements for the "free care services" provided to students. CDHS continues to request a waiver of CMS's free care policy. Your consideration in this matter is appreciated. CDHS requests that a formal response be provided within 60 days from the date of this letter.

If you have any questions, please contact Ms. Elizabeth Touhey, Chief of the Administrative Claiming Local and School Services Section at 552-9615 or [etouhey@dhs.ca.gov](mailto:etouhey@dhs.ca.gov).

Sincerely,

**Original Signed by Stan Rosenstein**

Stan Rosenstein  
Deputy Director  
Medical Care Services

cc: See Next Page

Ms Linda Minamoto  
Page 3  
August 1, 2006

cc: David Botelho  
Deputy Director  
Audits and Investigations  
Department of Health Services  
1500 Capitol Avenue, Suite 72.624  
MS 2000  
P.O. Box 997413  
Sacramento, CA 95899-7413

Nancy Grace, Esq.  
Office of Legal Services  
Department of Health Services  
1501 Capitol Avenue, Suite 71.5001  
MS 0010  
P.O. Box 997413  
Sacramento, CA 95899-7413

The Honorable Juan Arambula  
Assemblymember  
Thirty-First District  
P.O. Box 942649  
Sacramento, CA 94249-0031

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# **EXHIBIT C**

**Bush, Michael (DHCS-SNFD-ACLSS)**

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**From:** Botelho, David (DHS-A&I)  
**Sent:** Thursday, February 15, 2007 7:59 AM  
**To:** Rosenstein, Stan (DHCS-DIR); McCaffery, Thomas (DHS-DIR)  
**Cc:** zzzKent, Jennifer (CHHS)  
**Subject:** RE: Leno letter on SF free care issue

If that is the only change I have no objection, however if this ends up in a hearing the federal regulations and Medicaid Manual will be used to support the audit adjustment. In the hearing process for such an audit the Oklahoma court case will not be relevant and the letters from CMS denying our request for a waiver will further support the audit.

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**From:** Rosenstein, Stan (DHS)  
**Sent:** Thursday, February 15, 2007 7:53 AM  
**To:** McCaffery, Thomas (DHS-DIR)  
**Cc:** Botelho, David (DHS-A&I); Kent, Jennifer (DHS-EXEC-LGA)  
**Subject:** RE: Leno letter on SF free care issue

I read it last night and have it for you. We will walk it down.

We need to delete the statement that the audit was in compliance with federal rules.

In fact it was not as shown by CMS's loss at their own hearing appeals board. The free care issue is wrong and there is no basis for it in federal rules.

Making the statement undermines our argument to the feds that they have taken an illegal action and our effort to get this issue to fair hearing and get our due process. We don't want the Director's statement put into the record when we contest this policy.

Please also keep in mind that SF is not the only district with the free care issue. This is a major issue to the school districts.

Thank you.

**Stan Rosenstein**

Medical Care Services, Department of Health Services  
1501 Capitol Avenue, 6<sup>th</sup> Floor, MS 4000  
PO Box 942732

Sacramento, CA 94234-7320

(916) 440-7800, fax (916) 440-7805

The Medi-Cal program was 40 years old on March 1, 2006. Serving 6.8 million Californians

**Help Stop Medi-Cal Fraud: Hotline: 1-800-822-6222**

**Website: <http://www.stopmedi-calfraud.dhs.ca.gov>**

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**From:** McCaffery, Thomas (DHS-DIR)  
**Sent:** Wednesday, February 14, 2007 9:08 PM  
**To:** Rosenstein, Stan (DHS)  
**Cc:** Botelho, David (DHS-A&I); Kent, Jennifer (DHS-EXEC-LGA)  
**Subject:** Leno letter on SF free care issue  
**Importance:** High

I had Cynthia walk down to your office this afternoon the entire package on this issue with the proposed letter that would go from Sandra to Leno. We need to have Sandra sign a letter tomorrow prior to her taking off for vacation – that being said, I will need to get any feedback/comment you might have on the proposed response by tomorrow. Thx

**Tom McCaffery**  
**Chief Deputy Director**  
**California Department of Health Services**  
**916.440.7475**

# **EXHIBIT D**

**Touhey, Elizabeth (DHS-MCPD-MBB-ACLSS)**

**From:** Rasenstein, Stan (DHS)  
**Sent:** Thursday, April 27, 2006 7:00 PM  
**To:** Touhey, Elizabeth (DHS-MCPD-MBB-ACLSS); English, Jan (DHS-A&I-MRB); Mesaku, Winston (DHS-A&I-MRB); Botelho, David (DHS-A&I-FAB)  
**Cc:** Vogel, Jeff (DHS-A&I-MRB)  
**Subject:** RE: SF Unified

Normally I don't have a role in A&I's issuance of audits. The free care issue was a policy that was falsely issued by CMS and has no legal basis. CMS lost an appeal on this issue in Oklahoma where their appeals judge found there was no legal basis for the rule.

A&I should review the Oklahoma decision and our letters to CMS. We have not gotten a response, in part where we are asking them how they can act outside the law.

If A&I issues the audit it will neither be supported by state or federal law. A&I makes decisions about what audits and demands to issue, but if you proceed here it will be very controversial without any legal basis.

Thank you.

Stan Rosenstein

Medical Care Services, Department of Health Services

1501 Capitol Avenue, 6th Floor, MS 4000 PO Box 942732 Sacramento, CA 94234-7320

(916) 440-7800, fax (916) 440-7805

The Medi-Cal program was 40 years old on March 1, 2006. Serving 6.8 million Californians Help Stop Medi-Cal Fraud: Hotline: 1-800-822-6222

Website: <http://www.stopmedi-calfraud.dhs.ca.gov>

-----Original Message-----

**From:** Touhey, Elizabeth (DHS-MCPD-MBB-ACLSS)  
**Sent:** Thursday, April 27, 2006 2:51 PM  
**To:** English, Jan (DHS-A&I-MRB); Mesaku, Winston (DHS-A&I-MRB)  
**Cc:** Vogel, Jeff (DHS-A&I-MRB); Rosenstein, Stan (DHS)  
**Subject:** Re: SF Unified

Jan and Winston, please hold on this until we hear from Stan. Thanks

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Sent from my BlackBerry Wireless Device

-----Original Message-----

**From:** English, Jan (DHS-A&I-MRB)  
**To:** Mesaku, Winston (DHS-A&I-MRB)  
**CC:** Touhey, Elizabeth (DHS-MCPD-MBB-ACLSS); Vogel, Jeff (DHS-A&I-MRB)  
**Sent:** Thu Apr 27 14:46:52 2006  
**Subject:** RE: SF Unified

If I already reviewed the demand, ok to issue. If not can you send to me for review. Thanks

Jon English, N.P., Chief

Audits and Investigations  
Medical Review Branch  
1500 Capitol Avenue, MS 2303  
P.O. Box 997413  
Sacramento, CA 95899-7413  
916-440-7466 - 916-440-7619 (Fax)  
email: jinglish@dhs.ca.gov

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From: Mesaku, Winston (DHS-A&I-MRB)  
Sent: Thursday, April 27, 2006 1:37 PM  
To: English, Jan (DHS-A&I-MRB)  
Cc: Touhey, Elizabeth (DHS-MCPD-MBB-ACLSS); Vogel, Jeff (DHS-A&I-MRB)  
Subject: RE: SF Unified

Jan,

Update on the recovery audit on SF Unified. To summarize, we requested to schedule an exit conference but our offer was rebuffed. On April 11th, we sent them our working papers and informed them that communication would be considered the exit conference and they had 15 days to provide additional documentation. The 15 days have passed and we not received any communication whatsoever from SFUSD. Unless you have some concerns about issuing the demand, we plan to issue this tomorrow. The demand is for \$301,546.65. Let me know if you have any questions.

Winston Mesaku, Chief  
Medical Review North  
Audits & Investigations  
(415) 904-9715

-----Original Message-----

From: English, Jan (DHS-A&I-MRB)  
Sent: Wednesday, April 12, 2006 7:21 AM  
To: Mesaku, Winston (DHS-A&I-MRB)  
Subject: RE: SF Unified

Thanks-hang in there.

Jan English, N.P., Chief  
Audits and Investigations  
Medical Review Branch  
1500 Capitol Avenue, MS 2303  
P.O. Box 997413  
Sacramento, CA 95899-7413  
916-440-7466 - 916-440-7619 (Fax)  
email: jinglish@dhs.ca.gov <mailto:jinglish@dhs.ca.gov>

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From: Mesaku, Winston (DHS-A&I-MRB)  
Sent: Tuesday, April 11, 2006 4:55 PM  
To: English, Jan (DHS-A&I-MRB)

Cc: Vogel, Jeff (DHS-A&I-MRB); Touhey, Elizabeth (DHS-MCPD-MBB-ACLSS)  
Subject: SF Unified  
Importance: High

Jan,

Wanted to alert you that we are at loggerheads with SF Unified School District. We advised them that we are conducting a review of their "free care" claims and requested documentation for a sample of those claims. They have steadfastly refused to supply us with documentation based on what they perceive to be an inconsistent position by DHS on free care. We've made them aware that we intend to recover any "free care" claims that we paid, but they are questioning why since our Dept. requested an exemption from the federal "free care" regulations. We, of course, explained that CMS turned down our request and therefore, the school districts have to comply with this regulation. They're not satisfied with that response and therefore, will not provide us with documentation to assess whether any of these claims should have been covered under the "free care" regulation. We considered temporary suspension for not allowing us access to the records, but felt this would not be appropriate for a school district. Subsequently, we asked SFUSD to have an exit conference scheduled where it was our intention to have informed them that we had no option but to recommend recovery on all of the claims in the audit universe. Of course, we would have allowed them 15 days following the exit conference to provide the documentation for the claims (and likely more if we felt they were making a good faith effort to get the records for us). They have responded to this offer by refusing to participate in an exit conference. In response to their refusal, we sent (today) a letter informing them that their refusal to schedule an exit conference amounted to a waiver of their right to an exit. The letter states that they have 15 days to provide documentation that we will consider for the final overpayment calculation. We also sent them working papers which document how much the overpayment recovery will be based on the zero documentation. In addition, we also offered them another opportunity to have an exit conference but stated that they would have to make that request by April 17 (next Monday).

Jeff and the auditor (Lori Haueresly) have been more than reasonable in their audit. I consider this a last resort because of their refusal to cooperate with our request. You, Liz, and David may get some calls regarding this letter from David Campos, the general counsel for SF Unified. He has been our contact person for this audit.

Let me know if you have any questions.

Winston Mesaku, Chief  
Medical Review North  
Audits & Investigations  
(415) 904-9715

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# **EXHIBIT E**

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

VINCE CHHABRIA  
Deputy City Attorney

DIRECT DIAL: (415) 554-4674  
E-MAIL: vince.chhabria@sfgov.org

August 25, 2008

Via Facsimile: (916) 440-7656

Ms. Sandra Shewry, Director  
California Department of Health Care Services  
1501 Capitol Avenue, Suite 6001  
MS 0000  
P.O. Box 997413  
Sacramento, CA 95899-7413

Re: Denial of Medi-Cal Reimbursement for EPSDT Services

Dear Madame Director:

On July 22, 2008, I spoke with Elizabeth Touhey of the Department of Health Care Services ("DHCS") and informed her that the San Francisco Unified School District ("SFUSD" or "District") was exploring the possibility of filing a lawsuit against the State for failure to reimburse the District for EPSDT services provided by the District to Medi-Cal eligible students. I told Ms. Touhey that the District wished first to give the State an opportunity to set forth the legal basis for its decision that school districts are not entitled to EPSDT reimbursement. I have not heard back from Ms. Touhey or from any attorney representing DHCS in this matter.

On August 4, 2008, we sent DHCS a Public Records Act request, seeking three categories of records relating to the State's decision to withhold reimbursement from the District. The 10-day deadline to respond has long passed, and we have received no response. This places DHCS in violation of the Public Records Act.

The purpose of this letter is to formally demand that DHCS, by **no later than September 4, 2008**: (1) deliver to us the materials sought in the Public Records Act request; (2) agree to provide the District with a refund of the \$305,000 improperly withheld by DHCS in 2006 on the ground that EPSDT services were not reimbursable; and (3) formally commit to reimbursing the District for the provision of EPSDT services going forward, beginning with the 2008-2009 school year, as it is legally required to do.

California law requires that local educational agencies ("LEAs"), as medical providers under the Medi-Cal system, must be reimbursed for the provision of EPSDT services to Medi-Cal eligible children. See Cal. Welf. & Inst. Code § 14132.06(a); Cal. Code Regs. tit. 22 § 51190.2 & § 51360(a). As we understand it, certain individuals at DHCS have taken the position that: (i) although the State must indeed reimburse LEAs for covered services, it need not do so unless federal financial participation is available; and (ii) federal financial participation is not available, because certain individuals at CMS have told the State that CMS would apply the "free care principle" to deny reimbursement to the State for any EPSDT services provided by school districts. However, the assertions of the free care principle by individuals at CMS do not support

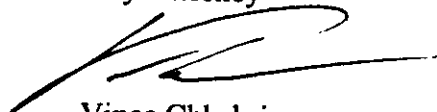
Letter to Ms. Sandra Shewry, Director  
Page 2  
August 25, 2008

a conclusion that federal financial participation is unavailable. To the contrary, in 2004, the federal Departmental Appeals Board ("DAB") unequivocally held that the free care principle is invalid and provides no basis for denying reimbursement to states for the provision of EPSDT services by school districts. *See* DAB 1924 (2004), 2004 WL 1764718 (H.H.S.). Accordingly, if California had formally sought reimbursement from the federal government for EPSDT services provided by school districts, it would have received reimbursement. If CMS somehow decided to disregard the law and deny reimbursement, California without question could have successfully challenged the CMS decision before the DAB on the strength of the 2004 DAB ruling.

In short, federal financial participation is very much available, but the State, for some unknown reason, has declined to obtain it. And because federal financial participation for these EPSDT services is available, the State is required by law to reimburse the District, whether or not the State chooses to take advantage of the available federal funding.

Sincerely,

DENNIS J. HERRERA  
City Attorney



Vince Chhabria  
Deputy City Attorney

cc: Elizabeth Touhey, Fax No. 916-324-0738  
Sharon Stevenson, Chief Counsel, Fax No. 916-440-7710  
Maribel Medina, General Counsel, SFUSD

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# EXHIBIT F



State of California—Health and Human Services Agency  
Department of Health Care Services



ARNOLD SCHWARZENEGGER  
Governor

October 2, 2008

Vince Chhabria  
Deputy City Attorney  
Office of the City Attorney  
1 Dr. Carlton B. Goodlett Place, Suite 325  
San Francisco, CA 94102

**RE: Demand Letter Concerning SFUSD**

Dear Mr. Chhabria:

The California Department of Health Care Services (DHCS) is in receipt of your demand letter dated August 25, 2008. We disagree with your interpretation that the \$305,000 was improperly withheld for 2006 and that EPSDT services are required to be reimbursed for future years. DHCS has diligently attempted to obtain CMS approval of these costs. Unfortunately, CMS has clearly stated that the "free care principle" requires the disallowance of those costs and therefore will disallow FFP in those situations. Therefore, these costs are not reimbursable to the City and County of San Francisco and DHCS will not be making the requested adjustments.

Please contact me at (916) 440-7735 if you require additional information concerning this matter.

Sincerely,

  
Anthony Lewis  
Assistant Chief Counsel