BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 60800, as added by Chapter 975, Statutes of 1995; and California Department of Education Memorandum dated February 16, 1996; filed on December 30, 1996, By the San Diego Unified School District, Claimant	NO. CSM 96-365-01 *Physical Performance Tests* *STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7* *(Adopted on June 25, 1998, as modified.)*

STATEMENT OF DECISION

The attached Statement of Decision of the Comrnission on State Mandates was adopted on June 25, 1998.

This Decision shall become effective on June 25, 1998.

PAULA HIGASHI, Executive Director

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STATEMENT OF DECISION

This test claim was heard by the Commission on State Mandates (Comrnission) on April 23, 1998, during a regularly scheduled hearing. Mr. James A. Cunningham appeared for the San Diego Unified School District, Ms. Robin E. Baker appeared for the Department of Finance, and Dr. Carol A. Berg appeared for the Education Mandated Cost Network.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken. The Commission unanimously approved the staff recommendation to find a partial state mandated program.

The law applicable to the Commission's deterrnination of a reimbursable state mandated program is Government Code section 17500 et seq., section 6, article XIII B of the California Constitution, and related case law.

BACKGROUND AND FINDINGS OF FACT

Historically, California required pupil physical fitness testing. The term "Physical Fitness Test" means any test, which addresses body structure and composition, and cardiovascular, musculoskeletal, and neuromuscular functions. [1] Until 199 1, the Superintendent of Public Instruction designated the tests. After 1991, the State Board of Education designated the tests. Test results were submitted to the district's governing board and to the Department of Education.

[1] Education Code, section 60602, subdivision (b), Definitions.

Physical fitness testing was required continuously from 1969 to December 3 1, 1994. For a one-year period from January 1, 1995, through December 3 1, 1995, state law did *not* require school districts to perform physical fitness testing.

Subsequently, the test claim legislation (i.e., Education Code section 60800, as added by Chapter 975, Statutes of 1995) *reinstated* physical fitness testing beginning on January 1, 1996. The State Board of Education is given authority to designate the physical performance test that will be administered. On February 9, 1996, the Board adopted an advisory designating the Prudential Fitnessgram as the required physical fitness test to be administered to California students in grades 5, 7, and 9. The Prudential Fitnessgram is "a comprehensive fitness program consisting of health-related fitness assessment, a computerized reporting program, a behavioral-oriented recognition system, and supplementary educational materials developed by [the American Alliance for Health, Physical Education, Recreation, and Dance] for use by teachers. "[2] The Prudential Fitnessgram focuses on three fitness areas: aerobic capacity, body composition, and muscular strength, endurance, and flexibility.[3]

The State Board of Education's advisory and the Prudential Fitnessgram are deemed to be "executive orders"[4] and a part of this test claim.

Issue

> Do the provisions of the test claim legislation and the related executive orders on physical fitness testing, impose a new program or higher level of service upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514?

Chapter 975, Statutes of 1995, added section 60800 to the Education Code. Section 60800 reads in relevant part:

> "(a) During the month of March, April, or May, the governing board of each school district maintaining any of grades 5, 7, and 9 *shall administer* to each pupil in those grades the physical performance test designated by the State Board of Education. . . .
>
> "(b) Upon request of the State Department of Education, a school district shall submit to the department, at least once every two years, the results of its physical performance testing. " (Emphasis added.)

The requirements for reimbursement to local entities are set forth in section 6, article XIII B of the California Constitution. In part, section 6, article XIII B of the California Constitution provides that local government shall be reimbursed when the state, by statute or executive order, "mandates a new program or higher level of service."

The California Supreme Court has interpreted section 6, article XIII B to require that three elements be met to have a reimbursable state mandated program. Those elements are:

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[2] California Department of Education's February 16, 1996 Advisory.

[3] The Prudential Fitnessgram Manual is included in the Claimant's June 20, 1997, Rebuttal.

[4] Government Code section 17516.

(1) The local agency must be obligated to do something that it had not been obligated to do immediately before the statutory enactment or executive order;

(2) The statute and executive order must require a "new program or higher level of service; " and,

(3) This requirement must result in increased costs to the local agency?

The test claim statute says that school districts '"shall administer" the physical performance test for pupils in grades 5, 7, and 9 designated by the State Board of Education. The Commission found that the statute clearly obligates school districts to conduct or administer a physical fitness test. Also, the Commission found that the obligation is a "new program" because *immediately before* the enactment of the 1995 amendment to Education Code section 60800, school districts did not have to conduct physical fitness tests.[6] Lastly, when administering the tests, school districts will incur some increased costs that are reimbursable as costs mandated by the state.

Notwithstanding the foregoing, the Commission found that classroom teacher tirne to administer the physical performance test, including scoring the tests in class and re-recording score data to computer scantron sheets, is *not* a reimbursable state mandated activity because no increased costs are incurred by school districts.

In written and oral testimony, the claimant contended that standard cost accounting principles require the Comrnission to find that the time taken by teachers to administer the physical performance tests is reimbursable. The claimant referred to the State Administrative Manual (Manual) in support of finding that teacher time administering the tests is reimbursable as "direct costs. " On page four of the claimant's March 20, 1998, supplemental filing, the

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[5] *See generally, County of Los Angeles v. State of California (1987) 43* Cal.3d 46, 56, *City of Sacramento v. State of California* (1990) 50 Cal.3d 5 1, *Carmel Valley Fire Protection Dist. v. State of California (1987)* 190 Cal.App.3d *521, 537; Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[6] The Department of Finance argues that there is no new program or higher level of service because school districts were required to administer physical fitness tests as far back as 1969. Also, on January 1, 1975, school districts were still obligated by the state to administer these tests.

This notion that January 1, 1975, is the key comparison date to determine the existence of a new program or an increased level of service was first proffered by San Diego Unified School District in another of its test claims pertaining to a 1994 statute. In that test claim, staff compared the 1994 test claim statute to the law in effect immediately preceding the 1994 statute and found that the 1994 statute imposed a lower level of service. Thus, staff reconnnended that the test claim be denied. San Diego objected to the comparison of the 1994 test claim statute with the law in effect immediately before the test claim for purposes of determining a new program or an increased level of service. Instead, San Diego argued that the test claim must be compared to the existing law on January 1, 1975, and that *all intervening statutes* between January 1, 1975, and the test claim statute were *irrelevant* and must be ignored.

In the instant test claim, the 1995 statute was compared to the law immediately in effect preceding the test claim. The Commission determined that the 1995 physical performance testing was a new program and, therefore, approved the test claim. However, the Department of Finance argues if the January 1, 1975, comparison date approach had been applied to the present test claim, this claim would be denied because physical fitness testing is not a new program because it has been on the books since 1969. San Diego disputes this reading of *the Lucia Mar* holding and subsequent application of the measurement date in this and other test claims.

claimant stated the Manual defines "costs" to include "the redirection of existing staff and/or resources [. . .] is required. "

However, the Commission was not persuaded by this argument. The Manual defines costs as ". . . all *additional expenses* for which either supplemental financing or the redirection of existing staff and/or resources [. . .] is required. "[7] (Emphasis added.) Because the school day or school year is not extended to accommodate the time required to administer physical performance tests, there *are* no *additional costs* as defined in the Manual.

On pages four and five of the claimant's March 20, 1998, supplemental filing, the claimant contended that the cost accounting principles detailed in the federal Office of Management and Budget Circulars (OMB) support its conclusion that teacher tirne to administer the tests is reimbursable. Specifically, the claimant contended there is no provision or exception under these publications for personnel that work a "normal" day. In essence, the claimant contended under standard cost accounting principles it is not material whether the time spent by teachers to administer the tests occurs during or outside of the normal classroom day. If an activity can be allocated to a particular program, then the time to perform that activity must be reported.

However, OMB Circular A-21, section 9224.1 details several ways labor time usage may be identified to a program. One of those ways is through "Continuous Exception Time Reporting" where "[t]he employee identifies only the time he spends on *other than his normal work.* "[8] Under the Continuous Exception Time Reporting method, a teacher is not spending time on programs other than their normal work - *physical education.*

The Commission dismissed the claimant's contentions that cost accounting methods create increased, reimbursable costs pertaining to classroom teachers.

Instead, the Commission recognized that the State Department of Education's advisory stated that physical performance testing takes between two and four regular class periods and, further, that the testing is conducted during the *normal* classroom day by regular school personnel.

Further, the Comrnission found that because neither the school day nor the school year is extended to accommodate the time required to administer and score the physical performance tests, school districts incur no increased reimbursable costs when classroom teachers administer the physical fitness test.

Also, the Commission acknowledged a similar test claim entitled *Emergency Procedures, Earthquakes and Disasters* (CSM-4241). In that test claim, the claimant asserted that in-classroom teacher tirne spent on instruction of students in emergency procedures was a reimbursable state mandated activity. The Commission found otherwise and ruled that the time and costs taken to implement the emergency procedures were absorbed within the school day with no resultant increased costs to the school district. Although the teacher spent time

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[7] The State Administrative Manual is referenced as Attachment 4 in claimant's March 20, 1998, supplemental filing.

[8] The Office of Management and Budget Circular A-21 is referenced as Attachment 4 in claimant's March 20, 1998, supplemental filing.

instructing the students on emergency procedures, this time was not passed on to the school district as "increased costs. "

Similarly, while teachers spend time administering physical performance tests, scoring the tests and re-recording scores on scantron sheets, teacher time is absorbed within the school day and is *not* passed on to the school district as "increased costs. "

In sum, the Cornmission found that physical performance testing requires teachers to substitute the tests for other activities. The tirne to administer and score the tests is therefore *absorbed* into the school day with no resultant increased costs to the school district. To be eligible for reimbursement a school district must incur increased costs as a result of administering physical performance tests. However, because testing takes place in an environment that has an identifiable limit on the number of hours in a normal workday, and the normal workday has not been extended, the Commission found that teacher time to administer physical performance tests is not reimbursable.

CONCLUSION

Based on the foregoing findings, the Commission concludes that the test claim should be approved and limited to the following reimbursable state mandated activities:

- Acquiring materials and equipment to administer the State Board of Education's designated physical performance test to students in grades 5, 7 and 9;
- Training teachers to conduct the designated physical performance test;
- Processing and analyzing score data by school personnel other than teachers; and
- Responding to requests by the California Department of Education for testing results pursuant to Education Code 60800, subdivision (b).