government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

(a) Legislative mandates requested by the local agency affected;

(b) Legislation defining a new crime or changing an existing definition of a crime; or

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

Most recently, Chapter 1459 of the Statutes of 1984 added Part 7 (commencing with section 17500) of Division 4 of Title 2 to the Government Code, to implement Section 6 of Article XIII B. While its provisions regarding reimbursement to local agencies for costs mandated by the state are substantially similar to those in the Revenue & Taxation Code sections 2201 et seq., this legislation made many significant revisions to the reimbursement process.

Government Code sections 17500 et seq. transferred certain responsibilities for the state mandate claims process from the State Board of Control to a newly-created Commission on State Mandates. The Commission is a quasi-judicial body composed of five members: the State Controller, the State Treasurer, the State Director of Finance, the State Director of the Office of Planning and Research, and a member of the public. The Commission has the responsibility for hearing test claims, adopting parameters and guidelines, establishing statewide cost estimates, and considering incorrect reduction claims.

If a local agency believes that legislation or an executive order imposes a State mandate that will cost the agency more than

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$200, the local agency may file a test claim with the Commission. The Commission is directed to hear and decide whether the local agency is entitled to be reimbursed by the state for "costs mandated by the state" as required by the California Constitution Article XIII B, section 6. Government Code section 17552; A successful test claim by one local agency establishes the right of all local agencies similarly situated to submit a claim for costs associated with the mandate.

When it determines that a mandate exists, the Commission solicits input from the affected local and state agencies, and develops parameters and guidelines for claiming costs of the mandate. The parameters and guidelines describe allowable program costs and other requirements of claiming. Following establishment of the parameters and guidelines, the Commission adopts an estimate of the statewide costs associated with the mandate. The estimate is submitted to the Legislature in a government claims bill. Once the Legislature funds the mandate, the State Controller issues claiming instructions which closely parallel the parameters and guidelines. Claiming instructions set forth deadlines, describe allowable costs, and provide claim forms. Local agencies file reimbursement claims in response to specific claiming instructions to obtain reimbursement for the mandated costs.

If the Commission determines that the legislation or executive order subject to the test claim does not impose a mandate, or if it determines that it is a mandate but the Legislature refuses to fund the mandate, an affected local agency may pursue relief through the courts.

"Costs mandated by the state" is defined as "any increased

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costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Government Code section 17514.

Government Code section 17556 lists circumstances under which the Commission is not to find that legislation or executive order that is the subject of the test claim (hereinafter referred to as "legislation") imposes costs mandated by the state. These include cases in which the Commission finds after hearing that:

(1) The entity submitting the test claim requested legislative authority for that entity to implement the program that is the subject of the test claim and the legislation imposes costs upon that entity;

(2) The legislation affirmed for the state that which had been declared existing law by court action;

(3) The legislation implemented a federal law or regulation and resulted in costs mandated by the federal government, and did not mandate costs which exceeded the mandate in that federal law or regulation;

(4) The local agency has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service;

(5) The legislation provides for offsetting savings to affected entities which result in no net costs to the claiming entities;

(6) The legislation imposes duties expressly included

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in a ballot measure approved by the voters in a statewide election; or

(7) The legislation created or eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only to the extent that the costs are related directly to the enforcement of the crime or infraction.

III. EDUCATION FOR THE HANDICAPPED LAW

A. FEDERAL LAW PROHIBITING DISCRIMINATION AGAINST THE HANDICAPPED

The fundamental component of federal law prohibiting discrimination against handicapped individuals in any program receiving federal funds was enacted by Congress in 1973 as Public Law 93-112, Title V, section 504 (codified at Title 29 U.S. Code Section 794). "Section 504" requires the promulgation of regulations by each agency of the federal government as may be necessary to carry out the provisions of Section 504 and other laws providing protection to the handicapped. At least 23 federal agencies and departments have promulgated "504 regulations."

Congress soon recognized that this general protection was inadequate to address the special needs of handicapped school children. In 1976, Congress enacted the Education for All Handicapped Children Act, discussed below, to remedy this situation. Shortly thereafter, "504 regulations" were enacted (now recodified as 34 Code of Federal Regulations, Part 104) which require that recipients of federal funding which operate a public or elementary or secondary education program ". . . provide a free

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appropriate public education to each qualified handicapped person rho is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R., Part 104.33.

I. FEDERAL LAW GOVERNING EDUCATION FOR THE HANDICAPPED

1. Introduction

In 1976, the "Education for All Handicapped Children Act", 20 .S.C. sections 1400 et seq. ("EHA") was enacted. The EHA and its mplementing regulations, 34 C.F.R. sections 300.1 et seq., stablish procedural and substantive standards for educating andicapped students. The EHA also incorporates by reference state ubstantive and procedural standards concerning the education of andicapped students. 20 U.S.C. section 1401(18); 34 C.F.R.section 00.4. In order to receive federal funds, a state must adopt a lan specifying how it will comply with federal requirements. 20 .S.C. sections 1412 and 1414(a).

2. EHA Services for Handicapped Children

Under the EHA, handicapped children are guaranteed the right o receive a free appropriate public education which emphasizes pecial education, and related services designed to meet their nique educational needs. 20 U.S.C. sections 1400(c) and 1412. Special education" means specially designated instruction to meet he unique needs of a handicapped child, including classroom nstruction and instruction in physical education, as well as home nstruction and instruction in hospitals and institutions. 20 U.S.C. section 1401(a) (16).

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Related services are defined by statute to include transportation and such developmental, corrective, and other supportive supplemental services as may be required to assist a handicapped child to benefit from special education. 20 U.S.C. section 1401(a)(17). Supportive services include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, counseling services, and limited medical services. Id. See also 34 C.F.R. section 300.13. Related services are to be provided at no cost to parents or children. If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. section 300.302.

3. Children Qualifying for EHA Services

Handicapped children are defined as children who are mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or health impaired, or children with specific learning disabilities, who by reason thereof require special education and related services. 20 U.S.C. section 1401(1).

"Seriously emotionally disturbed" (SED) children are children who have an inability to learn which cannot be explained by intellectual, sensory, or health factors; who are unable to build or maintain satisfactory interpersonal relationships with peers and teachers ; who exhibit inappropriate types of behavior or feelings under normal circumstances; who have a general pervasive mood of

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unhappiness or depression and/or who have a tendency to develop physical symptoms or fears associated with personal or school problems. One or more of these characteristics must be exhibited over a long period of time and to a marked degree, and must adversely affect educational performance in order for a child to be classified as "seriously emotionally disturbed." Schizophrenic children are included in the "seriously emotionally disturbed" category. Children who are socially maladjusted are not included unless they are otherwise determined to be emotionally disturbed. 34 C.F.R. section 300.5(b)(8).

4. IEP Process for Determining EHA Services

The EHA provides a specific mechanism for insuring that handicapped children receive a free appropriate public education: the Individualized Education Program (IEP). The IEP is a written statement for a handicapped child that is developed and implemented in accordance with federal IEP regulations. 34 C.F.R. section 300.340; 34 C.F.R. section 300.346. The state educational agency of a state receiving federal funding must insure that each public agency develops and implements an IEP for each of its handicapped children. 34 C.F.R. section 300.341.

The IEP process begins when a child is identified as possibly being handicapped. He or she must be evaluated in all areas of suspected handicaps by a multidisciplinary team, which includes a teacher or specialist with knowledge in the area of suspected disability. Parents also have the right to obtain an independent assessment of their child by a qualified professional. School districts are required to consider the independent assessment as

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part of their educational planning for the pupil. 34 C.F.R. section 300.503.

If it is determined that the child is handicapped within the meaning of EHA, an IEP meeting must take place. Participants in the IEP meeting (the "IEP team") include a representative of the local educational agency, the child's teacher, one or both of the child's parents, the child if appropriate, and other individuals, at the discretion of the parent or agency. 34 C.F.R. section 300.344. The public agency must take steps to insure that one or both of the parents are present at each meeting or are afforded the opportunity to participate, including giving the parents adequate timely notice of the meeting, scheduling the meeting at a mutually agreed on time, using other methods to insure parent participation if neither parent. can attend, and taking whatever steps are necessary to insure that the parent understands the proceedings. 34 C.F.R. section 300.345.

The IEP meeting serves a number of functions. It serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to decide what the child's needs are, and what services will be required to meet those needs. The IEP meeting provides a forum for resolving any differences between the school and parents. At the meeting, the IEP team develops the child's IEP.

The written IEP is an educational prescription which includes statements of the child's present levels of educational performance, annual goals (including short term instructional objectives), and specific special education and related services to be provided to the child and the setting in which the services will

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be provided, along with the projected dates for initiation of services and the anticipated duration of the services. It also includes appropriate objective criteria, evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved. 20 U.S.C. section 1414(a)(5); 34 C.F.R. sections 300.340-349. This document serves as a commitment of resources necessary to enable a handicapped child to receive needed special education and related services, and becomes a management tool, a compliance and monitoring document, and an evaluation device to determine the extent of the child's progress.

Each public agency must have an IEP in effect at the beginning of each school year for every handicapped child who is receiving special education from that agency. The IEP must be in effect before special education and related services are provided, and special education and related services set out in a child's IEP must be provided as soon as possible after the IEP is finalized. 34 C.F.R. section 300.342. Meetings must be conducted at least once a year to review and, if necessary, revise each handicapped child's IEP. More frequent meetings may take place if needed.

5. Procedural Safeguards

The EHA requires any State educational agency which participates in this program to establish and maintain procedures to assure that handicapped children and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education. The procedures must include an opportunity for the parents to examine all relevant records and to

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obtain an independent educational evaluation; procedures to protect the rights of children who do not have parents or guardians to assert their rights, including procedures for appointment of a surrogate for the parents; written prior notice to the parents whenever the educational agency proposes to initiate, change, or refuse to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child; procedures designed to assure that the required notice fully informs the parents in the parents' native language of all the procedures available; and an opportunity to present complaints. There must also be impartial due process hearing procedures which include the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children; the right to present evidence; the right to confront, cross-examine, and compel the attendance of witnesses; the right to a written or electronic verbatim record of such hearing; the right to written findings of fact and decisions; the right to appeal the determination of the due process hearing officer; and the right to bring a civil action. 20 U.S.C. section 1415. The court in its discretion may award attorney's fees and costs in certain circumstances. Id.

6. State Agency Responsibilities Under EHA

Under the EHA, other agencies may have some responsibilities, but the State education agency remains responsible for assuring that all education and related services required by a handicapped child are under the general supervision of the persons responsible

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for educational programs for handicapped children in the State educational agency and that the education meets the education standards of the State educational agency. This requirement does not limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided to handicapped children of the state. 20 U.S.C. section 1412(6).

The State educational agency is responsible for insuring that each public agency develops and implements an IEP for each of its handicapped children. 34 C.F.R. section 300.341. The State educational agency is responsible for insuring that the requirements of 34 C.F.R. sections 300.1 through 300.750 are carried out. Fur thermore, the State education agency must provide services directly if no other agency provides them. 34 C.F.R. sections 300.360 and 300.600.

For a more detailed discussion of this complex body of law, reference is made to Education for the Handicapped Law Report, published by CCR Publishing Company, Alexandria, Virginia.

C. CALIFORNIA LAW GOVERNING EDUCATION FOR THE HANDICAPPED

1. California Participation in EHA

California elected to participate in the EHA and adopted a state plan and enacted a series of statutes and regulations designed to comply with federal requirements. Education Code sections 7570 et seq. and sections 56000 et seq.; Government Code sections 7570 et seq.; Title 2 California Code of Regulations sections 60000 et seq.; and Title 5 California Code of Regulations

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sections 3000 et seq. See Section 2 of Chapter 1218 of the Statutes of 1980 added Chapter 24 to the Government Code (renumbered as Chapter 25 and amended by Chapter 714 of the Statutes of 1981; renumbered as Chapter 26 and amended by Chapter 193 of the Statutes of 1984).

The Legislature has established its intent to assure receipt of federal funding, including the funds available for services to handicapped children. Government Code section 7560. A single line of responsibility with regard to the education of all handicapped children as required by the EHA was established. The responsibility for supervising education and related services for handicapped children specifically required pursuant to the federal requirements was delegated to the Superintendent of Public Instruction. Government Code section 7561; Education Code section 56135.

2. General Structure for Public Education

In California, public education services are directly delivered through school districts throughout the state. In addition, there are county offices of education and county superintendents of schools which have certain responsibilities for overseeing educational services within counties. The relationship of school districts and counties varies from county to county. In some counties, there is only one school district, covering residents of the county. In other counties, there are several school districts. Some school districts cross county lines.

The governing board of each school district must elect the organizational structure which will serve special' education needs.

One option is for the school district to serve those needs directly, by submitting to the Superintendent of Education a local plan for the education of all individuals with special education needs residing in the district. The second option is for a school district, in conjunction with one or more districts, to submit to the Superintendent a joint local plan which provides a governing structure and administrative support for a system for determining the responsibility of participating agencies for the education of each individual with exceptional needs residing within the special education local plan area. Special districts of this type are known as SELPA districts. The final option is for a school district to join with the county office to submit to the superintendent a plan to assure access to special education and services for all individuals with exceptional needs residing in the geographic area served by the plan. Regardless of whether the services are being provided by school districts directly or through plans with SELPA districts or county offices of education, the service areas are referred to as special education local plan areas (SELPAs). Education Code section 56170.

Each plan submitted by a district, SELPA, or county office of education must contain assurances of compliance with Public Law 94-142 (EHA); section 504 of Public. Law 93-112, and Part 30 of Division 4 of Title 1 of the California Education Code. Plans, containing a description of services to be provided by each district and county office, must demonstrate that all individuals with exceptional needs have access to services and instruction appropriate to meet their needs as specified in their IEPs. There must be a description of the governance and administration of the

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plan, copies of joint powers agreements or contractual agreements among districts and counties (if services are to be provided through a SELPA district or county office of education), an annual budget plan which has been adopted at public hearing, and verification that the plan has been reviewed by the community advisory committee. The plan must include a description of the provisions for identification, referral, assessment, instructional planning, implementation, and review in compliance with Chapter 4 of Part 30 of Division 4 of Title 1 of the Education Code (sections 56300 et seq.). Education Code section 56200.

Each SELPA or county office of education submitting a local plan must develop written agreements with entities participating in the plan. The agreements must include a coordinated identification, referral, and placement system; procedural safeguards; provision for certain regional services; description of the process for coordinating services with other local public agencies that are funded to serve individuals with exceptional needs; a description for coordinating and providing services to individuals with special needs placed in hospitals, licensed children's institutions and foster homes; and a description of the process for coordinating and providing services to individuals with special needs placed in juvenile court schools or county community schools. Education Code section 56220.

Each district, SELPA or county office of education must actively and systematically seek out all individuals with exceptional needs who reside within the SELPA area, and must have policies and procedures to identify such children. Education Code sections 56300, 56301. Each must provide for the identification

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and assessment of the individual's exceptional needs and the planning of an instructional program to meet those needs; Education Code section 56302.

Each county office of education must submit to the state Superintendent of Public Instruction a countywide plan for special education which demonstrates the coordination of all local plans for special education and which ensure that all individuals with exceptional needs will have access to appropriate special education programs and related services, unless all districts within the county elect to submit a single local plan. The county office of education also has responsibility for approving proposed local plans and participating in the state onsite review of the district's implementation of an approved local plan. Education Code section 56140.

3. Santa' Clara County Educational Structure

There are 33 school districts in the County of Santa Clara. All have elected under Education Code section 56170(c) to join with the county office of education to submit special education plans to the State Superintendent of Schools, forming seven SELPA districts in the County. Five of the SELPAs serve more than one school district. Two serve single school districts (San Jose Unified School District and Santa Clara Unified School District):

The Santa Clara County Office of Education was established as an entity separate from the County of Santa Clara by the Board of Supervisors in 1973, pursuant to the authority of Education Code section 1043 (formerly section 658). It is governed by the County Board of Education, and is fiscally independent from the County of

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Santa Clara. The County Office of Education is administered by the County Superintendent of Schools.

While the details of the seven SELPA plans vary, under the plans submitted to the State Superintendent, the County Office of Education has some responsibility in each SELPA plan; The County Office of Education receives special education monies from the State, including regional service funds and program specialist funds. After withholding an amount to cover the administrative costs of SELPA administration, the monies are disbursed to the different SELPAs. Each SELPA has its own budget, which is managed either by the SELPA administrator at the County Office of Education or by the local education districts themselves. The County Office of Education is not responsible for the IEPs for any children, although it does operate some programs for severely handicapped children. These children are the responsibility of particular school districts, and funding (in the form of pupil units) are transferred from the districts to the County Office of Education when the children are served by these special programs.

The SELPA plans also include provisions for the special education of SELPA residents who are placed in Juvenile Hall, Juvenile Probation Ranches, and the Children's Shelter. The school district of residence retains responsibility for these students.

4. California IEP Process Prior to Legislation That is the Subject of This Test Claim

Chapter 797 of the Statutes of 1980 added Part 30 (commencing with section 56000) to Division 4 of Title 2 of the Education Code, to implement the EHA. This legislation set forth the basic

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California IEP process for identifying special education children and providing special education and related services necessary for a child with exceptional needs to benefit from a free appropriate public education.

Before July 1, 1986, local educational agencies (school districts and county offices of education) were responsible for the education of special education students, including the provision of related services necessary for the child to benefit from education. This included responsibilities for identifying and assessing children with suspected handicaps, as well as the responsibility for providing related services (including mental health services) required in individual IEPs.

Generally, the determination of whether a child is eligible for special education services is made by local educational agencies. Special education is available for "individuals with exceptional needs ." An "individual with exceptional needs" is a person within a certain age group who has been identified by an IEP team as handicapped within the meaning of Title 20 U.S.C. section 1401(1), whose needs cannot be met with modification of the regular school program, who meets the eligibility criteria outlined in the regulations, and whose educational needs are not due primarily to unfamiliarity with the English language, temporary disabilities, social maladjustment, or environmental, cultural or economic factors. Education Code section 56026.

Before a child with exceptional needs is placed in special education, qualified competent persons with knowledge of the specific disability must conduct an assessment of the child's needs. Assessment includes the use of appropriate validated tests

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which are non-discriminatory and appropriate to the child's native language, administered by trained personnel. Education Code sections 56320, 56322. All areas related to the suspected disability must be assessed, including health and development, vision, hearing, motor abilities, career and vocational abilities and interests, and social and emotional status, Education Code section 56320. Whenever an assessment for the development or revision of an IEP is to be conducted, the parent must be given a written proposed assessment plan with a copy of the notice of parent rights within 15 days of the referral of the assessment. Education Code section 56321.

A written report of each assessment must be prepared. The report must state whether the child needs special education and related services, and must include the following: the basis for the determination, the relevant behavior noted during the observation of the child in an appropriate setting, the relationship of that behavior to the child's academic and social functioning, the educationally relevant health and development and medical findings, whether the discrepancy between achievement and ability is such that it cannot be corrected without special education and related services (for children with learning disabilities), a determination of the effects of environmental, cultural, or economic disadvantage, and a determination of the need for specialized services, materials, and equipment (for children with low incidence disabilities). Education Code section 56327.

The parent must be given written notice that he or she may obtain a copy of the assessments, that an IEP team meeting will be scheduled to discuss the assessment, that the parent has a right to

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obtain an independent educational assessment from qualified specialists at public expense if the parent disagrees with the public education agency's recommendations, subject to certain due process provisions. Education Code section 56329;

Each district, SELPA, or county office of education must initiate and conduct IEP meetings for each child with exceptional needs. Education Code Section 56340. The IEP team must include a representative (other than the child's teacher) designated by administration who is knowledgeable of program options appropriate for the child and who is qualified to provide, or supervise the provision of, special education; the child's teacher with the most recent and complete knowledge of the child who has observed the child's educational performance in an appropriate setting; and one or both of the child's parents (or appropriate parent representative in accordance with EHA). Where appropriate, the team shall also include the child and other individuals who possess expertise or knowledge necessary for the development of the IEP. If the child has been assessed for the IEP, the person who conducted the assessment for the educational agency must also be present. Education Code section 56341. The IEP team must review assessment results, determine eligibility and content of the IEP, consider local transportation policies, and make program placement recommendations. Education Code section 56342.

The IEP team must meet when a child receives an initial formal assessment, and again when the child demonstrates a lack of anticipated progress, or the parent or teacher requests a meeting to develop, review, or revise the IEP (provided that the parental request not be granted more than twice in any semester). The team

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must meet at least annually. Education Code section 56343. Generally, IEPs required as a result of an assessment must be developed within 50 days, and IEP meetings held in response to parental request must be held within 30 days. Education Code sections 56343.5 and 56344. Prior to recommending a new placement in a nonpublic, nonsectarian school, the IEP team must submit the proposed recommendation to the SELPA governing board for review and recommendation. Up to 15 additional days are allowed for this process. Education Code section 56342.

The written IEP must include present level of educational performance, annual goals and short term objectives, required specific special educational instruction and related services, a determination of the extent to which the child will be able to participate in regular educational programs, the projected date for initiation and the anticipated duration of services, appropriate objective criteria and evaluation procedures, and other specific criteria where appropriate. The district, SELPA, or county office of education is responsible for providing the services. Education Code section 56345.

The district, SELPA, or county office of education must maintain procedures for conducting review of all IEPs on at least an annual basis, and for notifying parents of their right to request a review by the IEP team. Each IEP review must be conducted in, accordance with the notice and scheduling requirements for the initial assessment. Education Code section 56380. An IEP child must be reassessed once every three years, or more frequently either if conditions warrant or if the child's parent or teacher requests a new assessment and a new IEP is to be developed.

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:ducation Code section 56381.

All procedural safeguards of EHA must be established and ıaintained by each noneducational and educational agency that ırovides education, related services, or both, to IEP children, and n expeditious and effective process must be implemented for the esolution of any complaints. Education Code, sections 56500.1 and 6500.2. The due process hearing rights set forth in the alifornia Education Code satisfy the due process requirements set orth in the federal EHA legislation and regulations, as previously iscussed.

Prior to the legislation that is the subject of this Test laim, a child's mental health needs for IEP purposes were valuated pursuant to the process set forth in Government Code ections 56000 et seq., and local educational agencies were inancially responsible for the provision of mental health services equired on an IEP.

See also Title 5 California Code of Regulations Division 3, ommencing with section 3000, for further detail regarding the esponsibilities of school districts, SELPAs and county offices of ducation with respect to the assessment of, and provision of pecial education and related services to, handicapped hildren.

5. Legislation That is the Subject of This Test Claim

a. Chapter 1747 of the Statutes of 1984

Chapter 1747 of the Statutes of 1984 added Chapter 26 to Division 7 of Title 1 of the Government Code and amended Section

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11401 of the Welfare and Institutions Code.[3] This legislation shifted some of the individualized education plan (IEP) responsibilities for related services which previously had been held by local educational agencies to local mental health programs.

This legislation requires psychotherapy and other mental health assessments for special education children with suspected mental health handicaps or mental health needs to be conducted by, qualified mental health professionals, as specified in regulations developed by the State Department of Mental Health. Government Code section 7572(c). Mental health services may be added to a child's IEP only if a formal assessment is conducted and the qualified mental health professional conducting the assessment recommends the service in order for the child to benefit from special education. Government Code section 7572(d).

This legislation provides that the State Department of Mental Health, or designated community mental health service, is responsible for the provision of psychotherapy or other mental health services, if required in a handicapped child's IEP.[4] Government Code section 7576. The child's' family shall not be liable for the cost of such treatment services. Government Code Section 7582.

This legislation requires the expansion of the IEP team to include a representative of the county mental health department and

3. This legislation is commonly referred to as "AB 3632", after the Assembly designation for the bill which became Chapter 1747 of the Statutes of 1984. Mental health IEP-related services rendered pursuant to this and subsequent legislation also subject to this Test Claim are commonly called "AB 3632 services."

4. Later legislation and regulations made clear that this responsibility was delegated to local mental health programs. The terms "local mental health programs," "local community mental health programs" and "local mental health agencies" refer to local governmental agencies, generally counties, which have Short-Doyle plans or contracts with the State

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a representative of the county welfare department if the child is classified as seriously emotionally disturbed (SED) and any member of the IEP team recommends out-of-home placement based on relevant assessment information. Government Code section 7572.5(a). The expanded team must review the assessment to determine whether the child's needs can be met through a combination of nonresidential services, whether residential services will enable the child to benefit from educational services, and whether residential services are available which will address the child's needs and ameliorate the conditions leading to the SED designation. Government Code section 7572.5(b).

If the IEP requires residential placement, a case manager must be selected from the public agency representatives on the team. The IEP must include provisions for review of case progress, of the continuing need for residential placement, of the compliance with the IEP, and of the progress toward ameliorating the SED condition. There must be a review by the full IEP team every six months. Government Code section 7572.5(c). Aid in the form of AFDC (Aid to Families with Dependent Children) is provided for any child under the age of 18 who is placed out of home pursuant to an IEP. Welfare and Institutions Code section 11401(b)(l)(D).

This legislation required each local agency affected by the legislation to report to the Department of Finance through appropriate state agencies either an estimate of expenditures which previously were borne by it and which would be shifted to another agency as a result of this legislation or an identification of its responsibility for expenditures which would be acquired by the agency as a result of this legislation. Government Code

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section 7583. The original estimates were to be submitted no later than March 15, 1985 to the state agencies. Actual shifts in funding were to be reported annually by March 15 in subsequent years. Id. The Department of Finance was directed to recommend appropriate adjustments in the annual Budget Act to reflect shifts in expenditures. Id. The March 15, 1985 report was to include an estimate of the special education expenditures for Fiscal Year 1984-85 for psychotherapy, the number of children receiving psychotherapy at the time of the April pupil count, the name of the agency providing the psychotherapy, including the name of the agency paying for such service. Section 4 of Chapter'1747 of the Statutes of 1984.

This legislation was originally scheduled to become operative July 1, 1985. Later legislation delayed the full implementation until July 1, 1986. During a "window period" from March 1, 1986 through June 30, 1986, local mental health agencies received referrals from local educational agencies, conducted assessments, participated in IEP meetings to develop IEPs for the 1986-87 school year, but were not responsible for providing the treatment services.

b. Chapter 1274 of the Statutes of 1985

Chapter 1274 of the Statutes of 1985 amended Chapter 26 of Division 7 of Title 1 of the Government Code, and amended sections 5451, 10950, and 11401 and added Chapter 6 to Part 6 of Division 9 of the Welfare and Institutions Code. This legislation made certain technical changes and modified the responsibilities concerning IEP mental health services and made further changes to implement this program.

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This legislation requires that the regulations be developed by Departments of Health Services and Mental Health in consultation with the Department of Education. Government Code section 7572(c).

This legislation requires the person who conducted the IEP mental health assessment to review and discuss his or her recommendations with the parent and appropriate IEP team members, and to attend the IEP team meeting if requested.. Government Code section 7572(d)(l). If an independent assessment for the provision of related mental health services is submitted to the IEP team, that assessment must be reviewed by the mental health professional who conducted the assessment for the public agencies. Government Code section 7572(d)(Z). Disputes between a parent and IEP team members regarding related services recommendations must be resolved pursuant to Education Code sections 56500 et seq.. Government Code section 7572(d)(e).

This legislation eliminated the requirement of inclusion of a representative from the county department of social services on the expanded IEP team if the child'is classified as seriously emotionally disturbed and any member of the IEP team recommends out-of-home placement. Government Code section 7572.5(a). The legislation clarified that, in order for a child to be placed out-of-home pursuant to an IEP, the expanded IEP team must determine whether residential care is necessary for the child to benefit from educational services. Government Code section 7572.5(b). This legislation specifies that the county mental health department is case manager for SED children for whom residential placement has been called for on IEPs, and requires

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that an appropriate residential facility be identified on the IEP. Government Code section 7572.5(c). The county mental health agency may delegate this responsibility to the county welfare department, but the county mental health department remains financially responsible. Government Code section 7572.5(c)(1). Funding for out-of-home placement was shifted from the AFDC program to a special program. Welfare and Institutions Code sections 18350 et seq. Upon receipt of proper documentation from the State Department of Mental Health or the county mental health agency, the county welfare department is authorized to make payments to licensed residential care facilities for children placed pursuant to IEPs, based on the AFDC rate for the facility. Welfare and Institutions Code section 18351(a). These costs are reimbursed by the State Department of Social Services, and are funded from a separate appropriation in the budget. Welfare and Institutions Code sections 18351(b) and 18355. The child or his or her parent or parents is not liable for the cost of 24-hour out-of-home care for SED children. Welfare and Institutions Code section 18350.

This legislation provided that the State Department of Mental Health, or any community mental health service designated by the Department shall be responsible for the provision of psychotherapy or other mental health services, as defined by the regulations. Government Code section 7576.

This legislation clarified that assessments and therapy treatment services provided under programs of the State Departments of Health Services or Mental Health, or their designated local agencies, rendered to a child referred for IEP assessment, or a child with an IEP, are exempt from financial eligibility standards

and family repayment requirements. Government Code section 7582. In no event should the inclusion of necessary related services on a child's IEP be contingent upon identifying the funding source: Government Code section 7572(d).

This legislation eliminated the reporting of estimated expenditures to appropriate state agencies as of July 1, 1986. Government Code section 7583.

This legislation required the annual Short-Doyle plan for each county to include a description of the services required by Government Code sections 7571 and 7576, as well as the cost of those services. Welfare and Institutions Code section 5651(g).

c. Specific Legislation Funding Services That are the Subject of This Test Claim

No appropriation was included in Chapter 1747 of the Statutes of 1984, although there was a provision that local agencies and school districts may pursue remedies available under Chapter 3 (commencing with section 2201) of Part 4 of Division 1 of the Revenue and Taxation Code. Section 5 of Chapter 1747 of the Statutes of 1984.

Chapter 1274 of the Statutes of 1985 included some funding for mental health services pursuant to Government Code sections 7570 et seq. Funds reported by the Department, of Education and verified by the Department of Finance pursuant to Section 4 of Chapter 1747 of the Statutes of 1984 were to be transferred on July 1, 1986 to the appropriate state departments responsible for the services specified in Chapter 26 (commencing with section 7570) of Division 7 of Title 1 of the Government Code and designated in each

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child's IEP. Section 16, Chapter 1274 of the Statutes of 1985. The sum of $1,600,000 was appropriated from the General Fund to the Department of Mental Health for purposes of conducting assessments and participating in developing IEPs during the period of March 1, 1986 through June 30, 1986. Section 18 of Chapter 1274 of the' Statutes of 1985. Notwithstanding the county Short-Doyle match requirement of the Welfare & Institutions Code Section 5707, these expenditures were to be funded on a basis of 100 percent state funds during the period March 1, 1986 through June 30, 1986. Id. The legislation further stated that reimbursement to local agencies and school districts should be made pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost does not exceed $500,000, shall be made from the State Mandates Claims Fund. Section 17 of Chapter 1275 of the Statutes of 1985.

Item 4440-131-001 of Section 2.00 of Chapter 186 of the Statutes of 1986 (1986 Budget Act) provided $2,000,000 to the Department of Mental Health in Fiscal Year 1986-87 for local assistance for assessments and case management relative to special education for special education children pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985. Section 3 of Chapter 1133 of the Statutes of 1986 amended this provision to allow for the use of these funds for all services local mental health agencies are required to provide pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, including treatment services.

Item 6100-161-001 of Section 2.00 of Chapter 188 of the Statutes of 1986 (1986 Budget Act) also provided for a transfer of

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up to $2,700,000 during Fiscal Year 1986-87 from the Department of Education to the Department of Mental Health for the purpose of conducting assessments pursuant to Government Code Sections 7572 and 7572.5. Section 4 of Chapter 1133 of the Statutes of 1986 amended this item to allow for transfer of these funds for mental health treatment services pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 as well. Item 6100-161-001 also made available for transfer from the Department of Education to the Department of Social Services $5,400,000 for the cost of out-of-home placement of IEP children pursuant to Welfare and Institutions Code sections 18350 et seq.

Item 6100-161-001 of the 1986 Budget Act also required local education agencies to report to the Superintendent of Public Instruction the total costs incurred providing noneducational services in the 1985-86 fiscal year to IEP children who received mental health services pursuant to IEPs or who were classified as seriously emotionally disturbed and placed out-of-home pursuant to IEPs. The Superintendent was directed to reduce funding to any education agency which he determines engaged in willful failure to report accurate data by 150 percent of the amount reported in error. The Auditor General was directed to review the data reported by local education agencies to determine if the amounts reported were accurate. Based on the Auditor General's recommendations, the Superintendent was authorized to transfer additional amounts to the State Departments of Mental Health and Social Services, provided that the total amount transferred did not exceed the amounts spent by local educational agencies in the 1985-86 fiscal year for residential care and mental health services

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for children pursuant to IEPs.

d. Implementing Regulations

In accordance with Government Code section 7587, the State Departments of Education, Mental Health, and Health Services adopted emergency regulations to implement and make specific Chapter 26 (commencing with section 7570) of Division 7 of Title 1 of the Government Code. These emergency regulations, Title 2 of the California Code of Regulations sections 60000 et seq. became effective on January 1, 1986 and were refiled on June 30, 1986. A series of statutory provisions has kept these regulations in effect to date. Refiled 5-l-87, as an emergency, operative 5-l-87 (Register 87, No. 30); not subject to automatic repeal until the final regulations take effect on or before June 30, 1989 pursuant to Item 4440-131-001(b)(2), Chapter 313 of the Statutes of 1988.

IV. CALIFORNIA DELIVERY SYSTEM FOR PUBLIC MENTAL HEALTH SERVICES

The State of California asserts that the services required to be provided by local mental health agencies pursuant to the legislation that is the subject of this Test Claim are not new services or increased levels of existing services but, rather, services already required under the Short-Doyle Act. In the alternative, the State of California asserts that local mental health agencies receive adequate funding from the State of California for the cost of these services through the Short-Doyle program and through other funding sources. The County of Santa Clara asserts that the legislation subject to the Test Claim is a

new program or, alternatively that it increases levels of existing services. Furthermore, the County of Santa Clara asserts that funding it receives from the Short-Doyle program does not reimburse it for the services required by the legislation subject to this Test Claim.

A. PROVISION OF SERVICES

The law pertaining to the funding, organization, and operation of community mental health services in California, known as the "Short-Doyle Act", is contained almost exclusively in Part 2 (commencing with section 5600) of Division 5 of the Welfare and Institutions Code. The Short-Doyle Act was enacted in 1979 to organize and finance community mental health services for the mentally disordered in every county through locally administered and locally controlled community mental health programs. Before that time, state hospitals played a large role in the provision of mental health services. The Short-Doyle Act was a step in the de-institutionalization of the mentally ill.

The Short-Doyle Act was intended to efficiently utilize state and local resources, to integrate state-operated and community programs into a unified mental health system, to ensure appropriate utilization of all mental health professions, to provide a means for local government participation in determining need for and allocation of mental health resources, to establish a uniform ratio of local and state government responsibility for financing mental health services, and to provide a means for allocating state mental health funds according to community needs, The goals of

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Short-Doyle community mental health programs are threefold: to assist persons who are institutionalized because of a mental disorder, or who have a high risk of becoming so, to lead lives which are as normal and independent as possible; to assist persons who experience temporary psychological problems which disrupt normal living to return as quickly as possible to a level of functioning which enables them to cope with their problems; and to prevent serious mental disorders and psychological problems. Welfare and Institutions Code section 5600. Short-Doyle principles require that services be developed which permit persons receiving involuntary mental health treatment under the Lanterman-Petris-Short Act[5] to be treated in the least restrictive setting, and that services be designed so that they are equally accessible and effective for persons who may confront barriers in using those services because of differences in language, cultural traditions, or physical disabilities. Welfare and Institutions Code section 5600.4.

Mental health services provided through the Short-Doyle Act

[5] Closely associated with the Short-Doyle Act, Part 1 (commencing with section 5000) of Division 5 of the Welfare & Institutions Code (the Lanterman-Petris-Short Act) eliminates the old civil commitment statutes and provides statutory mechanisms for involuntary mental health treatment for mentally disordered persons, as well as protections for the rights of such persbns. Short-term detention and treatment mechanisms include 72-hour holds and 14-day certifications for intensive treatment for persons who are, as a result of a mental disorder, dangerous to self or others, or gravely disabled. Mechanisms for treatment for longer periods include the 180-day post-certification for persons dangerous to others as a result of a mental disorder and L.P.S. conservatorships for persons gravely disabled as a result of a mental disorder. Procedural protections range from certification notice requirements and mandatory certification review hearing before a neutral hearing officer, with a right to petition for a writ of habeas corpus (for 14-day certifications), to a right to a jury trial by unanimous verdict and a standard of proof of beyond a reasonable doubt (for 180-day post-certifications and conservatorships).

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include ten basic services: emergency, inpatient, outpatient, partial hospitalization, consultation and education, diagnostic, rehabilitation, precare and aftercare, training, and research and evaluation. The Short-Doyle Act provides that a county must give priority to services required for acute patients and involuntary patients. Welfare and Institutions Code section 5651.3. Each county must consider and make provision for certain other priority populations: the chronically mentally ill, including those who are homeless; mentally disturbed children and adolescents, including juvenile sex offenders and juvenile victims of sex offenses; mentally ill elderly, including those who are isolated; mentally ill inmates and, mentally ill wards of juvenile detention facilities, and mentally ill nuisance offenders to prevent inappropriate placement in the justice system; and underserved populations, including ethnic minorities, refugees, veterans, and other victims of posttraumatic stress disorders, and individuals diagnosed as both mentally ill and developmentally disabled. Welfare and Institutions Code section 5651.1,

Short-Doyle services are to be provided through community mental health services covering an entire county, or counties, established by the Board of Supervisors of each county. Welfare and Institutions Code section 5602. In most counties, the community mental health service area is the county, and the local mental health agency is an agency of the county. This is true in the County of Santa Clara.[6]

[6] There is one tri-county local mental health agency, and the City of Berkeley is a local mental health agency separate from the mental health agency for Alameda County.

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Generally, each county is required under the Act to develop and adopt a mental health plan annually specifying services to be provided in county facilities, in state hospitals, and through private agencies. Welfare and Institutions Code section 5650.

The annual Short-Doyle plan must include a detailed presentation of expected expenditures and revenues. The plan must include a programmatic description of each service provided, including program type, the number of staff, an estimate of unduplicated number of clients, an estimate of the number of units of service to be provided, the priority populations to be served, the number of acute beds service (if applicable), a detailed description of each new program, a detailed description of service for all services which have changed more than 25 percent from the prior year, and a detailed description of renovation or remodeling costs. The plan must provide additional information necessary to meet local planning needs. The plan must contain assurances that the county is in compliance with local mental health advisory board involvement criteria, has an approved quality assurance plan, an approved plan for providing case management services, and approved certification review procedures. Chapter 1274 of the Statutes of 1985 also required that the plan include a description of services required by Government Code sections 7571 and 7576 (which is the subject of this Test Claim). The plan also must include other information determined to be necessary by the Director. Welfare and Institutions Code section 5651. The Director requires counties to sign assurances that services are provided consistent with other sections of the Welfare and Institutions Code and with Department of Mental Health policy letters.

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Two alternative Short-Doyle planning and reimbursement methods exist: the county Short-Doyle plan and the negotiated net amount contract. Unless a county is selected by the Department of Mental Health and elects to enter into a negotiated net amount contract with the State, the Board of Supervisors must adopt and submit to the Department of Mental Health an annual county plan ("Short-Doyle plan") for mental health services to the county. Welfare and Institutions Code section 5650. The Department reviews and approves the Short-Doyle plan. The county Short-Doyle plan is deemed a contractual arrangement between the state and the county. Welfare and Institutions Code section 5707.

B. FUNDING OF SERVICES

Community mental health services are funded from a combination of sources: fee revenue from patients and third parties (such as insurance companies), grants from non-profit organizations, Medicare and federal Medi-Cal benefits from the federal government, Short-Doyle allocations and Short-Doyle Medi-Cal from the State, and required Short-Doyle "match" and voluntary "overmatch" through the county.

1. Short-Doyle Funding

Among the major features of the Short-Doyle Act are provisions relating to the allocation of state funds to community mental health services. Through the Short-Doyle Act, state general funds are distributed to counties to provide partial funding for community mental health services. In theory, and with a few

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exceptions[7], the net cost (cost less revenues such as grants, patient fees, third party reimbursement, Medicare, and federal portion of Medi-Cal) of all services specified in approved county Short-Doyle plans or covered under the negotiated net amount contract is financed on a basis of 90 percent state funds (the "Short-Doyle allocation" and the state portion of Medi-Cal) and 10 percent county funds (the "required county match").[8] Welfare and Institutions Code section 5705.

2. Short-Doyle Plan or Contract

Alternatively, subject to State approval, a county may elect to use the negotiated net amount (NNA) contract method in lieu of the annual Short-Doyle plan and budget.[9] Welfare and Institutions Code section 5705.2. The NNA is a contract between the Department of Mental Health and the electing county. The NNA concept differs from the cost reimbursement concept of the Short-Doyle plan. Through the NNA, a county contractually agrees to make certain mental health services available, and the state agrees to allocate to the county a fixed Short-Doyle amount. The NNA contract

[7] The cost of state hospital services and local hospital inpatient services are financed on the basis of 85 percent state funds and 15 percent county funds. Certain exemptions for county participation apply for counties of less than 100,000 population. The requirement of county match is also waived for all counties for some specific mental health programs.

[8] In reality, the Short-Doyle plan or NNA contract generally includes a county's entire mental health budget, including any overmatch. If a county elects to, overmatch, the services specified in the plan or contract include services funded by overmatch, thus reducing the state's actual financial contribution to less than 90 percent of the services specified in the plan or contract.

[9] Counties electing to enter into a negotiated net amount contract with the State are often referred to as "SB 900 counties," after the senate bill designation for Chapter 1042 of the Statutes of 1981, which created the NNA option.

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:ontains a statement of units of certain modes of service wh ich the :ounty agrees to make available (the "dedicated capacity"). The :ounty bears the financial risk in providing any and all mental ıealth services to the population described and enumerated in the :ontract to the dedicated capacity limit. The State bears the risk :hat fewer units of service will need to be provided, and bears the 'isk that the county can provide the services at a cost savings, ıny savings may be retained by the county as long as such funds are .sed for mental health services, including the defraying of ›perating and capital costs.

Counties submitting Short-Doyle plans must submit a summary ›resentation of all expected expenditures of county, state, and ederal government funds and all anticipated public and private evenues for the year covered in the plan. Welfare and nstitutions Code section 5651(d). The Department of Mental Health llocates to each county the amount required to carry out the ounty's Short-Doyle plan. Costs pursuant to Short-Doyle plans are udited -at year end, with certain costs subject to the "lower of ost or charges" limitation as well as the 125% of the statewide verage cost limitation. Unexpended Short-Doyle funds allocated to county pursuant to a Short-Doyle plan may be retained by the ounty for up to 12 months, with the Department's approval, for xpenditure for certain mental health services other than 24-hour ospital services. Welfare and Institutions Code section 5714.2.

While Short-Doyle budgets for counties with NNA contracts are ubject to audit at year end, the Short-Doyle allocation is not

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affected by actual cost determinations.[10] Short-Doyle/Medi-Cal charges are subject to year-end cost settlement to "lower of cost or charges." This impacts the federal portion of Medi-Cal but does not impact the state Short-Doyle allocation to the NNA county, as the state portion of the Medi-Cal funding is included in the state's overall NNA Short-Doyle contract amount.

Although there is no formal county Short-Doyle "plan" for counties electing a NNA contract with the State, there are similar requirements for data submission at the time of negotiation.

Counties negotiating net amount contracts with the State must submit to the Director documentation which includes descriptions of programs, units of service, budget, and other information as required by the Director. The NNA contracts are monitored for compliance by the Department of Mental Health program review section. Counties participating in the NNA contracting must comply with all applicable federal and state laws and regulations, just as counties operating under the Short-Doyle plan.

3. Allocation of State Funding Among Counties

A county receives the same Short-Doyle allocation whether it adopts a Short-Doyle plan or enters into a NNA contract with the State. To a large extent, allocation of Short-Doyle funding among counties is based on historical facts. No easy formula determines a county's base allocation. A county's allocation is based on the prior year's allocation (base allocation), with adjustments for

[10] However, the audit may result in an adjustment to the Medi-Cal portion of the Short-Doyle budget, which is funded by 50 percent federal funds and 50 percent state general funds. In counties with NNA contracts with the State, a Medi-Cal audit adjustment does not affect the amount of funds received from the State, although it will affect the federal portion of Medi-Cal.

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cost of living increases (COLA's), augmentations or reductions including funding for specific programs for target populations, and other adjustments required by policy or law.[11] Regardless of base allocation, each county receives the same percentage COLA, if one is provided in the Budget Act.

In recognition of the inequities of allocation of Short-Doyle funding among counties, Chapter 1081 of the Statutes of 1985 (SB 786) required that all augmentation funds beyond the base allocation and COLA be allocated based upon relative need.

Relative need is defined as the percentage of total population and total state poverty population residing in the county. The Department's Poverty/Population Model meets this requirement. With the exception of augmentation funds controlled specifically by Budget Act language, all augmentation funds are now distributed in accordance with the Department's Poverty/Population Model which was adopted by the Department in agreement with the Conference of Local Mental Health Directors in 1981.

In recent years the Legislature has appropriated mental health funds for specific target groups. Such categorical funds must be expended solely for services to the target groups

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11. Short-Doyle originally was an optional program designed in part to create state hospital alternatives. In the early years (1958-68), counties had unlimited use of state hospitals without fiscal penalty and without a requirement for Short-Doyle plan participation. Some counties continued to use the state hospitals instead of developing community resources. The allocation to counties electing to participate in Short-Doyle to some extent was determined by the amount counties were willing to contribute in the form of required county match. In those early years, counties could, in effect, write their own programs. Counties joining the Short-Doyle system later, received less generous, flexible allocations. Other historical factors also affect Short-Doyle allocation, such as agreements by counties to a decrease in allocation of state hospital bed-days in exchange for an increase in Short-Doyle allocation. When a county entered the Short-Doyle system, it began its base year allocation.

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specified. In allocating categorical funds, the Department must meet the intent of the Legislature. The Department must take into consideration all factors which have a significant correlation to the target population. For example, in allocating the Special Education Pupil funds in 1986-87 for services that are the subject of this Test Claim, a specific formula was developed, in cooperation with the California Conference of Local Mental Health Directors. The entire statewide allocation was $4,700,000. Local educational agencies were asked to calculate their Fiscal Year 1985-86 cost of providing the services which local mental health agencies would be required to provide pursuant to the legislation subject to the test claim, and this amount ($774,895) was specifically distributed to the counties in which those educational agencies were located. The remaining allocation ($3,925,105) was distributed among the counties by a formula based on the following three factors: each county's relative population of children ages 5-19 (weighted 20%), each county's relative special education enrollment (weighted 40%), and each county's relative seriously emotionally disturbed enrollment (weighted 40%).

C. COUNTY OF SANTA CLARA MENTAL HEALTH SERVICE STRUCTURE

In the County of Santa Clara, community mental health services are provided through the Mental Health Bureau of the Department of Health, which is the local mental health agency for the County of Santa Clara. Under direction from the Board of Supervisors for the County, the Mental Health Bureau administers the Short-Doyle funds, provides mental health services, and

monitors contracts with Short-Doyle contract providers of mental health services.

Some mental health services are rendered by the County directly. The Mental Health Bureau operates several inpatient psychiatric facilities: an acute facility at Santa Clara County Valley Medical Center (Don Lowe Pavilion), an acute infirmary at the Santa Clara County Main Jail (Med II), and an intermediate skilled nursing facility (East Valley Pavilion). The Bureau operates the County's psychiatric emergency room (Emergency Psychiatric Service, or EPS). The Bureau provides some community support services and case management services for adults. On referral, the Bureau provides some services for persons, in the County's custody, including jail inmates and children placed in the Children's Shelter, Juvenile Hall, and Juvenile Ranches (which, prior to the legislation that is the subject of this Test Claim, did not include IEP-related services).

The Bureau operates' several outpatient clinics which provide individual and group therapy. The Bureau operates one adolescent day treatment program. The Bureau also operates several on-site school programs. Prior to the legislation that is the subject of this Test Claim, these on-site programs were not integrated into the schools' IEP programs, but were simply clinic "satellites" offering limited assessment and treatment services.

Except for services provided under the legislation that is the subject of this Test Claim, families or patients are charged for assessment and treatment services provided by the County, based on the family's liability as determined by the Uniform Method for Determining Ability to Pay (UMDAP). Insurance, Medi-Cal and

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Medicare are billed to the maximum extent possible.

In addition to direct services, the Mental Health Bureau funds some contract agencies which provide mental health assessments and/or treatment for children. Generally, these providers contract to provide a certain number of units of a given service, such as individual therapy, group therapy, or day treatment, during a fiscal year. These agencies are Short-Doyle providers, and generally are required by contract to collect insurance, Medi-Cal and Medicare, and to charge clients according to their ability to pay, as determined by UMDAP.

Prior to the legislation that is the subject of this Test Claim, none of the services to be provided under the Short-Doyle contracts were specifically referenced to serving IEP needs. With two exceptions, the Fiscal Year 1985-86 Short-Doyle contract agencies rendered services independent of the IEP process or requirements, charged parents based on UMDAP liability, and collected insurance, Medi-Cal and Medicare. The exceptions were two Short-Doyle agencies which also had contracts with local educational agencies to provide IEP-related services. These two agencies rendered IEP-related assessment and treatment services for the local educational agencies with which they had contracts, and received partial funding for these services from the local educational agencies instead of through parent fees, Medi-Cal and insurance.

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D. SANTA CLARA COUNTY NEGOTIATED NET AMOUNT CONTRACT WITH STATE

The County had negotiated net amount (NNA) contracts with the State of California for both Fiscal Years 1985-86 and 1986-87. Through these contracts, the County agreed to provide services consistent with the following principles:

(1) A continuum of mental health services which are required by statute and which are 'accessible and acceptable to the county population;

(2) Mental health services which are culturally and age-appropriate to the type, amount, and intensity needed to maximize recovery;

(3) Mental health services in the least restrictive appropriate environment available with due regard for individual constitutional rights and public safety;

(4) Prompt evaluation and care of persons with acute disabling symptoms,, especially those considered dangerous to self or others and persons with grave disabilities;

(5) Continuity of care and treatment for persons disabled as a result of a mental disorder who need assistance in using available mental health or other community resources; and

(6) Programs in the community which enhance the ability of the general population to cope with stressful life situations and prevent the onset of mental. disorder.

The Fiscal Year 1986-87 negotiated net amount contract provides generally that the County "shall provide accessible appropriate services in accordance with Federal and State regulations .to all eligible clients." Client is defined as "a

person who receives services pursuant to the Short-Doyle Act."

E. SANTA CLARA COUNTY MENTAL HEALTH BUDGET

1. Fiscal Year 1985-86

During the Fiscal Year 1985-86, the year prior to the year that is the subject of this Test Claim, the County Mental Health Bureau submitted a mental health budget (excluding state hospital services) of $35,552,792. The non-categorical Short-Doyle allocation (including the state portion of federal Medi-Cal) received from the state general funds was $21,640,430. The County provided $6,431,014 ($2,018,400 in required match and $4,412,614 in "overmatch", general County funds committed to mental health programs at the discretion of the Board of Supervisors). The remaining amount, $5,977,481, was from non-County, non-State sources such as grants, patient fees and insurance, federal Medi-Cal, and Medicare.

1985-86		
State Funding		
General Short-Doyle Funding	$21,640,430	
Categorical Funding	1,422,000	
MDO Contract	81,871	
State Funding		$23,144,301
County Funding		
Required Match	2,018,400	
Optional "Overmatch"	4,412,614	
County Funding		6,431,014
Non-State, Non-County Funding	5,977,481	
Other Funding		5,977,481
Total 1985-86		$35,552,796

The State later increased its 1985-86 funding of mental

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health programs to the County by $1,063,207. These funds were to be used for two categorical programs (supplemental rates and homeless programs).

2. Fiscal Year 1986-87

During the Fiscal Year 1986-87, the year that is the subject of this Test Claim, the County Mental Health Bureau submitted a mental health budget (excluding state hospital services) of $43,215,710. The state's non-categorical Short-Doyle allocation to the County was $22,515,326, which represented an increase from Fiscal Year 1985-86 of 4% (1% cost of living increase and 3% for program expansion).[12] State funding for categorical funding was $3,682,166, including $222,955 to fund the program subject to this Test Claim. The County provided $7,481,097 ($2,547,225 in required match and $4,933,872 in "overmatch"). The estimated revenue from non-County, non-State sources was $9,537,122.

1986-87

State Funding		
General Short-Doyle Funding	$22,515,326	
Categorical Funding	3,682,166	
State Funding		$26,197,492
County Funding		
Required Match	2,547,225	
Optional "Overmatch"	4,933,872	
County Funding		7,481,097
Non-State, Non-County Funding	9,537,122	
Other Funding		9,537,122
Total 1986-87		$43,215,710

12. The State later reduced its general Short-Doyle allocation to the County by $1,184,712 to reflect the County's use of State hospital resources beyond the County's original allocation. The State later also reduced by $143,000 the County's categorical funding for the supplemental rates program.

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The Budget Act of 1986 allocated $2,000,000 to the State Department of Mental Health for assessments, treatment, and case management services, and made available for transfer from the State Department of Education to the State Department of Mental Health an additional $2,700,000 for assessments and mental health treatment services for IEP children. Item 4440-131-001, Chapter 186, Section 2.00, Statutes of 1986; Chapter 1133, Section 3, Statutes of 1986. Of these amounts, $222,955 was allocated to the County of Santa Clara for Fiscal Year 1986-87. There was no required County match for this amount, The other categorical funding for Fiscal Year 1986-87 included funding for the community residential treatment system, the jail diversion program, programs for the elderly (target supplemental fund), and the supplemental rate program (additional payment to residential care facilities for the chronically mentally ill).

Additional amounts were to be transferred from the State Department of Education to the State Department of Mental Health if reports of local educational agencies indicated higher costs during Fiscal Year 1985-86 for services that are the subject of this Test Claim. Relatively low figures were reported initially. The Auditor General's Report showed wide discrepancies among school districts in the manner in which they reported their costs, and it was determined by the State Auditor General that the figures submitted were unreliable. An additional audit was to be conducted. Counties did not receive additional allocations for Fiscal Year 1986-87 as a result of these audits.

In its negotiated net amount contract with the State, the County agreed to maintain certain dedicated capacities for the

Fiscal Year 1986-87. The County's stated estimated cost of the dedicated units of service are as follows:

Mode of Service	Units of Service Dedicated	Estimated cost
Outreach	65,733	$ 2,531,199
24-Hour Services	111,991	14,862,886
Day Services	76,964	4,959,740
Outpatient	171,756	16,029,508
Continuing Care	110,127	4,300,142
Total Dedicated Capacity Adjusted Gross Cost		$42,683,475
Non-County, Non-State Revenue		(9,537,122)
Dedicated Capacity Net Cost		$33,146,353
Unallocated Costs		532,235
Total State/County Funded Costs		$33,678,588

Several of these modes of service do not include the kinds of services that are the subject of this Test Claim. The outreach services include public information programs and brief client contacts in which no Short-Doyle client record is opened. None of the outreach services are services provided pursuant to the IEP process. The 24-hour services include inpatient acute services, subacute residential services, and housing for the mentally ill. None of these are services provided pursuant to the IEP process. Although the detail budget sheets show the State's allocation for the IEP program in the continuing care budget, none of the other continuing care services were provided pursuant to IEPs. The costs of providing the assessment and treatment services required by the legislation subject to this test claim primarily fall into the day treatment and outpatient modes of service categories.

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V. ANALYSIS OF SERVICES THAT ARE THE SUBJECT OF THIS TEST CLAIM

A. SERVICES REQUIRED BY THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM

The legislation that is the subject of this Test Claim, and its implementing regulations, require involvement of the local mental health programs (generally, counties) in a variety of ways.

1. Interagency Agreement

To facilitate the provision of services, the local mental health director must appoint a local mental health liaison person and shall ensure that there is an interagency agreement with the county superintendent of schools. Title 2 California Code of Regulations section 60030.

2. Preliminary Steps Before Referral to Mental Health

Title 2 California Code of Regulations section 60040(b) and (c) sets forth the steps that must be taken before a child is referred by the responsible local education program to the local mental health agency to determine the child's need for mental health services. Written parental consent for the referral must be obtained. An assessment must be made by the school site personnel in accordance with Education Code provisions. Certain school guidance and counseling services must be provided to the child, and the IEP team must determine that such counseling is not meeting the child's needs. A review of assessment data must document that the child's behavioral characteristics adversely affect the child's educational performance, are severe and present in several

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settings, have been observed for at least 6 months, and cannot be defined solely as a behavior disorder or temporary adjustment problem. The local education agency must forward to the local mental health program educational information including a copy of assessment reports, current relevant behavior observations of the child in a variety of educational and natural settings, and a report prepared by personnel who provided counseling and guidance services, The local education agency also must obtain written parental consent to allow the mental health program professional to observe the child during school, and must propose a date for the IEP team meeting.

3. Mental Health Assessment Responsibilities

Title 2 California Code of Regulations section 60040(d) outlines the local mental program's responsibilities when it receives a referral. Mental health must review the educational information, observe the child in the school environment if necessary, and determine if a mental health assessment is needed. If it is, mental health must develop an assessment plan and obtain parental consent for the assessment. Assessments must be completed within the time frame of Education Code section 56344 (generally 50 days to complete the IEP assessment), although an extension not to exceed 15 days may be granted with parental consent. The local mental health program must provide the IEP team with a written assessment report. The report must include whether the child needs mental health services, the basis for malting the determination, the relevant behavior noted during the observation of the child in an appropriate setting, the relationship of the behavior to social and

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academic functioning, the educationally relevant health and development, and medical findings, if any, and a determination concerning the effects of environmental, cultural or economic disadvantages where appropriate. Education Code section 56327;

4. Participation in IEP Meetings

When the mental health prograom has conducted an assessment, the assessor must review and discuss his or her recommendations with the parent and appropriate IEP team members, and must attend the IEP team meeting if requested. Government Code section 7572(d)(l).

When mental health services are to be provided, the written IEP must include a description of the mental health services, the goals and objectives of those services (with appropriate objective criteria and evaluation procedures), and a statement of the initiation, frequency and duration of those services. Parental approval must be supported by a signed consent for treatment. Title 2 California Code of Regulations section 60050.

5. Mental Health Treatment

The local mental health program is responsible for providing psychotherapy and other mental health services required in an IEP. These services are to be provided by the local mental health program directly or by contract. Title 2 California Code of Regulations section 60020.

6. Exnanded IEP Team Responsibilities

If the IEP team is considering out-of-home placement for a

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Seriously Emotionally Disturbed (SED child, a local mental health program representative must be on the IEP team. Government Code section 7572.5(a). If the local mental health program is not represented, the IEP meeting must be adjourned and reconvened within 15 calendar days with the local mental health program's participation. The expanded IEP team must consider all possible alternatives to out-of-home placement, including any combination of cooperatively developed education and mental health service options and mental health services. If residential placement is the final option, the IEP team must develop a written statement documenting the child's educational and mental health treatment needs that support the recommendation for placement. The expanded IEP team must identify one or more appropriate, least restrictive and least costly residential placement alternatives. The facility must have a rate set by the State Department of Social Services, and must be located within or adjacent to the county of residence of the child's parents, unless documentation is provided that no nearby placement alternative is able to implement the IEP. The facility must be a privately operated residential facility licensed by the Department of Social Services with an appropriate off-grounds or on-grounds public school program or with a nonpublic, nonsectarian school program certified by the State Department of Education. The local mental health program representative must notify the local mental health director or designee of the IEP team's decision within one working day of the IEP team meeting. Title 2 California Code of Regulations section 60100.

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7. Case Management Responsibilities

If residential placement is called for in an IEP, the IEP must include designation of the county mental health department as lead case manager and must provide for a review of case progress. Government Code section 7572.5(c). Title 2 California Code of Regulations section 60110 outlines case management responsibilities. The local mental health director must designate a lead case manager to finalize the placement plan with the approval of the parent and the IEP team within 15 days from the decision to place the child in a residential facility. Case management includes services designed to provide continuity of care within the mental health system, to prevent neglect or exploitation, to prevent rehospitalization to the extent possible, to track and monitor progress within the mental health system and to intervene as needed, directly or indirectly, to assure the availability and adequacy of treatment services and necessary mental health social services. Title 9 California Code of Regulations section 548(a). Specifically, the IEP case manager must convene the expanded IEP team meetings to identify appropriate placement, verify appropriate educational agency authorization for the placement, complete placement paperwork, coordinate placement as soon as possible, assist the family and child in the child's social and emotional transition from home to the residential facility and the child's subsequent return home, conduct quarterly face-to-face contacts with the child at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the requirements of the IEP, notify the parent and the local educational agency if there is a discrepancy,

and coordinate the six-month expanded IEP team meeting. If the child is adjudicated to be a dependent or ward of the court, he or she is to receive case management for child welfare services and AFDC-Foster Care from the agency vested with the care, custody, and control of the child (Juvenile Probation or Social Services).

8. Ability to Charge Fees

Services for individualized education program assessment, treatment and case management must be provided at no charge to the child or the child's parents, regardless of the family's financial situation. However, the County may obtain reimbursement from parents ' insurance companies for therapy rendered pursuant to an individualized education program if the parents voluntarily agree to submit insurance claim forms. Parents may not be compelled to use insurance benefits if to do so would result in any cost to them, such as. through a reduction of lifetime benefits or an increase in premiums. "Notice of Interpretation", 45 FR 86390-86391, December 30, 1980; Bureau of Education for the Handicapped Policy Letter, 2 EHLR 211:361, April 29, 1985.

B. NON-IEP RELATED MENTAL HEALTH SERVICES PROVIDED BY COUNTY

Prior to the passage of Chapter 1747 of the Statutes of 1984, the County of Santa Clara, and local mental health programs generally, were not required to provide IEP assessments for local educational agencies, and were not required to participate in IEP meetings. Local educational agencies had these responsibilities. The County of Santa Clara is neither a local educational agency nor

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pecial education local plan area (SELPA), and has a fiscally ndependent Office of Education which is not involved in this Test Claim.

The county mental health program and county welfare department had no statutory roles in the IEP process prior to this legislation. The following describes non-IEP related services provided by the Santa Clara County Mental Health Bureau which are analogous to the IEP-related services. The assessment and treatment services described were provided prior to Fiscal Year 1986-87 and continue to be provided to clients other than children referred through school districts in the formal IEP process.

1. Interagency Agreement

No interagency agreement for the provision of IEP services was required, absent legislation subject to this Test Claim. However, the Department of Mental Health and the Superintendent of Public Instruction urged local mental health programs and local educational agencies to negotiate interagency agreements. The County of Santa Clara in years prior to the year of this Test Claim entered into a very general agreement with the County Office of Education and an agreement with the State. These agreements did not require the County of Santa Clara to accept any formal responsibility in the IEP process.

2. Preliminary Steps Before Referral to Mental Health

Prior to the implementation of the legislation that is the subject of this Test Claim, there were no direct referrals to the Santa Clara County Mental Health Bureau by local education agencies

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under the IEP process.

3. Mental Health Assessment Responsibilities

Prior to the full implementation of Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, the Santa Clara County Mental Health Bureau provided, directly and indirectly, some assessment services to children in some respects similar to the assessment services subject to this Fiscal Year 1986-87 Test Claim.

Children referred to the County's mental health clinics or clinic satellites were given mental health assessments to determine treatment needs, generally within one to two weeks of referral, At times, some clinics had assessment wait lists. Then, referrals were briefly screened, and only those cases presenting emergencies (people dangerous to themselves or others, gravely disabled, or referred from Emergency Psychiatric Services, the County's psychiatric emergency room) received immediate assessments.

Once a client was accepted for assessment, clinicians prepared a written intake assessment approved by a psychiatrist within five visits, but no later than thirty days following the first visit. These assessments were independent of the IEP process. The assessment included identifying data (name, age, address, demographic data, referral source), history of presenting illness, past psychiatric history, medical history, personal/social situation, family history, mental status examination, disposition, diagnosis, specific behavior and symptoms, treatment interventions, prognosis, and duration of interventions. For an adult, the assessment could generally be completed in one interview; For a

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child, the assessment often took up to three interviews, including interviews with the child and parents, as well as collateral contacts with the child's school, probation officer or social worker, if authorized by the parent. The assessment generally was a handwritten document in the child's clinical chart. The chart information was confidential and not shared with local educational agency representatives except pursuant to a consent to release information satisfying the requirements of Welfare & Institutions Code section 5328.

The procedure for non-IEP related assessments is not dictated by State law. Rather, it is dictated by clinical practice and policy of the Mental Health Bureau of the County of Santa Clara.

4. Participation in IEP Meetings

Prior to the implementation of the legislation that is the subject of this Test Claim, County mental health clinicians did not participate in the IEP process in a formal manner. Frequently, if a child in therapy had an IEP, and the therapist was an employee of the County, the child's therapist voluntarily participated in the IEP process to a limited extent. Neither the therapist nor the County was required to participate. In each case, the therapist became involved at the invitation of the parent or the educational agency, after parental consent had been obtained. Dependent upon insurance coverage, eligibility and ability to pay, parents, insurance, Medi-Cal and Medicare were billed for the services. The therapist did not submit an IEP assessment to the team and was not an IEP decisionmaker. The therapist may have discussed the case with the person conducting the assessment for the IEP team, or may

have attended the IEP meeting. However, the therapist's presence at the IEP meeting was not required..

5. Mental Health Treatment

Clinical decisions are made regarding whether services will be offered in non-IEP cases. One of the factors taken into consideration in making clinical decisions is the limited availability of resources. Clinics often have treatment waiting lists. Attempts are made to give priority to those in greatest need. Subject to wait list availability, treatment plans are implemented. Parents are charged based on their UMDAP ability to pay. Medi-Cal, Medicare, and private insurance are billed.

These services prior to implementation of the legislation that is the subject of this Test Claim were not necessarily services required by IEPs. Children with IEPs recommending mental health treatment services were treated no differently from other children receiving mental health services. Treatment services were rendered without regard to whether such services were required by IEPs. The focus of therapy was the global mental health needs of the children, not the needs as they relate to the ability to benefit from a free, appropriate public education.

6. Expanded IEP Team Responsibilities

Prior to the implementation of legislation subject to this Test Claim, representatives from the local mental health program were not members of a child's IEP team even if out-of-home placement was recommended.

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7. Case Management Responsibilities

Prior to the implementation of legislation that is the subject of this Test Claim, representatives from the local mental health program did not have case management responsibilities for children placed out-of-home pursuant to IEPs. In Fiscal Year 1985-86, the County of Santa Clara did not have a responsibility to provide case management services.

By Department of Mental Health regulation, case management is defined as services designed to provide continuity of care within the mental health system, to prevent neglect or exploitation, to prevent rehospitalization to the extent possible, to track and monitor progress within the mental health system and to intervene as needed, directly or indirectly, to assure the availability and adequacy of treatment services and necessary mental health social services. Title 9 California Code of Regulations section 548(a). Generally, case management services are utilized to provide services to persons who are chronicly and acutely mentally ill. As most persons in this category are adults, case management services typically have been provided primarily to adults.

Prior to the legislation that is the subject of this Test Claim, the Mental Health Bureau provided some case management services for the most severely mentally disturbed children: those placed in Napa State Hospital or receiving inpatient services at Don Lowe Pavilion, the County's acute psychiatric hospital. Generally, these children were dangerous to themselves or others and/or met the criteria of gravely disabled as a result of a mental disorder. All of the Santa Clara County children at state' hospitals were on LPS conservatorships. These case management

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services did not overlap with IEP case management services, as the acute hospital and state hospital placements were not placements pursuant to IEPs.

Prior to the full implementation of the legislation that is the subject of this Test Claim, in Santa Clara County, the departments of social services and probation also provided some case management services unrelated to IEP case management services for children who were wards or dependents of the court. Counties were not required to provide these services. In Santa Clara County, parents were billed for these services, based on ability to pay. Not all children receiving these case management services were on IEPs, and few were in out-of-home placement pursuant to IEPs. Case management responsibilities did not include IEP case management responsibilities, even for children who had IEPs.

8. Ability to Charge Fees

Generally, patients or other responsible parties are charged fees for mental health services, determined by their ability to pay. Welfare and Institutions Code section 5716. If a patient is covered by insurance, insurance companies are billed for any covered services, subject to the patient's consent.

Medi-Cal and Medicare are billed for covered services to Medi-Cal and Medicare patients. Cost recovery from the Medi-Cal program is limited to the federal portion of Medi-Cal for the year that is the subject of this Test Claim, as the County in that year had a NNA contract with the State. Under this contract, the amount of Short-Doyle allocation includes the state portion of Medi-Cal for Short-Doyle services.

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VI. ANALYSIS OF SANTA CLARA COUNTY IEP-RELATED SERVICES IN 1986-87

A. COST OF PROVIDING SERVICES SUBJECT TO THIS TEST CLAIM

The Fiscal Year 1986-87 cost to the County for providing mental health assessments, case management, and treatment required by the legislation that is the subject of this Test Claim exceed the $222,955 specifically allocated to the County by the State for this program. The excess costs place this Test Claim within the jurisdiction of the Commission on State Mandates. The County will submit evidence regarding its Fiscal Year 1986-87 costs to comply with the legislation that is the subject of this Test Claim.

B. EFFECT ON PRIORITIES

Handicapped children needing mental health treatment to take advantage of a free, appropriate education under the EHA and the State's implementation of the EHA have an entitlement to receive those services. No other persons served by local mental health programs have an entitlement to mental health services;

The effect of Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985, and Title 2 California Code of Regulations Division 9 is to give the highest priority to individualized education program treatment, If'mental health resources are insufficient to meet the entire mental health needs of the community, treatment required by individualized education programs must continue to be provided. Patients with more acute illnesses, but without IEPs--including children--may be placed on

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'waiting lists.

With respect to non-IEP mental health services, counties have flexibility to determine treatment priorities in terms of who is served, what kind of treatment they receive, and how often they receive those services.

C. IMPACT OF LEGISLATION ON ABILITY TO CHARGE FOR SERVICES

As the assessments and treatment services are specifically required to be provided at no cost to the handicapped child or the child's families, affected local entities do not have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. Some services rendered pursuant to these statutes for Medi-Cal eligible children are covered under Medi-Cal. The legislation does not impact the ability of the County to bill Medi-Cal, and this revenue is included as an offset to expenses on this Test Claim.

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VII. CONCLUSION

The State and the County agree to the statement of facts and issues set forth in this document. Additional evidence will be submitted at the hearing. Thank you for your consideration.

Dated: December, 1988

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
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By: HARLAN E. VAN WYE, Deputy
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Departments of Education, Finance and Mental Health

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County of Santa Clara

By: SUSAN A. CHAPMAN, Deputy
Attorneys for County of Santa Clara

DECLARATION OF ROBERT F. PORTER

1, Robert F. Porter, hereby declare:

1. I am the Children's Coordinator for the Mental Health Bureau of the County of Santa Clara, a position I have held since 1985. In this position, I act as a resource person for mental health services for children and adolescents and their families for the Bureau's three subsystems (Acute Services, Community Mental Health, and Community Mental Health Support), under the direct supervision of Ken Meinhardt, M.D., Mental Health Director for the County of Santa Clara. I serve as liaison to other agencies and departments rendering services to children and adolescents and their families. I represent the County of Santa Clara in the California Mental Health Children's Coordinators' Association. I am the chairperson of the County Children and Adolescent Coordinating Group, a consortium of private and public providers of services to children and adolescents and their families. I am e member of the County's Napa Review Committee, which must approve all state hospital placements for children and adolescents of the County, es well as all placements in the County's state hospital-alternative programs,

Concurrently, I am a Health Services Supervisor for Children and Adolescent Services in the Community Mental Health Subsystem, a position I have held since November, 1984. In this capacity, I work under the supervision of

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the Director of the County Mental Health Bureau's Community Mental Health Subsystem. In this position, I am responsible for a multi-disciplinary mental health program unit serving a specified region within the County. This unit provides a full range of mental health services to the population within the region.

From January 1974 to November 1984, I was employed by the Mental Health Bureau of the County of Santa Clara as a Psychiatric Social Worker I, II, III, and then as a Lead/Unit Supervisor. I am a clinical social worker licensed to practice in California. A copy of my resume is attached hereto as Exhibit A and incorporated herein by reference.

2. I am familiar with the mental health treatment needs of the people of the County of Santa Clara in general and specifically with the needs of children and adolescents and their families. I am familiar with the mental health treatment resources and the services provided to children and adolescents and their families during the Fiscal Sears 1985-86 and 1986-87 through the County and County Short-Doyle contract providers, including services provided through the IEP process in Fiscal Year 1986-87. I am generally familiar with the demographics and relative resources and mental health needs of the population of the County of Santa Clara. I have some familiarity with the individual cases of the most severely mentally ill children and adolescents who reside in the County of' Santa Clara and who receive services through

the County, the state hospitals, the state hospital alternative programs, the other County Short-Doyle contract providers, and/or those who receive mental health services pursuant to IEPs.

I am familiar with the Special Education IEP criteria, with the federal Education for All Handicapped (EHA) criteria, and with Chapter 1747 of the Statutes of 1984 (hereinafter referred to as AB 3632), Chapter 1274 of the Statutes of 1985 (hereinafter referred to as AB 8821, and their implementing regulations. I am familiar with the role of Santa Clara County school districts and SELPAs (Special Education Local Plan Areas) in the IEP process.

During the period covered by this Test Claim relating the mental health services to handicapped students, I functioned as the County of Santa Clara's liaison to the State Department of Mental Health on matters relating to AB 3632. Until March, 1986, at which time the County of Santa Clara hired a full-time AB 3632 Coordinator, I coordinated the activities of the Mental Health Bureau in planning for the implementation of AB 3632/AB 882. From approximately January, 1988 until July 1988, when the Coordinator position was eliminated in a budget reduction move, I supervised the activities of the Coordinator, Subsequent to the elimination of the full-time AB 3632 Coordinator postition, I have reviewed the activities, work, files and other documentation of the Coordinator and have assumed some of the responsibilities of Coordinator for this program.

3. I have reviewed the records, files, policies, procedures and available information of the County of Santa Clara relating to the AB 3632 program. Specifically, I have reviewed the following:

a, Policy and procedures Manual. I have reviewed the Policy and procedures Manual of the County's Mental Health Bureau and the County's Community Mental Health Subsystem relating to AB 3632 procedures and have satisfied myself that the procedures require appropriate referrals from local educational agencies in accordance with AB 3632 and AB 882 and their implementing regulations and require appropriate assessments, IEP team participation, mental health recommendations, mental health treatment, and case management in accordance with the federal EHA requirements and the requirements of AB 3632 and AB 882 and their implementing regulations.

b. Records of AB 3632 Coordinator, I have reviewed the files and records of the full-time AB 3632 Coordinator who was employed by the County Mental Health Bureau from March, 1986 to July, 1988,

c. Computer Data. I have reviewed the data from the Mental Health Bureau's automated services reporting system for children identified as receiving IEP-required services or assessments during Fiscal Sear 1986-87, including the 1986-87 reported units of IEP-related assessments and IEP-required day treatment, individual therapy and group therapy for individual children specifically identified as

receiving IEP-related services. I also reviewed the 1985-86 data from the Mental Health Bureau's automated services reporting systems relating to mental health services rendered to any individual children identified as receiving IEP-related services in 1986-87. In addition, I have reviewed the AB 3632 services information which was compiled on the Bureau's micro-computer files for analysis purposes. I am familiar with the pattern of referrals from the seven SELPAs (Special Education Local Plan Areas) within the County of Santa Clara, as well as the pattern of referrals from individual school districts.

d. Individual Records. I reviewed the individual Short-Doyle charts and the AB 3632 records of children identified through the computer data as having received IEP-related services in 1986-87, and have satisfied myself that the units of service, upon which the reported costs for assessments, treatment, and case management were calculated for the purposes of this Test Claim, are accurate, documented, and were required by AB 3632 and AB 882, and their implementing regulations.

e. Provider Records, I have reviewed the records and files of AB 3632 providers in Santa Clara County, both County-operated and Short-Doyle contractors, to satisfy myself that the services identified as IEP-related were required by AB 3632 and AB 882 and their implementing regulations, Specifically, I satisfied myself. that assessments were conducted after appropriate referrals from

local school districts, that assessments were made, and that mental health treatmdnt services identified as IEP-related were rendered pursuant to valid IEPs.

In the process of reviewing the individual records and provider records, I discovered that some of the units of service originally reported as IEP-related were not rendered pursuant to valid IEPs, although the children receiving those services probably would have been entitled to receive those services pursuant to IEPs if school districts had made appropriate referrals and the Bureau's Policy and Procedure Manual had been followed. These units of service, which cannot properly be considered to be IEP-related for purposes of this Test Claim, have been eliminated from the data upon which the cost of complying with AB 3632 and AB 882 and their implementing regulations was calculated.

f. Interagency Agreements. I reviewed the interagency agreements relating to AB 3632 between the Bureau of Mental Health and other departments and agencies for the Fiscal Year 1986-87.

g. SELPA n s . I reviewed the plans submitted to the State by the seven SELPAs within the County of Santa Clara which covered Fiscal Tear 1986-87.

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3. The following general service6 were provided by the County of Santa Clara **in Fiscal Year 1985-86 and Fiscal Year 1986-87** in connection with the "AB 3632 Program":

a. An AB 3632 Coordinator (Mental Health Program Specialist **II) was employed full time** from March, 1986 through Fiscal Year 1986-87, to coordinate and oversee the activities of the AB 3632 program.

b. During the AB 882 "Window Period" from March 1, 1986 through June 30, 1986, during which time the Mental Health Bureau had the responsibility for assessing all Santa Clara County children referred by school districts per the Chapter 1274 of the Statutes of 1985. the Mental Health Bureau of the County of Santa Clara designated all of its children's service6 providers, both County employees and County contract providers, as eligible to provide assessments. Those short-Doyle contract providers opting to provide such assessments were reimbursed out of the allocation from the State for Fiscal Year 1985-86 for such services.

c. Three AB 3632 clinical assessor positions were created and filled in July, 1966, by the County Mental Health Bureau to carry out assessments for special education students referred by school districts under the AB 3632 program.

d. Throughout Fiscal Year 1986-87, three County-operated mental health centers and selected County short-Doyle contract providers of day treatment services were assigned to do AB 3632 assessments.

e. During Fiscal Year 1986-87, all of the mental health providers for the County of Santa Clara, both county and contract, were designated as eligible to provide mental health treatment

services required by IEPs.

f. During Fiscal Year 1986-87, the following units of service (defined as a visit for assessments, outpatient treatment and case management services, regardless of the length of the visit, and defined as a day for day treatment services). as summarized on Exhibit B attached hereto, were provided to AB 3632-referred children:

1. Assessments: 612 assessment unit6 of service were provided to 569 special education students properly referred for IEP assessments from local school districts through the IEP process under the provisions of AB 3632. Of the children assessed, 74 received assessments only and did not receive mental health services pursuant to IEPs.

2. Outpatient Treatment: 4,910 units of individual therapy and 267 units of group therapy were provided pursuant to IEP requirements to the 272 children who received outpatient services without day treatment and the 177 children who received a combination of outpatient and day treatment services. All services were provided pursuant the requirements of AB 3632 and AB 882 and their implementing regulations.

3. Day Treatment: 20,455 units of day treatment services were provided pursuant to IEP requirements to the 32 children who received day treatment only and the 177 children who received a combination of outpatient and day treatment services. All services were provided pursuant the requirements of AB 3632 and AB 882 and their implementing regulations.

4. Residential Treatment: 13 children were placed out-of-home pursuant to IEPs. Case management services for

student6 placed out-of-home pursuant to their IEPs were assigned to mental health clinicians within the County-operated mental health centers where these students had been assessed. Case management units of service required by AB 3632 and AB 882 and their implementing regulation6 for these 13 children totalled 295 units. Case management service6 ceased for three of these children when they were placed in residential treatment Out-of-state because of the lack of appropriate California placements.

4. Some of the children who were referred to the County by local school districts when AB 3632 went into effect previously had been known to the County mental health system. Children were "known to the system" if they had Short-Doyle client record number6 assigned prior to their referral to the Mental Health Bureau by the school districts. All persons who are seen by county Mental Health or County Short-Doyle contract provider6 for formal assessment and/or treatment at any time have short-Doyle client record number6 assigned. A person's Short-Doyle client record number remains the same regardless of which County or County Short-Doyle contract provider the person sees, and regardless of time (much like a Social Security number). Of the 568 children referred to the County by school district6 and receiving mental health treatment services in Fiscal Year 1986-87, 316 did not have Short-Doyle client record numbers at the time of referral (56%): 251 had Short-Doyle client record numbers assigned prior to referral and were receiving mental health service6 through the County or County contract provider6 during the prior fiscal year (44%). One child referred by a school district had a Short-Doyle client record number assigned but had not received services for some time prior

to the referral. This child was placed in residential treatment.

5. Of the 251 children previously known to the system, the number of children receiving mental health treatment in Fiscal Years 1985-86 and 1986-87 per treatment mode, and the number of units of service, as set forth on Exhibit C, is as follows:

a. Outpatient Treatment. In 1985-86, 110 of the 251 children received only outpatient services and 115 received outpatient services and day treatment. In 1986-87, 75 received only outpatient services and 110 received outpatient services and day treatment.

b. Dav Treatment. In 1985-86, 25 of the 251 children received only day treatment services and 115 received outpatient and day treatment services. In 1986-87, 66 received only day treatment and 110 received outpatient services and day treatment. Whether the 140 children receiving day treatment mental health services in Fiscal Year 1985-86 had those services included on their IEPs for that school year is difficult to determine. Whether such services were included on children's IEPs varied from provider to provider, though similar mental health services were provided for all children in day treatment. Most children receiving day treatment services in both years received services in 1985-86 that were identical or nearly identical to the mental health services required in their 1986-87 IEPs, regardless of their 1985-86 IEPs.

c. Residential Treatment. None of the 251 children receiving services both in 1985-86 and 1986-87 were placed in residential treatment in 1986-87.

6. 1 am informed and believe and on that basis allege that most Santa Clara County children receiving'mental health services

pursuant to IEPs in 1986-87 did not receive mental health services pursuant to IEPs in 1985-86, when school district6 had the responsibility for identifying, assessing, and providing services for mental health treatment needs. Children in need of service were under-identified. With the exception of children served by the two Short-Doyle agencies with local educational agency contracts, most of the 251 children receiving mental health services directly or indirectly from the County in 1985-86 had not received IEP mental health assessments and did not have IEPs which called for mental health services in prior years.

Some of the children receiving mental health services had IEPs, either because they were classified as SED or because they had some other disabilities, such as learning or physical handicaps. Few of the IEP children (and even few of those categorized as SED) were receiving mental health services pursuant to IEPs during Fiscal Year 1985-86, even those which should have been entitled to such services,

7. Not all children in need of mental health services are entitled to receive those services pursuant to IEPs. In fact, many of the most acutely and seriously disturbed youth are not entitled to receive the needed mental health services pursuant to IEPs. In order to be eligible to be referred for mental health assessment and/or treatment pursuant to an IEP, students must meet the following specified criteria:

a. The child must be enrolled in Special Education. Of the 220,000+ school age youngseters in Santa Clara County in Fiscal Year 1986-87, 21,441 were enrolled in Special Education.

b. The child's behavior must adversely affect educational performance,

c. The adverse behavior cannot be defined solely as a behavior disorder.

d. The adverse behavior cannot be defined as a temporary adjustment problem.

e. The adverse behavior must have been observed for a period of at least six months.

8. The following are examples of situations in which children clearly in need of mental health services do not qualify for services under the AB 3632 statutes:

a. A child emerging from his or her first psychotic episode, and in acute need of day treatment, does not qualify because the illness has not been manifested for a long period of tine.

b. An out-of-control adolescent with a diagnosis of a conduct disorder but without another psychiatric diagnosis does not qualify because he or she is considered "socially maladjusted" as opposed to emotionally disturbed. This is true even if the conduct disorder is so extreme that the child is disruptive in all spheres of his or her life, even if the conduct disorder renders the child completely unable to benefit from his or her education, and even if the child is violent or self-destructive, and even if the child is ordered into treatment by the juvenile court.

c. A child in extreme distress because of a recent personal or family tragedy (such as divorce, child abuse, rape, or the death of parents) does not qualify because the issue is a "temporary adjustment problem."

d. An over-achieving child with a psychiatric illness and extreme internal conflicts does not qualify for IEP-related mental health services as long as the psychiatric illness doe6 not adversely affect educational performance, regardless of the seriousness of self-destructive behavior, and regardless of the length of acute hospitalization stays.

e. A child with mental health needs for whom school is the one sphere of adequate functioning does not qualify for IEP-related mental health servicesbecause educational performance is not adversely affected, regardless of the degree of dysfunction in the other areas of the child's life. This can include abused and neglected children; children who have failed multiple out-of-home placement attempts, including therapeutic placements; children who are self-destructive: children who completely disrupt the family with violence and threats.

f. A child who previously functioned adequately but now fails to function in all spheres of his or her life would not qualify for IEP-related mental health services because the characteristics have not been manifest for a long period of time.

10. Generally, the County has the flexibility to determine treatment priorities, given limited resources. The County has lost this flexibility with regard to IEP-related services, as the legislation mandates that the County provide mental health services pursuant to IEPs, regardless of the severity of the mental condition, and regardless of funding limitations. In Santa Clara County, nearly all County mental health treatment centers have waiting lists for non-IEP services. This is true even though the Board of Supervisors has voluntarily funded mental health services

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beyond the funding required by State law.

11. Prior to Fiscal Year 1986-87, the County was not required to fund mental health services provided by private non-County contract providers. Although the County was not required to pay for services of private therapists pursuant to the IEP program in Fiscal Year 1986-87, the County may be required by State and federal law to pay for mental health services rendered by private therapists. This could occur, for example, if a child was placed in private therapy prior to referral for IEP services and an administrative hearing officer or court were to order continuation of that treatment, or if the County and County contract providers were unable to render the treatment required by an IEP. In fact, following 1986-87, the County has been required by an administrative law judge to pay for mental health services rendered by private mental health therapists who were not previously County contract providers.

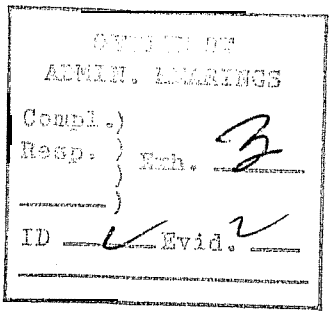
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon my information and belief, and as to those matters, I believe them to be true.

Executed on December 1, 1988, at Sacramento, California.

Robert F. Porter

Robert F. Porter
Children's Coordinator
Mental Xealth Bureau
County of Santa Clara

DECLARATION OF DAVID WYTOCK



I, David Wytock, hereby declare:

1. I am the Administrator for the Santa Clara County Mental Health Bureau and am responsible for budgeting, financial matters, computer systems, and various administrative support areas for the County Bureau of Mental Health, a county health department bureau with approximately 700 employees and a $57 million annual budget. I work under the direct supervision of the County Director of Mental Health, Ken Meinhardt, M.D., and supervise a staff of 25 persons. I am responsible for administering the County's 'Short-Doyle negotiated net amount contract with the State and the County's contracts with County Short-Doyle contract providers. I have held the position of Mental Health Administrator for six years.

From 1977 to 1982, I was a Program Manager in the Office of Management and Budget for the County of Santa Clara. I was responsible for supervising a section of budget analysts who prepared the County Executive's budget and reviewed financial and management issues concerning the County Hospital, County Departments of Health and Social Services, and various general government departments. I am familiar with financial and services documentation and accounting for human services generally and specifically for mental health services. A copy of my resume is attached hereto as Exhibit A and incorporated herein by reference.

EXHIBIT 3

2. I have familiarized myself with the data sources and methods used in compiling the financial information in support of the test claim of Santa Clara County regarding handicapped students. Based upon my review, the estimated Fiscal Year 1986-87 cost of providing services pursuant to Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985 and the implementing regulations is $2,387,835. The County received a Fiscal Year 1986-87 categorical allocation from the State to fund this program in the amount of $222,955. The County received revenue from private insurance and the federal portion of Medi-Cal for services provided pursuant to this legislation. My best estimate of the associated revenue is $235,869. The estimated net cost of complying with this legislation is $1,929,011. A distribution of the costs by category is attached hereto as Exhibit B and incorporated herein by reference. These costs and revenue were estimated by the following methods:

a. Direct Administrative Costs. The costs for program coordinator, services and supplies, and overhead are specific estimated costs of these functions for Fiscal Year 1986-87.

b. Case Management Costs. The case management costs were based on a specific survey of staff hours spent on case management for AB 3632 students who were placed in residential placement pursuant to IEPs. The actual hours spent on this activity were then multiplied by an average hourly cost per staff.

c. Direct Service Costs. costs for assessments, day treatment, individual therapy, and group therapy were based on actual units of service reported by the Bureau for AB 3632 clients in the Bureau's automated services reporting system. All direct

client services rendered by the County and the County Short-Doyle contract providers were reported through the Bureau's automated services reporting system. Services rendered pursuant to IEPs and IEP-related assessments are so identified at the time of reporting. I am informed and believe and on that basis allege that the units of each mode of service per provider have been properly identified as IEP-required services. The units of each mode of service, per provider, were then multiplied by the average cost of service for each service provider. The average costs were taken from the Bureau's Fiscal Year 1986-87 Cost Report.

d. Federal Medi-Cal and Third Party Insurance Reimbursement. The estimates for Medi-Cal reimbursement were based on the average percent reimbursement of total direct service expenditures received by each provider during Fiscal Year 1986-87, as reported in the Bureau's Fiscal Year 1986-87 Cost Report. The Medi-Cal estimate includes the federal portion of Short-Doyle Medi-Cal only. Although there were some revenues from third party insurance, I am informed and believe and on that basis allege third party insurance reimbursement does not materially change this claim. Third party insurance reimbursement has therefore been disregarded for purposes of estimating the cost of the mandate at this stage of the test claim procedure.

3. I have familiarized myself with the data sources and methods used in compiling the financial information regarding children who both received services through the County pursuant to AB 3632 during Fiscal Year 1986-87 and received services through the County or County Short-Doyle contract providers during Fiscal

Year 1985-86. I estimate that the net cost of providing services to these children is is $1,403,963 for Fiscal Year 1985-86, and $856,189 for Fiscal Year 1986-87. The distribution of costs per treatment mode of service is shown on Exhibit C, attached hereto and incorporated herein by reference. These costs and revenue were estimated by the following methods:

a. Assessment Costs. Assessment costs were disregarded for purposes of this comparison.

b. Direct Administrative Costs. Direct administrative costs were disregarded for purposes of this comparison.

c. Direct Treatment Costs. Costs for day treatment, individual therapy, and group therapy were based on the actual units of service reported by the Bureau for the 251 clients identified as receiving IEP-required mental health services in Fiscal Year 1986-87 and receiving mental health services from the County or the County contract providers in Fiscal Year 1985-86. I am informed and believe and on that basis allege that 251 children were so identified as receiving IEP-related services in 1986-87 and mental health services through the County or County contract providers in 1985-86, and that the estimates of the units of the various modes of service are set forth accurately on Exhibit C. These services, per provider, were then multiplied by the average cost of service for each service provider for the respective years. The average costs were taken from the Cost Reports for the Bureau for Fiscal Years 1985-86 and 1986-87. The 1986-87 costs were costs relating to IEP-required services only. The 1985-86 costs are the total 1985-86 costs to the County and County Short-Doyle contract providers for providing mental health

services to these specifically identified children, regardless of whether these mental health services were required by IEPs.

d. Federal Medi-Cal and Third Party Insurance Reimbursement, The estimates for Medi-Cal reimbursement were based on the average percent reimbursement of total direct services expenditures received by each provider during the respective years, as reported in the Cost Reports for the Bureau for Fiscal Years 1985-86 and 1986-87. The Medi-Cal estimate includes the federal portion of Short-Doyle Medi-Cal only. The revenue estimate does not include an estimate for third party insurance for 1986-87. I am informed and believe and on that basis allege that the third party insurance revenues associated with these services in 1986-87 were relatively insignificant.

4. I am informed and believe and on that basis allege that County Short-Doyle contract providers sustained a revenue loss as a result of the implementation of the legislation that is the subject of this Test Claim. The amount of the revenue loss to the County and the County Short-Doyle contract providers has not been estimated, although County short-Doyle contract providers report a revenue loss of approximately $66,000.

In addition, in prior years school districts partially funded County contract providers who provided individualized education program services. I am informed and believe and on that basis allege that in Fiscal Year 1985-86, two County contract providers received $204,000 from school districts for IEP services. These County contract providers now look to the County alone to provide all the funding for mental health treatment pursuant to IEPs. The

Revised 10/88

DAVID M. WYTOCK

ADDRESS 1420 Richards Avenue
San Jose, California 95125

Phone (408) 287-6979 (Home)
(408) 299-5952 (Work)

EXPERIENCE

SUMMARY

Extensive and varied experience as department administator and as key assistant for local government chief executive officers, focusing on the areas of budgeting and financial management, policy analysis and program evaluation, and program administration.

March 1982 to present

Administrator, Mental Health Bureau, Santa Clara County. Responsible for budget, systems, and administrative support for a department with 700 employees and $57 million budget. Supervise staff of 25 persons. Instituted quarterly goal-setting and performance review process with unit supervisors reporting to me.

Established a microcanputer-based financial reporting and budgeting system which identifies budgets for eleven responsibility centers, tracks monthly expenditures and revenues by account, and includes position control monitoring. Directed a requirements study, RFP acquisition and implementation processes for a $1.6 million on-line canputer system which was critically needed to replace an outmoded batch processing system. Provided leadership and direction in reorganizing the Mental Health billing unit, resulting in increased third party revenue collections of 50% over a two year period.

August 1977 to March 1982

Program Manager, Office of Management and Budget, Santa Clara County. Supervisor of Human Services/General Government section consisting of six budget analysts. Responsible for preparing budgets and reviewing financial and management issues concerning the County hospital, health, social services, and general government departments. These departments represented over $400 million and sane 65% of the County budget.

In addition to budget work, supervised projects to analyze and implement legislation for Proposition 13, study and improve County services for seniors, evaluate a County-wide drinking driver program leading to the termination of a contractor for making unauthorized profits, study the current and future role of County hospital, develop and implement a canputer model to forecast County revenues and expenditures.

October 1973 to July 1977

Operations research analyst, Center for Urban Analysis, Santa Clara County. Lead responsibility on projects applying analytical techniques to local government problems. Canpleted multiple projects using canputer modeling and graphics systems in the areas of fire services, school planning, health and emergency medical services, financial analysis.

February 1971 to October 1973

Program Planner/Budget Analyst, New York City, Bureau of the Budget. Member and supervisor of four-person team which reviewed the city's $2 billion school budget and prepared the Mayor's recommended budget. Specific projects included development of indicators for monitoring effectiveness of school system and diverse program analysis efforts.

EXHIBIT A

estimated loss in revenue from this source is $212,000 ($204,000 plus a cost of living increase of 4%).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon my information and belief, and as to those matters, I believe them to be true.

Executed on December 1, 1988, at ~~San Jose~~ Sacramento, California.

David Wytock
Mental Health Administrator
County of Santa Clara

Experience Detail Continued...

August 1968 to December 1970	Peace Corps volunteer, El Salvador, Central America. Initiated fishermen's cooperative, instructed directors in leadership techniques and coop principles, organized accounting system and acted as business advisor.

EDUCATION	Stanford University, Stanford, California. M.S. in Engineering Econanic Systems, 1968. Canpleted program in systems analysis and economics, with additional courses in anthropology, psychology, econanic development. B.S. in Electrical Engineering, 1967. Phi Beta Kappa, Frederick Terman Engineering Award.

COST TO SANTA CLARA COUNTY FOR FISCAL YEAR 1986-87 FOR "AB 3632" PROGRAM (MENTAL HEALTH SERVICES TO HANDICAPPED CHILDREN)

The County's cost of providing mental health assessments, case management, and treatment for Fiscal Year 1986-87 are set forth in the following schedule.

Assessment and Case Management		
Coordinator	$ 52,000	
Assessments	80,331	
Case Management	8,935	
Services & Supplies	16,000	
Overhead	10,880	
Subtotal		$ 168,146
Treatment		
Day Treatment	$1,784,076	
Individual Therapy	419,349	
Group Therapy	16,264	
Subtotal		2.219.689
Total		2,387,835
Federal Medi-Cal		(235,869)
Categorical Appropriation		(222,955)
Net Cost		$ 1,929,011

EXHIBIT B

COMPARISON OF FISCAL YEAR 1986-87 IEP TREATMENT COSTS WITH FISCAL YEAR 1985-86 MENTAL HEALTH TREATMENT COSTS FOR CHILDREN WHO RECEIVED COUNTY MENTAL HEALTH TREATMENT IN 1985-86 AND IEP-RELATED SERVICES IN 1986-87

Of the children who received mental health assessments and/or services pursuant to IEPs in Fiscal Year 1986-87, 251 had previously been receiving mental health services (day treatment and/or outpatient therapy) from the County or the County Short-Doyle contract providers in the prior fiscal year. Of these children, the number receiving each type of service is as follows:

	Fiscal Year 1985-86	Fiscal Year 1986-87
Outpatient Only	110	75
Day Treatment Only	25	66
Day Treatment & Outpatient	115	110
Residential Treatment	0	0
Total	251	251

The units of services, and the associated costs, for treating this group of children (excluding assessment costs) is as follows:

	Fiscal Year 1985-86		Fiscal Year 1986-87	
	Units of Service	cost	Units of Service	cost
Day treatment	18,674	$1,342,595	10,499	$835,808
Individual treatment	2,860	193,215	998	82,136
Group therapy	113	6,343	28	1,435
Total		$1,542,153		$919,379
Estimated Revenue		138,190		63,190
Estimated Net Cost		$1,403,963		$856,189

EXHIBIT C

City and County of San Francisco:

Office of City Attorney

Louise H. Renne,
City Attorney

Paula Jesson
Deputy City Attorney
(415) 864-1952

April 21, 1988

Keith A. Levy
Administrative Law Judge
502 J Street, Suite 230
Sacramento, CA 95614

Re: CSM-4262; Claim of County of Santa Clara
Chapter 1747, Statutes of 1984; Chapter 1274,
Statutes of 1985; Title 2, CAC, Division 9
Handicapped and Disabled Students

Dear Mr. Levy:

The enclosed declaration of Dr. Reiko True, Deputy Director of Health for Mental Health Programs for the City and County of San Francisco, is being submitted in support of the claim of the County of Santa Clara in the above-referenced matter. We request by this letter that this declaration be considered in support of that claim.

Additionally, we would like to emphasize two points.

First, the Legislature has itself recognized that the laws in question constitute a state mandate. Section 17 of Chapter 1274, Statutes of 1985 acknowledges that costs incurred in providing services for the handicapped and disabled in compliance with that law are constitutionally mandated costs which are reimbursable by the State. Such a legislative finding is presumed valid. We respectfully submit that there is no evidence that would warrant a determination that the Legislature erred in that legislative finding.

Second, the handicapped services law subverts the Short Doyle program by forcing the county to fund those services to the detriment of other mental health service programs. The county is unable under the handicapped services law to allocate its resources so that it provides services to those children with the greatest needs. Once a child is determined educationally handicapped and in need of the services, the county must provide them free of charge. This is distinctly different from the

EXHIBIT 7

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flexibility that the county normally exercises with Short Doyle funds to determine how best to maximize the benefit from the services that it provides. The result of this mandate and the State's insufficient funding of it is to deprive children who are in substantial need of help from receiving it.

Thank you for your consideration of these matters.

Very truly yours,

LOUISE Ii. RENNE
City Attorney

PAULA JESSON
Deputy City Attorney

cc: Susan Chapman
Deputy Attorney General Harlan VanWye

4026P

City and County of San Francisco

Department of Public Health
COMMUNITY MENTAL HEALTH SERVICES
ADMINISTRATIVE OFFICES
555 Polk Street
San Francisco, CA 94102-3333

I, Reiko Homma True, Assistant Director of Health for Mental Health Programs, declare;

The City & County of San Francisco contracts with the State of California for a Short-Doyle allocation based on an acceptable County Plan. The Short-Doyle Act (W & I Code 5600) requires that Counties "provide a means for participation by local governments in the determination of the need for and the allocation of mental health resources...". The County Short-Doyle Plan (W & I Code 5651.1) states that "the County shall consider and make provisions for, all of the following priority populations: . ..(b) Mentally disturbed children and adolescents, including juvenile sex offenders and juvenile victims of sex offenses." In fact San Francisco cannot absorb the requirements of the AB 3632 mandate without jeopardizing the County's ability to meet the requirements of the Short-Doyle contract stated above To serve the 689 children identified by mental health during the implementation period of AB 3632/882 between April 1, 1986 and June 30, 1986 would leave almost no capacity for mentally disturbed children who are not enrolled in Special Education, or not enrolled in school. Moreover, San Francisco has a commitment to early, intervention and prevention services which would be undermined by a single focus mental health service for children referred through Special Education. Clearly the requirements of the AB 3632 mandate seriously interfere with the Short Doyle mandate with its attendant community planning functions.

In fiscal year 1986187 San Francisco Community Mental Health Services provided 10,029 service units (individual contacts) to 558 handicapped children as mandated by AB 3632 and AB 882 (Chapter 1747, Statutes of 1984 and Chapter 1274, Statutes of 1985). It is determined that $816,735 was spent by the City and County of San Francisco in order meet the requirements of AB 3632 for

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assessment, case management and treatment services. The State provided an allocation to the County of only $127,501 for these services. The City General Fund supported AB 3632 services with an additional $437,370; Short-Doyle Medi-cal was an additional revenue source.

AB 3632/882 services are based on the individual needs of the Special Education student and in keeping with FL 94-142 require that appropriate services be available when the need is documented on the child's Individual Educational Program (IEP) by the IEP team. This means that Community Mental Health cannot simply "fit" the child into an existing system, but rather must provide an appropriate service which meets the stipulations in the IEP Plan. This plan is determined by the IEP team which includes the parent, school staff and mental health. Mental Health therefore is not the sole determinant of the services, but rather a partner.

This situation is exacerbated by the fact that Children and Adolescent services in San Francisco are at capacity. As of this date, there are waiting lists at most outpatient clinics. Therefore, San Francisco is unable to guarantee immediate treatment placement following an IEP plan decision.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on _____

_____

Reiko Homma True
Assistant Director of Health for
Mental Health Programs

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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS	OAH No N-30939

OPENING BRIEF OF CLAIMANT COUNTY OF SANTA CLARA

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SUSAN A. CHAPMAN, Deputy County Counsel
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Claimant County of Santa Clara

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San Jose California 95110

EXHIBIT 8

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TABLE OF AUTHORITIES

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City of Sacramento v. State of California (1980) 15 Cal.App.3d 196; 203 Cal.Rptr. 258 — 23-26

County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 58; Cal. Rptr. — 8-9, 23

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Welfare & Institutions Code Section

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FEDERAL STATUTES AND REGULATIONS

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Education for All Handicapped Children Act 1, 2, 10, 20-27

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INTRODUCTION

Santa Clara County filed a Test Claim with the Commission on State Mandates to obtain subvention of funds for its mandated participation in the federal Education for All Handicapped Children Act, as required by California legislation (Chapter 1274 of the Statutes of 1984 and Chapter 1747 of the Statutes of 1985).

Under the Education for All Handicapped Children Act of 1975 (hereinafter referred to as EHA), each participating state must make available to all handicapped children, as defined, a free, appropriate public education which emphasizes special education, as well as related services designed to meet their unique educational needs. "Free appropriate public education" is defined as special education under public supervision and direction, and without charge . . ." Related services include psychological services, counseling and, if necessary, out-of-home placement. See Exhibit 1, Joint Statement of Facts and Positions (hereinafter referred to as Joint Statement), pages 9-15 for details of this program. The mechanism for implementing each handicapped child's special education program is the "individualized education program" (hereinafter referred to as IEP). An IEP must be established for each eligible handicapped child. The IEP includes a prescription for special education and necessary related services which must be provided to the child.

The EHA requirements apply to states which receive federal funds for education. Exhibit 1, Joint Statement, page 9.

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California has participated in EHA since 1980.

Before 1986, the EHA program in California was implemented through state and local educational agencies. Local educational agencies were responsible not only for providing special education for handicapped students, but also for providing any supportive services necessary for those students to benefit from their education (including mental health assessments, treatment, placement, and case management). Exhibit 1, Joint Statement, pages 15-25. Neither counties nor county representatives were designated as having responsibilities in the IEP process. Local educational agencies, which are not under county jurisdiction, were responsible for identifying individuals with exceptional needs, and for assessing those individuals in all areas related to the suspected disability. Local educational agencies also were responsible for developing a written mental health assessment. Local educational agencies were responsible for initiating and conducting IEP meetings for each child with exceptional needs. The IEP team was composed of local educational agency representatives, the child's teacher, and one or both of the child's parents or representatives for the parents, if necessary. Local educational agencies were responsible for the provision of any supportive services required on an individual child's IEP, including mental health services.

Prior to the passage of Chapter 1274, counties were not involved in the IEP process. Counties were not required to conduct the IEP mental health assessments or mental health services required by IEPs. In fact, Santa Clara County did not do so prior to the implementation of this legislation. Testimony of

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Robert F. Porter, Reporter's Transcript of December 1, 1988 hearing before Administrative Law Judge Keith A. Levy (hereinafter referred to as R.T.), pages 30-33. County were not included on the IEP team, and were not required to attend IEP meetings or otherwise participate in the IEP process. The County did not provide mental health services required by individual IEPs prior to the implementation of Chapter 1274 of the Statutes of 1984.

ARGUMENT

Section 6 of Article XIII of the California Constitution provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local govenment, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . .

The undisputed testimony is that in fiscal year 1986-87, Santa Clara County incurred unreimbursed costs of $1,929,011 to comply with Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, and their implementing regulations. This is clea ly a mandate, and has been so recognized by the legislature. Section 17 of Chapter 1274 of the Statutes of 1985:

> Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

The effect Chapter 1274 and subsequent legislation and regulations is to impose a mandate on local mental health agencies to perform IEP-related mental health services. As local mental

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health agencies generally are agencies of counties (Exhibit 1, Joint Statement, Page 37, footnote 6), this legislation imposes a mandate on counties. The County does not have the ability to offset its costs with fees, because the IEP law requires that the services be provided free of charge.

The services performed under the legislation subject to this Test Claim are not reimbursed through the state's Short-Doyle allocation, as this program is separate and fundamentally different from the Short-Doyle program. In fact, the provisions of the IEP program conflict with the terms of the County's Short-Doyle negotiated net amount contract. Moreover, this program is a state mandate, not a mandate of the courts, and not a federal mandate as defined by the California Constitution.

I.

THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM MANDATES THAT THE COUNTY PROVIDE SPECIFIC SERVICES IT WAS PREVIOUSLY NOT REQUIRED TO PROVIDE.

With the passage of Chapter 1747 of the Statutes of 1984, as well as the subsequent legislation and regulations, the IEP process dramatically changed. The undisputed facts reveal that the statutes and regulations in question require local mental health agencies to provide services and programs which they were previously not required to provide. While local educational agencies still are responsible for identifying children potentially in need of mental health services pursuant to IEPs, and for providing guidance and counseling services, they are no longer responsible for performing mental health assessments or for

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County Counsel
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providing or financing mental health treatment required by IEPs.

Local mental health agencies now are required to perform specific and detailed mental health assessments after appropriate local educational agency referrals, to participate in IEP team meetings, to serve as IEP team members if out-of-home placement is recommended, to provide mental health services required by an individual child's IEP, and to provide case management services if the child is placed out-of-home pursuant to an IEP. Exhibit 1, Joint Statement, pages 52-63; Exhibit 2, Declaration of Robert F, Porter.

The effect of shifting the responsibility for assessing and funding IEP mental health needs away from the agency responsible for identifying those in need of services has been formidable. According to the California State Auditor General, by December 31, 1986 (the end of the first ten months of local mental health agencies' involvement in this process), the number of students referred for noneducational services was more than double the number of special education students who received services during the 1985-86 fiscal year.

For Santa Clara County Selpa Area I, which was included in the Auditor General's audit, the escalation in referrals was even more' striking: during the period March 1, 1986 to June 30, 1986, more than twice the number of children who received noneducational services during that fiscal year were referred for mental health evaluation. By December 31, 1986, the number of children so referred was nearly triple the number of special education students receiving noneducational services during the immediately preceding fiscal year (1985-86). Exhibit 5, Report by the Auditor

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General of California, page 18 (Figure 1).

Clearly, children in need of IEP-related mental health services were under-identified prior to the implementation of Chapter 1274 of the Statutes of 1984. Generally, children who were referred through this process were in need of mental health services and received IEP recommendations for such services as a result of the referrals. Exhibit 5, Report by the Auditor General of California, page 19 (Figure 2). In Santa Clara County during fiscal year 1986-87, 494 of the 568 children referred for mental health IEP assessments subsequently received mental health services pursuant to IEPs. Exhibit 2, Declaration of Robert F. Porter, page 8 (Paragraph 3(f)(1)).

Counties have assumed substantial burdens due to their increased responsibility resulting from this legislation. In Santa Clara County for fiscal year 1986-87, four 'full time additional staff were employed by the county mental health agency as a result of this legislation: an IEP coordinator and three full-time assessors, Exhibit 2, Declaration of Robert F. Porter, page 7 (Paragraph 3(a) and (c); Testimony of Robert F. Porter, R.T., page 38.

During fiscal year 1986-87, a total of 568 students was served through this program in Santa Clara County. In addition to the coordination and assessment services provided by the four full-time IEP employees, in fiscal year 1986-87 the County provided 4,910 units of IEP-mandated outpatient treatment services, and 20,455 units of IEP-mandated day treatment services. Also, thirteen children were placed in residential treatment pursuant to IEPs. Declaration of Robert F. Porter, page

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8 (Paragraph 3(f)(1) through (4)).

The fiscal year 1986-87 cost to Santa Clara County of providing IEP-related mental health services was $2,387,835. The breakdown of these expenses is as follows: $168,146 for IEP assessment and case management services: $1,784,076 for day treatment services; $419,349 for individual therapy services; and $16,264 for group therapy services. Fiscal year 1986-87 revenues relative to these services is estimated to be $235,869 in federal Medi-Cal revenue. In addition, an insignificant amount of revenue from third party insurance payments was received. Exhibit 3, Declaration of David Wytock, pages 2-3 (Paragraph 2) and Exhibit B, attached thereto. State funding of this IEP program in fiscal year 1986-87 was $222,955. Exhibit 1, Joint Statement, page 49. The net unreimbursed cost of the program is therefore estimated to be $1,929,011.

The legislation resulted in an influx of children being referred for IEP mental health assessments who previously were unknown, to the local mental health agency system. Of the 568 children referred for assessment during fiscal year 1986-87, 316 were new to the system. Exhibit 2, Declaration of Robert F. Porter, at 9 (Paragraph 4). Of these, 242 (316 less 74) received IEP-required mental health services in fiscal year 1986-87 as a result of the referrals. Id., page 8 (Paragraph 3(f)(1)) and pages 9-10 (Paragraphs 4 and 5). The cost of the mental health outpatient, group therapy, and day treatment for these 242 new children in fiscal year 1986-87 was $1,300,310 ($2,219,689 less $919,379). See Exhibit 3, Declaration of David Wytock, Exhibits B and C. Thus, the cost of providing IEP-related services to these

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children who were previously unknown to the mental health system exceeded by 59 percent the cost of providing IEP-related services to children who previously had cases open with the mental health system. There were additional costs for assessment and case management for these children, All IEP-related case management costs related to these children, as all children placed out-of-home were previously unknown to the system. Exhibit 2, Declaration of Robert F. Porter, pages 8-9 (Paragraph 3(f)(4)).

II.

CHAPTER 1747 OF THE STATUTES OF 1984, CHAPTER 1274 OF THE STATUTES OF 1985 AND THEIR IMPLEMENTING REGULATIONS MANDATE A NEW PROGRAM OR HIGHER LEVEL OF SERVICE ON THE MENTAL HEALTH BUREAU OF THE COUNTY OF SANTA CLARA AS DEFINED IN CALIFORNIA CONSTITUTION ARTICLE XIII B SECTION 6. .

Section 6 of Article XIII of the California Constitution Article XIII B 56 requires state subvention of funds "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government . . ." Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, and their implementing regulations, impose on county local aental health agencies "a new program or higher level of service" subject to the constitutional imperative of subvention under Section 6 of Article XIII B of the California Constitution.

The Supreme Court of California has determined that "program" has two alternate meanings: "[1] programs that carry out the governmental function of providing services to the public or [2] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to

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all residents and entities in the state." County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.

The legislation that is the subject of this Test Claim is a "program" under either definition. The state chose to carry out a governmental function of providing mental health assessments, treatment, and case management of handicapped children who need supportive services in order to benefit from their education by delegating the responsibility to local mental health agencies. The legislation requires local mental health agencies to provide certain specific services to the public. The responsibilities imposed on local mental health agencies pursuant to this legislation are obviously not imposed upon all residents and entities of the state, only on local mental health agencies.

This is a new program in several ways. Before this legislation, counties in general and local mental health agencies in particular had no formal responsibilities in the individualized education program (IEP) process. The legislation requires the local mental health agencies to provide services not hitherto required. Exhibit 1, Joint Statement, pages 52-63. This legislation involves the local mental health agencies in the IEP process, with its full panoply of federal and state time lines, rights, and procedures. Exhibit 1, Joint Statement, page 9-34.

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III.

SERVICES REQUIRED BY THIS LEGISLATION ARE DISTINCT FROM SHORT-DOYLE MENTAL HEALTH SERVICES AND ARE NOT REIMBURSED BY SHORT-DOYLE FUNDING.

This program is inherently different from the general Short-Doyle mental health program which each local mental health agency operates under plan or contract with the state. The IEP program is an entitlement program. It guarantees to any child who is a "handicapped child", as defined by federal or state law, the right to a free, appropriate public'education which emphasizes special education, including any supportive services necessary for the child to benefit from his or her education.

The legislation that is the subject of this Test Claim shifted to local mental health agencies certain responsibilities in the IEP process. Local mental health agencies must provide mental health assessment, treatment and case management services to identified childrfen. The right to the services is an individual right of a handicapped child and his or her family, enforceable through administrative and judicial proceedings. No other individuals have an entitlement to receive mental health services from the county.

Also, the IEP process requires that services be provided within certain time lines: assessments generally must be completed within SO days of referral; related services required by a child's IEP must be provided as soon as possible after the IEP is finalized. Exhibit 1, Joint Statement, pages 53 and 13. The law does not provide time deadlines for the provision of other

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mental health services. Local mental health agencies prioritize non-IEP-related services based on clinical needs, providing services to those most in need when resources are available.

There are other fundamental differences between the IEP program and other mental health services provided by counties. Generally, a county, through its local mental health agency, provides mental health services pursuant to the county's Short-Doyle plan or contract with the state. Exhibit 1, Joint Statement, pages 34-44.

The local mental health agency must not require payment of fees from parents or insurance companies for services rendered pursuant to the IEP process, as individuals are entitled to receive those services free of charge, regardless of ability to pay. Exhibit 1, Joint Statement, page 57. (The ability to require insurance contribution if contribution will neither reduce annual benefit or lifetime limitations on coverage nor increase premiums is a phantom right: no such insurance exists.) Everyone receiving general Short-Doyle services is charged for the services, based on his or ability to pay, Exhibit 1, Joint Statement, page 63. In fact, in its Short-Doyle negotiated net amount contract, the County agrees to conform to all policies and procedures regarding revenue collection issued by the Department of Mental Health under the provisions of Welfare & Institutions Code sections 5717 and 5718. These sections require that fees be charged in accordance with ability to pay for mental health services rendered, but not in excess of actual or negotiated cost. Exhibit 4, Santa Clara County Negotiated Net Amount Short-Doyle Fiscal Year 1986-87 Contract, Paragraph 24. Provision

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of free services relative to IEPs thus contradicts the terms of the Short-Doyle contract.

Moreover, inclusion of necessary related mental health services in an individual's IEP cannot be contingent on identifying the funding source. Government Code section 7572(d). Other services provided by local mental health agencies are limited by funding constraints. As county budgets must be balanced, mental health services cannot be provided unless funding is located. Section 18 of Article XVI of the California Constitution.

The state Short-Doyle system allocates funds to counties. Generally, each county is required to add a "ten percent match" to the state Short-Doyle funds. Exhibit 1, Joint Statement, pages 39-44. While the Short-Doyle Act sets forth guidelines regarding the types of services which must be provided, it is the responsibility of the governing bodies of local mental health agencies (generally, county boards of supervisors) to determine, with the approval of the State Department of Mental Health, allocations to local programs. If resources such as patient fees, third party payments, grants, Medi-Cal, Medicare, and state Short-Doyle funds and required county Short-Doyle match are insufficient to fund Short-Doyle services, a county is not required to provide services in excess of the resources, although it may choose to do so by using county general funds (overmatch).

That the IEP program is separate from the Short-Doyle program is evident from the Short-Doyle contract itself. The County's negotiated net amount contract is authorized by, and subject to the provisions of, Welfare & Institutions Code section 5705.2,

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Exhibit 4, Santa Clara County Negotiated Net Amount Short-Doyle Fiscal Year 1986-87 Contract, Paragraph 8. Welfare & Institutions Code section 5702.5(a) states that "[i]t is the intent of Legislature that the use of negotiated net amounts or rates, . . . be given in preference in contracts for services under this division [referring to the Short-Doyle Act, Part 2 of Division 5 of the Welfare & Institutions Code]." Government Code section 7572 et seq., which mandated local mental health agency involvement in the IEP process, is not part of the Short-Doyle Act (Part 2 of Division 5 of the Welfare & Institutions Code, commencing with section 5600).

The twenty page Short-Doyle contract between the state and the County of Santa Clara for Fiscal Year 1986-87 is replete with references to the Short-Doyle Act. The introductory provisions of the contract refer to the Short-Doyle Act as the enabling legislation. Exhibit 4, Santa Clara County Negotiated Net Amount Short-Doyle Fiscal Year 1986-87 Contract. The contract defines "client" or "patient" as a person who receives services pursuant to the Short-Doyle Act. Paragraph 27(a).

The body of the Short-Doyle contract makes no references to Government Code section 7572 et seq., nor to any IEP responsibilities. The only specific mention of this program is the reference to the state's $222,955 allocation for the "S.E.P. [IEP] Program" on the tables of Exhibits B and F of the contract.

The increase in the basic Short-Doyle state allocation (excluding allocations for categorically funded programs) from fiscal year 1985-86 to 1986-87 was less than four percent ($22,515,326 compared to $21,640,430). Exhibit 4, Joint Statement

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of Facts and Positions, at 48-49. If the net unreimbursed cost of the IEP program is to be absorbed by the Short-Doyle program, it would consume over eight-and-a-half percent of the county's general state Short-Doyle allocation for fiscal year 1986-87 ($1,929,011 out of 22,515,326).

The County's Short-Doyle responsibilities for mental health services unrelated to IEPs is substantial. In its contract, the County agreed to provide a dedicated number of units of certain kinds of service. Some of these services, such as outreach, 24-hour care, and continuing care never overlap with IEP-required services. The estimated cost of the dedicated units of these services is $21,471,272 ($2,531,199 plus $14,862,886 plus $4,300,142 less $222,955). Exhibit 1, Joint Statement of Facts and Positions, at 51. In addition to dedicating certain levels of service, in its contract the County agreed to provide a dedicated number of units of outpatient and day treatment services which are estimated to cost $17,989,248 ($1,959,740 plus $16,029,508). Id.

The Short-Doyle Act is designed to "provide a means for participation by local governments in the determination of the need for and allocation of mental health resources . . . ." Welfare & Institutions Code section 5600. The goals of the Short-Doyle Act are as follows: to assist persons who are institutionalized as a result of a mental disorder, or who are at risk of so becoming, to lead lives which are as normal and independent as possible; to assist persons who experience temporary Psychological problems to enable them to return as quickly as possible to normal functioning; and to prevent serious mental disorders and psychological problems. Id. Services are to

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be designed to be equally accessible and effective to persons with differences in language, cultural traditions or physical disabilities. Welfare & Institutions Code section 5600.4. Each county is to utilize private and private non-profit resources before developing new county resources. Welfare & Institutions Code section 5600.9. Optimal use must be made of appropriate local public and private organizations and of federal, state, county and private funds which may be available for mental health planning. Welfare & Institutions Code section 5653.

Although great discretion is vested in counties, the Short-Doyle Act itself sets forth priority populations to be served and mandates certain activities. Each county must consider and make provision for the following priority populations: the chronically mentally ill, including the homeless: mentally disturbed children and adolescents, including juvenile sex offenders and juvenile victims of sex offenses; the mentally ill elderly; mentally ill jail inmates and wards of juvenile detention facilities; and underserved populations, including ethnic ainorities, refugees, veterans, and dually diagnosed individuals. elfare & Institutions Code section 5651.1. The county must give irst priority to services required for acute patients and involuntary patients. Welfare & Institutions Code section 651.3. Although no one disputes the mental health needs of IEP hildren, 'the needs of the priority populations are equally or ore pressing. The County's ability to provide these services to he priority populations set forth in the contract, and to provide continuum of services, is jeopardized by utilization of hort-Doyle funds for the IEP program.

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In fiscal year 1986-87, the County of Santa Clara was able to meet its Short-Doyle agreement by committing $4,933,872 in County resources to the program, over and above its required match, Even so, all the mental health needs of the residents of the County were not met, and had not been met in years prior to fiscal year 1986-87, even with overmatch. Testimony of Robert F. Porter, R.T. at 22-24. Without additional funding for this mandate, the ability of the County to meet the most pressing mental health needs of its residents is severely compromised.

For all these reasons, Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 and their implementing regulations mandate a new program, separate from the pre-existing Short-Doyle program.

Clearly, the population of children receiving mental health services through county mental health agencies prior to the passage of Chapter 1747 overlaps with the population of children who were receiving mental health services pursuant to IEPs. Approximately 44 percent of the children referred for assessment in fiscal year 1986-87 had received mental health services from the County or County contract providers in the past (251 out of 568). Exhibit 2, Declaration of Robert F. Porter, page 9 Paragraph 4). Some of the children received services in prior years which were compatible with the services later required by their IEPs. However, services rendered in prior years were rendered independent of, and without regard to, IEPs. Testimony of Robert F. Porter, R.T., pages 31-33.

Redefining these services as IEP-related has resulted in a revenue loss for the County and County contract providers, as IEP

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legislation effectively prohibits charging fees. Provision of services to this population in prior years produced revenues. The estimated revenue loss from insurance and patient fees is $66,000, and the minimum estimated revenue loss from school districts is $212,000. Exhibit 3, Declaration of David Wytock, pages 5-6 (Paragraph 4).

The County concedes that it has responsibility for providing certain mental health services to children under the Short-Doyle Act and the negotiated net amount contract with the State, including some services which are, in addition, required by Chapters 1747 and 1274 in particular cases. Children do constitute a population for which counties are required to provide mental health services under Welfare & Institutions Code section 5651.1. The statute is silent, however, as to the levels and specific types of services to be provided.

The mental health needs of children are not equivalent to the IEP mental health needs of children. There are children whose mental health needs are most urgent, but are not entitled to receive mental health services pursuant to IEPs. They include the County's 54 children who were considered most acutely disturbed, who were placed out-of-home in state hospitals or sub-acute facilities during fiscal year 1986-87. Testimony of Robert F. Porter, R.T., pages 13-15.

Children do not qualify for IEP-related mental health services as "seriously emotionally disturbed" unless they have an inability to learn which cannot be explained by intellectual, sensory, or health factors, unless they are unable to build or maintain satisfactory interpersonal relationships, unless they exhibit

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inappropriate types of behavior or feelings under normal circumstances, or unless they have a general pervasive mood of unhappiness and/or who have a tendency to develop physical symptoms or fears associated with personal or school problems. One or more of these characteristics must be exhibited for a long time and to a marked degree, and must adversely affect educationa performance. Socially maladjusted children not otherwise disturbed do not qualify. Exhibit 1, Joint Statement, pages 10-11. Children do not qualify if their educational needs are due primarily to unfamiliarity with the English language, temporary disabilities, social maladjustment, or environmental, cultural, or economic factors. Exhibit 1, Joint Statement, page 21.

The effect of these special definitions is to exclude from IEP eligibility a broad range of children with tremendous mental health needs, They include runaways, children who have experienced a severe recent trauma such as the loss of a parent, children who are sexual offenders or victims of sex offenses, children who have recently become psychotic, refugee children whose language and cultural difficulties make adjustment difficult, children in poverty, children who are out-of-control and self destructive, children who are suicidal, children who have failed multiple placement attempts, children in juvenile detention facilties, children who are ordered into therapy by the courts, children who are gravely disabled, children who are dangerous to themselves or others, children in need of acute hospitalization, and children who have been abused. Exhibit 1, Joint Statement, pages 10-11, and 21-22. Exhibit 2, Declaration of Robert F. Porter, pages 11-13 Exhibit 6, Declaration of the County of

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Riverside; Exhibit 7, Declaration of Dr. Reiko True, City and County of San Francisco; Testimony of Robert F. Porter, R.T., pages 13-15. Some of these children might be good candidates for therapeutic intervention. The cost to society of inadequately meeting the mental health needs of these children can be monumental.

The mandate of Chapters 1747 and 1274 distorts clinical priorities in such a way as to threaten exclusion of services for certain needful children. The impact of the mandate of Chapters 1747 and 1274 on children's programs in counties which do not overmatch is graphically illustrated by the supporting declaration filed by the County of Riverside. Children receiving services pursuant to Chapters 1747 and 1274 are receiving treatment in preference to other children in need of mental health services.

In Riverside County, the list of children excluded from needed mental health services is appalling. It includes abused children, children who have failed multiple placement attempts, and delinquent children who are ordered into treatment by the courts or who are on probation. Other children who are beginning to show sighs of serious problems, particularly younger children, who are prime candidates for early intervention, are also denied service. In effect, Riverside County can no longer fulfill its Short-Doyle obligation to children in general.

Similarly, without additional funding, the City and County of San Francisco, with its large population of runaway children, cannot provide IEP-related services and also meet Short-Doyle plan requirements to provide services on a priority basis to mentally disturbed children and adolescents, including juvenile sex

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offenders and victims of sex offcnces. Exhibit 7, Declaration of Dr. Reiko True, City and County of San Francisco.

The only reason this has not happened in the County of Santa Clara is that the County has contributed voluntary overmatch of approximately five million dollars.

IV.

THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM IS NOT STATE LEGISLATION IMPLEMENTING A FEDERAL MANDATE.

Legislation does not impose a mandate requiring state subvention if it is required for purposes of complying with a mandate of the federal government. The legislation that is the subject of this Test Claim is required neither Section 503 of the federal Rehabilitation Act nor the Education for All Handicapped Children Act. Section 504 does not require a provider of mental health to single out for special treatment one group of the mentally ill. The EHA program is an optional program. To the extent that statutes define "federal mandate" to include optional programs, they are unconstitutional. Lastly, even if Section 504 or the EHA impose a mandate, the mandate is on the state, or on educational agencies, not on counties.

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A. THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM DOES NOT IMPLEMENT A FEDERAL MANDATE CONTAINED IN SECTION SO4 OF THE REHABILITATION ACT OF 1973.

Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1974 (P.L. 93-516, 29 U.S.C. 794), together with the implementing regulations, prohibits discrimination against handicapped individuals in any program receiving federal funds. Exhibit 1, Joint Statement, pages g-9. Section SO4 does not require counties to give mental health services on a priority basis to handicapped students who receive services pursuant to their IEPs. If anything, Chapters 1747 and I274 require counties to discriminate against handicapped individuals who are not entitled to mental health services pursuant to IEPs, in violation of Section 504.

The burden of providing public education and related services is on educational agencies, not counties. The Section 504 regulation requirement that recipients of federal funding who operate educational programs ". . . provide a free appropriate public education to each qualified handicapped person . . ." does not apply to counties, which do not operate a public or elementary or secondary education program. In Santa Clara County, local education agencies provide these services, even to children in the custody of the County, in the Juvenile Hall, Shelter, or Ranches.

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B. THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM IS NOT STATE LEGISLATION IMPLEMENTING A FEDERAL MANDATE CONTAINED IN THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975, As THE PROGRAM IS VOLUNTARY.

The Education for All Handicapped Children Act is not a mandated program. A state may elect or decline to participate. Acceptance of federal funding for education is a state option. But once the option is accepted, its terms and conditions must be met by the receipient. The state, by accepting the federal monies, and agreed to abide by the terms and conditions of the EHA. It now seeks to impose the financial burden of this decision on counties, who do not even receive the federal monies which fund this program.

Section 6 of Article XIII of the California Constitution provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local govenment, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ,

In defining reimbursable mandates, Section 9(b) of Article XIII B of the California Constitution excludes "[a]ppropriations required for purposes of complying with mandates of the federal government which, without discretion, require an expenditure" by the governmental entity.

If the state is to receive certain federal grants, the EHA requires that the state participate in the IEP program. Nevertheless, a financially induced choice is not the same as a statutory requirement. In a another state mandate case, the appellate court determined that state legislation requiring local government employers to pay into the state unemployment insurance

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fund on behalf of their public employees was not a federal mandate exempt from reimbursement, but was rather a financially induced choice creating costs mandated by the state. City of Sacramento v. State of California (1980) 156 Cal.App.3d 182, 196; 203 Cal.Rptr. 258, disapproved on other grounds in County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 58; Cal. Rptr. ___.

C. IF THE EHA CONTAINS A FEDERAL MANDATE, THE MANDATE IS ON THE STATE OR EDUCATIONAL AGENCIES, NOT ON COUNTIES.

If a state decides to participate in the EHA program, nothing in federal law requires the State to impose on county mental health agencies the responsibility for providing mental health assessments, treatment or case management for handicapped students pursuant to the federal IEP standards. The state could impose the responsibilities on local school districts, as it did before the passage of Chapter 1747. Alternatively, the state could provide the services directly.

Federal law requires states which receive federal funding to have in place a program applying to the state as a whole. See 34 Code of Federal Regulations 5300.1 et seq. It is the State that has the responsibility to design such a program. Federal regulations generally do not dictate which state or local agency will be responsible for program execution.

Usually, where federal EHA regulations do identify a particular local or state entity with IEP responsibilility, it is

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the education agency which is identified. For example, 34 C.F.R. §300.600(a) provides:

> The State educational agency is responsible for insuring :
>
> (1) That the requirements of this part are carried out; and
>
> (2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:
>
> (i) IS under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and
>
> (ii) Meets education standards of the State educational agency (including the requirements of this part).

When the state chose to transfer to county mental health agencies a portion of the responsibilities which local education agencies previously assumed for handicapped children, it imposed a mandate on counties for which subvention is required.

D. GOVERNMENT CODE SECTION 17513, INCLUDING IN THE DEFINITION OF "FEDERAL MANDATE" COSTS RESULTING FROM THE ENACTMENT OF STATE LAW, WHERE FAILURE TO ENACT THAT LAW RESULTS IN SUBSTANTIAL MONETARY PENALTIES OR LOSS OF FUNDS, IS UNCONSTITUTIONAL IF APPLIED TO THIS TEST CLAIM.

There is no federal EHA mandate unless the state accepts the federal funds. As the state has the option to accept or to reject the funding, there is no federal mandate. Acceptance by the state of this optional program therefore makes the legislation subject to this Test Claim a state mandate, not a federal mandate.

Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 mandate a new or higher level of service on local government, by requiring county mental health agencies to provide

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certain assessment, case management, and therapeutic services. The increased costs incurred by the County were not "required for purposes of complying with mandates of the federal government which, without discretion, require an expenditure." Therefore, the costs are not mandated by the federal government, as defined by Section 9 of Article XIII B of the California Constitution.

Government Code section 17515 defines "costs mandated by the federal government" excludable from reimbursable mandates as:

> any increased costs incurred by a local agency . . . in order to comply with the requirements of a federal statute or regulation. . . [including] costs resulting from enactment of a state law or regulation where failure to enact that law *or* regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state.

This statute is. unconstitutional, as local governments are entitled to state subvention of mandated programs as defined by the California Constitution. The constitutional definition of "federal mandate" for which subvention is not required is much narrower than Government Code section 17513.

The court of appeals has held that the use of Revenue & Taxation Code § 2206 (predecessor to Government Code §17513) to state laws implementing federal laws which provide financial incentives for compliance would conflict with the definition of a

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Federal mandate contained in Article XIII B §9(b).[1] City of Sacramento v. State of California, Id. at 198. city of Sacramento, involved extension of the state unemployment insurance system to local government employees, which resulted in increased costs to all California employers, including local government. Failure to adopt the changes would have resulted in decertification of the state's unemployment insurance program, with a concomitant loss of tax credit for the state's private employers.

In determining that the changes were not federally mandated, the court stated:

> . . . [California Constitution Article XIII §9(b)] 'defines a federal mandate as one leaving the state or local government no discretion as to alternatives. If participation in a federal program is optional, it follows that state legislation requiring local participation involves a state mandate under article XIII B, section 6. Revenue and Taxation Code section 2206 insofar as it defines as nonreimbursable federal mandates those federal programs which make state participation optional, even if substantial financial incentives indicate the desirability of participation, is invalid under article XIII B, section 6 and 9. Id. at 198-99. (Italics in original.)

In the present case, as in City of Sacramento, failure to

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[1] Revenue & Taxation Code §2206, as amended in 1980, provided in part:

> . . . "Costs mandated by the federal government" includes costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. . . [and] does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district.

This language is substantially similar to Government Code section 17513.

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enact legislation to implement the federal goals would involve a loss of financial benefits. Nevertheless, it is an optional program. The detailed requirements of the EHA are not generally required by federal law.

V.

THE LEGISLATION THAT IS THE SUBJECT TO THIS TEST CLAIM DOES NOT MERELY AFFIRM FOR THE STATE THAT WHICH HAD BEEN DECLARED EXISTING LAW BY ACTIONS OF THE COURTS.

Absent this legislation, no existing court decisions impose on counties the responsibility of providing services which, essentially, relate to the provision of educational services.

Court decisions, at the federal and state level heard before the enactment of Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, which established the rights of handicapped individuals, were decided under due process and equal protection theories. Mills v. Board of Education of the District of Columbia (1972) 348 F.Supp. 866 held that the Board of Education, by failing to provide special education to certain disturbed children, denied due process to the children and the class they represented. Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (1971) 334 F.Supp. 1257 involved the equal access to educational services for retarded children. Neither case involved the imposition on local mental health agencies of responsibilities to provide services supportive to the educational requirements of handicapped children.

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CONCLUSION

Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985, and their implementing regulations, impose a mandate on the County to participate in the IEP process, fulfilling handicapped children's entitlement to mental health services needed in order for them to benefit from their education. This is a state mandate, not a federal mandate or a court mandate.

This is also a new program, different from the Short-Doyle program governing community mental health services. As the stipulated facts attest, the County now has IEP-related responsibilities which it clearly did not have before, such as formally participating in IEP meetings, conducting IEP assessments, funding non-County therapy services, and providing case management services to children placed out-of-home pursuant to IEPs.

The assessment and treatment services required by this legislation overlap somewhat with Short-Doyle services because both this legislation and the Short-Doyle Act deal with the provision of mental health services. Yet there the similarity ends. The IEP legislation creates for certain individual children an entitlement to free services, enforceable through administrative and judicial proceedings. The Short-Doyle Act is the mental health program designed to meet the mental health needs of the entire community, giving broad discretion to counties to determine the character and design of local mental health services, Fulfillment of IEP requirements using Short-Doyle funds

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eopardizes the Short-Doyle **program, diverting resources from** priority populations and services.

The cost of the **legislation** has been substantial. In dollar terms, the net cost for Santa Clara County has been **$1,929,011.** This amount has been paid with County general fund dollars, and the County is entitled to subvention. In human terms, the net cost is difficult to calculate. Because the IEP program was not adequately funded, it robbed scarce mental health resources from a needy population. People need ng mental health services remain on waiting lists, unable to get services.

The **effects in** counties other than Santa Clara have been even more dramatic, and serve **only** to highlight the conflict between the IEP program and the Short-Doy e program. Subvention for the IEP mandate is essential for the continued viability of the state Short-Doyle community mental health system.

Respectfully submitted,

DONALD L. CLARK,
County Counsel

January 27, 1989

Susan A. Chapman
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C C

BEFORE THE COMMISSON ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the Test Claim of SANTA CLARA COUNTY	OAH NO. N-30939

PROOF OF SERVICE BY WAIL

I, Susan A. Chapman. declare that:

I am employed in the County of Santa Clara, California. I am over the age of eighteen year6 and not a party to the within cause. My business address is Ninth Floor. 70 West Hedding Street, San Jose, California 95110-1771. On January 28, 1989, I served the within Opening Brief of Claimant County of Santa Clara by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Bail at San Bruno, California, addressed a6 follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 28, 1989, at San Jose, California.

Susan Chapman

300

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ADMIN. HEARINGS
Compl.
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Ib. Evid.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF THE COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS.	OAH NO. N-30939

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OPENING BRIEF ON BEHALF OF THE STATE OF CALIFORNIA

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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS	))))))))	OAH No. **N-30939**

OPENING BRIEF ON BEHALF OF THE STATE OF CALIFORNIA

INTRODUCTION

This Test Claim presents the Commission on State Mandates with a fundamental question: may a local public agency bootstrap a legislative reordering of its service priorities, which insures effective compliance with federal constitutional mandates, into an open-ended claim upon the State Treasury where the reordering in question requires neither the establishment of a new program nor any increased expenditures on behalf of the local agency? The answer to this question is self-evident, and this Test Claim should be unequivocally rejected.

On December 1, **1988,** the parties to this matter: Petitioner County' of Santa Clara ("County") and Respondent the State of California (hereinafter "State") - filed a JOINT STATEMENT OF FACTS AND POSITIONS ("Joint Statement") which sets forth at length the substantive law and procedural framework

surrounding this Test Claim. While a recapitulation of that document is not warranted, this brief is presented as a complementary document to the Joint Statement and fully incorporates the material presented therein.

The County alleges that, taken together, Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 (along with their implementing regulations) impose a "mandate" on the County, as that term is used in Section 6 of Article XIII B of the California Constitution, related to the provision of mental health services pursuant to Individual Education Plans ("IEP"). The State denies this allegation.

The issues before the Commission do not arise in a vacuum. Each year the State is confronted with the problem of responding to unlimited demands upon its fiscally limited resources. Through the annual budget process a vigorous competition takes place among and between the various communities of interest in the executive departments and legislative halls of state government. Each year the political process is called upon to balance the needs for additional Highway Patrol positions on the long lonely stretches of roads across South-eastern deserts with additional funding for state park improvements in the redwood forests of our North Pacific coast, How' much of our limited resources should be spent to aid indigent families in the Los Angeles basin? And how do you balance that against funding which allows CALTRANS to keep interstate 80 open across the Donner Pass throughout the Winter.

In a very real sense the budget process is light-years beyond an apples versus oranges comparison; it is a process dependent not upon intellect and abstract logic but rather upon the collective political judgment and wisdom of the Governor and those men and women of the Legislature to whom the people have chosen to delegate their sovereign power. Any intrusion on that decision by administrative or judicial action can only be done with the greatest circumspection, under the most clear and certain Constitutional authority, and under a set of factual circumstances wherein there is no doubt whatsoever that the State has imposed upon a local public agency a requirement that it provide a new program or "higher level of service" in an existing program. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.) Where, as here, the State-generated compulsion to do more is nonexistentthe Test Claim must perforce fail.

In this brief, the State shall demonstrate that Government Code sections 7570 et seq. as enacted and amended by Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 do not mandate counties to implement either a new program or higher level of service in an existing program within the meaning of Government Code section 17514 and Section 6 of Article XIII B of the California Constitution.

SUMMARY OF THE STATE'S POSITION

While recognizing that the County's delivery of IEP-related mental health services has increased in the last several years, the State contends that a "state mandate" has not arisen out of this situation for several reasons:

I. Costs claimed by the County are costs mandated by the federal government.

A. Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1974 (P. L. 93-516, 29 U.S.C. 794) requires that "handicapped individuals" shall not be subjected to discrimination under, excluded from participation in, or denied the benefits of "any program or activity receiving Federal financial assistance".

B. Government Code section 17513 provides, in pertinent part, that: "... 'Costs mandated by the federal government' includes costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state ..."

II. Chapters 1747 and 1274 and their implementing regulations affirmed for the State that which had been declared existing law by actions of the courts,

Handicapped individuals have a right to certain special services under the equal protection provisions of the Constitution of the United States.

III. Costs claimed by the County are not costs' mandated by the State, but costs incurred by contractual obligation.

Any increased costs incurred by the county as a result of the enactment of Chapters 1747 and 1274, and their implementing regulations, are pursuant to a contractual agreement, and not costs mandated by the state.

IV. Chapters 1747 and 1274 do not impose a "new program",

Chapters 1747 and 1274 do not constitute a new program, but, instead, are a redelineation of the responsibilities of carrying out an existing local program, a program that was implemented by statute at the local level in 1980.

V. These statutes and regulations do not impose a "higher level of service".

State reimbursement is already provided to Santa Clara County for these services.

ARGUMENT

I

Costs claimed by the County are costs mandated by the federal government

The program delineated in Government Code sections 7570 et seq. as enacted and amended by Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 and the implementing regulations is a program mandated by the federal government in order to comply with requirements of the United States Constitution, federal statutes and regulations.

A reading of Government Code section 7570 clearly evidences the intent of the Legislature to address issues regarding California's compliance with Public Law No. 94-142, as amended (20 U.S.C. §§ 1400 et seq.) by further delineating the, state's and local agencies' responsibilities under Public Law No. 94-142, which was first implemented in California in 1977.

Section 1 of Chapter 1747 of the Statutes of 1984 provides:

"The Legislature hereby finds and declares that a number of state and federal programs make funds available for the provision of education and related services to children with handicaps who are of school age. The Legislature further finds and declares that California has not maximized, or sufficiently coordinated existing state programs, in providing supportive services which are necessary to assist a handicapped child to benefit from special education . . . ."

Irrespective of whether reimbursement is constitutionally required for certain state-mandated programs, reimbursement is not required in this case, because the legislation in question is a direct response to Public Law No. 94-142, a de facto federally mandated program which itself implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Equal Protection Clause of the Fourteenth Amendment of United States Constitution,

Consistent with the analysis by the United States Supreme Court in Smith v. Robinson (1984) 468 US 992, it must be concluded as a matter of law that handicapped children have a constitutional claim to a free appropriate public education, and that when the United States Congress enacted Public Law No. 94-142 it recognized that a series of "landmark court cases" had

evolved for the handicapped the right to equal education opportunity. In Smith the Court stated that Public Law No. 94-142 ". . . is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education. We concluded above that in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education," Smith v. Robinson supra at 1016.

The Supreme Court also concluded that Section 504 of the Rehabilitation Act of 1973 and Public Law No. 94-142 as applied to the rights of handicapped children to public'education are "strikingly similar". In Smith the court stated that, "Because both statutes are built around fundamental notions of equal access to state programs and facilities, their substantive requirements, as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar." Smith v. Robinson, supra at 1017.

Thus, it is clear that the matters provided for in Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 and the implementing regulations are in essence required by the federal government in order to comply with the United States Constitution, federal statutes and regulations.

The legislation on its face clearly indicates that it is federally driven and is not a new state mandated program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Accordingly, pursuant to Government Code section 17556(b) the costs involved in this claim are not mandated by the state because the costs claimed were incurred by the County in complying with federal legislation that Congress has deemed an appropriate federal response to constitutional equal protection mandates. (See Smith v. Robinson supra.)

Government Code section 17513 provides, in pertinent part, that: ". . . 'Costs mandated by the federal government' includes costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state . . ."

Clearly, the Section 504 and implementing regulations and Public Law 94-142 are such a strong coercive force toward education of handicapped children that the State's program delineation in Chapters 1747 and 1274 is a de facto federal mandate. The State has no practical alternative but to comply with the requirements of Public Law No. 94-142. If the State does not comply with Public Law No. 94-142 the State would lose its federal education funding, an amount in excess of one hundred million dollars, a "substantial monetary loss" and, therefore, come within the definition of "costs mandated by the federal government" set forth in Government Code section 17513.

II

Chapters 1747 and 1274 and their implementing regulations affirmed for the State that which had been declared existing law by action of the courts.

The implementation of Chapters 1747 and 1274 merely affirm for the state that which has been declared existing law by action of the courts. There are numerous federal cases which were heard before the enactment of Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973 that indicate that handicapped individuals have a right to certain special services under the equal protection provisions of the Constitution of the United States (see, for example, Pennsylvania Assn. for Retarded Children v. Commonwealth, (1971) 334 F.Supp. 1257 and Mills v. Board of Education of District of Columbia, (1972) 348 F.Supp. 866).

Accordingly, pursuant to Government Code section 17556(b) the costs involved in this claim are not mandated by the state because the costs claimed were incurred by the County in complying with legislation that had been declared existing law by action of the courts. (See Smith v. Robinson supra.)

111

Costs claimed by the County are not costs mandated by the State, but costs incurred by contractual obligation.

Any increased costs incurred by the County as a result of the enactment of Chapters 1747 and 1274, and their implementing regulations, are pursuant to a contractual agreement, and not costs mandated by the state.

As a general rule, community mental health services are provided pursuant to 'an annual Short-Doyle plan. Welfare and Institutions Code section 5707 provides that a county's annual

Short-Doyle plan is a contract between the county and the state. Services provided in accordance with an annual Short-Doyle plan are reimbursed at actual cost.

In 1983, the statutes were amended (W & I Code § 5705.2) to allow the Director of Mental Health to negotiate net amount contracts between counties and the State Department of Mental Health in lieu of the annual Short-Doyle plan and budget (Chapter 1207 of the Statutes of 1983). The negotiated net amount contracts are not audited to cost and the counties are able to utilize any savings that occur pursuant to the negotiated net amount contract. Provisions of a negotiated net amount contract must include, among other things, assurance of an adequate quality and quantity of services and an assumption of the financial risk by the County in providing all mental health services to the population described and enumerated in the approved contract within the negotiated net amount.

For the fiscal year 1986-87, Santa Clara County entered into a negotiated net amount contract with the State to render mental health services in Santa Clara County. (Hearing Exhibit 4) In that contract, the language clearly states that the County has agreed to provide services in accordance with the following principle: "(1) a continuum of mental health services which are required by statute . , . ."

Therefore, the provision of needed services pursuant to Chapters 1747 and 1274 is within the scope of the contract, Thus, any costs for mental health services to minors, which is a

population that must be provided for (W & I Code § 5651. 1), that are not reimbursed from the negotiated net amount, are a financial risk the County assumed when it became a party to a negotiated net amount contract.

IV

Chapters 1747 and 1274 do not impose a "new program"

Chapter 1747 of the Statutes of 1984; Chapter 1274 of the Statutes of 1985; and Division 9 of Title 2 of the California Code of Regulations do not implement a new program or higher level of service within the meaning of Government Code section 17513 and Section 6 of Article XIII B of the California Constitution.

It is clear from the language of Section 6 of Article. XIII B of the California Constitution that local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of services imposed upon them by the state (Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830). A shift in responsibility of an existing program from one local entity to another local 'entity does not necessarily constitute a new program or a higher level of service within the context of the Constitution.

Chapters 1747 and 1274 do not constitute a new program, but, instead, are a redelineation of the responsibilities of carrying out an existing local program, a program that was implemented by statute at the local level in 1980. (See §§ 56000 et seq. Education Code.) While Chapters 1747 and 1274 specified

certain responsibilities of community mental health programs in providing services to handicapped students, these services were already being provided at the local level. Community mental health programs were already providing assessments and mental health treatment for many handicapped children in carrying out their responsibilities under the Sho'rt-Doyle Act (W & I Code §§ 5600 et seq.). (Such children are part of a priority population under W & I Code § 5651.1.) In fact, the Santa Clara County claim notes that fully 215 out of 336 children receiving treatment were known to the mental health system prior to fiscal year 1986-87.

In recognizing that local mental health programs now have the responsibility for providing those mental health services to special education children which were previously paid for by the schools, Section 16 of Chapter 1274 required the transfer of funds, reported by local education agencies as having been previously spent by them for mental health services from the State Department of Education to the Department of Mental Health. It is self-evident that Section 16 was intended to ameliorate the shifting between local agencies of financial responsibility for providing public mental health services in view of the restriction on the taxing and spending power of the local entities. This does not, however, create an ongoing claim for continued supplemental funding removed from the normal State budgetary processes.

In the present case, the issue of whether the legislation in question involves a new program never even arises. It is clear that, at the time the legislation in question was enacted,

local entities were responsible for providing educationally related services for students in their districts. The legislation merely consolidated the responsibility for providing IEP-related mental health services within the local mental health agencies which had already been deeply involved in the provision of such services.

V

These statutes and regulations do not impose a "higher level of service"

A. Local Mental Health Agencies Control the Delivery of IEP-related services.

The Auditor General issued a'report, in April 1987, that found that the number of special education students referred for non-educational services had increased since March 1, 1986 (Report No. P-640, page 17). A significant growth was recognized in the funding level in the 1987-88 budget.

The State contends that any increase in the number of children being assessed as needing mental health treatment is due to the shift in responsibilities among county agencies, not because of a mandate for a higher level of service.

Specifically, County argues that flexibility has been lost with regard to this program, since mental health services must be provided regardless of the severity of the mental condition and regardless of funding limitations.

However, Government Code section 75'72 states that:

"Whenever a service is to be considered for inclusion in a child's individualized education program (IEP),

the local education agency shall invite the responsible public agency representative to meet with the IEP team to determine the need for the service."

It is clear from these provisions that counties do maintain some flexibility as to who is served and what services are received. The local mental health representative will provide input to the IEP team as to the need for mental health treatment services.

The County claims that under Chapters 1747 and 1274, and implementing regulations, it may be required to pay for mental health services rendered by private therapists who are not county contract providers. Government Code section 7576 allows a county:

"... to provide psychotherapy or other mental health services, when required in a child's IEP either directly or by contracting with another public agency, qualified individual or a state certified nonpublic, nonsectarian school or agency."

Therefore, the County continues to maintain a prerogative as to how a required service will be provided and in no way is required to pay for services unless there is a contractual obligation to do so.

B. <u>The Legislation in Question Does Not Mandate an Increase in Local Mental Health Services.</u>

There is no dispute between and among the parties to this matter that the legislation in question requires the County

to provide certain mental health services that were formerly the responsibility of local school districts. (See, e.g., Joint Statement, pp. 52 et seq.) It is equally beyond cavil, however, that nothing in this legislation or its accompanying regulations requires an increased level of mental health services on the part of the County.

The Joint Statement summarizes the California delivery system for mental health services at pp. 34 and following. Each County has great discretion in formulating its own "Short-Doyle" plan to meet local needs to the extent that funds are available. In addition to the Short-Doyle monies provided by the State (and the individual County's required match), each County may provide supplementary monies from its general fund for local mental health services -- as Santa Clara County has historically chosen to do. Each County has very broad discretion in directing its mental health resources as the essence of the Short-Doyle Act is local administration and local control (W & I Code § 5600).

The Short-Doyle Act provides little absolute guidance to counties in formulating their local plans. While Welfare and Institutions Code section 5651 establishes the elements of the local plan only Welfare and Institutions Code section 5651. 1 identifies five categories of "priority populations" (one of which is "mentally disturbed children and adolescents" such as are addressed by the legislation at issue in this Test Claim) which must be at least considered and addressed in the local plan. Even here, however, how they are considered and the extent

to which they are provided for is a matter for local determination. Only Welfare and Institutions Code section 5651.3 mandates that within the categories of service which the county chooses to provide, "acute and involuntary patients" shall have "first priority" for services.

Upon this highly flexible scheme -- and in direct response to federal mandate -- the Legislature has chosen to impose a single category of persons who have a special or super-priority to local mental health services -- handicapped children with such services written into their Individual Education Plans pursuant to the Education of the Handicapped Act (20 U.S.C. §§ 1400, et seq.). Such children were already one of the five identified priority populations under Welfare and Institutions Code section 5651.1 and the legislation in question simply identifies them as having head-of-the-line privileges, and incidentally tells the county mental health departments to provide appropriate and necessary case management services, Nothing in the legislation requires or implies that the counties of California, including but not limited to Santa Clara County, must increase their level of mental health services, nor need they spend one single penny more on local mental health services as a result of this legislation. Accordingly, there are no new or increased mandated costs as that term is used in Section 6 of Article XIII B of the Constitution. Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835; County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.

The Supreme Court's analysis of the purpose behind Article XIII B, Section 6, in Lucia Mar, supra, 44 Cal. 3d at pp. 835.6 and County of Los Angeles, supra, 43 Cal, 3d at pp. 56-7 is instructive. The Court held, in essence, that the State could not enact legislation which established or increased a program and resulted in a transfer of increased fiscal responsibility for such programs to a local agency without incurring an obligation to fund such local agency for its increased mandated costs. Set against this standard the instant Test Claim must fail. For the legislation at issue creates no new program, nor does it increase the amount or type of mental health services which Santa Clara County is required to provide to its citizens, nor does it mandate any increased costs to the County Mental Health budget.

Really, at heart, the legislation only provides a certain amount of guidance to the counties regarding who has absolute first call on their Short-Doyle system. To this extent a small amount of flexibility is lost by the local mental health bureaucracy in administering its Short-Doyle priorities, but no increase in costs to the County arises out of the legislation and it cannot reasonably be questioned that the State may undertake to give such direction. (See, e.g., Los Angeles County v. Orange County (1983) 97 Cal. 329, 331. "[Counties are] local subdivisions of the state, created by the Legislature for governmental purposes . . . ."; Counties of Los Angeles v. Riley (1936) 6 Cal.2d 625, 627, "Counties are vested by the state with a variety of powers,, which the state itself may assume or reassume and directly exercise. ")

VI

State reimbursement' is already provided to Santa Clara County for these services

The Short-Doyle Act specifically requires that mental health services be provided to children, Moreover, this act also includes maintenance of effort requirements with regard to children's services. Specifically, Welfare and Institutions Code section 5704.5 provides that counties cannot decrease their proportion of mental health expenditures for children unless they can demonstrate that the need for such services has decreased. Further, Welfare and Institutions Code section 5704.6 requires that, with certain exceptions, counties must spend 50 percent of each noncategorical augmentation for children's services until such services represent 25 percent of the County's total mental health program.

The administration and the Legislature have recognized maintenance of effort requirements in appropriating funds to implement Chapters 1747 and 1274. Moreover, the Conference of Local Mental Health Directors, which is comprised of the directors of all of the county mental health programs, has also recognized a maintenance of effort in its estimates of program costs. As previously noted the Santa Clara County claim notes that fully 215 out of 336 children receiving treatment were known to the mental health system prior to fiscal year 1986-87.

Currently in the State of California in excess of one billion dollars is expended annually to provide public mental health services to the citizenry of the State, For fiscal year

1985-86, the County received state mental health resources in excess of thirty one million dollars and in excess of thirty two million for fiscal year 1986-87, which monies were supplemented by millions of local dollars. The total amount claimed by the County in this matter represents less than six percent of the State mental health resources received by the County for the fiscal years in question -- well within the range for any readjustment of priorities which may have been required to respond to this legislation.

CONCLUSION

For the reasons stated and for such other reasons as may be proper the Commission should determine that the legislation in question does not mandate the County to implement a new program or maintain a higher level of service in an existing program within the meaning of Government Code section 17514 and Section 6 of Article XIII B of the California Constitution.

DATED: January 27, 1989

Respectfully submitted,

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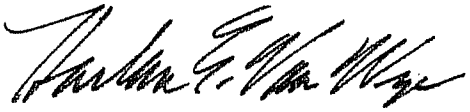

HARLAN E. VAN WYE
Deputy Attorney General

Attorneys for the State of California

DECLARATION OF SERVICE BY MAIL

Re: In the Matter of the TEST CLAIM OF COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS.

No. N-30939

I, J. BRICE declare that I am over 18 years of age, and not a party to the within cause; my business address is 350 McAllister Street, Suite 6000, San Francisco, California 94102. I served a true copy of the attached

OPENING BRIEF ON BEHALF OF THE STATE OF CALIFORNIA

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Susan Chapman
Deputy County Counsel
70 West Hedding Street, 9th Floor
San Jose, California 95110

Each envelope was then, on January 27, 1989, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on January 27, 1989, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

JUDIE A. BRICE
(Type Name)

Judie A. Brice
DECLARANT

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

RECEIVED
FEB 27 1989
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SACRAMENTO

In the Matter of the TEST CLAIM OF COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS	OAH No N-30939

OFFICE OF
ADMIN. HEARINGS
Compl.)
Resp.) Exh. 9
)
ID ✓ Evid.

RESPONSE BRIEF ON BEHALF OF CLAIMANT COUNTY OF SANTA CLARA

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I. INTRODUCTION

This is the Reply Brief of the County of Santa Clara submitted in support of its Test Claim filed with the Commission on State Mandates, asserting that Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, and their implementing regulations, mandate a new program or increased level of existing service on counties.

II. STATEMENT OF POSITION

Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, and their implementing regulations mandate counties to provide IEP-related mental health services for handicapped children. The State has delegated its responsibilities for providing supportive mental health services to handicapped children, responsibilities it voluntarily assumed as a condition of accepting federal education funding, to counties. It did so without providing adequate funding to pay for these new services. This is a state mandate for which state funding is required.

The State attempts to dodge its responsibilities by asserting that this is not a "new" program because other local entities (educational agencies) were previously required to perform these services in previous years. Clearly, this is a new program insofar as counties are concerned. The State then attempts to dodge its responsibilities by asserting that the program is not "new" because the County was providing some mental health services before, as if the State had unlimited authority to mandate counties to provide for any and all mental health entitlement programs, regardless of cost. The facts clearly show that this

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legislation requires the County to do things it never did before. It mandates the County to provide new services.

The program is also new because it is an entitlement program, unlike any of the other mental health programs operated by the County. It is not a Short-Doyle program. Having to provide mental health services on an entitlement basis is a revolutionary responsibility for the County. The State asserts that funding has been provided through the Short-Doyle program. It has not. The State Short-Doyle allocation funds responsibilities of the County which pre-existed this mandate. Short-Doyle funds the community mental health program. It is clear that the legislature did not intend that these monies be robbed to pay for the cost of providing IEP-required mental health services. It is also clear from federal law that the federal educational grants are intended to augment, not supplant, existing resources for handicapped children. The legislation does not merely implement federal law or court decisions which impose a mandate on counties. Public Law 34-142 (the Education for All Handicapped Children Act, or EHA), ioes not impose responsibilities on counties to provide for mental ıealth services required in order for a handicapped child to benefit from special education, nor does Section 504 (29 U.S.C. section 794), nor does the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, by statute or caselaw.

Clearly, this legislation imposes a state mandate, for which ıdequate funding has not been received. The County is constitutionally entitled to reimbursement.

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III. ARGUMENT

A. Chapters 1747 and 1274 and their implementing regulations impose "a new program or increased level of service of an existing program" on the County.

The claim of the County of Santa Clara is based on the requirement contained in section 6 of Article XIII B of the California Constitution. Article XIII B was enacted by initiative passed by the people in a special statewide election held November 6, 1979. In Section 3 of Chapter 1205 of the Statutes of 1980, the legislature described the intent of Article XIII B as follows:

> [It] is intended to provide certain limitations and controls on government spending at all levels of government in the state, but these restrictions are intended to be applied in a reasonable and practical way so as to permit flexibility in meeting the constantly changing conditions and needs of the people for government services.

Section 1 of Article XIII B generally limits the annual appropriations of each local government to the appropriations Limit of such entity for the prior year, adjusted for changes in the cost of living and population. Because this section substantially limited local governments spending authority, Article XIII B also created a source of funding for new programs, or increased levels of service of existing programs, which are mandated by the state. Article 6 of Section XIII B provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on an local government, the state shall provide a subvention of funds to reimburse such local government for the. costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

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(a) Legislative mandates requested by the local agency affected;

(b) Legislation defining a new crime or changing an existing definition of a crime, or

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

Proponents of the ballot measure explained to the voters that section 6 of Article XIII B "will not allow the state government to force programs on local governments without the state paying for them . . . ." Ballot Pamphlet, Proposed Amendment to California Constitution with Arguments to Voters, Special Statewide Election (November 6, 1979), page 18. (Italics added.

This constitutional provision granted relief to local governments whose powers to raise property taxes had been curtailed by Article XIII A, passed the previous year, and whose ability to increase spending was also severely restricted, but who were still subject to increased costs through the imposition of state-mandated local programs. The state was now constitutionally required to reimburse local government for costs associated with these programs. City of Sacramento v. State of California (1988) 201 Cal.App.3d. 409, 414.

That Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 and their implementing regulations mandate a new program or increased level of service on the county is clearly set forth in the Joint Statement of Facts and Positions and the Opening Brief of the County of Santa Clara. Pr'ior to this legislation, educational agencies had the responsibility for providing free, appropriate public education to each handicapped

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child, including whatever supportive services were necessary in order for that child to benefit from special education. Chapters 1747 and 1274 and their implementing regulations shifted from educational agencies to local mental health agencies substantial responsibilities for the IEP process, as well as substantial financial and program responsibilities for mental health services provided to handicapped children pursuant to the IEP process. The services mandated by this legislation had not previously been mandated by the general state mental health program, the Short-Doyle program.

B The shift of IEP-related responsibilities from local educational agencies to local mental health agencies represented a "new program" for local mental health agencies for which state subvention is required.

In the Opening Brief of the State of California, the State argued that a shift in responsibility of an existing program from one local entity to another does not necessarily constitute a new program or a higher level of service within the context of the Constitution. Respondent's Opening Brief (R.O.B.) at 11, citing Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830. In Lucia Mar, the California Supreme Court held that legislation requiring local school districts to contribute part of the cost of education of severely handicapped students from local, districts who were enrolled at state schools, when the cost previously had been borne by the state, was a "new program or higher level of service" under section 6 of article XIII B of the California Constitution. The Supreme Court stated:

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> Unquestionably, the contributions called for . . . are used to fund a program within this definition, for the education of handicapped children is clearly a governmental function providing a service to the public . . . . Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years the program was new insofar as plaintiffs are concerned.

Id. at 835 (Italics added). The Court clearly held that a shift in responsibility between entities can constitute a new program:

> To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIII B. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of Article XIII A, which severely limited the taxing power of local governments. Section 6 was intended to preclude the state from shifting to local Agencies the financial responsibility for providing public services in view of these restrictions on the taxing and spending power of the local entities.
>
> The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIII B because the programs are not "new."

Id. at 835-36 (Citations omitted; italics added.)

It is clear, therefore, that the shift in responsibility for part of the IEP process and the shift of responsibility for providing IEP-related mental health supportive services from educational agencies to local mental health agencies creates a "new program" insofar as local mental health agencies are concerned. The question of whether the initial statutes adopting the EHA program in California imposed a state mandate on local educational agencies is currently subject of litigation. Huff v.

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Commission on State Mandates (Sacramento Superior Court No. 352795).

B. Services required by Chapters 1747 and 1274 are not services which the County was mandated to provide through the Short-Doyle Act and therefore constitute a "new program or increased level of service of an existing program."

The state argues that Chapters 1747 and 1274 and their implementing regulations do not impose a new program on local mental health agencies because "[c]ommunity mental health programs were already providing assessments and mental health treatment for many handicapped children under the Short-Doyle Act." R.O.B. at 12. This ignores fundamental differences between IEP-related services and Short-Doyle services which existed prior to this legislation:

1. Local educational agencies were responsible for providing IEP-related mental health assessments and treatments. Community mental health programs were not providing IEP-related mental health assessments, and were not formally participating in the IEP process. No community mental health representative was an IEP team member, regardless of the placement possibilities. Community mental health had no IEP team responsibilities, was not responsible for locating out-of-home placement pursuant to IEPs, and was not responsible for case management for children placed out of home pursuant to IEPs. To the knowledge of the County, the County was not providing any mental health treatment required by individual IEPs prior to this legislation. Testimony of Robert F. Porter, R.T. at 30-34.

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2. The IEP program, based on the federal EHA requirements, provides for very specific evaluations and services, to be delivered within certain time limits and with due process safeguards. There is no similar process for Short-Doyle services, no similar time lines for evaluations or reevaluations or delivery of services, no similar definition of what must be included in an evaluation, no mandatory process similar to the IEP meeting process, no similar due process procedure.

3. The Short-Doyle program is not an entitlement program. It is a broad mental health program that grants great discretion to the community mental health system to determine what services are to be provided, and to whom. The County determines its service priorities based on program principles and clinical needs. It is the policy of the County that if resources are inadequate to meet demands on a particular mental health center, needs are triaged. Those in most urgent need of treatment are seen; others are placed on waiting lists. Although the Short-Doyle Act sets forth certain priority populations, it does not grant to any individual an entitlement 'to services. The IEP program, on the other hand, is an entitlement program. If an individual child meets certain criteria, he or she is entitled to services, a right that is enforceable through administrative and judicial remedies. There is no such thing as a waiting list for IEP services. Those services simply must be delivered.

4. Patients receiving Short-Doyle services are charged for the services, based on their UMDAP ability to pay. If the services are covered by insurance or some other third party, collection is made from that source. Families of children

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receiving IEP-related services are entitled to receive those services free of charge. The parents or child cannot be charged for the services. If the IEP-related services are covered by insurance, any submission of insurance claims to providers must be voluntary, unless such claims would result in neither an increase in premiums, nor a decrease of annual or lifetime insurance benefits, nor a cancellation of the insurance policy.

5. Since the IEP program is an individual entitlement program, the responsibility for providing IEP-related mental health services represents an open-ended financial demand on the County. Each individual child who qualifies for IEP-related services is entitled to receive them. Receipt of the services cannot be contingent on identifying a funding source. Government Code section 7572(d). Through the Short-Doyle program, on the other hand, a community mental health agency cannot be required to expend more for mental health programs than it receives in its state Short-Doyle allocation plus the required county match. Welfare and Institutions Code section 5709. Board of Supervisors of the County of Los Angeles v. Superior Court (1989) Cal.App.3d ___, 89 Daily Journal D.A.R. 1109

6. The Short-Doyle Act is designed to organize and finance community mental health services in every county through locally administered and locally controlled programs, and to provide a means for allocating state mental health funding according to community needs. Welfare and Institutions Code section 5600. The goals of the Act are to assist persons who are institutionalized, or at a high risk of becoming so, because of a mental disorder, lead lives as normal and independent as possible; to assist

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persons experiencing temporary mental health problems to return to a functioning level; and to prevent serious mental disorders and psychological problems, Id. Local community mental health programs must operate to develop services which permit persons detained under the Lanterman-Petris-Short Act to be treated in the least restrictive setting, and must design services so that they are equally accessible and as effective for persons who, because of differences in language, cultural traditions, or physical disabilities, confront barriers to knowing about or to using the mental health services offered. Welfare and Institutions Code section 5600.4. First priority must be given to services required for acute patients and involuntary patients. Welfare and Institutions Code section 5651.3. The other priority populations are the chronically mentally ill, including the homeless; mentally disturbed children and adolescents, including juvenile sex offenders and juvenile sex offense victims; the mentally ill elderly, including those who are isolated; mentally ill jail inmates, mentally ill wards of juvenile detention facilities, and mentally ill persons who are nuisance offenders who may be inappropriately incarcerated; and underserved populations, including ethnic minorities, refugees, veterans and other victims of post-traumatic stress disorders, and individuals diagnosed as both mentally ill and developmentally disabled. Welfare and Institutions Code section 5651.1. In short, the Short-Doyle Act is designed to give community control and direction to the complex mental health needs of a county's population. The legislation requiring local mental health agency involvement in the IEP process (Government Code section 7570 et seq.) is not part of the

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Short-Doyle Act (Welfare and Institutions Code section 5600 et seq.), and is in fact contrary to it. There is little local control over services to be offered, as the services to be provided are dictated by the specific criteria contained in federal and state law and regulation. The IEP program singles out a narrow population for separate, special treatment, as an entitlement program, outside the priorities of the Short-Doyle Act.

The fact that the IEP program is separate from the Short-Doyle program and, in fact jeopardizes the Short-Doyle program has been recognized by the Department of Mental Health. In his response to the State Auditor General, the State Director of Mental Health, Dr. D. Michael O'Connor, in commenting on a paragraph in the report stating that county mental health officials are using Short-Doyle funds to provide noneducational services to special education students, stated:

> This paragraph may lead the reader to conclude that diversion of Short-Doyle funds is not a problem. In fact, county Short-Doyle plans are designed to address the most pressing local mental health needs. After adoption by local boards of supervisors, the plans are submitted to the State Department of Mental Health for approval. These plans become the counties' blueprints for expenditure of Short-Doyle funds.
>
> Although some of the pupils currently being referred by local education agencies are every bit as needful of mental health services as children and adults presently receiving Short-Doyle services, many others are much less so. Nonetheless, Chapter 1747/84 and Chapter 1274/85 mandate that all special education pupils in need of mental health services in order to benefit from instruction must receive them.

Exhibit 5, Report of the Auditor General of California, at 28.

To be sure, there were some children referred through the IEP process in Fiscal Year 1986-87 who previously had been known to the county mental health system (251 out of 568). Al though some

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of these children previously had been identified as IEP children, it is not clear the extent to which they had IEPs requiring the mental health services they in fact were receiving. To the County's knowledge, none of these children seen by the County were receiving mental health services pursuant to IEPs: the services were rendered by the County independent of the IEP process, and parents and third parties were charged for the services under the County's standard Short-Doyle process. Many of these children may have had IEP-related mental health needs which had not been identified by the local educational agencies prior to the transfer of responsibility to local mental health agencies, and which should have been the responsibility of the local educational agencies, with no contribution required from family or third party insurance. Prior to Fiscal Year 1986-87, the needs of these 251 children may have been partially or fully met through the County in an informal manner, even through they should have been entitled to receive free services through IEPs, as a matter of right.

Note, however, that the 251 children previously known to the mental health system were not individual children the County was mandated to serve prior to Fiscal Year 1986-87. In Fiscal Year 1985-86, the County was able to maintain its level of service by contributing $4,412,614 in optional overmatch (compared to the state general Short-Doyle funding of $21,640,430). The voluntary overmatch comprised a full 12.4 percent of the Short-Doyle budget in 1985-86 ($4,412,614 compared to $35,552,766). Exhibit 1, Joint Statement of Facts and Positions, at 48. The extent to which elimination of the optional overmatch would have impacted services

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to these 251 children in Fiscal Year 1986-87 is impossible to calculate.

Most of the children referred to the local mental health agency pursuant to the IEP process in Fiscal Year 1986-87 had not previously been known to the county mental health system. Of the 568 referrals, 317 children had not previously been known by the county mental health system.[1] Exhibit 2, Declaration of Robert F. Porter, at 9.

C. The legislature did not intend that the services mandated by Chapters 1747 and 1274 would be part of, and funded through, the Short-Doyle program.

The IEP-related mental health services were never to be funded through the Short-Doyle program. As the State notes in its Opening Brief, Section 16 of Chapter 1274 provided for a transfer of funds from the State Department of Education to the State Department of Mental Health. R.O.B. at 12. Section 17 of Chapter 1274 recognized that the Chapter imposed a mandate and directed that reimbursement to local agencies be made through to State Mandates Claim Process. Chapter 1133 of the Statutes of 1986 further provided for funding for mental health for this program, by providing for a transfer of $2,000,000 from the Department of Education to the Department of Mental Health, to fund the IEP

1. The State cites in its opening brief that "215 out of 336 children receiving treatment were known to the mental health system prior to fiscal year 1986-87." R.O.B. at 12. These numbers are based on the estimate contained in the original Test Claim, before final data for the year were compiled. The correct comparison should be 251 out of 494 (568 total referred children less the 74 children who received assessment services only). See Exhibit 2, Declaration of Robert F. Porter, at 8-9.

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mental health program. This statute also provided that counties were not required to provide county match for this program, unlike the Short-Doyle program, and that the Department of Mental Health was to allocate funds based on individual county needs, in lieu of the Short-Doyle Act allocation. Section 3 of Chapter 1133 of the Statutes of 1986. It also provided for additional transfers from the Department of Education to the Department of Mental Health, based on the Auditor General's report. Id.

That the IEP-related services were never to be funded through Short-Doyle is clear through the devastating impact on local mental health programs if Short-Doyle funds are used to fund IEP-mandated services. In Santa Clara County in Fiscal Year 1986-87, using Short-Doyle monies to fund the IEP program drains over eight-and-a-half percent of the county's state Short-Doyle allocation ($1,929,011 out of $22,515,326). The cost of delivery of units of service which the County is required by contract to make available to its population and which, by their nature are never provided as IEP-related services, is $21,471,272 ($2,531,199 for outreach services, plus $14,862,886 for 24-hour care services, plus $4,077,187 for continuing care ($4,300,142 less the $222,955 allocation for IEP-related services erroneously categorized on the budget as "continuing care")). Exhibit 1, Joint Statement of Facts and Positions, at 51. The 24-hour services are provided to the first priority population: acute patients and involuntary patients. The continuing care services are provided to another priority population: the chronically mentally ill. Outpatient and day treatment services still must be funded for priority populations: the chronically mentally ill, including the

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homeless; mentally disturbed children and adolescents who do not qualify for mental health services pursuant to IEPs, including juvenile sex offenders and juvenile sex offense victims; the mentally ill elderly, including those who are isolated, mentally ill jail inmates, mentally ill wards of juvenile detention facilities, and mentally ill persons who are nuisance offenders who may be inappropriately incarcerated; and underserved populations, including ethnic minorities, refugees, veterans and other victims of post-traumatic stress disorders, and individuals diagnosed as both mentally ill and developmentally disabled.

"Mentally disturbed children and adolescents" which constitutes a priority population, is not synonymous with children entitled to IEP-related mental health services. See Exhibit 2, Declaration of Robert F. Porter, at 11-13. The most severely mentally ill children, those in acute hospitals, state hospitals, or state hospital alternative programs do not receive their mental health services pursuant to IEPs. Hospital care is deemed "medical services" which is not the kind of supportive service required to be provided under the EHA. 20 U.S.C. section 1401(a)(17). Those mentally disturbed children and adolescents who are to be given first priority -- those in need of acute care and those involuntarily detained -- do not receive their mental health services pursuant to IEPs. Presumably, most juvenile sex offenders, juvenile victims of sex offenses, and wards of juvenile detention facilities -- all of whom are specifically targeted as priority populations -- also do not qualify for IEP-related mental health services.

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Mentally disturbed children and adolescents can fail to qualify for IEP-related mental health services for a variety of reasons : they are not educationally handicapped; the services are needed primarily for emotional, social or medical reasons; they have not been referred by their school districts; their aberrant behavior is due solely to a conduct disorder; their aberrant behavior has not been displayed over a long period of time; or their problems are primarily temporary adjustment problems. See Claimant's Opening Brief, at 17-19 The County could not have met the needs of these adult and minor priority populations, and fulfilled its IEP responsibilities, without a substantial overmatch: $4,933,872 out of $43,215,710 (11.4 percent). Even with the overmatch, the IEP-mandated responsibilities strained county resources and contributed to wait lists for non-IEP-related services.

The only Fiscal Year 1986-87 budget augmentation directly related to the IEP program was the $222,955 allocation.

Chapter 1274 did amend Welfare and Institutions Code section 5651, within the Short-Doyle Act, to require Short-Doyle plans to include a description of services required by Government Code sections 7571 and 7576.[2] The legislature did not, however, add handicapped students in need of IEP-related mental health services to the list of priority populations, although it did have before it the subject matter when the IEP legislation was before it. It did not include the IEP statutes within the Short-Doyle provisions.

> It is assumed that the Legislature has in mind existing laws when it passes a statute. . . . The failure of the Legislature to change to law in a particular respect, when the

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> subject is generally before it and changes in other respects are made, is indicative of an intent to leave the law as it stands in the aspects not amended.

3state of McDill (1975) 14 Cal.3d 831, 837-38 (Citations omitted).

While the Legislature in enacting Chapters 1274 and 1133 intended to reimburse counties for newly-imposed responsibilities, the fact is that it failed to do so. The reasons for the inadequate funding for this program are complex. One reason for the inadequate transfer of funding from the Department of Education to the Department of Mental Health was that local educational agencies reported inaccurate data about their spending for noneducational services to special education students. Exhibit 5, Report of the Auditor General of California, at 7-14.

More importantly, prior to this legislation, educational agencies were responsible for identifying children in need of service, for identifying the needed services, and for providing or funding for those needed services, including IEP-related mental health services. As a result, IEP-related mental health needs of children were under-identified by educational agencies.

The State contends the increase in the number of children assessed as needing services "is due to the shift in responsibilities among county agencies, not because of a mandate for a higher level of service." R.O.B. at 13. The radical shift

2. Section 5651 is not applicable to the County, as the County has elected to enter into a negotiated net amount contract with the State, instead of submitting a Short-Doyle plan. See Exhibit 1, Joint Statement of Facts and Positions, at 39-42 and 47-48.

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was not among county agencies, but from local educational agencies (which are not county agencies) to the county. Once the responsibility for providing and funding the mental health services was shifted to local mental health agencies, the number of children referred to local mental health agencies by local educational agencies for IEP-related mental health assessments and services soared. Id. at 17-19.

The referrals generally have been appropriate. These children are entitled to receive IEP-related mental health services, and in fact in many cases have been in need of such services for some time. Even a number of the referred children who were previously receiving services from mental health had not previously had these needs identified by their educational agencies, even though, in retrospect, the services should have been on their IEPs.

The shift in responsibility between agencies did not create new rights for the children so much as it removed a practical obstacle to the identification of those rights, by freeing those with the responsibility of first identifying potentially needy children from the responsibility of funding the needed mental health treatment.

The State further states that counties have flexibility as to who is served and what services are provided because a mental health representative "will provide input to the IEP team as to the need for mental health treatment services." R.O.B. at 14. The State suggests that it is the County's own fault for identifying so many children in need of services, and for making so many recommendations for mental health service. Once a child has been appropriately referred from a local educational agency

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for evaluation, mental health must conduct a specific and detailed evaluation, according to federal and California IEP statutes and regulations. The assessor then makes a clinical judgment regarding whether or not the child needs mental health services in order for him or her to benefit from his or her education. The assessor cannot decide not to recommend treatment which is necessary for a child to benefit from his or her education; he or she must make a recommendation guided by IEP criteria, and based on sound clinical judgment; The individual handicapped child has a right to supportive services necessary for him or her to benefit from special education. The therapist cannot choose not to recommend needed service, in a budget saving move.

Certainly, the costs for which subvention is required must relate to services mandated by Chapters 1747 and 1274 their implementing regulations. Mental health services not required should not be included on the claim, and parameters and guidelines which ultimately are established should delineate this, If the local mental health agency does not receive a proper referral from the educational agency, there can be no IEP-required assessment or mental health services, even if the child is handicapped and such services are needed for the child to benefit from special education. If the therapist determines that a child needs out-of-home placement because of his mental health needs and chaotic family situation, but does not need it in order to benefit from his special education, out-of-home placement cannot be included as an IEP recommendation. If the child is so placed, those costs cannot be and are not included on this claim. The undisputed evidence is that the unreimbursed costs claimed by the

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County - - $1,929,011-- were required by Chapters 1747 and 1274 and their implementing regulations. Exhibit 2, Declaration of Robert F. Porter, at 5.

D. The costs claimed by the County are not costs incurred by contractual obligation, but are costs mandated by the State.

It is not the County's Short-Doyle negotiated net amount contract with the state that imposes on the County the requirement to provide IEP-related services, but Chapters 1747 and 1274 and their implementing regulations. As discussed in III B, ante, the County was not providing IEP-mandated services prior to this legislation, even though the County had a Short-Doyle negotiated net amount contract with the State in Fiscal Year 1985-86 which was substantially similar to the Fiscal Year 1986-87 contract. Except for the inclusion of the $222,955 allocation from the state for the IEP program, there is no reference to the IEP program in the contract.

Further , as discussed in III C, ante, the IEP program is fundamentally different from and contradictory to the Short-Doyle program. The inclusion of "mentally disturbed children and adolescents, including juvenile sex offenders and juvenile victims of sex offenses" among several priority populations does not mean that the County is obligated to become involved in the IEP process or provide services required by IEPs.

In its argument, the State suggests that the County is obligated by contract to meet all of the mental health needs of its residents, or its residents within the priority populations. This is not the case, The Short-Doyle program is not an

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entitlement program. The county is not required to expend more than its Short-Doyle allocation and required overmatch. Welfare and Institutions Code section 5709. Board of Supervisors of the County of Los Angeles v. Superior Court (1989) Cal.App.3d , 89 Daily Journal D.A.R. 1109.

E. Even if the services mandated by Chapters 1747 and 1274 are part of the Short-Doyle program, the County has not received full reimbursement for the costs of complying with this mandate.

Even if it is determined that the services mandated by Chapters 1747 and 1274 are included in the Short-Doyle program, the services are mandated services for which subvention is required. The Commission on State Mandates has determined that specific programs within the Short-Doyle program are mandated by the state and require state subvention. For example, on October 20, 1988, the Commission determined that a Test Claim filed by the City and County of San Francisco established that legislation requiring counties' participation in a residential care services program established that there was a state mandate. See minutes of the October 20, 1988 hearing, approved by the Commission on State Mandates on December 1, 1988.

If it is determined that these services are mandated, but are part of the Short-Doyle program, the County should receive reimbursement proportional to the overall funding for the County for mental health (required match and overmatch, compared to the the match plus State Short-Doyle allocation), because there is no way to separate out the contribution of the state overmatch. At the minimum, the County should receive subvention equal to its ten

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percent required match.

F. The costs claimed by the County are not costs mandated by the federal government.

The County's costs of complying with Chapters 1747 and 1274 their implementing regulations are not "costs mandated by the federal government: for which subvention is not required.

The basis for the federal mandate exception to the state's subvention responsibilities is section 9 of article XIII B of the California Constitution, which states:

> "Appropriations subject to limitation" for each entity of government shall not include
>
> " " "
>
> (b) Appropriations required for purposes of complying with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly.

(Italics added.) This allows an exception to the annual appropriations limit of each local government entity, which is set forth in section 1 of article XIII B of the Constitution. It is because of this very limitation that section 6 of article XIII B requires subvention for new programs or higher levels of existing service mandated on local government by the state.

Public Law 94-142 (the EHA) is not a federal mandate or even, as the state asserts, a "de facto mandate." The EHA does not mandate the state to do anything: "the discretionary nature of Public Law 94-142 frees the state to participate or not in the acquisition of federal funds under the Act as it chooses." New Mexico Association for Retarded Citizens v. State of New Mexico

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(DCNM 1980) 495 F.Supp. 391. See also Garrity v. Gallen (DCNH 1981) 522 F.Supp. 171, 201. Deciding not to participate is a political choice the state can make:

A financially induced choice is not the same as a mandated requirement . In City of Sacramento v. State of California, the appellate court twice determined that state legislation requiring local government employers to pay into the state unemployment insurance on behalf of their public employees was not a federal mandate exempt from reimbursement, but a financially induced choice, even though failure to impose such a requirement on local government employers would have resulted in federal de-certification of the State's unemployment insurance program, with a concomitant loss of federal tax credit for the State's private employers. City of Sacramento v. State of California (1980) 156 Cal.App.3d 182, 196 (Sacramento I); disapproved of on other grounds, to the extent it conflicts, in County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 58; City of Sacramento v. State of California (1988) 201 Cal.App.3d 409.

Similarly, acceptance of federal education monies, which only then requires the state to implement the IEP program, is a financially induced choice, not a federal mandate. In fact, the State is going one step farther than they attempted to go in the City of Sacramento cases. At least in the City of Sacramento cases, federal law did require contribution into the state unemployment insurance fund from all local government employers, if the State program was to be certified, In the present case, nothing in the federal EHA law requires county mental health or county government involvement in the IEP process.

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Under federal law, commingling of the federal funds with State funds is prohibited, and the federal funding must be used so as to supplement and increase the level of Federal, State and local funds (including funds not under the direct control of the State or local educational agencies) expended for special education and related services provided to handicapped children. Title 20 U.S.C. section 1413(9). The State is not complying with the intent of the federal law -- that there be a net increase in services as a result of the federal funding, rather than a supplantation of funds with no increase in services -- when it attempts to have counties deplete existing mental health funding for this special population.

Citing the Government Code section 17513 definition of "costs mandated by the federal government," the state asserts that the costs of complying with Chapters 1747 and 1274 are federally mandated because failure to opt into Public Law 94-142 (the EHA) would result in "a substantial monetary loss" in the form of loss of federal education funding. R.O.B. at 8. The State asserts that the amount of this loss would be $100,000,000. There is no evidence in the record to support that assertion.

Even assuming that failure to opt into the EHA would result in a loss of a substantial sum of federal monies to the state, there is no evidence that this would result in a substantial net monetary loss. The net costs of complying with the IEP requirements to the mental health agency of the County of Santa Clara alone is $2,151,966 ($2,387,835 less $235,869 federal Medical). There are fifty-seven other counties in the state. There are also costs of the Department of Social Services, for

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out-of-home placement, and costs of state and local educational agencies, for special education and other supportive or related services. It may well be that the cost of compliance exceeds the funding received.

Even if failure to opt into Public Law 94-142 were to result in substantial monetary loss, Chapters 1747 and 1274 and their implementing regulations are not federally mandated costs as defined by Government Code section 17513, which provides:

> any increased costs incurred by a local agency . . . in order to comply with the requirements of a federal statute or regulation. . , [including] costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state.

Failure to impose on counties -- which do not provide primary or secondary education -- a requirement that counties provide IEP-related mental health services does not result in substantial nonetary penalties or loss of funds, It is the failure of the state or local educational agencies to do so that would result in the loss of funds. When it opts into the EHA program, the State itself, as well as educational agencies, incur certain obligations. Nothing in the federal law requires involvement of counties in the IEP process. What the state is attempting to do is take the federal monies, and pass along the responsibility to the counties, sans the monies. This is precisely the kind of delegation of responsibility which, under the California Constitution, the state must provide subvention funds.

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That the costs of complying with Chapters 1747 and 1274 and their implementing regulations are not costs mandated by the federal government is clear when one looks at whether counties could, under section 9 of article XIII B, increase their appropriations limit to pay for this program. Clearly not. Section 9 is entity-specific, and applies only to appropriations required to comply with mandates of the courts or federal government which, without discretion, require expenditure for additional services. As discussed earlier, participation in the EHA is voluntary, not discretionary. Also, even if it were not discretionary, nothing in the EHA requires counties, which do not operate primary or secondary educational institutions, to expend anything for that program. If Government Code section 17513 were to be construed as to categorize the EHA as imposing a federal mandate on counties, it would be unconstitutional. See discussion in Claimant's Opening Brief at 24-27.

The costs of complying with Chapters 1747 and 1274 and their implementing regulations are also not costs mandated by Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. section 794, hereinafter referred to as Section 504), or the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

Section 504 provides

> No otherwise qualified individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . , ,

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The County, in its Short-Doyle program, serves handicapped .ndividuals, particularly the mentally disordered or handicapped. Jo one is excluded by reason of his handicap. Section 504 does lot require the County, in the course of its provision of mental ıealth services, to single out a small subset of handicapped .ndividuals for special treatment.

The Section 504 regulations require that participants of federal funding which operate a public elementary or secondary ɜducation program must "provide a free appropriate public ɜducation to each qualified handicapped person who is in the ɜecipient's jurisdiction, regardless of the nature or severity of ɜhe person's handicap." 34 C.F.R. Part 104.33. This does not ıpply to the county. Under the state educational system, even ɜhildren in the custody of the county, at shelters, hospitals or ietention facilities, have their educational needs met by ɜducational agencies, not the county.

Similarly, the Equal Protection clause of the Fourteenth \mendment to the United States Constitution does not require that ɜhe county single out a subset of handicapped individuals for ɜpecial treatment.

Moreover, it is in error to think that the requirements of Section 504 and the Equal Protection clause are equivalent to the EHA requirements. The EHA intends to accommodate the Section 504 and Equal Protection claims of handicapped children for insured access to public education. Smith v. Robinson (1984) 468 U.S. 392, 1016. The EHA goes beyond Section 504 in establishing the

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rights of handicapped students to free, appropriate public education including whatever supportive services are necessary.

Section 504 does not create unlimited demands on local government. It does not require affirmative action on behalf of handicapped persons, only the evenhanded treatment of qualified handicapped persons. Southeastern Community College v. Davis (1979) 442 U.S. 397, 410. In Davis, the Supreme Court held that regulations requiring extensive modifications in a college nursing program would constitute an unauthorized extension of the obligations imposed by that statute. Id.

In Smith v. Robinson, the Supreme Court noted that, in light of Davis, there was much confusion about the extent to which Section 504 requires special services necessary to make public education accessible to handicapped children. Smith v. Robinson, supra at 1018. At least one court refused to impose liability under Section 504 for mere failure to provide the free, appropriate education required by the EHA, suggesting that "discrimination" under Section 504 might be found in something more, such as bad faith or gross misjudgement. Monahan v. Nebraska (8th Cir. 1982) 687 F.2d 1164, 1170-71.

In an analogous case involving services to the developmentally disabled, a federal district court held that a private cause of action does not come into existence under the Developmentally Disabled Assistance and Bill of Rights Act unless and until the state accepts funds from the federal government. Garrity v. Gallen (DCNH 1981) 522 F.Supp. 121, 201. The court held that any relief to which residents of a school for the mentally retarded were entitled to under Section 504 would be limited in scope to

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requiring reasonable funding and administrative burdens upon state officials for purposes of removing barriers to the handicapped. Id. at 209. Chapters 1747 and 1274 and their implementing regulations impose unreasonable, excessive burdens on the county and go beyond the purposes of removing barriers to the handicapped. Instead, they impose on the County a mandate to discriminate in favor of a narrow sub-group of mentally handicapped individuals.

This is required neither by Section 504 nor the Equal Protection clause of the Fourteenth Amendment of the Constitution.

G. Chapters 1747 and 1274 and their implementing regulations do not affirm for the state that which had been declared existing law by action of the courts.

No court actions require county involvement in the IEP process. The cases cited by the State, Pennsylvania Ass'n for Retarded Children v. Commonwealth (1971) 334 F.Supp. 1257 and Mills v. Board of Education of District of Columbia (1972) 348 F.Supp. 866, involved the provision of educational services to the handicapped, and the responsibilities of educational agencies, based on Section 504 and Equal Protection theories. As discussed, neither requires county provision of free mental health services to all handicapped children in need of such services in order to benefit from their education. Ante.

IV. CONCLUSION

This Test Claim presents three issues. The first is whether

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the services required by this legislation constitute a new program or an increased level of service in an existing program. Clearly these services were not required to be provided by the County prior to this legislation, and are required now. They were not part of the Short-Doyle offerings before Chapter 1747 of the Statutes of 1984 came into effect.

The second issue is whether the services required by this legislation are reimbursed through the State's general Short-Doyle allocation to the County. They are not. The Short-Doyle program predated Chapter 1747. The requirement to provide mental health services to handicapped students pursuant to IEPs is not contained in the Short-Doyle Act.

It was not the intent of the legislature that Short-Doyle allocations be expended to fund the IEP program. The legislature recognized that Chapter 1274 imposed a mandate on counties; it and subsequent legislation were designed to fund the IEP program. Funding has not been adequate because the needs of handicapped children for mental health services in order to benefit from special education were so significantly under-identified in prior years.

Requiring the County to use its Short-Doyle allocation to make up the difference cripples the Short-Doyle program to such an extent that even the most urgent mental health needs of a county's population must either be ignored, or met by county general fund overmatch. What is happening, in effect, is that county general funds, not State Short-Doyle funds, have been mobilized to meet the requirements of providing mental health services to handicapped students pursuant to IEPs.

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The third issue is whether Chapters 1747 and 1274 are federal or court mandates, rather than state mandates. The federal EHA program is a voluntary one. It mandates nothing. Nothing is required unless the state chooses to accept federal educational grants and agrees to implement the provisions of EHA. Once the state has made the choice, there is still nothing in the EHA that would require counties, which do not directly provide primary and secondary education services, to do anything. The EHA requirements are on the state, and educational agencies. The state has chosen to delegate some of its EHA responsibilities to the counties. The mandate originates from the state, not from the federal law, It is precisely this lcind of delegation of responsibility for which local governments are constitutionally entitled to state subvention of funds.

The counties provide mental health services. Certainly, the State can point to no federal judicial, statutory or constitutional provisions which require counties to discriminate in favor of one small group of the large population of mentally handicapped individuals. Only Chapters 1747 and 1274 and their implementing regulations create such discrimination and injustice in the distribution of mental health resources.

Respectfully submitted,

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February 24, 1989

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BEFORE THE COMMISSON ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the Test Claim of SANTA CLARA COUNTY	OAH NO. N-30939

PROOF OF SERVICE BY MAIL

I, Susan A. Chapman, declare that:

I am employed in the County of Santa Clara, California. I am over the age of eighteen years and not a party to the within cause. My business address is Ninth Floor, 70 West Hedding Street, San Jose, California 95110-1771. On January 28, 1989, I served the within RESPONSE BRIEF ON BEHALF OF THE COUNTY OF SANTA CLARA by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

KEITH A. LEVY, Administrative Law Judge
Office of the Administrative Hearings
501 J Street, Suite 230
Sacramento, CA 95814

HARLAN E. VAN WYE, Deputy Attorney General
Office of the Attorney General
350 McAllister Street, Suite 6000
San Francisco, CA 94102-3600

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 1989, at San Jose, California.

Susan A. Chapman

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF THE COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS.	OAH NO. N-30939

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF THE COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS,	OAH NO. N-30939 **REPLY BRIEF ON BEHALF OF THE STATE OF CALIFORNIA**

INTRODUCTION

Several years ago the Legislature enacted two bills which became, respectively, Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985. These'enactments added Chapter 26.5 ("Interagency Responsibilities For Providing Services To Handicapped Children"), to Division 7, Title 1 of the Government Code (§ 7570, et *seq.*). Now the County of Santa Clara alleges' that, taken together, these statutes (along with their implementing regulation&) impose a "mandate" upon the County as that term is used in Section 6 of Article XIII B of the California Constitution. The State of California has denied the County's allegation.

The issues which divide the parties have been set forth in detail in their Joint Stipulation Of Facts and Positions, and have been explored in their respective Opening Briefs. It is evident that the parties have a fundamental conceptual difference

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1. Title 2, California Code of Regulations § 60000, et ***seq.***

concerning what constitutes a "mandate."[2] On the one hand the County views the idea of a mandate broadly, to the effect that if a statute pushes a local agency into areas where it had heretofore not been required to go, then one has a mandate -- and extra State funding must perforce flow as a result.

The State, on the other hand, views the concept of a "mandate" somewhat more narrowly. In its view a mandate which requires compensating funding by the State is one which either establishes a new non-elective program or compels an increased effort or expenditure of local funds in an existing mandatory program. Where, as here, neither situation obtains, there is no Constitutional mandate; and any funds which may be devoted to such efforts (as are provided for in the statute(s) at issue) must be obtained through the normal political/legislative budgetary process.

The foundation of the County's argument is its assertion that it has incurred unreimbursed costs to comply with the legislation that is the subject of this Test Claim and, accordingly, a "mandate" must be present, On the contrary, while the County may have unreimbursed costs, compliance with the legislation that is the subject of this Test Claim is <u>not</u> the reason for the unreimbursed costs.

The unreimbursed costs are the result of the <u>manner</u> in which the County chose to implement the legislation that in

---

2. As that term is used in Article XIII B, Section 6 of the Constitution.

question. Nothing in the legislation requires or implies that the counties of California, including but not limited to Santa Clara County, must increase their level of mental health services, nor need they spend any more money on local mental health services as a result of this legislation. Accordingly, there are no new or increased mandated cost as that term is used in Section 6 of Article XIII B of the Constitution. *Lucia Mar Unified School District* v. *Honig* (1988) 44 Cal.3d 830, 835; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Unreimbursed costs do not a mandate make.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF THE STATUTES IN QUESTION SUPPORTS THE STATE'S POSITION THAT THERE IS NO MANDATE IN THE INSTANT CASE.

The County states that the legislation that is the subject of this claim has been recognized by the Legislature as a mandate. This is not accurate.

Government Code section 17575 requires the Legislative Counsel to determine whether proposed legislation mandates a new program or higher level of services as defined in Section 6 of Article III B of the California Constitution.

Pursuant to Government Code section 17575, the Legislative Counsel's determination has to be included in the digest of the bill. In both Chapter 1747 of the Statutes of 1984

and Chapter 1274 of the Statutes 1985, the Legislative Counsel described in the digest the mandates contained in the bills. For example, in the digest of Chapter 1747 of the Statutes of 1984, Legislative Counsel states ". . . This bill would create a state-mandated local program by imposing various requirements upon educational agencies. . ."; in Chapter 1274 of the Statutes of 1985, the Legislative Counsel concluded that ". . . This bill would be a state-mandated local program by requiring payments to be issued by the county welfare department to residential care providers upon receipt of authorization documents from the State Department of Mental Health or a designated county mental health agency. . ." [Emphasis added.] In both bills possible increases in local mental health services are not described as a state-mandated local program.

The courts have held it is reasonable to presume that the Legislature adopts legislation with the intent and meaning expressed in the Legislative Counsel's digest of the bill. (See, *Maben v. Superior* Court (1976) 255 Cal.App.2d 708, 713 and *People v. Superior Court* (1979) 24 Cal.3d 428, 434.) Since the digests of the legislation that is the subject of this Test Claim did not state that the mental health services delineated in the legislation are a state-mandated local program it can be presumed that contrary to the County's statement the Legislature did not recognize that Chapters 1747 and 1274 contained a state-mandated local program regarding local mental health programs.

II.

THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM DOES NOT MANDATE THAT THE COUNTY PROVIDE SPECIFIC SERVICES IT WAS PREVIOUSLY NOT REQUIRED TO PROVIDE.

The County argues that the legislation that is the subject of this Test Claim mandates that the County provide specific services it was previously not required to provide. However, the County mischaracterizes the law and the nature of the services that are delineated in the legislation in question.

In California, counties have a long history of being legally responsible for providing mental health services to their residents. (See, Joint Statement, pp. 34-44.) One of the fundamental services a provider of mental health services must provide is an assessment. An assessment is necessary in order to determine what services need to be provided.

If one were to believe the County's description of how it provided mental health services prior to the enactment of the legislation in question, one must believe that mental health services were provided without first ascertaining what services were needed and then providing those services without any review to see if the services were beneficial.[3]

The State cannot subscribe to the County's implicit picture of a disorganized provision of mental health services.

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3. It belies common experience to believe that any public service arrives without its accompanying administrative baggage.

Mental health services have always been provided with some type of assessment as to the need for such services.

The County makes a questionable assertion when it states that there has been a shift in ". . . the responsibility for assessing and funding Individual Educational Plan ("IEP") mental health needs away from the agency responsible for identifying those needs of services" (See, County Brief, p. 5, 11. 1-13). The law is quite clear that short of the fair-hearing/judicial review process, the County is the entity that determines what mental health services are needed (See, Joint Statement, p. 53).

III.

CHAPTER 1747 OF THE STATUTES OF 1984, CHAPTER 1274 OF THE STATUTES OF 1985 AND THEIR IMPLEMENTING REGULATIONS DO NOT MANDATE A NEW PROGRAM OR HIGHER LEVEL OF SERVICE ON THE COUNTY AS DEFINED IN SECTION 6 OF ARTICLE XIII OF THE CALIFORNIA CONSTITUTION.

The services that this legislation requires are mental health services. Counties have long had the responsibility of providing mental health services to their residents.

The Joint Statement summarizes the California delivery system for mental health services at pp. 34 and following. Each County has great discretion in formulating its own "Short-Doyle" plan to meet local needs to the extent that funds are available. In addition to the Short-Doyle monies provided by the State (and

the individual County's required match) each County may provide supplementary monies from its general fund for local mental health services -- as Santa Clara County has historically chosen to do'. Each County has very broad discretion in directing its mental health resources, since the very essence of the Short-Doyle Act is local administration and local control (W & I Code § 5600).

The Short-Doyle Act provides little absolute guidance to counties in formulating their local plans. While Welfare and Institutions Code section 5651 establishes the elements of the local plan only section 5651.1 identifies five categories of "priority populations" (one of which is "mentally disturbed children and adolescents" such as are addressed by the legislation at issue in this Test Claim) which must be considered and addressed in developing and providing services in a county mental health program. Even here, however, how they are considered and the extent to which they are provided for is a matter for local determination, Only section 5651.3 mandates that within the categories of service which the county chooses to provide, "acute and involuntary patients" shall have "first priority" for services.

Upon this highly flexible scheme -- and in direct response to federal mandate -- the Legislature has chosen to impose a single category of persons who have a special or super-priority to local mental health services -- handicapped children with such services written into their IEP pursuant

to the Education of the Handicapped Act (20 U.S.C. §§ 1400, *et seq.*). Such children were already subsumed within one of the five identified priority populations under section 5651.1. The legislation in question simply identifies them as having "head-of-the-line" privileges and, incidentally, tells county mental health programs to provide appropriate and necessary case management services in certain limited circumstances./' Nothing in the legislation requires or implies that the counties of California, including but not limited to Santa Clara County, must increase their level of mental health services, nor need they spend one single penny more on local mental health services as a result of this legislation. Accordingly, there are no new or increased mandated costs as that term is used in Article XIII B, Section 6 of the Constitution. *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.[5]

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4. Case management is required by the legislation in question only if residential placement is required in an IEP for a seriously emotionally disturbed child. (See, Joint Statement, at pp. 56-57.) This is not the only required case management in the Short-Doyle Act. Welfare and Institutions Code section 5675 requires that case management systems be developed by counties for target populations with high hospital readmissions.

5. The Auditor General issued a report in April 1987, which found that the number of special education students referred for non-educational services had increased since March 1, *1986,* (Report No. P-640, p. 17). A significant growth was recognized in the corresponding funding level in the 1987-88 budget. The State believes that any increase in the number of children being assessed'as needing mental health treatment is due to the shift in responsibilities among local agencies, not because of a mandate for a higher level of service.

IV.

SERVICES REQUIRED BY THIS LEGISLATION ARE NOT DISTINCT FROM SHORT-DOYLE MENTAL HEALTH SERVICES ARE REIMBURSED BY SHORT-DOYLE FUNDING.

The County argues that services required by this legislation are distinct from Short-Doyle mental health services which are reimbursed by Short-Doyle funding. This argument is in direct conflict with the law. Welfare and Institutions Code section 5651 delineates items that must be included in a county's Short-Doyle plan. Welfare and Institutions Code section 5651(g) states that a.description of the services required by Section 7571 and 7576 of the Government Code including the cost of those services must be included in a county's Short-Doyle plan. It is quite clear from this language that the Legislature intended that the services provided in accordance with Government Code sections 7570, *et seq.,* should not be distinct from other Short-Doyle mental health services.

As a general rule, community mental health services are provided pursuant to an annual Short-Doyle plan. Section 5707 of the Welfare and Institutions Code provides that a county's annual Short-Doyle plan is a contract between the county and the state. Services provided in accordance with an annual Short-Doyle plan are reimbursed at actual cost.

In 1983, the statutes were amended to allow the Director of Mental Health to negotiate net amount contracts between counties and the State Department of Mental Health in

lieu of the annual Short-Doyle plan and budget (Chapter 1207, Statutes of 1983). The negotiated net amount contracts are not audited to cost and the counties are able to utilize any savings that occur pursuant to the negotiated net amount contract. Provisions of a negotiated net amount contract must include, among other things, assurance of an adequate quality and quantity of services and an assumption of the financial risk by the County in providing all mental health services to the population described and enumerated in the approved contract within the negotiated net amount.

For the fiscal year 1986-87, Santa Clara County entered into a negotiated net amount contract with the State to render mental health services in Santa Clara County. In that contract, the language clearly states that the County has agreed to provide services in accordance with the following principal: "(1) a continuum of mental health services which are required by statute . , . ." The provision of related services pursuant to Government Code section 7570, et seq., is within the scope of this contract. Thus, any costs for mental health services to minors, which is a population that must be provided for (Welf. & Inst. Code § 5651.1), that are not reimbursed from the negotiated net amount are a financial risk the County assumed when it became a party to this negotiated net amount contract.

V.

THE LEGISLATION THAT IS THE SUBJECT OF THIS TEST CLAIM IS STATE LEGISLATION IMPLEMENTING A FEDERAL MANDATE.

The program delineated in Government Code sections 7570, *et seq.,* and the implementing regulations is a program mandated by the federal government in order to comply with requirements of the United States Constitution, federal statutes and regulations,

A reading of Government Code section 7570 clearly evidences the intent of the Legislature to address issues regarding California's compliance with Public Law No. 94-142, as amended (20 U.S.C. §§ 1400, et *seq.),* by further delineating the state's and local agencies' responsibilities under Public Law No. 94-142, which was first implemented in California in 1977.[6]

A. The Legislation That Is The Subject Of This Test Claim Does Implement A Federal Mandate Contained In Section 504 Of The Rehabilitation Act of 1973.

Consistent with the analysis by the United States Supreme Court in *Smith* v. *Robinson* (1984) 468 U.S. 992, it must be concluded as a matter of law that handicapped children have a constitutional claim to a free appropriate public education, and that when the United States Congress enacted Public Law No. 94-142 it recognized that a series of "landmark court

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6. The underlying constitutional nature of Public Law No. 94-142 is set out at pp. 5-8 of the State's Opening Brief.

cases" had evolved for the handicapped the right to equal education opportunity. In *Smith* the Court stated that Public Law No. 94-142 ". . . is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education. We concluded above that in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education." *Smith v. Robinson, supra,* at p. 1017.

B. The Lesislation That Is The Subject Of This Test Claim Is State Legislation Implementing A Federal Mandate Contained In The Education For All Handicapped Children Act Of 1975.

It is clear that the matters provided for in Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statues of 1985 and the implementing regulations are in essence required by the federal government in order to comply with the United States Constitution, federal statutes and regulations.

The legislation on its face indicates that it is federally driven and is not a new state mandated program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

c!. **Counties, As Agencies Of The State, May Be Required To Perform Services On Behalf Of The State.**

It is undisputed that both counties and school districts are agencies created by the State to in large part perform State functions at the local level.[7] Accordingly, when the State is mandated by federal law to undertake certain activities, the fact that it chooses to delegate primary local responsibility for accomplishing the task is a matter within the sound discretion of the appropriate legislative and/or executive officials of the State.

VI.

GOVERNMENT CODE SECTION 17513 IS NOT UNCONSTITUTIONAL AS APPLIED TO THIS TEST CLAIM.

The day has long since passed when it can seriously be argued that a state is not under a mandatory constitutional duty to provide a free and appropriate public education for handicapped children resident therein. Only in the most technical sense could any state's participation in the federal EHA be characterized as "optional" -- and, as shown above, even if a state chose not to participate in EHA its underlying federal constitutional obligation to provide handicapped children with a free public education and such related services as may be necessary for them to benefit therefrom would remain unchanged.

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7. See, 45 Cal.Jur.3d, Municipalities, §§ 3 and 114 [counties] and 56 Cal.Jur.3d, Schools, § 58 [school districts],

The provision of a free and appropriate public education for handicapped children, and appropriations therefore, are simply not a matter over which the State of California has any fundamental discretion. While the State clearly has discretion to assign functional responsibility for providing services to appropriate subordinate local entities (or to provide such service directly) it clearly has no discretion to say that the services in question shall not be provided.

Accordingly, compliance with EHA is so far beyond the optional or the discretionary as to make the concept of inducement by monitory reward alone (as in the case of City of *Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 198, and Government Code section 17513) simply irrelevant. Granted, the EHA contains a tasty federal carrot -- but the federal government and each of the thousands of parents of handicapped children holds in his or her hand a truly compelling legal stick. It is the presence of this stick which removes the element of discretion&' -- as well as the need to interpret section 17513 as the County would do.

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8. See, Cal. Const. Article XIII B, section 9(b).

CONCLUSION

The State is not unsympathetic to the County's attempt to maintain stability in its mental health program in an era of relatively diminished resources. However, though the County's presentation is artful it is ultimately smoke and mirrors rather than substance, California gives its 58 counties a great degree of local control over local mental health services. The legislation in question has imposed relatively minor requirements in one small portion of the whole and left the counties with virtually unfettered discretion to adjust to this small imposition. No increase in overall effort is required by the State, nor is a new program laid on the counties, Accordingly, there is no "mandate" and the State should prevail in these proceedings.

DATED: February 24, 1989.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California

CHARLTON G. HOLLAND, III
Assistant Attorney General

STEPHANIE WALD, Supervising
Deputy Attorney General

HARLAN E. VAN WYE
Deputy Attorney General

Attorneys for Respondents

DECLARATION OF SERVICE BY MAIL

Re: In the Matter of the TEST CLAIM OF COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS.

No. N-30939

I, JUDIE A. BRICE declare that I am over 18 years of age, and not a party to the within cause; my business address is 350 McAllister Street, Suite 6000, San Francisco, California 94102, I served a true copy of the attached

REPLY BRIEF ON BEHALF OF THE STATE OF CALIFORNIA

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Susan Chapman
Deputy County Counsel
70 West Hedding Street, 9th Floor
San Jose, California 95110

Each envelope was then, on February 24, 1989, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on February 24, 1989, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

JUDIE A. BRICE
(Type Name)

Judie A. Brice
DECLARANT

BEFORE THE
COMMISSION ON STATE MANDATE
STATE OF CALIFORNIA

a the Matter of the Test Claim [SANTA CLARA COUNTY	OAH No. N-30939

REPORTER'S TRANSCRIPT
December 1, 1907
Sacramento, California

EFORE: KEITH A. LEVY
Administrative Law Judge
Office of Administrative Hearings

PPEARANCES:

or Appellant: SUSAN A. CHAPMAN
Deputy County Counsel
County of Santa Clara
Administrative Building
9th Floor, East Wing
70 West Hedding Street
San Jose, CA 95110

or Respondent: JOHN K. VAN DE RAMP, Attorney General
BY: HARLAN E. VAN WYE, Deputy
350 McAllister Street, Room 6000
San Francisco, California 94102-3600

EPORTER: PATRICIA L. FITZGERALD, CSR #2687
ffice of Administrative Hearings

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OFFICE OF ADMINISTRATIVE HEARINGS

WITNESSES

APPELLANT'S:	DIRECT	CROSS	RE-DIRECT	RE-CROSS	ALJ
PORTER, Robert F.	7	20	41 51	46 53	55
WYTOCK, David	69	70	76	79	77

EXHIBITS

APPELLANT'S:		FOR ID.	IN EVIDENCE
1	Joint Statement of Facts and Positions	1	5
2	Declaration of Robert F. Porter		17
3	Declaration of David Wytock		17
4	Negotiated Net Amount Contract 1986-87		18
5	Report by Auditor General, 12/23/86		18
6	Support Declaration, County of Riverside		19
7	Support Declaration, County of San Francisco		20
ESPONDENT'S:			
A	Commission Letter and Documents, 2/18/88	1	5
B	Notice of Pre-hearing Conference	1	5
C	Pre-hearing Order	1	5

1 SACRAMENTO, CALIFORNIA, THURSDAY, DECEMBER 1, 1988, 9:50 A.M.

ADM. LAW JUDGE: This is the hearing in the Matter of the Test Claim of the County of Santa Clara dealing with handicapped and disabled students. We first met and had a pre-hearing conference on April 22, 1988. And we have had a number of conference calls, and a joint statement of facts and positions have been generated and marked for identification.

What number did you want to give that?

MS. CHAPMAN: I think Exhibit 1.

MM. LAW JUDGE: That will be Exhibit 1. Okay? And that's a 66-page document, dated December 1st, 1988, and signed by Harlan E. Van Wye, Deputy Attorney General, representing the Department of Education, Finance and Mental Health; and Susan H. Chapman, Deputy Attorney for the County of Santa Clara. And that has been marked Exhibit 1.

And I have also marked as Exhibit capital A the Commission letter of February 18, 1988, and the Commission's file of documents that were sent in this matter; capital B is a notice of pre-hearing conference, and C is the pre-hearing order.

The case is being heard before the Commission on State Mandate for the State of California on December 1, 1988, in Sacramento, California.

I would like to get the appearances starting first with the County.

MS. CHAPMAN: Susan Chapman, Deputy County Counsel, appearing on behalf of the County of Santa Clara.

1 MR. VAN WEY: Harlan E. Van Wye, Deputy Attorney General,
2 appearing on behalf of the State.
3 MM. LAW JUDGE: Thank you. Okay. We had a discussion
4 before wc went on the record as to what we would be doing here
5 today, and we are going to take some testimony from a few
6 witnesses, and at the conclusion of taking of the testimony we
7 are going to arrange for a briefing schedule to brief and make
8 the closing arguments in this matter to be concluded by the end
9 of January.
10 Ms. Chapman indicated that she would like to make a brief
11 opening statement to kind of give a background for this test
12 claim.
13 Ms. Chapman, would you like to do that now?
14 MS. CHAPMAN: Thank you, your Honor.
15 The issue that is before you being referred from the
16 Commission on State mandates is whether or not the legislation
17 subject to this test claim creates a mandate as defined under
18 the California Constitution and California state law. And so
19 the questiontoday is whether it's -- whether it is a mandate.
20 We wanted to introduce some evidence as to the dollar
21 impact of this legislation on the County of Santa Clara because
22 I think that it's important that you have an idea of the impact
23 in order to make a determination as to whether or not it's a
24 mandate, but if you find that there is a mandate and the
25 Commission finds that there is a mandate, there will be other
26 procedures down the road that will define exactly what that --
27 you know, in dollars and cents what that mandate is; what the
28 parameters and guidelines are. So the facts that will be

1 introduced as to the significance of the claim are mainly to
2 give you -- sort of put you in the ballpark.
3 This is a claim that has to do with mental health
4 services for handicapped students. And legislation primarily
5 went into effect and impacted the County in fiscal year 1986-87
6 which is the subject of this test claim.
7 The evidence I think will be uncontradicted that this
8 legislation requires the County to do some things it did not
9 have to do before, the services that the County is required to
10 provide pursuant to this legislation -- services to handicapped
11 students. And those handicapped etudents have a right to those
12 services under Federal law. So this puts it in a whole
13 different ballpark for the County.
14 The County generally provides mental health services to
15 the population and makes its decision about how it is going to
16 spend its resources. This is a very different program in that
17 under Federal law and under State law certain handicapped
18 children who need mental health services in order to take
19 advantage of their education are entitled to receive them, and
20 the formal procedures to have that happen are clear. They have
21 a right to ask for a fair hearing or to go into court if they
22 feel they are not getting the services they are entitled to.
23 This is the only mental health entitlement program; other
24 mentally ill people in the County sort of have to stand in line.
25 The legislation specifically requires the County to enter
26 into interagency agreements with educational agencies. It
27 requires them to conduct a very particular special kind of
28 mental health assessment following State regulations. And it

1 requires the County to participate in what really is the
2 educational process in the form of IEP meetings, Individual
3 Education Program meetings for children. And it requires the
4 County to provide mental health services that a child needs in
5 order to benefit from his education. And it requires the County
6 to provide case management services and to be part of the team.
7 And that the cost of those services is substantial. And the
8 services that are provided for those children are not the same
9 as all mental health services that are provided to those sick
10 children.
11 There is a large population in Santa Clara County of
12 children in need of mental health services. This legislation
13 picks out a sub-group of that population, children whose mental
14 health problems leads them to have difficulties in education.
15 And it happens over a long period of time. And a number of
16 other requirements are met. Those kids get, basically, to be
17 put at the head of the line. And they receive services before
18 anybody else. The IEP, the program for delivering mental health
19 services to handicapped students begins from Federal statutes,
20 and the State has opted into a plan that requires them to follow
21 the Federal guidelines.
22 This legislation shifted some responsibility that
23 previously had been held by school districts to the Mental
24 Health Bureau. There was a small shift of funding, but the
25 shift of funding was willfully inadequate and did not provide
26 for cost -- did not reimburse the County for all of the costs of
27 the program.
28 And I just wanted to say that much by way of opening and

1 :hen ark that Exhibit, that the document marked as 1 for
2 ɔurposes of identification be moved into evidence. That's the
3 ;6-page document entitled Joint Statement of Pacts and
4 ?ositions.
5 ADM. LAW JUDGE: Any objection?
6 MR. VAN WYE: No objection, your Honor.
7 ADM. LAW JUDGE: Okay. Exhibit 1 is admitted.
8 MS. CHAPMAN: We would then ask that the Commission's
9 Letter and the Commission's file be moved into evidence?
10 ADM. LAW JUDGE: Any objection?
11 MS. CHAPMAN: Marked as Exhibit A.
12 MR. VAN WEY: No objectian to A, B, or C, your Honor.
13 ADM. LAW JUDGE: Okay A, and C are admitted.
14 MS. CHAPMAN: At this particular time I would call
15 Robert Porter.
16 ADM. LAW JUDGE: Well, let me just see if Mr. Van Wye
17 has any opening statement that he wants to make.
18 MR. VAN WEY: Well, I really hadn't, your Honor, prepared
19 an opening statement. I think the State's position is clear
20 from the documents that have been already in evidence and most
21 of which, I think, you have had a chance to examine.
22 Basically, the two principal arguments that the State has
23 that does not constitute a mandate -- or that the legislation in
24 question is implementing a Federal requirement. And, secondly,
25 that, as Ms. Chapman alluded to, in fact, specifically mentioned
26 is what this does is it creates -- is telling the counties the
27 priorities in which they utilize mental health dollars. Not
28 telling the counties to spend anymore, simply saying that of

1 the -- it's by way of saying of the population in need of mental
2 health services within Santa Clara County certain groups need to
3 be served first, and not mandating an incrcaee level of anything
4 for the County, but rather just simply --
5 The State in its wisdom in exercising its police power or
6 its sovereign power is toward the counties who are, of course,
7 creatures of the State, and is simply directing them to
8 prioritize them in a way that the State legislature has the
9 legitimate authority to tell them how to prioritize money that
10 they were receiving from the State.
11 With that I have no further questions and -- no further
12 statement, rather, and it will -- our position will be set out
13 in the briefs to follow.
14 ADM. LAW JUDGE: You had said that you had two principal
15 arguments. Did you include both of them in that?
16 MR. VAN W'YE: Well, the Federal and the prioritized.
17 ADM. LAW JUDGE: Okay. Ms. Chapman, you may proceed.
18 MS. CHAPMAN: I would call Robert Porter.
19 ADM. LAW JUDGE: Step forward and raise your right hand
20 and I will swear you in.
21
22 ROBERT F. PORTER,
23 called as a witness by the Appellant, was sworn and testified as
24 follows:
25 ADM. LAW JUDGE: Okay. Please have a seat right there.
26 And if you will state your full name and spell it.
27 WITNESS: It's Robert F. Porter, P-o-r-t-e-r.
28 ADM. LAW JUDGE: Thank you. You may proceed.

DIRECT EXAMINATION

BY MS. CHAPMAN:

Q. Mr. Porter, what is your occupation?

A. I am a psychiatric social worker working for the Mental Health Bureau of Santa Clara County.

Q. And what roles do you hold as a psychiatric social worker?

A. As a psychiatric worker I hold the roles of *Children's* Coordinator for the Mental Health Bureau and also as a Health Services Supervisor.

Q. And what are your responsibilities as Children's Coordinator for the Bureau.

A. Okay. In general, I coordinate the activities of the services of children-adolescents in Santa Clara County and act as liason to other departments and agencies, oversee a child-adolescent coordinating group which is a consortium of county and contract providers and mental health services of Santa Clara County; then various other duties as I am directed by the Mental Health Bureau of directors.

Q. And then how long have you held that position?

A. Since 1985.

Q. And how long have you worked for the County as a psychiatric social worker?

A. Since January of 1984.

Q. And you have before you a document. Could you describe that document?

A. Okay. It's a declaration of -- that I had signed today. Do you want me to describe it?

1 Q. Yes.

2 A. Okay. It's a declaration of my responsibilities

3 within the Mental Health Bureau of the County of Santa Clara;

4 specifically, my involvement in relation to implementing

5 services in our AB 3632 program which were our program services

6 that have been mandated through, as I would describe the

7 statutes, 1985 and '86 and that relate to AB 836 and 832.

8 And, also, in it I state my process for not only being

9 involved with the program but in reviewing the data, the

10 information that's available that supports this test claim.

11 Q. Have you ever --

12 And this is a document that's 14-pages in length and has

13 an exhibit A, B, and C attached to it. Is that right?

14 A. Yes, it is.

15 Q. Have you reviewed that document?

16 A. Yes, I have.

17 Q. And you signed it under penalty of perjury?

18 A. Yes, I have.

19 Q. Does it accurately set forth -- is it a true

20 statement?

21 A. Yes, it is.

22 Q. Mr. Porter, are you familiar with the impact of

23 AB 3632 on the County --

24 A. Yes, I am.

25 Q. -- 1986 and '87. If you could wait for the end of

26 my question.

27 What was the impact on the County?

28 A. Okay. In general, the impact has been an

1 increasing impact where it's increasingly --

2 Should I say we have had to prioritize our --

3 rc-prioritize our general services, general mental health

4 services for children and adolescents in Santa Clara County in

5 that these youngsters in our understanding in implementing the

6 regulationa are that they have priority.

7 And we have had to assess these kids as they have been

8 referred through the process by school districts. We have had

9 to serve them with the specific mental health needs that were

10 assessed end have to do that following very specific legal time

11 lines.

12 The major impact for us has been that it has increased

13 our waiting list for other kids who have been referred through

14 our general population that we had been serving previously. And

15 I would say that's probably it, generally.

16 A specific issue that has come out of that, that has been

17 real clear, is that this being a mandate having to serve these

18 youngsters we are now having --

19 MR. VAN W-YE: Your Honor, I am going to object. It's not

20 responsive to the --

21 ADM. LAW JUDGE: Okay. Just wait for the question.

22 BY MS. CHAPMAN:

23 Q. Are the children that are seen through the AB 3632

24 program the same children that otherwise would be seen by the

25 County?

26 A. Not necessarily.

27 Q. Could you explain?

28 A. Yes. We are required under AB 3632 to provide

1 treatment services or pay for those for all youngsters who are
2 duly referred to us through special education and that we assess
3 and deem that their assessment results in their needing
4 treatment.
5 Those youngsters, all the ones that we have done, are not
6 necessarily the same youngsters that we had seen previously.
7 There are many youngsters that are not as disturbed as we had
8 seen previously; that in our priority for Santa Clara County
9 would not be youngsters that would be at the top of our waiting
10 list, for example. And, specifically, we are having to see kids
11 that are less disturbed than kids who are more disturbed that we
12 are not able to see in our other general population.
13 Q. And the AB 3632 program requires that you provide
14 these services free of charge?
15 A. Yes, they do.
16 Q. Are you serving children who otherwise -- serving
17 free children who otherwise would have to pay 100 percent for
18 the cost of the services provided?
19 A. Yes, we are.
20 Q. Does the --
21 MR. VAN WEY: Your Honor, I am going to object to that
22 last question and move that it be stricken on the 'grounds of
23 relevance. I mean, what relevance does that have to the issues
24 of whether there is a mandate.
25 ADM. LAW JUDGE: Do you have an offer of proof?
26 MS. CHAPMAN: I forget what the question was. Could I
27 have it read back? I am sorry.
28 (The question was read.)

1 MS. CHAPMAN: Part of the definition of a mandate is --
2 has to do with increasing services or, I believe, decreasing the
3 revenue opportunities for the County.
4 The fact that we have -- we are serving children who
5 otherwise would be served by private providers, or would have to
6 pay 100 percent for the services if it were not through this
7 program, certainly is an impact on having to serve youngsters
8 free as a part of the mandate.
9 MR. VAN WYE: Whether or not a parent has to pay for
10 services does not seem to me to be particularly germane to the
11 issue as to whether there is a mandate on -- the State law
12 creates a mandate. I think that was the thrust of the question.
13 ADM. LAW JUDGE: I don't know. You know, I suppose
14 that -- 1 haven't read enough background to be really able to
15 rule on that, and I would like to leave it in.
16 MR. VAN WYE: I can appreciate the difficulty you are in
17 and --
18 ADM. LAW JUDGE: I mean, it would seem to me just in a
19 general sense that wherein a mandate requires a county to add a
20 service or increase their existing services that perhaps seeing
21 mentally -- or having to assess mentally disturbed students free
22 of charge where otherwise those same students would have to pay
23 ,100 percent of an assessment if they -- if their parents or some
24 other private provider made that request could be relevant to
25 whether the County was asked to increase their services. You
26 know, this is without having a tremendous amount of background
27 in this particular area, it would seem like the possibility of
28 relevancy is certainly there.

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1 MR. VAN WEY: Perhaps, I could Bake this -- I understand,
2 I think, your problem.
3 Perhaps, I could make this a continuing objection and you
4 could rule on it at the time that you deem appropriate, and that
5 He. Chapman could continue to present such evidence that she
6 thinks she needs to have.
7 MM. LAW JUDGE: Yea. I think probably the best way of
8 going about this is that you should make your objection when you
9 do not think it's relevant to filing a mandate or not. And then
10 in your closing briefs, of course, you could address this, and I
11 would eventually rule in my proposed decision.
12 MR. VAN WYE: Yes. In order to avoid having to hop up
13 and down every time, let me just say that I have a continuing
14 objection to this entire line of questioning and leave it at
15 that and request that you make a ruling in your decision.
16 ADM. LAW JUDGE: Okay. And I would request that you
17 point out in what way you felt that it was not relevant in terms
18 of your closing brief. Okay? I am sure you will be doing that
19 anyway.
20 I will grant you your continuing' objection.
21 BY US. CHAPMAN:
22 Q. Has this program also resulted in the County seeing
23 children who otherwise would be seen by private providers?
24 A. Yes, it has.
25 Q. How many children were seen under this program for
26 1986-87?
27 A. 568.
28 Q. And of those 568 were some of those children new to

1 the County mental health bureau system?

2 A. Yen, they were.

3 Q. How many were new referrals, of children who had

4 never received mental health services from the County before,

5 out of the 568?

6 A. If I may refer to my declaration. 33.6 of those are

7 new to our system.

8 Q. How many children --

9 This program can result in a child being referred into a

10 residential treatment program. Isn't that right?

11 A. Yes.

12 Q. And being placed out of home. During 1986-87, how

13 many children were placed out of home pursuant to AB 3632?

14 A. Thirteen children.

15 Q. Are there other children who the County has some --

16 County mental health has some responsibility for who were placed

17 out of home during that year?

18 A. Yes. Those for the State hospital.

19 Q. How many -- approximately, how many children were

20 placed in the State hospital?

21 A. During '86 and '87 it would have been approximately

22 30.

23 Q. And were there also some children who were placed

24 in sub-acute residential treatment centers for whom the County

25 was paying some mental health funding?

26 A. Yes, there were.

27 Q. And approximately how many were there?

28 A. I would say approximately 24.

402

1 Q. Were these 30 children in the State hospital and
2 the 24 in the -- would the 30 in the State hospital be the most
3 acutely ill?
4 A. Yes, they would.
5 Q. And were any of those children placed in the State
6 hospital pursuant to AB 36321
7 A. No, they were not.
8 Q. Were any of 24 that were in residential treatment
9 that the County was providing some mental health services, were
10 any of those receiving the mental health services pursuant to
11 IEPs.
12 A. No, they were not.
13 ADM. LAW JUDGE: Which? This is the residential
14 treatment centers?
15 MS. CHAPMAN: Yes.
16 BY MS. CHAPMAN:
17 Q. How do the -- are these children and some of the
18 other children seen by the County sicker than many of the
19 children, the 5683
20 MR. VAN WEY: I am going to object to that question.
21 Really, lack of foundation. I simply don't understand "sicker."
22 You know, there seems to be a lot of -- and with all due respect
23 to my colleague and respect to Mr. Porter there is some terms
24 that are being bandied about that are professional terms with no
25 reference of definition. And, again, it also is an issue of
26 relevance, continuing issue of relevance to this whole line of
27 questioning.
28 ADM. LAW JUDGE: Okay. Perhaps you could break this down

1 just a little bit because I was unclear what you meant by that
2 last question as well.
3 us. CHAPMAN: Let me say it a different way.
4 BY MS. CHAPMAN:
5 Q. Does -- the children who are in State hospitals,
6 the estimated 30 children in 1986-87, were those the most
7 acutely disturbed children in the County?
8 A. Yes, they were.
9 Q. And the County also provided adolescent day
10 treatment services. Were all of the students in adolescent day
11 treatment receiving the adolescent day treatment in 1986-87
12 through IEPs?
13 A. No, not all.
14 Q. Thank you. Could you describe for us the kind of
15 children who are in acute need of mental health services who do
16 not qualify for services under AB 36321
17 A. Okay. Examples would be the 36 youngsters placed
18 in the State hospital which are the most acutely mentally
19 disturbed youngsters in that they require a locked facility for
20 dealing with their mental disorder. That's not true of other
21 youngsters. That's not true of any of the youngsters that were
22 referred to in 3632 as examples.
23 As examples of kids who do not qualify are youngsters who
24 have acute crisis that might even require them being
25 hospitalized in an in-patient unit because of being acutely
26 suicidal, possibly even dangerous to others, but it's a short
27 term problem that is expected with either in-patient and/or
28 out-patient treatment to have the situation resolved within a

1 matter of several weeks or a few months. Those Youngsters do
2 not qualify under 3632 because the problems exhibit -- they
3 exhibit, haven't been for a long period of time.
4 If the youngster is functioning adequately in school, or
5 even adequately, or making adequate progress in his or her
6 special education program and suffer any kind of a aerious
7 mental or emotional disturbance they don't qualify.
8 And may I refer to my declaration, if I am answering the
9 question that you are asking.
10 MS. CHAPMAN: I think that maybe at this point, since the
33 judge has not had an opportunity to review your declaration,
12 rhat I would ask is that the declaration be marked for
13 identification as 2 and admitted into evidence as Exhibit 2.
34 MR. VAN WYE: I have no objection to the declaration being
15 aarked and admitted subject to, essentially, the continuing
16 objection that I have as to the relevance of some of the data as
37 to the cost; in fact, the parents don't have to assume some of
18 the cost on it. And, also, with the understanding, of course,
39 that all data with respect to cost is simply to give you a sense
20 of proportions of the problem. And that I don't -- it's my
6
21 understanding and, I believe, Ms. Chapman's understanding, that
22 the scope of the mandate, the amount, the dollar amounts of the
23 mandate is not something that is before the Commission at this
24 time, but only whether or not there is a mandate.
25 And subject to those comments I have no objection to the
26 admission of that document. And, in fact, perhaps it might be
27 useful.
28 We have previously discussed a number of documents that

1 Ms. Chapman wants to admit. I can stipulate them all in at this
2 [illegible] nd perhaps you might rant to take a recess and examine
3 them or proceed on with the witnesses at pours and Ms. Chapman's
4 pleasure.
5 MS. CHAPMAN: It would be fine with me to have the
6 remaining documents admitted into evidence and we can take a
7 break, and then we can just have Hr. Van Wye have an opportunity
8 to do a cross of Mr. Porter and do a cross of Mr. Wytock whose
9 declaration at that time will have been put into evidence.
10 ADM. LAW JUDGE: Okay. The declaration of Robert F.
11 Porter is admitted as Exhibit 2.
12 MS. CHAPMAN: I would ask that the declaration of David
13 Wytock, which is a six-page declaration, with exhibits A, B, and
14 C attached be admitted as Exhibit 3.
15 MR. VAN WYE: Without objection.
16 MM. LAW JUDGE: Okay. Exhibit 3 is admitted.
17 MS. CHAPMAN: And I would ask that the County of Santa
18 Clara's "Negotiated Net Amount Contract" for fiscal year 1986-87
19 between the State Department of Mental Health and Santa Clara
20 County, cover sheet is dated December 23, 1986, it is a 20-page
21 document with exhibits A, B, C, D, E, F, G, H attached. And
22 attached to it are attachments 1, 2, and 3 which are the budget
23 information that were submitted at the time of the contract.
24 Exhibit 5 is a report by the Auditor General of
25 California, dated April, 1987. And it's a numerous Page
26 document and ends with Page 28 which was a responsive letter
27 signed by D. Michael O'Connor, M.D., Director of Mental Health
28 for the State. And I would request that that be introduced into

1 evidence as Exhibit 5.

2 MM. LAW JUDGE: Okay. Was there any objection to

3 Exhibit 4 coming in, the "Net Amount Contract"?

4 MR. VAN WYE: No. No objection, your Honor.

5 MM. LAW JUDGE: Okay. That will be admitted.

6 How about the report of the Auditor General. Exhibit 5?

7 MR. VAN WYE: No objection.

8 ADM. LAW JUDGE: Okay. It's admitted.

9 MS. CHAPMAN: I would ask that the supporting declaration

10 of the County of Riverside, dated November 17, be admitted as

11 Exhibit 6. It's a three-page document and it is signed by John

12 J. Ryan, Director, of the County -- Riverside County Department

13 of Mental Health.

14 MR. VAN WYE: I have no objection to its admission with

15 the proviso that really it is argument, and it's in the nature

16 of a brief rather than a fact.

17 So I will have no objection to its being admitted, again,

18 with the understanding that this is -- while it's an exhibit,

19 it's in the form of an amicus brief rather than stating a

20 factual situation in the most part, or at least certainly large

21 portions of it are conclusionary and argumentative.

22 There are some facts that are stated and that we have no

23 reason to doubt the veracity of the numbers, but we can't

24 stipulate to the numbers. We haven't had a chance to

25 cross-examine Riverside County, but those portions which --

26 Essentially, what we would say is we will agree to the

27 admission of this document with the proviso that it be

28 considered as argument rather than as fact.

1 MM. LAW JUDGE: Do you have any problem with that?
2 MS. CHAPMAN: I don't have a problem with that.
3 ADM. LAW JUDGE: Okay. ' Exhibit 6 is admitted.
4 MS. CHAPMAN: We would ask that Exhibit 7 be admitted.
5 This is a document -- actually, a two-part document 'from the
6 City and County of San Francisco.
7 The first is a letter to you, your Honor, dated April 21,
8 1988, signed by Paula Jesson, Deputy City Attorney. And the
9 second part is a two-page declaration from Reiko Homma True from
10 the City and County of San Francisco. She is the Assistant
11 Director of Health for Mental Health Programs.
12 And this, like the supporting declaration from Riverside
13 County, I would assume the State would ask to be admitted more
14 in the form of an amicus rather than evidence.
15 MR. VAN WYE: Yes. That's correct, your Honor. With the
16 previous understanding with regard to Riverside County applied
17 to Exhibit 7 we have no objection to their admission.
18 ADM. LAW JUDGE: What are you calling Exhibit 7 now?
19 MS. CHAPMAN: It's a four-page document. The first
20 two-pages are from the Office of the City Attorney, the second
21 two are from the Department of Public Health, both from the City
22 and County of San Prancisco.
23 ADM. LAW JUDGE: Okay. I am going to call this the San
24 Francisco document, and it is a 40 some odd page document?
25 MR. VAN WYE: Yes.
26 ADM. LAW JUDGE: You see, I have a little line that's
27 about that long and that wide. You see, I have to come up with
28 some catch phrase, you know, to put in there.

1 MS. CHAPMAN: San Francisco supporting letter.

2 ADM. LAW JUDGE: Okay. That's admitted.

3 MS. CHAPMAN: Okay. That's it.

4 ADM. LAW JUDGE: So would you like me to take a break and

5 read over these documents now.

6 MR. VAN WEY: I think it may be useful. Can we go off

7 the record?

8 ADM. LAW JUDGE: Yes. Let's go off the record.

9 (Recess.)

10 MM. LAW JUDGE: Back on the record. You may proceed.

11 MS. CHAPMAN: I will pass the witness.

12 ADM. LAW JUDGE: Okay. Cross-examination.

13 MR. VAN WYE: Yes.

14

15 CROSS EXAMINATION

16 BY MR. VAN WEY:

17 Q. Mr. Porter, just a couple of questions. Referring,

18 specifically, to Paragraph 10 of your declaration, which is

19 found on Page 13, what is your knowledge --

20 Do you have any responsibility with regard to

21 prioritizing the County Department of Mental Health budget?

22 A. It's a limited responsibility as Children's

23 Coordinator.

24 Q. What is your responsibility in this area?

25 A. As a Children's Coordinator it's in a complicated

26 capacity. And as the Chairperson of the Children's Coordinating

27 Group I am periodically asked to give feedback -- information to

28 the Bureau policy group, the Director of Mental Health, from all

1 of the providers. In that sense it surfaces each pear around
2 budget time when we talk about priorities in children.
3 Q. To your knowledge, how does the County decide how
4 to allocate it's mental health dollars among the various
5 competing communities? I mean, communities not necessarily in
6 the geographical sense, but in the functional sense within the
7 mental health budget?
8 A. I could speak more about children services.
9 Q. Perhaps, the next witness might be the more
10 appropriate one to ask.
11 Could you tell us how you make those allocations among
12 children's services?
13 A. All I can say is my input into that is related more
14 to clinical priorities. I make that input. I can't say,
15 specifically, how the Bureau does that. I mean, I am part of
16 all that; ultimately, I don't think I can say.
17 Q. Well, in your declaration, and that's why I
18 prefaced this line of questioning with the reference to your
19 declaration, you indicate that the County's loss has
20 flexibility:
21 "Generally, the County has the flexibility to
22 determine treatment priorities, given limited
23 resources. The County has lost this flexibility
24 with regard to IEP-related services, as the
25 legislation mandates that the County provide
26 mental health services pursuant to IEPs, regardless
27 of the severity of the mental condition, and
28 regardless of funding limitations."

1 A. Excuse me, which page are we on?
2 Q. We are on Page 13.
3 A. I am sorry. Wrong page.
4 Q. Yea. Paragraph 10, Page 13.
5 A. Yes. Thank you.
6 Q. Prior to the enactment of the legislation in
7 question, were all -- were there funds available to serve all
8 the mental health needs for children in Santa Clara County?
9 A. No.
10 Q. Subsequent to -- what populations were being served
11 and what populations were not being served prior to the
12 legislation in question?
13 A. Okay. The populations being served -- I think,. to
14 answer more directly the part of your earlier question --
15 Within mental health there is a certain amount of
16 discretion given to local -- to each of the mental health
17 providers to determine priorities, some priorities within
18 parameters.
19 Q. When you say "mental health provider," do you mean
20 someone who is employed by the County as a County employee or
21 someone who is a private mental health provider under contract?
22 A. I would be speaking of a unit or a program.
23 Speaking of a program it might be one of the seven county mental
24 health out-patient clinics. It might be a private contract
25 agency. One of the --
26 Q. So it would be a combination of employees and
27 contractors that provide -- collectively provide mental health
28 services in Santa Clara County?

1 A. Uh-hum, uh-bum.

2 Q. Now with regard -- and I take it your answer is in

3 the affirmative. The reporter sort of has trouble picking up

4 uh-hums.

5 A. Yes.

6 Q. Yes's and no's, generally.

7 A. Okay.

8 Q. So the answer is in the affirmative?

9 A. Yes.

10 Q. Okay. The mental health providers prior to the

11 legislation were not serving the needs of all of the eligible

12 population in the County in the children's area. Is that

13 correct?

14 A. Correct.

15 Q. How was -- how was it determined prior to the

16 legislation in question who would get services and who would not

17 get services?

18 A. Primarily, I would say on the clinical, the

19 clinical definitions and clinical priorities. And what I am

20 saying, too, based on the out-patient services, based on the

21 priorities in a given region.

22 For example, in an out-patient clinic we have a general

23 understanding of priority. We have to serve youngsters who are

24 a danger to themselves or others, youngsters who are in acute

25 crisis, youngsters who may need hospitalization, youngsters who

26 will require a higher level of care if not treated immediately,

27 walk-in services: that kind of thing. And in the last several

28 years it ends up that every clinic has had a waiting list and is

1 constantly triaging priority time.

2 Q. When you say in the last several pears, you mean

3 several years before the legislation in question, or pre-1985?

4 Or are we talking between '85 and '88?

5 A. No. I would say pre-1985, absolutely.

6 Q. Well, this line of questioning that I am dealing

7 with is prior to the legislation in question.

8 A. Uh-hum, uh-hum.

9 Q. So pre-1985 you had a hierarchy of priorities that

10 generally you were trying to direct your mental health assets

11 towards the more severe situations leaving occasionally a

12 fallout of relatively severe things, problems that just weren't

13 being handled. Is that correct?

14 A. Yes, generally so.

15 Q. Okay. Now, what has been the affect of the

16 legislation in question with regard to prioritizing the process

17 and the clients that are being served in Santa Clara County?

18 A. Okay. These youngsters are a top priority. One

19 example would be one of the smaller children's clinics, one of

20 seven, would have a waiting list: would be serving in that

21 program's judgment the most severe youngsters. And with the

22 advent of this law these youngsters get referred in and are not

23 on the waiting list and go right into service, creating larger

24 waiting lists and kids that that particular center had

25 clinically judged in higher need of service.

26 We have kids on a waiting list that need to be seen more

27 than once a week service, for example, that are now on a waiting

28 list. And then a decision is made to see a youngster under this

1 legislation that may need once a week therapy, for example.
2 Q. Were the children who are currently served in Santa
3 Clara County by virtue of having mental health services as a
4 component of their IEPs, would these children be eligible --
5 would these children have been eligible for mental he'alth
6 services from Santa Clara County prior to the enactnient of the
7 law?
8 A. Some would.
9 Q. Who would and who would not?
10 A. That would have been on a clinical determination.
11 Q. Could you explain how determination would be made
12 as to why some person would be eligible for services and why
13 some person would not be eligible for services?
14 A. Okay.
15 Q. And my question is not -- and let me just clarify
16 my question.
17 It's not that they would necessarily get the services
18 because of the prioritizing that you have previously explained,
19 but would they be eligible for services?
20 A. Yes. The term "eligible," I am sorry, does confuse
21 it. Yes, many kids are eligible. We may have in the general
22 population many thousands of kids that are eligible that we
23 don't even know about. So, yes, kids would be eligible. But
24 again, we determine those kids that have become known to us
25 either have been referred in to us by whatever source and then
26 we make a decision based on pretty much clinical reasons. An
27 example of that would be like a youngster -- like someone I had
28 described earlier where each of our centers and all of our

1 private agencies have some emergency crisis responsive
2 capability and that shows a top priority. And if a youngster
3 comes in that is seriously disturbed and is a suicidal youngster
4 or maybe a youngster that is in acute distress from a recent
5 crisis, tragedy in the family, or whatever, would be a youngster
6 under any circumstance that would be a priority for us.
7 Q. Is it fair to say that if a person, a child in
8 Sante Clara County, is identified as being in need of mental
9 health services, that he or she is, at least, technically,
10 eligible to receive these services from county mental health,
11 perhaps for free, perhaps having to pay for the services,
12 depending on family income --
13 A. I guess, potentially, but that would depend upon
14 the circumstance. There are many kids in Santa Clara County
15 prior to this that school districts would refer privately that
16 we would never even know about, and you could say in a broad
17 sense that that youngster is eligible and we would never even
18 know about it.
19 Q. You wouldn't know about it, but if a child
20 needed -- if a child needs mental health services and resides in
21 santa Clara County that child can come to the County Office of
22 Mental Health and say, "Please give me some services." Is this
23 a fair statement? And you may say, no, because you are not
24 serious enough, but ii you had the resources available you would
25 be able to provide mental health services for that child.
26 A. Well, we would provide consultation and might
27 assess the situation. We would not necessarily provide that; we
28 may determine that the youngster of the family doesn't need

1 mental health services.

2 Q. Sure.

3 A. Or we might consult with whoever the referring

4 person is, sure.

5 Q. Let me give you a hypothetical. Assuming you had

6 an unlimited budget, an absolutely unlimited budget, an

7 unlimited ability to hire professional staff, office space, and

8 this sort of thing, if a child needed mental health services in

9 Santa Clara County, could they come to the County Mental Health

10 Department and receive those services?

11 A. Possibly. I would have to know the individual

12 situation.

13 Q. Well, assuming the child needed the mental health

14 service, but perhaps had a family that could afford to pay,

15 could bring the child to County Mental Health and ask or insist

16 on services being provided?

17 MS. CHAPMAN: I would object on the basis of relevance.

18 MR. VAN WYE: Well, let me give you essentially where I

19 am going on this by the way of an offer of proof.

20 One of the contentions that the State maintains is that

21 this law does not impose any new duties on the County. It

22 simply reprioritizes the population that the County must serve.

23 What I am attempting to establish through this line of

24 questioning is basically that the County has never had an ideal

25 world in which it could serve everyone. It's always had a

26 triage process wherein people fell out of the bottom.

27 The population that is now being served pursuant to IEPs

28 has always been eligible for County mental health services. The

1 family might be well-to-do and they may have had to pay for
2 those services, or the school district may have had to fund
3 those services if they were required by IEP, but they could
4 always come to County health for these services.
5 That, in essence, the only thing that the legislation in
6 question has really done is to, basically, take away discretion;
7 that is take away a minor part of the discretion of the County
8 mental health and say that the State in its wisdom has decided
9 that the most important priority that you have at County mental
10 health is to serve handicapped children who have mental health
11 components written into their IEPs. And that's all that this
12 legislation has done. And the County is not required to do
13 anything more than it used to do. And it's a matter of complete
14 volition as to the remaining population that they serve; that
15 they make a decision in their wisdom.
16 Having made that as an offer of proof, perhaps I could
17 submit that as a question to Mr. Porter.
18 BY MR. VAN WYE:
19 Q. Isn't that a true statement of fact?
20 A. Well, I guess. your Honor, I guess that's what
21 part of my declaration is that the County has lost that
22 flexibility or discretion as you would describe. I described it
23 as flexibility. And that was the point of my declaration; that
24 we have lost that flexibility to make that determination based
25 on treatment severity which has been our major criteria.
26 Q. So that's what it has done. It has removed the
27 ability for you to -- it's, in effect, said that there are
28 certain patients that come to the head of the line, and it has

1 taken away some of your treatment flexibility through the County
2 to make that determination?
3 A. Absolutely.
4 Q. Okay.
5 A. Which is our basic priority or process of
6 prioritizinq, yes, absolutely.
7 Q. So is it imposed -- has the law imposed any new
8 requirements on the County Mental Health Service system overall;
9 in other wards, does the County Mental Health system in Santa
10 Clara County, are they required to spend more dollars by virtue
11 of this legislation.
12 MS. CHAPMAN: I would object. The question is compound.
13 MR. VAN WYE: Let me rephrase it. I will withdraw my
14 question.
15 BY MR. VAN WYE:
16 Q. As a result of the legislation in question, is
17 County Mental Health required to spend more dollars?
18 MS. CHAPMAN: I would object based on lack of foundation.
19 MR. VAN WYE: One of the essential premises of the State
20 mandate is that the State mandates that a local agency do
21 something which requires them to expend more funds. Unless you
22 have a State mandate that requires the County or local agency to
23 expend more funds, you really --
24 MS. CHAPMAN: Well, I think the question is whether this
25 is a new program or service. And if you want to ask Mr. Porter
26 whether the legislation requires the County to do anything
27 different than what it did before, I think that would be an
28 appropriate question.

1 MR. VAN WYE: Well, I would submit my question was also
2 appropriatc. Well, I believe my question is an appropriate
3 question.
4 MM. LAW JUDGE: I will overule the objection.
5 BY MR. VAN WYE:
6 Q. Do you have the question in mind?
7 A. The question again?
8 Q. Right. Does the legislation in question require
9 the County to expend any more funds than it previously expended?
10 A. I am not sure I know that.
11 Q. Okay. That's a fair answer.
12 Does the County -- does the legislation in question
13 require the County to undertake any new programs or do --
14 undertake different types of services than it ever performed
15 before?
16 A. Yes.
17 Q. How?
18 A. I would have to -- it requires new duties for our
19 staff.
20 Q. What?
21 A. Pursuant to legislation IEP -- it requires
22 attendance at IEP meetings, being part of IEP teams that were
23 rrot required before, and requirement to assess youngsters that
24 are referred through a new process for us, come through school
25 districts, special education via the 3632 process.
26 Q. Didn't the County do this -- didn't the County do
27 this before through the legislation in question?
28 A. NO.

1 Q. Didn't County mental health -- did County mental
2 health people ever participate on IEP teams prior to 19857
3 A. Not es an IEP team member, no. I attended IEP
4 meetings, but not as an IEP team member, no.
5 Q. Isn't everybody that attends an IEP team'or
6 participates in the process a member of the IEP team?
7 A. No. That's not my understanding of the law.
8 Q. Didn't County mental health people sign-off on
9 Mental Health component IEPs prior to legislation in question?
10 A. I am not sure to the extent if that happens. The
11 majority of the time I know that that was not signed off by our
12 County mental health staff, all that attended IEP meetings. The
13 majority of them that I am aware of -- now, there could have
14 besen some that I em not aware of.
15 Q. Did County mental health -- did County mental
16 health services --
17 Did the County of Santa Clara through its County mental
18 health program provide health services pursuant to IEPs prior to
19 19857
20 A. Some, maybe, but, generally not. Generally not.
21 Q. If a children had -- prior to 1985, if a child had
22 Mental health services as a related component, or a related
23 service as a component of their IEPs, could they go to County
24 mental health for these services?
25 A. Not pursuant to their IEP. That didn't happen in
26 our County. Schools were not referred to us that way, no.
27 Q. Could a school refer?
28 A. Yes. Uh-hum, uh-hum.

1 Q. Do you know cases that they did?

2 A. I need to make a distinction here, your Honor. I

3 don't know.

4 What happens in the IEP process is that there are many

5 youngsters in that process whereby the IEP team recommends to

6 their family that you seek mental health services wherever you

7 want; that's not written into the IEP. It's not a designated

8 service. The school district doesn't have to pay for it or

9 whatever. And many of those situations happen in Santa Clara

10 County. And so you will have a youngster that has an IEP

11 because he or she is in special education, may'be receiving

12 youngsters or referring treatment from a County mental health

13 provider, a center, whom the school district just kind of said

14 "This might be good for your kid."

15 And they come in to a mental health center and they are a

16 Short-Doyle client and they are charged a family fee, or

17 whatever. And then because we are a professional working with a

18 youngster, just like a pediatrician, we may get invited to an

19 IEP meeting, but in no way -- we are not an IEP member. We

20 don't sign the IEP, but we would be invited very often and

21 sometimes we have the discretion to go or to not go.

22 Q. This is pre-19851

23 A. Yes.

24 Q. What you are describing7

25 A. Yes.

26 Q. Well, the question is -- it's my understanding

27 that -- well, strike that.

28 Prior to 1985, if a child had been identified as a

1 special education child by a school district in Santa Clara
2 County and it had been determined that this child needed mental
3 health services a8 a related service --
4 A. Uh-hum, uh-hum.
5 Q. -- and that related service was written into her
6 IEP, would that child thereafter be eligible to come to the
7 County Mental Health Department to receive these services?
8 A. Yes, but not pursuant to the IEP unless we were
9 told that ahead of time. And, yes, they could come to us, but
10 we wouldn't necessarily know that -- in fact, it happens often.
11 It happened often. Kids would come and we would hook them into
12 short-Doyle services and didn't even know the kid had an IEP.
13 Q. But if the child came to the County Mental Health
14 Department IEP in hand, the IEP says this child needs mental
15 health services, whatever nature, would that child be eligible
16 to receive those services from the County Mental Health
17 Department?
18 A. Not unless we had an agreement 'with the school,
19 with the school district. The school district is responsible to
20 pay for that, and we would have to have an agreement with that?
21 Q. And could you have -- or did you have any
22 agreement -- or could you have had any agreement with the school
23 district prior to that?
24 A. We could have, but I am not aware that we had any.
25 In essence, that would have been the school contracting with us,
26 a couple of our contracting agencies separate from the mental
27 nealth budget.
28 Q. But children -- if I am hearing you right and I

1 want to be very clear -- prior to 1905 children who may have had
2 mental health services written into their IEPs as a component
3 could have come into you simply as a Short-Doyle client or did,
4 in fact, come into you just simply as a Short-Doyle client and
5 the County would provide these mental health services and
6 perhaps not even know that they were in the IEPs?
7 A. That's posaible, correct.
8 Q. But so this -- the type of services that you are
9 now providing because the legislation requires you to provide it
10 was the type of services that were being provided prior to 1985
11 with the possible exception of the fact that you didn't sit on
12 the IEP teams and do that assessment which you are now required
13 by law?
14 A. I would say only in a general way, not in a
15 specific way.
16 Q. I don't understand what you mean by that.
17 A. Okay. When I was having difficulty answering the
18 question, you know, the new programs or whatever, theoretically,
19 if we provided a full range of services then you just plug in
20 3632 kids. However, what may happened, what we are having to
21 deal with now, we may have from a particular school district --
22 under this law we didn't have that many kids referred before,
23 for example, but now all of a sudden we have a group of about 40
24 kids that have been referred and we assess them and determine
25 that they need group therapy. This happens to be a mental
26 health center that has a small -- too small a staff. Doesn't
27 even have staff that even know about group therapy. And that
28 case we will have to develop a new group therapy program in that

1 distriet region, in that mental health center region. Then that
2 would be a new program. But a program that Previously had a
3 youngster come in under Short-Doyle we may not have had the
4 staff and we may not have had a group therapy program in that
5 center and now we have to because we have 20 kids that need
6 group therapy.
7 Q. The type of changes you are talking about that have
8 been engendered by the law, you are not doing anything that --
9 is it fair to say that the mental health department is not doing
10 anything substantially different than it did before? I mean,
11 you are basically still providing mental health services to
12 various members of the population of Santa Clara County?
13 A. In a general sense, that's correct. Specifically,
14 we are doing many -- I think specific things very differently.
15 Q. In other words, is it fair to say that what the
16 legislation has done is reprioritize and essentially said you
17 have a new order of triage for mental health services in Santa
18 Clara County?
19 A. You are -- generally, that may be true. I would
20 like to give a specific example to clarify if I might.
21 Q. Sure.
22 A. That is to understand a dilemma that has really
23 surfaced is real clear to us now. In assessing --
24 For example, we in Santa Clara County have huge numbers
25 of school programs, on-site school programs we have had for
26 years. Typically, with our staff connected with schools we have
27 done, I think, a pretty good job of publicizing the kind of
28 variety of services we offer individuals, family group, a full

1 range of services. But we are, also, a system that is very
2 family oriented, very parent oriented. And the majority of our
3 day treatment programs and the majority of our out-treatment
4 services are well known. That if a youngster comes in for
5 treatment we are going to work with the family and we are going
6 to work with the parents. That's real clear. We are, also,
7 really clear that our clinical -- we provide a better service
8 where parents are involved that way.
9 What is happening now for us is we have numbers of kids
10 that come in for IEP process; that, first off, our assessment
11 would recommend family therapy to be successful with that
12 youngster. That's possible to write that on the IEP, but we
13 can't be required to do that because a parent under this law and
14 this process does not have to agree to that. Okay?
15 So what we are having now is numbers of kids who if had
16 come in under Short-Doyle we would have said, yes, we could
17 provide services for your youngster, and we probably could be
18 pretty successful in mental health treatment, but we are going
19 to need to work with you parents and with the family. They
20 would agree to that. And we would say that's how we provide our
21 service. That's changing now. Because under this process
22 parents don't have to agree to be involved.
23 So we are now having numbers of kids that we are real
24 clear that we could be successful with them had the parents
25 continued to be involved in family therapy; these parents are
26 refusing now to be involved, but yet we are still required to
27 provide the treatment for that youngster. And that's -- now in
28 that sense, that's a huge change. Now that's not listed as, you

1 know, our -- I don't know how to may it, in determining our
2 priorities, but that's a huge problem.
3 Now what could have happened, previously, under
4 Short-Doyle, a youngster like that which might be a minimal
5 level of service -- we are not talking in-depth hospftaliration
6 and all of that, but someone who may need to be seen once a
7 week, the family once a week. We could have before said to the
8 family, "Look, we are not going to be successful with your
9 youngster, individually, if you don't come in once a week and we
10 see the family." And the majority of the families would go
11 along with that. If they wouldn't, then we could make a
12 decision that we can't be effective. We have lost that.
13 Parents can say we are not going to be involved in family
14 therapy. I don't care if you tell me that my youngster -- that
15 that's necessary for him to improve. You have still got to see
16 him one time a week because that's what it says on this IEP.
17 And those aren't isolated cases. I mean, they are huge
18 numbers now. But that's an example of what we are struggling
19 with at the line staff level that I would see is a
20 consequence of this being a mandate.
21 Q. If it continued, obviously, it would be an adverse
22 consequence?
23 A. Absolutely, in those given situations.
24 May I give you -- another example would be -- which is a
25 very typical situation now under this -- is yet referred from a
26 school district, 3632, a family, and almost typical, not of all
27 cases, but many, many cases we will make an assessment, and we
28 will assess that, "Look, treatment is not going to be useful

13

1 unless the family is involved or whatever." And we will talk to
2 the school district and, yes, it will be very clear, yes, that's
3 true. But it's on the IEP; that's got to happen. And prior to
4 this we may not have referred them, but you are stuck with
5 having to provide this service. And we are referring this
6 difficult family to you and you are stuck with dealing with
7 them.
8 And no matter what, previously, whether we would have
9 referred it to a private therapist or whatever we had done, you
10 have got to do it now. And that's a daily occurrence in Santa
11 Clara County. And if not daily many times a week.
12 That's what I was trying to get at the flexibility
13 around not only severity of treatment priority, but also with
14 the kind of cooperation of the kind of things that are necessary
15 conditions to make treatment work in terms of being successful.
16 Q. To your knowledge did this legislation, 3632,
17 require you to hire more staff?
18 A. I don't know if I can say it required us. I would
19 say, yes, it did. I mean, that's my opinion.
20 Q. How many can you identify? How many staff were
21 hired because of the enactment of this legislation?
22 A. Oh, boy, just when I got involved with the program
23 three assessors and one AB 3632 coordinator had been hired. And
24 subsequent to that two more assessors were hired. They were
25 additional positions.
26 Q. Now aid those -- were those off-set'by reductions
27 in other positions?
28 A. I don't think so.

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1 Q. To your knowledge does the County of Santa Clara
2 add general fund money to the mental health budget or is the
3 mental health budget all from Short-Doyle funds?
4 MS. CHAPMAN: I would object to the question. It is
5 compound and vague.
6 MR. VAN WYE: Well, does -- let me ask the first
7 question.
8 BY MR. VAN WYE:
9 Q. Does the -- I will rephrase my question.
10 Does the County of Santa Clara allocate general fund
11 monies to the Mental Health Department?
12 A. Yes, County general fund monies.
13 Q. County general funds. Do you know the magnitude?
14 A. I don't know the specific level.
15 Q. Do you know whether or nat the County is required
16 to allocate general funds to mental health programs?
17 A. It is in a limited amount.
18 Q. Does it allocate more than the limited amount that
19 it is required by law?
20 A. Yes, it does.
21 Q. Is it fair to say that the County Board of
22 upervisors has chosen freely and of their own volition to
23 llocate general fund money to the mental health program in your
24 ounty?
25 A. That's my understanding. I don't know that I am
26 he best person to answer that.
27 Q. How do mental health services get written into an
28 EP after the passage of the legislation in question?

1 A. It can be one of -- well, they just get written
2 into one of the basic special education forms, usually Form c.
3 Q. Does the County Mental Health Services have a
4 representative on the IEP team?
5 A. It does in most cases.
6 Q. Well, wait. Back up. Let me rephrase.
7 I will withdraw my last question.
8 Isn't it a fact that in every case in which mental health
9 services are to be a component of the IEP that County Mental
10 Health has a representative on the IEP team?
11 A. That's not my understanding necessarily, no.
12 Q. All right. Can you recall any situations in which
3.3 mental health services get written into a final IEP that County
14 mental health does not have a representative on the IEP team?
15 A. Well, many times it happens that way. Essentially,
16 we will do an assessment and don't even have to attend an IEP
17 meeting. We can do it in a conference call and discuss the
18 recommendation with a parent.
19 Q. Well, the essence of my question is -- the real
20 thrust of my question is isn't it a fact that mental health
21 services do not get written into an IEP absent the concurrence
22 of the County Mental Health Department?
23 A. Right, yes.
24 Q. That's true.
25 A. Yes. That's true.
26 MR. VAN WYE: Okay. I have no further questions of this
27 witness.
28 ADM. LAW JUDGE: One moment. Redirect.

1 MS. CHAPMAN: Thank you, your Honor.

2

3 REDIRECT EXAMINATION

4 BY MS. CHAPMAN:

5 Q. Mr. Porter, with regard to IEP assessments prior to

6 1986-87, did the County of Santa Clara have any responsibility

7 for conducting mental health assessments specifically for IEPs?

8 A. Only in the window period; that period between

9 March and July. And that was the 1985-882 statute, yes.

10 Q. And disregarding the window period, did the Mental

11 Health Bureau have any responsibility for conducting the

14

12 assessment to determine whether Mental Health Services should be

13 included on a child's IEP?

14 A. No.

15 Q. Okay. So that responsibility is a brand new

16 esponsibility with AH 36327

17 A. Yes, it is.

18 Q. Are those -- are all of the formal steps of that

19 ssessment process inherent in any assessment process or is the

20 EP assessment process different from the normal mental health

21 ssessment process?

22 A. It's different.

23 Q. Okay. Does the IEP assessment process generally

24 esult in a formal written letter or assessment?

25 A. Yes, it does.

26 Q. And does a normal mental health assessment result

27 n a formal written letter?

28 A. Not necessarily.

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1 Q. Now with regard to those assessments, if a mental
2 health clinician made an assessment and determined that -- and
3 LOW we are talking about '86-87 -- and determined that mental
4 health service6 were needed by that child in order for the child
5 to benefit for hi6 or her education, would the clinician have
6 my discretion to simply decide not to recommend?
7 A. No, not in my understanding of the law, no.
8 Q. What would be the clinician's responsibility?
9 A. To make the recommended treatment based on their
10 assessment.
11 Q. So even though the County has some input into what
12 treatment is needed they don't have discretion to decide that
13 needed treatment is not going to be given?
14 A. No, they don't.
15 Q. Prior to 1986-87, did the County Mental Health have
16 any formal responsibilities in the IEP process, were they
17 required to be IEP team members?
18 A. No.
19 Q. Were they required to participate in IEP meetings?
20 A. Not generally. I am hedging because there may have
21 Seen a situation where someone -- well, I am trying to think.
22 If they were fair hearings under 94-142 there might have been an
23 isolated case where someone was ordered to attend an IEP.
24 Q. So there may have been some cases where a therapist
25 was subpoenaed to testify?
26 A. Yes. That's absolutely -- that's what I am saying.
27 Q. But other than situations where somebody was
28 subpoenaed to testify there were no mental health

1 responsibility -- requirement to participate in the IEP process?
2 A. No. Not that I am aware of, no.
3 Q. And subsequent -- and starting in 1986 is mental
4 health required to participate in IEP meetings?
5 A. Yes.
6 Q. And are they required to become a part of the IEP
7 team if out-of-home placement is recommended?
8 A. Yes. For out-of-home placement, yes.
9 Q. Prior to 1986-87, if a child pursuant to an IEP
10 had to be placed out-of-home, did the County mental health have
11 any case management responsibility for locating a placement and
12 following through on the child's progress on the placement.
13 A. No.
14 Q. Prior to 1986-87, did the County have any
15 responsibility for calling or arranging IEP meetings.
16 A. No.
17 Q. Subsequent to that, does the County have case
18 management responsibility for children who are placed
19 out-of-home pursuant to IEPs?
20 A. Yes, if it's within California.
21 Q. And are you familiar with what case management
22 services are required?
23 A. Yes.
24 Q. What are the services?
25 A. Generally, conducting at least every six months an
26 on-site review. And in conjunction with education calling an
27 IEP meeting for reporting on that. As part of not just a
28 six-month visit to a youngster for a face-to-face contact that's

15

1 in placement, but to monitor treatment planning progress which
2 means to receive any kind of information that's relevant from
3 the residential placement which happens periodically. And that
4 would be a change of status of a youngster or whatever.
5 Q. And does the case management responsibility include
6 finding that placement?
7 A. Yes. Oh, yes.
8 Q. Are these case management responsibilities brand
9 new responsibilities with this legislation?
10 A. Those are. For those kids, yes.
11 Q. Other than children who are referred through the
12 IEP process, are there any other children and adolescents and
13 their families served by the County who have an entitlement to
3.4 mental health services?
15 A. Not that I am aware of.
16 Q. So other than the AB 3632 students, if a child were
17 eligible to receive student -- strike that -- eligible to
18 receive services, that would not necessarily mean that their --
19 it would not mean they are entitled to receive those services?
20 A. Yes, that's correct. 'That's my understanding, yes.
21 Q. And the Mental Health Bureau could, in fact, refer
22 people to a private provider?
23 A. Yes, absolutely.
24 Q. And did the County refer People to private
25 providers?
26 A. Yes. Yes.
27 Q. What type of people would be referred to a Private
28 provider?

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1 A. It might be a youngster in the family that did have
2 private insurance or that was going to pay 100 percent cost of
3 the services who chose to go privately and agreed to do that.
4 It might be a youngster that needed some kind of specialized
5 combination of services that we can provide within the County.
6 And it might be a youngster that needed to be hospitalized say
7 in a locked psychiatric facility that we didn't have available
8 at the time. It might be a situation -- often it happens where
9 families come into any of our walk-in clinics for kid services
10 and have us assess a youngster and then may ask -- often will
11 ask: "Can you give us the name of a private therapist that we
12 would like to see." That kind of thing. And if we would
13 recommend in-hone treatment, and then we would do that, we would
14 refer that person out.
15 Q. And people would have the ability to pay 100
16 percent or -- and have full coverage for services, would they,
17 generally, be referred to private providers?
18 A. Not necessarily, no.
19 Q. But they might be?
20 A. They might be, yes, but not necessarily, no.
21 Q. Under AB 3632 is the County required to pay for
22 mental health services that are beyond -- that may be beyond the
23 County's professional resources?
24 In other words, if a child pursuant to an IEP needed some
25 kind of service and there was no provider in the County who knew
26 how to provide the services, would the County be required to
27 pay?
28 A. Yes. Yes. That's my understanding.

1 Q. So that also is a new responsibility?
2 A. Yes, it is.
3 MS. CHAPMAN: Thank you. No further questions.
4 MR. VAN WYE: I have a few more, if I might.
5 MM. LAW JUDGE: Recross.
6
7 RECROSS EXAMINATION
8 BY MR. VAN WE:
9 Q. You indicated that the case management services
10 were new, newly required by 3632.
11 Prior to 3632 didn't the County monitor ongoing progress
12 of the people within its -- that it was providing services for?
13 A. Yes, but not as case management.
14 Q. Well, how do you distinguish between -- what does
15 case management mean other than keeping track of what you are
16 doing?
17 A. Well, case management -- at least, the requirement
18 we have is to manage kids at the State hospital, okay? That was
19 the requirement. And that's the only category of kids that I am
20 aware of that we had a requirement to do that.
21 Case management means being intimately involved with the
22 treatment team of the provider and knowing about the provider.
23 Generally, that's not true, particularly for out-of-home placed
24 kids where you have a dependent youngster that social services
25 case manages. you may have a youngster, say, that has been in
26 individual treatment within our system, Santa Clara County
27 Mental Health and an individual therapist works with the
28 youngster and works with the family. We would define that as a

1 primary treatment person. And that's the person, yes, that
2 would make the phone calls and make the referral. But ray that
3 youngsttr then gets placed through DSS, juvenile probation, then
4 thty have the primary case management responsibility to *find* the
5 placement, and monitoring the placement, reporting to the court,
6 all of those things, and yet the mental health person might be
7 minimally involved because they are the primary therapist. But
8 they are not *a* case *manager* in any sense of the word. They
9 don't have any responsibility to monitor that treatment.
10 Q. And so now there is a requirement for -- at least
11 within the IEP that the child is referred to mental health and
12 through the IEP process mental health is now responsible for
13 managing *or monitoring* that child's progress?
14 A. For youngsters placed out-of-home, yes.
15 Q. For a youngster placed out-of-home, right.
16 Could prior to 3632, could the County have done those
17 functions, if it so chose, to monitor out-of-home placement for
10 children who were placed out-of-home by the County Mental Health
19 Department.
20 MS. CHAPMAN: I would object on the basis of relevance.
21 MR. VAN WYE: Well, one of the things that is obviously
16
22 what we were *talking* about and one of the principal items the
23 State is pursuing is that this legislation really hasn't *done*
24 anything to change *any* basic thrust of what mental health is
25 doing. It is simply prioritizing, directing mental health to
26 give certain priorities. And so what I am trying to show
27 through this witness is that most of these things were done
20 before, and that we are not changing anything, substantially.

1 That the legislature -- or the legislation didn't change things
2 substantially. It simply reprioritizes things.
3 MS. CHAPMAN: This witness has already testified that
4 this was something that was not done before. And the question
5 i8 a hypothetical one: Could the County have done it if they
6 wanted to?
7 MR. VAN WYE: I think on cross I am entitled to probe the
8 witness.
9 ADM. LAW JUDGE: I will overule the objection.
10 BYMR. VAN WYE:
11 Q. Could the County have done this before?
12 A. I suppose it would be superfluous in our County.
13 Either through IEP education would have that responsibility and
14 they would have asked us not to do it even if we would have
15 offered. Just like under kids who are Welfare and Institution
16 Code 300 kids, dependent kids that are placed in our County as
17 well as many other counties, if we are offered to case manage
18 the kids in placement they would ask us not to. That's their
19 responsibility and they have got the money for it and they are
20 required by law to do that.
21 Q. But now you are required whenever there is an IEP
22 that includes mental health kids --
23 A. Absolutely.
24 Q. -- County mental health is required to be the case
25 manager?
26 A. Right. Absolutely. Whether that youngster is a
27 dependent to the court, or a ward of the court, straight special
28 education, and all of those other departments had those

1 responsibilities before.

2 Q. Now what -- you indicated also that the County is

3 required to fund out-of-county placements when they are written

4 into an IEP mental health residential placement. Is that

5 correct?

6 A. Out-of-home placement.

7 Q. Out-of-home placement? Okay.

8 And I think in response to one of Ms. Chapman

9 questions --

10 h. Say that again because that's not --

11 Q. Let me rephrase and strike that.

12 A. Because that's what I disagree to. That's not

13 accurate.

14 Q. Strike my last question. Let me rephrase it.

15 I believe you testified in response to one of Ms.

16 Chapman's question that the County is now required to fund

17 out-of-County residential placements when such are written into

18 an IEP as a mental health component. Is that correct?

19 A. That's not correct if I --

20 MS. CHAPMAN: I believe that was a mistatement of the

21 testimony. I think the testimony in question had to do with

22 providing case management services to students who were placed

23 out-of-home.

24 MR. VAN WYE: Okay. So it's only case management

25 services out-of-home.

26 BY MR. VAN WYE:

27 Q. For instance, if some child is -- Devereux School

28 is a well-known residential facility in Santa Barbara?

1 A. (Indicating affirmative.)

2 Q. If a child in Santa Clara County has it written

3 into his or her IEP that that child needs to go to the Devereux

4 School in Santa Barbara because of mental health reasons, is

5 that a responsibility of your office to fund that?

6 A. Well, it wouldn't -- the process wouldn't happen

7 that way.

8 First, seldom is a provider written into an IEP. That

9 will only happen and that has happened when there has been a

10 fair bearing and an Administrative Law judge has directed, as

11 some will, to a particular provider and many won't. Okay?

12 An in case only out-of-home placement residential

13 treatment would be written into the IEP, but it is then mental

14 health's responsibility, the case manager, to find the

15 appropriate placement starting with one within the County, close

16 to home, least restrictive, most family connected. And it could

17 very well end up being Devereux if there were no appropriate

18 placement in the County, but it would seldom be written on the

19 IEP that way unless there was a court hearing directing us to

20 that.

21 Q. So other than the court hearing situation the

22 choice of where these placements would be made even now under

23 the new legislation is within, basically, the purview of the

24 case manager which is the County Mental Health Department?

25 A. With -- to a limited extent. It would have to be

26 with agreement of the local school district. They have to agree

27 to that placement because of the educational component that they

28 have responsibility for. And if they don't agree with that, and

17

1 we were to place, it would be a single agency placement, and
2 then we are stuck with the full thing. But as a case management
3 responsibility for out of placement, it has to be done in
4 agreement with education.
5 Q. Now these -- and the funding for these out-of-home
6 placcments is a responsibility of County Mental Health?
7 A. Yes. County Mental Health has the responsibility
8 for it, but the money is a special AFDC-FC amount of money at
9 the State level. But mental health has the responsibility to
10 authorize it.
11 Q. Okay. But the funding for these type of placements
12 is not a responsibility of County Mental Health Department,
13 then, it doesn't come out of County Mental Health?
14 A. No. Only in the situation where it is written into
15 the IEP that there are additional mental health services that
16 are in addition to those services provided by that particular
17 provider in the State as a residential center. We have the
18 option to write in additional services if we choose to do that.
19 In we do do that then we are responsible for those services.
20 MR. VAN WYE: Okay. Fine. No further questions.
21 ADM. LAW JUDGE: Anything further?
22 MS. CHAPMAN: All right. Just to a clarify.
23
24 REDIRECT EXAMINATION
25 BY MS. CHAPMAN:
26 Q. If a child has to be placed out-of-home, it's the
27 esponsibility of the case manager to find the most appropriate
28 placement closest to home that is going to meet the treatment

1 needs and the edubational needs?

2 h. Yes.

3 Q. And does that sometimes mean -- are there times

4 when there are no County facilities available?

5 A. Yes.

6 Q. And are there times when you have to go out of

7 County?

8 A. Yes, there are.

9 Q. Are there times, in fact, when you have to go out

10 of the State?

11 Q. Yes.

12 Q. And is that part of the responsibility is meeting

13 the needs of the kids regardless of where you have to send them?

14 A. Uh-hum, uh-hum. Yes.

15 Q. Okay. And if a child were to go to a place like

16 Devereux and a mental health clinician who had conducted the

17 assessment determined that it was needed that that child receive

18 atdditional mental health services over and above that offered by

19 the basic program, would that the clinician have the option of

20 including those services or not on the IEP or would that be

21 required?

22 A. Our understanding is that that is required. And,

23 in fact, we do have a situation where we didn't think it was and

24 we were ordered by an administrative judge to pay for services

25 that an independent evaluator had determined in their assessment

26 that was needed.

27 MS. CHAPMAN: Thank you. I have no further questions.

28 MR. VAN WYE: One further question.

1 RECROSS EXAMINATION

2 BY MR. VAN WYE:

3 Q. Writing thing5 into an IEP -- or writing things

4 into any mental health *treatment* that are necessary from a

5 clinician, that's a matter of professional ethics and

6 professional responsibility not to omit something; that's a

7 subjective decision on the part of the clinician, isn't it?

8 A. Partially, but I don't think ultimately, depending

9 on how you mean.

10 Q. Well, I mean, making -- well, isn't it always a

11 subjective decision as to what the treatment plan is and what is

12 needed by any individual that is in the mental health system?

3.3 A. Not exclusively. In mental health in the

14 assessment for an IEP referral has to take in account all of the

15 assessment data, whatever, for example. And it often happens

16 that if there is a disagreement or the family as a member of the

17 IEP team which we are not can have a private assessor assessing

18 the youngster. And that often happens. And then we have to

19 review and have to take that information into account. And

20 often times -- I mean, our assessor may not agree with that.

21 The case that I was talking about is a perfect example of

22 where our assessor did not agree with that but we were ordered

23 that had we had to do that. And in that case -- if that

24 clarifies it or not -- but it's not solely --

25 l It would be misleading to say that it's solely

26 discretionary. Because that's really not true. Or that it's

27 just a matter, I think, of professional ethics that you

28 recommend the best treatment. Do you recommend based on what

1 you assess that? Because often times what happens is that an
2 assessor then may use any of the other specialists in their --
3 or in our mental health system available to them. And we have a
4 psychiatrist that we will want to evaluate a youngster. And we
5 may have someone doing an assessment from a school referral and
6 not really sure of the clinical picture. And we may have a
7 youngster that we have one of our psychologists -- we have to
8 ask to teat. And we may have to have a pediatric neurologist
9 see a youngster or question about medication in order to know
10 what is going on. And in order then for that clinician, who is'
11 the person that will make that formal letter to the IEP team, it
12 will be based not just on their discretion, clinical judgment,
13 that will have to take into account other professionals that
14 have actual expertize that they don't.
15 You know, in that sense, if I have a mental health worker
16 that says this youngster may need day treatment or whatever, and
17 a pediatric neurologist says, yeah, this youngster needs a
18 certain kind of medication ES part of that -- or the psychiatric
19 says needs something, that clinician I don't think can recommend
20 that that kid not get what the psychiatric recommended. It's
21 not a matter of ethics at all. It's a matter that will be
22 played out legally in the IEP process.
23 Q. I see.
24 A. Absolutely.
25 Q. And you have clarified that?
26 A. It's a little -- this is different than usual in
27 that it's much less discretion, much less.
28 MR. VAN WYE: Nothing further.

1 MS. CHAPMAN: I have no further questions.

2 ADM. LAW JUDGE: You do have?

3 MS. CHAPMAN: I do not.

4 ADM. LAW JUDGE: I should probably ask a couple of

5 uestions to make sure that I understand some of these things.

6 have question marks all over the place here.

7

8 EXAMINATION

9 Y the ADM. LAW JUDGE:

10 Q. Is it true that you testified that since the

11 assage of AB 3632 that the Department of Mental Health is now

12 equired to act as a case manager when out-of-home placements

13 re written into an IEP?

14 A. Yes, that's correct.

15 Q. And prior to the legislation that was not the

16 requirement?

17 A. No, that was not the requirement of Mental Health.

18 Q. Okay. I want to clarify your testimony regarding

19 flexibility to use private providers prior to AB 3632.

20 Did your testimony on that relate to an assessment of

21 ervices needed in an IEP evaluation?

22 A. I don't think it did. I don't think we had

23 liscussed private providers related to IEPs.

24 As I recall, it was a family that may have brought their

25 oungster in and then do we -- are they eligible for County

26 services automatically or do we refer them sometimes privately,

27 referral out.

28 I was trying to point out that often times we may do an

1 assessment, refer a family out. May, before the assessment,
2 refcr them out if we know someone else has a service that we
3 don't have. Or the family may choose to do that after talking
4 to us, but I don't think it was IEP related.
5 Q. Now was that based on their ability to pay or based
6 on their having insurance coverage?
7 A. Not solely. The judgment wouldn't be based on that
8 necsssarily not at all. But what will happen is sometimes a
9 family may have insurance and then may have a therapist picked
10 out that they feel is pretty expensive and before -- or it might
11 have been recommended by Bomebody outside of the IEP process,
12 and before doing that they may want to come to us knowing that
13 they can walk in the door and kind of get some sense as to:
14 Does my kid really need this heavy duty service?
15 And often, you know, we will do our best job as an
16 assessment. And if treatment is recommended then they will have
17 a choice, and they may chose to go privately, you know, with
18 whatever therapist has been recommended. That happens quite
19 often.
20 Q. We are talking about -- we are talking about
21 mentally handicapped students, right, versus, you know, more
22 general population?
23 A. Well, we are talking about special education
24 students that are handicapped, but handicapped under the special
25 ed law which doesn't necessarily mean mentally handicapped. It
26 can be a youngster who is orthopedically handicapped in a
27 wheelchair who for whatever circumstance, life's circumstance,
28 separation from the family, you know, parents die or whatever

1 and the problem goes on for a youngster staying with a relative
2 for a pear's time and gets really depressed and then becomes
3 clinically depressed, that youngster's need for mental health
4 services first starts out that the kid is in special education;
5 secondly, the youngster is in special education because he or
6 she may be orthopedically handicapped. That's the special ed
7 category. And then they are referred to us because they may
19
8 need mental health services on top of that.
9 The only real specific more mental health psychological
10 category under special ed of the handicapping condition is SED,
11 Seriously Emotionally Disturbed, but that's not necessarily
12 mental health definition of Seriously Emotionally Disturbed.
13 That was the definition that was written into the Federal law
14 before 142 and has real strict specific criteria. Now many of
15 the kids that we see that are mentally disturbed do fit that
16 criteria. And, in fact, it is a part of the thing that any
17 youngster that is being placed out-of-home has to have the
18 special education criteria of Seriously Emotionally Disturbed
19 already determined by special education not by mental health.
20 I think some of things that we were asked about case
21 management before we can even receive a referral for out-of-home
22 placement the youngster has to be special education'determined
23 by education as Seriously Emotionally Disturbed by the Federal
24 criteria which some parts of it coincide with mental health
25 criteria and some don't.
26 And those kids are generally true -- most of our day
27 treatment program youngsters are -- most all of them are.
28 But, again, a key distinction is that special education

1 law criteria that first determines Serious Emotionally
2 Disturbed. Again, that's just one of eleven or twelve
3 handicapping categories along with learning disabilities,
4 hearing impaired, visually impaired.
5 Q. Now you are not required in any way to use private
6 providers unless the County doesn't have the resources to
7 provide the services the individual needs. Is that correct?
8 A. That's one condition. We have been ordered by a
9 judge to pay for a private therapist, but we had not recommended
10 it. I was trying to think of other conditions.
11 We have had several situations we have anticipated where
12 a youngster has been in private treatment for some time with a
13 therapist and paid by the family who then became eligible
14 through 3632 who was referred to us and we made the assessment
15 and then might have recommended the same level of treatment and
16 what has happened, I believe, in each of those instances we have
17 worked out some kind of compromise.
18 We have been real clear that had most of those cases gone
19 to fair hearing we probably would have been required to pay that
20 private therapist because of the treatment relationship they
21 already had with the youngster. And I am not aware that there
22 has been one of those that has happened.
23 Q. I guess what I don't quite understand is that why
24 since this new legislation has the County had greater
25 responsibility or higher likelihood of having to pay for private
26 providers that they didn't have before?
27 A. I guess from my point of view it is just in those
20 specific instances. It's -- I can't give you actual numbers,

1 but it's a mituation that is likely to have happened. And I
2 just know of that one specific case.
3 Q. Well, I mean, couldn't you -- I mean wasn't there a
4 situation where you were ordered by a hearing officer or an ALJ
5 to provide a private provider services before AB 36327
6 A. Well, I don't know ii I can remember of any.
7 Q. Well, let me ask you --
8 A. I don't -- that seldom happens.
9 Q. Well, let me ask it this way.
10 What is it about the change in law that gives -- that
11 would give the judge the authority to make that order?
12 A. What happens is we have the responsibility to
13 either provide or pay for a service. Okay?
14 And, well, I guess -- 1 think with some of our meetings
15 with Ms. Montgomery -- the issue being that we have a
16 responsibility to pay for or provide recommended treatment. But
17 there are those situations where a youngster will already have
18 been in treatment with a private therapist, psychiatrist, some
19 place that the family is paying for whom now we inherit that
20 responsibility. And it is an ethical dilemma when what we would
21 be told by administrators or the State department will say: You
22 don't have to pay that private therapist. You can provide that
23 same level of service.
24 Okay, my staff can do that, but that is going to disrupt
25 a successful treatment relationship and then we are liable to go
26 to a fair hearing. And I am saying that when that has happened
27 we have been able to compromise somehow. I think we have been
28 lucky.

20

1 MS. CHAPMAN: Your Honor, if I may interject, I thin): I
2 might be able to clarify the difficulty that you are having.
3 Prior to 1986-87, local educational agencies had the
4 rcsponsibility for providing mental health services required by
5 IEPs. This legislation transferred that responsibility from
6 education to mental health. The rights of the students, the
7 handicapped students, remained the same. It's just who they
8 looked to to provide those services. So prior to '86-87 a local
9 educational agency would be required to provide or pay for
10 mental health services required by an IEP and could be -- and
11 because local mental, the local educational agencies are not in
12 the business of providing mental health services it would all be
13 private providers or non-educational agency providers.
14 Now -- with the responsibility now, the responsibility
15 for providing the mental health services required for education
16 has been transferred from education to mental health, end mental
17 health has the responsibility far providing all of the needed
18 mental health services, and if they can't do it themselves
19 because they don't have the providers, they don't have the
20 expertise, the kid is placed in another county far from home end
21 they don't have a contract provider there and they need extra
22 mental health services the County is on the hook.
23 MR. VAN WYE: Fortunately, this isn't a jury trial or I
24 would have asked Ms. Chapman to be sworn as a witness.
25 MS. CHAPMAN: Well, I think it goes over some of the
26 information that was in the Joint Statement of Pact just because
27 you haven't had an opportunity to read all the way through it to
28 clarify that this law was a transfer of authority, or transfer

1 of responsibility for mental health service8 from education to
2 mental health.
3 MR. VAN WYE: I was distracted for a moment, but I didn't
4 hear all of your statement. And you look like you are asking me
5 for agreement or assent?
6 ADM. LAW JUDGE: Well --
7 MS. CHAPMAN: Well, all I was saying is the fact that
8 this legislation transferred the responsibility from local
9 education agencies to mental health agencies is something that
10 is a stipulated fact. That's something we all agree on.
11 MR. VAN WYE: That's in the record.
12 MS. CHAPMAN: And it actually is in the record.
13 MR. VAN W-YE: Yes, it is in the report.
14 ADM. LAW JUDGE: All right.
15 MR. VAN WYE: And I might add by way of testimony that
16 for Santa Clara County it is unique, but prior to the
17 legislation I am informed that some local education agencies had
18 interagency agreements with other mental health departments in
19 various counties around California.
20 Santa Clara, of course, is a unique situation. And I am
21 not sure whether you had mental -- you had interagency
22 agreements with local education agencies before the advent of
23 AB 3632.
24 WITNESS: Well, yes, we had a general agreement, but I
25 guess I would say those agencies that had those agreements are
26 probably the exception rather than us: that in the sense that,
27 sure, we had two private agencies that are mental health
28 contract agencies, and, yeah, they had contracts to provide IEP

1 service, but it wasn't a mental health contract. It was
2 straight education with them.
3 Now if that happened in an interagency agreement with
4 another county that would have had to have been a contractual
5 relationship because education was responsible to gay for that.
6 They would have to pay mental health. And, sure, we could have
7 done that; education chose not to do that. They would have had
8 to initiate it in our County, any county. It wouldn't have been
9 us. Education would have to do that.
10 Now it does happen in some small counties. They don't
11 have very much mental health services, you know, and they look
12 to County mental health and private providers.
13 MR. VAN WE: All right.
14 BY the ADM. LAW JUDGE:
15 Q. Do I understand your testimony that -- well, that
16 the mental health component of an IEP will not get written in
17 without the County's consent?
18 A. Yes.
19 Q. Does that have more to do with a particular type of
20 service that is needed than it does whether any service is
21 needed?
22 A. No, any service. We are responsible -- whatever is
23 written in we are responsible to pay for and to provide. That's
24 why it has to have our consent.
25 Q. Well, this is why I want to try to understand all
26 of this.
27 Who decides whether there are needs to be provided at
28 all?

1 A. Mental health -- 'as a related service it's mental
2 health, if that's a question the IEP team ham, whether it's in
3 with the principal, parent, or professional, at that point to
4 make that assessment from mental health it has to come to us,
5 County Mental Health.
6 If the IEP team -- if there is some other kind of
7 service, if the youngster needs medical service, or whatever, a
8 related service, then education has the responsibility to get
9 someone to assess that. Just the mental health portion, with
10 that question, the referral has to come to us which previously
11 education did that. We assess the youngster and then whatever
12 we recommend as treatment that's what goes on the IEP, if the
13 IEP team agrees. But that can't be done independent of us.
14 Previously, what would have happened is that the school
15 district would have had one of their assessors, psychologist,
16 likely, assess the youngster for needed mental health services.
17 And if the recommendation was, yes, it was, it would be written
18 into the IEP by education, and then they would have to provide
19 that or pay for it and usually would contract that out with a
20 private therapist. And that's what is different. That's the
21 responsibility we have inherited.
22 Q. And I understand from your testimony that you have
23 to provide services to the youngster whether or not the parents
24 agree to participate?
25 A. Yes. If it's on the IEP, we do, yes.
26 Q. If it's on the IEP?
27 A. Yes.
28 Q. And prior it was the County's policy where a need

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1 was demonstrated to involve the family and the parents in
2 treatment, if they would not agree to that particular
3 methodology you could have the discretion not to provide
4 treatment?
5 A. Yes. I would say not as a policy, but we had that
6 option, a clinician did. He would often exercise that.
7 Q. When you brought -- when you testified about that,
8 I guess you were speaking more of referrals that were not IEP
9 referrals?
10 A. Yes.
11 Q. Because you didn't have that responsibility before.
12 A. Yes. I was making the distinction of an additional
13 dilemma, if you will, that we have to deal with.
14 Q. You were comparing the situation where someone --
15 family would show up at your doorstep and say here is our son,
16 John, who needs some services. And you would say, "Fine. We
17 would like to involve you as a parent."
18 A. Based on our determination, yes, he needs service,
19 but you need to be involved.
20 Q. And now under the IEP process where the County is
21 involved in assessing and paying for the services, if the parent
22 refuses to be involved you have no choice; you still have to
23 provide a service to the child?
24 A. Right. Right.
25 Q. Prior to the legislation where school districts
26 would contract with the County to provide services, the school
27 district would pay for those services. Right?
28 A. Right. We didn't have any contract with the

1 County. The two cases I am talking about are agencies that we
2 have contracts with, private agencies. We have a contract for a
3 limited part of their services. School districts, also, had
4 contracts for another part of their mttvicts.
5 It became an issue because it had to do with our costs at
6 one point.
7 Q. Okay. I need for you, then, to put into context,
8 if you will -- recall your testimony about the example you gave
9 about group therapy.
10 And you were saying that -- you know, if you didn't
11 have -- if you didn't have, under Short-Doyle,' a group therapy
12 situation set up for a particular group that you could choose
13 not to provide the services, but now you would have to set up
3.4 the group therapy and pay for it?
15 A. Yes. I was making the point, that when Mr. Van Wye
16 wes asking about, "You really don't have to provide new programs
17 and new services?" Well, maybe not new types of services, but I
18 was giving an example that has happened under 3632 where now a
19 certain group of referrals we are getting in from one region of
20 the County that we didn't have previously from that school
21 district; all of a sudden we are getting referrals from them.
22 And we assess youngsters that need group therapy and then we
23 have to develop a group in that region, in that mental health
24 center. That's a new thing for us.
25 You know, previously we would have had maybe a couple of
26 staff in that center and didn't have enough referrals of kids
27 who needed group therapy that we would even have enough to have
28 a group. Then all of a sudden with this, from that particular

1 district, wc are having a number of kids that are being referred
2 that need group therapy. And so we have to provide group.
3 That's a new group of clientele. Group therapy in our system is
4 not a new type of service, but that is certainly a new program
5 or a new service to that mental health center meeting those kids
6 living in that area. And that was more my doing that way by way
7 of illustration. I think I answered the question.
8 Q. From your declaration and your testimony it seems
9 to me that the process that has been set up under this
10 legislation has through the assessment process found more kids,
11 more students, that need services than was previously
12 discovered?
13 A. Uh-hum, uh-hum.
14 Q. Is that true?
15 A. Yes. In my opinion it is, uh-hum, uh-hum.
16 Q. The population always existed. It's just a
17 question of process that would discover the children with the
18 need?
19 A. I think that's partly true. That's partly true.
20 And I think to use part of my declaration and part of maybe in
21 the stipulation that the issue of how school districts
22 behaved -- had been behaving under 94-142 and what changed that,
23 I mean, there was a real --
24 I think in the stipulation, if I can remember right, that
25 Ms. Chapman had the disincentive -- if the school district was
26 on the hook to pay for it there is disincentive to identify
27 those kids. Now that mental health, to be honest, has the
28 responsibility there is a real incentive to identify every kid

1 you can.

2 To say it bluntly that is happening in our County as well

3 as some others. And that's why in the examples I have tried to

4 make -- like in some of the group therapy -- that has happened

5 in one area. You have a school district all of a sudden that --

6 didn't -- had some of those same kids that may have needed group

7 therapy, but somehow it didn't happen.

8 Q. I think it is a team decision as to when someone

9 needs mental health type services. Is that correct?

10 A. Yes. yes, it is a team decision. For example,

11 team parents as team members have veto power.

12 For example, if the team recommends referral to mental

13 health and the parents don't agree with that, referral is not

14 made. Or if parents as a member of the team agree with

15 assessment, referrals -- for assessment and a referral is made

16 to us we make an assessment and recommend a certain level of

17 treatment and the parents don't agree with that it doesn't

18 happen.

19 Q. What happens if the team members from the education

20 component -- and I am assuming that there must be a teacher,

21 their principal, or somebody -- or special ed people.

22 A. Well, the administrator and the teacher and then a

23 program specialist are the minimum and the kid. If the kid is

24 old enough and appropriate to be part of the team can be a team

25 member. But go ahead, I am sorry.

26 Q. Well, what ii education component thinks there is a

27 need and the mental health component assesses and finds there

28 isn't a need, what happens then?

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1 A. Then that's -- at this point in time our
2 undcrstanding from the State Department is that if it's an
3 out-patient service recommendation, the opinion of the mental
4 health professional is the opinion of the IEP team. And parents
5 can object to that, though. But if it's a day treatment
6 recommcndation or residential treatment recommendation, there
7 has to be the concurrence of education because they have an
8 education component as part of that.
9 The way the law is written there is no -- there is no way
10 to resolve that difference. The only kind of way that there can
11 be any kind of an appeal process between departments is if
12 either of us are doing something not in compliance. If there is
13 a straight judgment call on that and we recommend treatment and
14 the parent agrees with that and education thinks it's not
15 treatment, it is written in that it is going to be provided.
16 Now what can happen is education could choose not to
17 write that in and not reassign that and then the only recourse
18 is for a parent to go to fair hearing. And that has happened.
19 Or if education thinks the services need to be provided
20 so that the parents really don't recommend -- that it isn't
21 needed, then the only option is for a parent to go to a fair
22 hearing. And that has happened.
23 Q. Okay. I think we have the Hearing Officers that
24 conduct those, don't we?
25 A. Yes. Yes.
26 Q. I am starting to understand what they have been
27 doing.
28 A. Yes. Yes. And we will do our darndest to go to

1 ıediation to mediate the thing out before going to fair hearing,
2 ›ut it's not always successful.
3 MM. LAW JUDGE: That takes care of it. Did I prompt any
4 ıuestions from anybody7
5 MR. VAN WYE: No.
6 MS. CHAPMAN: No.
7 MM. LAW JUDGE: I hope not. Okay. You are excused.
8 :hank you for your testimony.
9 (The witness was excused from the stand.)
3.0 ADM. LAW JUDGE: I think we are going to need a break
11 ›efore we go an.
12 MR. VAN WYE: Are we taking a lunch recess?
13 ADM. LAW JUDGE: Yes. Okay. Let's see -- off the
14 :ecord.
15 (At 1:06 p.m. a recess was taken until 2:35 p.m.
16 of the same day.)
17 SACRAMENTO, CALIFORNIA, THURSDAY, DECEMBER 1, 1988, 2:35 P.M.
18
19 ADM. LAW JUDGE: Back on the record.
20 MR. VAN WYE: The ball is in your court.
21 MS. CHAPMAN: I would call David Wytock to the stand.
22 ADM. LAW JUDGE: Nothing personal there.
23
24 DAVID WYTOCK,
25 called as a witness by the Appellant, was sworn and testified as
26 follows:
27 ADM. LAW JUDGE: Okay. And if you will just state your
28 full name and spell it, please.

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1 WITNESS: David Wytock, W-y-t-o-c-k.

2

3 DIRECT EXAMINATION

4 BY MS. CHAPMAN:

5 Q. Mr. Wytock, what is your position with the County

6 of Santa Clara?

7 A. I am the mental health administrator.

8 Q. And what does that mean?

9 A. I am responsible for budgeting financial matters,

10 computer systems and various administrative support areas.

11 Q. Do you have in front of you a document entitled

12 "Declaration of David Wytock"? It's a six-page document plus

13 exhibits A, B, and C.

14 A. Yes, I do.

15 Q. And it is signed -- executed on December 1st,

16 Sacramento, California, signed by you?

17 A. That's correct.

18 Q. Okay. And have you reviewed this document?

19 A. Yes, I have.

20 Q. And is the information in there true and correct?

21 A. Yes, it is.

22 MS. CHAPMAN: Okay. I will pass the witness.

23

24 CROSS EXAMINATION

25 BY MR. VAN W-YE:

26 Q. Mr. Wytock, I am directing your attention to

27 Paragraph 4, on Page 5 of the document. You indicate that you

28 were informed and believe that the County Short-Doyle contract

1 providers sustained a certain revenue loss.

a Who are -- what are or who are the County'8 Short-Doyle

3 contract providers that are referred to in this paragraph?

4 A. There were -- there were two. There were two

5 contract providers in Palo Alto: Penninsula Children's Center

6 and Children's Health Counsel in Palo Alto.

7 Q. Okay. How did they sustain a revenue loss as a

8 result of the implementation of this legislation?

9 A. I was just trying to think back on this particular

10 case.

11 I take that back. The two that I just 'mentioned are in

12 the following paragraph; i.e., the ones that had contracts with

13 school districts, and in this case there were two others:

14 Catholic Social Services and Eastfield Children's Center.

15 And in this particular case is referring to private

16 insurance revenues that they were receiving from families for

17 which they were providing services in the year prior to the

18 implementation of AB 3632.

19 Q. Okay. I am trying to get a thread of the relevance

20 of some private providers loss of revenue from private insurance

21 sources to this test claim.

22 A. Okay. Basically, the providers made the claim that

23 these were 3632 services that they were providing with a

24 continuing obligation. And the County in response to this

25 information provided funding for them to continue these same

26 services to A0 3632 clients starting in 1986-87 and continuing

27 now, And so that, essentially, we recommended and the County

28 Board of Supervisors agreed to increase their Short-Doyle

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1 ontracts to include services because of these revenue losses.

2 Q. Well, correct mc if I am wrong, but what I am

3 ensing is that, number one, this is a voluntary action on the

4 art of the County Board of Supervisors to reimburse them for

5 his revenue loss and there was no obligation on the part of the

6 ounty Board of Supervisors to do that?

7 A. From our point of view, a number of the children

8 nvolved were continuing into the current fiscal year and so

9 here was a direct entitlement on those cases.

10 And, generally, they had been providing -- they had had

11 ontracts with the school districts and so it was optional in

12 he sense that we couldn't provide the services through direct

13 ounty services or through these contract programs and so we,

14 he Board, chose in this case to continue it through the

15 ontract program.

16 Q. I see. Is it fair to say that you are the senior

17 dministrative officer of the Department of Mental Health?

18 A. Yes. That's correct.

19 Q. Approximately how much of your budget is derived

20 Erom State or Federal funding; i.e., Short-Doyle, and how much

21 is derived from mandatory County contributions, and how much is

22 derived from voluntary County contributions.

23 A. I guess the easiest thing is ii I could refer to

24 the attachment here rather than talking off the top of my head.

25 What I believe -- I guess the figures that you are

26 eferring to are in the document that has been stipulated to.

27 Q. I am just asking approximately.

28 A. Okay. Approximately right now we have a

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1 fifty-seven million dollar budget. And we have about -- I
2 guess, it's a twenty-six million dollar Short-Doyle allocation.
3 And we have about ten million -- or about three million dollars
4 in required ten percent match; approximately, ten percent match
5 to the twenty-six million dollars. And another seven million
6 dollars in what we refer to as voluntary match or overmatch to
7 distinguish it from the required match. And the remainder would
8 be revenues.
9 Federal level we have -- there is about three or four
10 million dollars of Federal funds for Medi-Cal share, Federal
11 share of Medi-Cal. And the remaining would be various private
12 insurance and outside revenues.
13 Q. Okay. So what you are saying is that the County
14 Board of Supervisors and Santa Clara County in its wisdom in
15 exercising their discretion has decided to contribute out of
16 general county funds approximately seven million dollars to the
17 county annual mental health budget?
18 A. Yes, generally. We would characterize it a little
19 differently than that, but, essentially, that's correct.
20 Q. But there is no obligation on the part of the
21 county Board of Supervisors to do that. They choose to do that
22 voluntarily as opposed to devoting that money to the sheriff or
23 to the County counsel or to the District Attorney's office?
24 A. I don't believe there is any legal obligation to --
25 for the County to provide that funding.
26 Q. Thank you. What is the scope, the amount of money
27 we are talking about on an annual basis that is claimed by the
28 county as an increased expenditure because of the passage of

1 3632; that's, approximately, two million a year?

2 A. That's correct. The figure in the claim is in

3 Exhibit B of 1.9 million dollars.

4 Q. So, what we are really talking about is not -- the

5 amount of money that we are talking about here is really

6 somewhere between about 30 percent -- somewhat less than 30

7 percent of the amount of money that the County voluntarily out

8 of the goodness of the supervisors' hearts or the wisdom of the

9 supervisors contributes to County mental health that it doesn't

10 even -- is not legally required.

11 MS. CHAPMAN: I would object on the basis of relevancy.

12 MR. VAN W'YE: Well, this all goes to the issue of the

13 fact that there -- or goes to the claim of the State that this

14 entire matter is something that is within -- we are not

15 mandating anything new and that this is well within the area of

16 the County's discretionary -- the County is making the choice as

17 to what they do and we are simply -- and the legislation simply

18 mandates a certain priority of services.

19 MM. LAW JUDGE: Okay. I will overule the objection.

20 BY MR. VAN WYE:

21 Q. So is it fair to say that the amount at issue in

22 this test claim is about 30 percent of the amount of the

23 County's voluntary non-obligated contribution to County Mental

24 Health budget?

25 A. This two million -- or 1.9 point million dollars is

26 approximately 30 percent of the seven million dollars of County

27 quote over-match or voluntary match of the budget.

28 Q. Can you identify any services to others that have

1 had to be terminated because of -- other than handicapped
2 childrtn, IEP handicap services, by your Department that have
3 been occasioned by the passage of 36327
4 In other words, have you had to close down facilities?
5 gave you --
6 A. No, not to my recollection. I think, again, the
7 level of our over-match was approximately five million in
8 1986-87 when this was talked about and now it's about ten
9 million, so it has increased. And in 1981-82 it was very close
10 to zero. So in the last six years or so it has increased
11 dramatically.
12 The County would see that as not necessarily a voluntary
13 optional discretionary type of thing, which is the strict legal
14 sense, I think it possibly could be that, but as a serious
15 needed contribution for something that is supposed to be a State
16 funded service. In the last three years we have gotten zero
17 percent increase -- or one percent three years ago and zero
18 percent in the last two years on our basic Short-Doyle State
19 allocation. And our over-match has increased significantly in
20 those years. So the County Board of Supervisors and the
21 Department as in, I think, most other counties throughout the
22 State see this as a very difficult response to a very serious
23 local need that's basically a State responsibility. And so I
24 guess that's --
25 You know, it's very hard to isolate a relatively small
26 item like two million dollars in a fifty-seven million dollar
27 budget and say that our overmatch has increased exactly because
28 of this. But, basically, overall, that's what we see happening.

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1 Q. Are the services required by 3632 by the County
2 Mental Health are they of a different nature than the County
3 Department of Mental Health was performing prior to 1985?
4 A. I guess, to my knowledge, that was covered in
5 really more detail by the prior witness. I can't add a lot to
6 that. I would say in my opinion a lot of the services are of
7 the same general nature, some of them are different services.
8 And I want to make sure of both.
9 Q. Is it fair to say that as a general term that 3632
10 hasn't put you into any different type of business, it has
11 simply rearranged and mandated certain priorities at the County
12 level; i.e., the priority that you serve IEP kids first?
13 A. Again, with the same -- I would say as a general
14 statement I would agree to that.
15 MR. VAN WYE: Thank you. I have no further questions.
16 ADM. LAW JUDGE: Redirect.
17 REDIRECT EXAMINATION
18 BY MS. CHAPMAN:
19 Q. Mr. Wytock, are there mental health needs in the
20 County of Santa Clara that are not being met?
21 A. Definitely.
22 Q. Could you describe some of those needs that are not
23 being met?
24 MR. VAN WYE: Objection, relevance.
25 MS. CHAPMAN: Well, counsel has raised the issue of the
26 County's voluntary, in its wisdom, over-match. And I think to
27 get en understanding of that over-match and the need for it I
28 think that we have to look, also, et the remaining unmatched

1 rental health needs in the County.

2 MR. VAN WYE: Your Honor, that could lead us down

3 highways and by-ways for weeks to come. And I question as to

4 how relevant that would be, how relevant an inquiry that would

5 be given the fairly focused nature of what is before you.

6 ADM. LAW JUDGE: I will overule the objection.

7 BY MS. CHAPMAN:

8 Q. You may answer the question about the nature of the

9 unmet needs.

10 A. Well, I guess the first thing that comes to my mind

11 is each year in our budget process and in developing our budget

12 we do identify needs. And the requirements in almost all areas

13 of children, adults, chronically mentally ill adults in the

14 County and adults requiring short-term mental health care, are

15 significantly more than the funds we have available.

16 I think in every year there has been a very specific

17 request for programing in the order of one or two million

18 dollars more than the budget that has been actually feasible.

19 And that is part of the pressure that has caused the increase in

20 the overmatch that has taken place, because the County is also

21 under tremendous pressure from the other areas: for instance,

22 jail overcrowding, criminal justice, sheriff's services, and et

23 cetera. And it's only through a very, very competitive and

24 difficult process that this additional funding has been

25 required -- has been gained from the Board of Supervisors.

26 Q. Have those unmet needs included unmet needs for

27 acute hospitalization services?

28 A. Definitely, that's one area.

1 Q. Are there other specific areas that come to mind?

2 A. Again, in just about every area that we provide

3 services. There is children's day treatment, day treatment for

4 adults, chronically mentally ill and out-patient services.

5 MS. CHAPMAN: Thank you. I have no further questions.

6 MR. VAN WYE: Nothing further.

7

8 EXAMINATION

9 BY the ADM. LAW JUDGE:

10 Q. Did you say your total budget was fifty-seven

11 million?

12 A. Yes. That's correct.

13 Q. Okay. And you said that --

14 A. That's this year's budget, not in '86-87, the year

15 in question.

16 Q. Okay. All right. 26 million, that is the

17 Short-Doyle allocation from State allocation. Right? Is that

18 what you said?

19 A. That's correct. I was also saying that that was

20 approximate, off the top of my head.

21 Q. Okay. We are just talking approximately. I am

22 just trying to get an idea here.

23 So the County has a ten percent matching responsibility.

24 And I think you said --

25 A. About three million.

26 Q. -- about three million, 2.6. If 2.6 is accurate?

27 A. Yes. It's not exactly. And it's basically a ten

28 percent on out-patient and 15 percent on in-patient and zero

1 erccnt on funds for Mcdi-Cal. So it'8 not exactly ten percent.
2 Q. Okay. And there is a seven million dollar
3 vermatch?
4 A. Yes. That's correct.
5 Q. Okay. Okay. So where does the other twenty
6 illion come in? I did something wrong here.
7 The County match three and overmatch seven, that's ten,
8 nd twenty-six Short-Doyle, that's 36. And didn't you. say your
9 otal budget was fifty-seven?
10 A. Right.
11 Q. Private sources?
12 A. That's a major source. There is about three
13 illion dollars, three or four million, maybe five million
14 ollars in Federal funding share per Medi-Cal, and maybe another
15 ive million dollars in private sources. The remaining amount I
16 hink I would have to look and see. Maybe I rounded it off due
17 o the original estimate I gave you.
18 Q. Okay. Now is there -- for the programs that we
19 ave been discussing here today, is there any restriction as to
20 here that money within the total budget comes from?
21 A. Yes, there would be. There are some restrictions
22 n the funds that we get. And, obviously, there are other
23 andated and quasi-mandated parts of the budget. But I would
24 ay, generally, the -- there is a large amount of our funding we
25 ave relative flexibility in setting local priorities on how --
26 n how it is used to provide mental health services?
27 ADM. LAW JUDGE: Okay. I have no further questions. Do
28 y questions prompt any by the parties?

1

2 RECROSS EXAMINATION

3 BY MR. VANWYE:

4 Q. Yes. Are there any services that you are required

5 by law to provide that are not being provided by your

6 iepartment?

7 A. Not to my knowledge.

8 MR. VAN WYE: Thank you. No further questions.

9 MM. LAW JUDGE: Okay. Thank you for your testimony.

10 You are excused.

11 (The witness was excused from the stand.)

12 ADM. LAW JUDGE: Okay. Do you rest?

13 MS. CHAPMAN: I do.

14 ADM. LAW JUDGE: Okay. And --

15 MR. VAN WYE: The State of California rests.

16 ADM. LAW JUDGE: Okay. so all we need to do now is set'

17 up a briefing schedule.

18 MR. VAN WYE: Can we go off the record for a moment?

19 ADM. LAW JUDGE: Yes.

20 (Off the record.)

21 ADM. LAW JUDGE: Okay. Back on the record.

22 We have had a discussion off the record and the parties

23 nave agreed to a briefing schedule. They will file simultaneous

24 briefs. The first one due on -- or due to be mailed on January

25 13th, 1999, and the rebuttal brief filed simultaneously on the

26 27th of January, to be postmarked.

27 Parties agreed?

28 MS. CHAPMAN: Agreed.

1 MR. VAN WYE: Correct.

2 ADM. LAW JUDGE: Very good. Thank you. Then, if I have

3 any questions or feel that I need to have some kind of oral

4 argument, I will get in touch with the parties and we will set

5 thet up. I tend to think that we won't need that, I am hoping.

6 MR. VANWYE: I would suspect not.

7 ADM. LAW JUDGE: Okay. Thank you very much. And that

8 will conclude the hearing for today.

9 (Matter uubmitted et 2:35 p.m.)

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REPORTER'S CERTIFICATE

I, PATRICIA L. FITZGERALD, CSR, a hearing reporter for the Office of Administrative Hearings, do hereby certify that the foregoing pages, 1 through 81, comprise a full, true, and correct transcript of the proceedings held in the matter of the Test Claim of Santa Clara County, before the Commission of State Mandate of the State of California, held at Sacramento, California, on December 1, 1988.

DATED: December 14, 1968, Sacramento, California.

Patricia L. Fitzgerald

PATRICIA L. FITZGERALD, CSR No. 2687

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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF THE COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS Respondent.	)))))))	OAH NO. N-30939

PROPOSED DECISION

On December 1, 1988, in Sacramento, California, Keith A. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Harlan E. Van Wye, Deputy Attorney General, represented the California State Departments of Finance, Education, and, Mental Health.

Susan A. Chapman, Deputy County Counsel, represented the County of Santa Clara.

Evidence was received and the record remained open for the submission of post hearing briefs. The opening brief from the State of California was received on January 30, 1989 and marked as Exhibit D. The opening brief from the County of Santa Clara was received on January 30, 1989 and marked as Exhibit 8. Reply briefs were received from the State of California and the County of Santa Clara on February 27, 1989 and marked as Exhibits E and 9 respectively. The matter was thereupon submitted.

I

The County of Santa Clara filed a Test Claim with the Commission on State Mandates under the provisions of Revenue and Taxation Code section 2231 and Government Code Division 4 Part 7. Santa Clara County alleges that Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes 1985 and their implementing regulations, relating to the provision of certain mental health services for handicapped and disabled students, impose a mandate on the County as defined by the California Constitution and Government Code section 17514(a).

II

On January 28, 1988, this matter was referred to the Office of Administrative Hearings by the Commission on State Mandates for a

hearing. The Commission requested that the following issues be addressed in the decision as well as any others deemed appropriate by the Administrative Law Judge:

A. Does Chapter 1747, Statutes 1984; Chapter 1274, Statutes 1985, and Division 9, of Title 22, of the California Administrative Code mandate counties to implement a new program or higher level of service in an existing program within the meaning of Government Code section 17514 and section 6 of Article XIII b of the California Constitution?

B. Do the statutes in question implement a federal mandate, specifically, section 504 of the Rehabilitation Act of 1973, and Public Law 94-142?

C. Has the claimant incurred unreimbursed costs, from state or federal funds, as a result of any activities mandated by these statutes and regulations?

D. If the statutes in question are found to require a new program or higher level service, do the affected local entities have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service as discussed in Government Code section 17556(d)?

E. Do any of the other provisions for denying a test claim, as set forth in Government Code section 17556, apply to this claim?

III

Following a prehearing conference, the parties, at the suggestion of the Administrative Law Judge, arrived at a "Joint Statement of Facts", by which the matter was submitted. The following findings are based on that Joint Statement of Facts.

I V

The fundamental component of federal law prohibiting discrimination against handicapped individuals in any program receiving federal funds was enacted by Congress in 1973 as Public Law 93-112, Title V, section 504 (codified at Title 29 U.S. Code section 794). "Section 504" requires the promulgation of'regulations by each agency of the federal government as may be necessary to carry out the provisions of section 504 and other laws providing protection to the handicapped. At least 23 federal agencies and departments have promulgated "504 regulations."

Congress soon recognized that this general protection was inadequate to address the special needs of handicapped school

children. In 1976, the "Education for All Handicapped Children Act", 20 U.S.C. section 1400 et seq. ("EHA") was enacted. Shortly thereafter, "504 regulations" were enacted (now recodified as 34 Code of Federal Regulations, Part 104) which require that recipients of federal funding which operate a public or elementary or secondary education program"... provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. Part 104.33. The EHA and its implementing regulations, 34 C.F.R. sections 300.1 et seq., establish procedural and substantive standards for educating handicapped students. The EHA also incorporates by reference state substantive and procedural standards concerning the education of handicapped students. 20 U.S.C. section 1401(18); 34 C.F.R. section 300.4. In order to receive federal funds, a state must adopt a plan specifying how it will comply with federal requirements. 20 U.S.C. sections 1412 and 1414(a).

V

Under the ERA, handicapped children are guaranteed the right to receive a free appropriate public education which emphasizes special education, and related services designed to meet their unique educational needs. 20 U.S.C. sections 1400(c) and 1412. "Special education" means specially designated instruction to meet the unique needs of a handicapped child, including classroom instruction and instruction in physical education, as well as home instruction and instruction in hospitals and institutions. 20 U.S.C. section 1401(a)(16).

Related services are defined by statute to include transportation and such developmental, corrective, and other supportive supplemental services as may be required to assist a handicapped child to benefit from special education. 20 U.S.C. section 1401(a)(17). Supportive services include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, counseling services, and limited medical services, Related services are to be provided at no cost to parents or children. If placement is a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. section 300.302.

VI

Handicapped children are defined as children who are mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or health impaired, or children with specific learning disabilities, who by reason thereof require special education and related services. 20 U.S.C. section 1401(1).

VII

The EHA provides a specific mechanism for insuring that handicapped children receive a free appropriate public education: the

Individualized Education Program (IEP). The IEP is a written statement for a handicapped child that is developed and implemented in accordance with federal IEP regulations. 34 C.F.R. section 300.340; 34 C.F.R. section 300.346. The state educational agency of a state receiving federal funding must insure that each public agency develops and implements an IEP for each of its handicapped children. 34 C.F.R. section 300.341.

The IEP process begins when a child is identified as possibly being handicapped. He or she must be evaluated in all areas of suspected handicaps by a multidisciplinary team, which includes a teacher or specialist with knowledge in the area of suspected disability. Parents also have the right to obtain an independent assessment of their child by a qualified professional. School districts are required to consider the independent assessment as part of their educational planning for the pupil. 34 C.F.R. section 300.503.

If it is determined that the child is handicapped within the meaning of EHA, an IEP meeting must take place. Participants in the IEP meeting (the "IEP team") include a representative of the local educational agency, the child's teacher, one or both of the child's parents, the child if appropriate, and other individuals, at the discretion of the parent or agency. 34 C.F.R. section 300.344.

VIII

The written IEP is an educational prescription which includes statements of the child's present levels of educational performance,, annual goals (including short term instructional objectives), and specific special education and related services to be provided to the child and the setting in which the services will be provided, along with the projected dates for initiation of services and the anticipated duration of the services. It also includes appropriate objective criteria, evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved. 20 U.S.C. section 1414(a)(5); 34 C.F.R. sections 300.340-349. This document serves as a commitment of resources necessary to enable a handicapped child to receive needed special education and related services, and becomes a management tool, a compliance and monitoring document, and an evaluation device to determine the extend of the child's progress.

Each public agency must have an IEP in effect at the beginning of each school year for every handicapped child who is receiving special education from that agency. The IEP must be in effect before special education and related services are provided, and special education and related services set out in a child's IEP must be provided as soon as possible after the IEP is finalized, 34 C.F.R. section 300.342, Meetings must be conducted at least once a year to review and, if necessary, revise each handicapped child's IEP. More frequent meetings may take place if needed.

IX

California elected to participate in the EHA and adopted a state plan and enacted a series of statutes and regulations designed

to comply with federal requirements. Education Code sections 7570 et seq.; and section 56000 et seq.; Government Code section 7570 et Calif Title 2 ornia Code of Regulations sections 60000 et seq.; and Title 5 California Code of Regulations section 3000 et seq.

The Legislature has established its intent to assure receipt of federal funding, including the funds available for services to handicapped children. Government Code'section 7560. A single line of responsibility with regard to the education of all handicapped children as required by the EHA was established. The responsibility for supervising education and related services for handicapped children specifically required pursuant to the federal requirements was delegated to the Superintendent of Public Instruction. Government Code section 7561; Education Code section 56135.

x

In California, public education services are directly delivered through school districts throughout the state. In addition, there are county offices of education and county superintendents of schools which have certain responsibilities for overseeing educational services within counties. The relationship of school districts and counties varies from county to county. In some counties, there is only one school district, covering residents of the county. In other counties, there are several school districts. Some school districts cross county lines.

The governing board of each school districtmust elect the organizational structure which will serve special education needs. One option is for a school district, in-conjunction with one or more districts, to submit to the Superintendent a joint local plan which provides a governing structure and administrative support for a system for determining the responsibility for participating agencies for the education of each individual with exceptional needs residing within the special education local plan area. Special districts of this type are known as SELPA districts.

There are 33 school districts in the County of Santa Clara. All have elected under Education Code section 56170(c) to join with the county office of education to submit special education plans to the State Superintendent of Schools, forming seven SELPA districts in the County. Five of the SELPAs serve more than one school district. Two serve single school districts (San Jose Unified School District and Santa Clara Unified School District).

The Santa Clara County Office of Education was established as an entity separate from the County of Santa Clara by the Board of Supervisors in 1973, pursuant to the authority of Education Code section 1043 (formerly section 658). It is governed by the County Board of Education, and is fiscally independent from the County of Santa Clara. The County Office of Education is administered by the County Superintendent of Schools,

While the details of the seven SELPA plans vary, under the plans submitted to the State Superintendent, the County Office of

Education has some responsibility in each SELPA plan. The County Office of Education receives special education monies from the State, including regional service funds and program specialist funds. After withholding an amount to cover the administrative costs of SELPA administration, the monies are disbursed to the different SELPAs. Each SELPA has its own budge, which is managed either by the SELPA administrator at the County Office of Education or by the local education. districts themselves. The County Office of Education is not responsible for the IEPs for any children, although it does operate some programs for severely handicapped children.

XI

Chapter 797 of the Statutes of 1980 added Part 30 (commencing with section 56000) to Division 4 of Title 2 of the Education Code, to implement the EHA. This legislation sets forth the basic California IEP process for identifying special education children and providing special education and related services necessary for a child with exceptional needs to benefit from a free appropriate public education.

Before July 1, 1986, local educational agencies (school districts and county offices of education) were responsible for the education of special education students, including the provision of related services necessary for the child to benefit from education. This included responsibilities for identifying and assessing children with suspected handicaps, as well as the responsibility for providing related services (including mental health services) required in individual IEPs. Local educational agencies were financially responsible for the provision of mental health services required in the IEP.

XII

Chapter 1747 of the Statutes of 1984 added Chapter 26 to Division 7 of Title 1 of the Government Code and amended section 11401 of the Welfare and Institutions Code. This legislation shifted some of the IEP responsibilities for related services which previously had been held by local educational agencies to local mental health programs.

This legislation requires psychotherapy and other mental health assessments for special education children with suspected mental health handicaps or mental health needs to be conducted by qualified mental health professionals, as' specified in regulations developed by the State Department of Mental Health. Government Code section 7572(c). Mental health services may be added to a child's IEP only if a formal assessment is conducted and the qualified mental health professional conducting the assessment recommends the service in order for the child to benefit from special education. Government Code section 7572(d),

This legislation provides that the State Department of Mental Health, or designated community mental health service, is responsible for the provision of psychotherapy or other mental health services, if required in a handicapped child's IEP. Government Code section 7576.

The child's family shall not be liable for the cost of such treatment services. Government Code section 7582.

This legislation requires the expansion of the IEP team to include a representative of the county mental health department and a representative of the county welfare department if the child is classified as seriously emotionally disturbed (SED) and any member of the IEP team recommends out-of-home placement based on relevant assessment information. Government Code section 7572.5(a). The expanded team must review the assessment to determine whether the child's needs can be met through a combination of nonresidential services, whether residential services will enable the child to benefit from educational services, and whether residential services are available which will address the child's needs and ameliorate'the conditions leading to the SED designation. Government Code section 7572.5(b).

If the IEP requires residential placement, a case manager must be selected from the public agency representatives on the team. The IEP must include provisions for review of case progress, of the continuing need for residential placement, of the compliance with the IEP, and of the progress toward ameliorating the SED condition. There must be a review by the full IEP team every six month. Government Code section 7572.5(c). Aid in the form of AFDC (Aid to Families with Dependent Children) is provided for any child under the age of 18 who is placed out of home pursuant to an IEP. Welfare and Institutions Code section 11401(b)(1)(D).

This legislation required each local agency affected by the legislation to report to the Department of Finance through appropriate state agencies either an estimate of expenditures which previously were borne by it and which would be shifted to another agency as a result of this legislation or an identification of its responsibility for expenditures which would be acquired by the agency as a result of, this legislation. Government Code section 7583. The original estimates were to be submitted no later than March 15, 1985 to the state agencies. Actual shifts in funding were to be reported annually by March 15 in subsequent years. Id. The Department of Finance was directed to recommend appropriate adjustments in the annual Budge Act to reflect shifts in expenditures. Id. The March 15, 1985 report was to include an estimate of the special education expenditures for Fiscal Year 1984-85 for psychotherapy, the number of children receiving psychotherapy at the time of the April pupil count, the name of the agency providing the psychotherapy, including the name of the agency paying for such services. Section 4 of Chapter 1747 of the Statutes of 1984.

This legislation was originally scheduled to become operative July 1, 1985. Later legislation delayed the full implementation until July 1, '1986. During a "window period" from March 1, 1986 through June 30, 1986, local mental health agencies received referrals from local educational agencies, conducted assessments, participated in IEP meetings to develop IEPs for the 1986-87 school year, but were not responsible for providing the treatment services,

Chapter 1274 of the Statutes of 1985 amended Chapter 26 of Division 7 of Title 1 of the Government Code, and amended sections 5651, 10950 and 11401 and added Chapter 6 to Part 6 of Division 9 of the Welfare'and Institutions Code. This legislation made certain technical changes and modified the responsibilities concerning IEP mental health services and made further changes to implement this program.

This legislation requires that the regulations be developed by Departments of Health Services and Mental Health in consultation with the Department of Education. Government Code section 7572(c).

This legislation requires the person who conducted the IEP mental health assessment to review and discuss his or her recommendations with the parent and appropriate IEP team members, and to attend the IEP team meeting if requested. Government Code section 7572(d)(l). If an independent assessment for the provision of related mental health services is submitted to the IEP team, that assessment must be reviewed by the mental health professional who conducted the assessment for the public agencies. Government Code section 7572(d)(2). Disputes between a parent and IEP team members regarding related services recommendations must be resolved pursuant to Education Code sections 56500 et seq. Government Code section 7572(d)(e).

This legislation eliminated the requirement of inclusion of a representative from the county department of social services on the expanded IEP team if the child is classified as seriously emotionally disturbed and any member of the IEP team recommends *out-of-home placement. Government Code section 7572.5(a). The legislation clarified that, in order for a child to be placed out-of-home pursuant to an IEP, the expanded IEP team must determine whether residential care is necessary for the child to benefit from educational services. Government Code section 7572.5(b). This legislation specifies that the county mental health department is case manager for SED children for whom residential placement has been called for on' IEPs, and requires that an appropriate residential facility be identified on the IEP. Government Code section 7572.5(c). The county mental health agency may delegate this responsibility to the county welfare department, but the county mental health department remains financially responsible. Government Code section 7572.5(c)(1). Funding for out-of-home placement was shifted from the AFDC program to a special program. Welfare and Institutions Code sections 18350 et seq. Upon receipt of proper documentation from the State Department of Mental Health or the county mental health agency, the county welfare department is authorized to make payments to licensed residential care facilities for children placed pursuant to IEPs, based on the AFDC rate for the facility. Welfare and Institutions Code section 18351(a). These costs are reimbursed by the State Department of Social Services, and are funded from a separate appropriation in the budget. Welfare and Institutions Code sections 18351(b) and 18355. The child or his or her parent or parents is not liable for the cost of 24-hour out-of-home care for SED children. Welfare and Institutions Code 18350.

This legislation provided that the State Department of Mental Health, or any community mental health service designated by the Department shall be responsible for the provision of psychotherapy or other mental health services, as defined by the regulations. Government Code section 7576.

This legislation clarified that assessments and therapy treatment services provided under programs of the State Departments of Health Services or Mental Health, or their designated local agencies, rendered to a child referred for IEP assessment, or a child with an IEP, are exempt from financial eligibility standards and family repayment requirements. Government Code section 7582. In no event should the inclusion of necessary related services on a child's IEP be contingent upon identifying the funding source. Government Code section 7572(d).

This legislation eliminated the reporting of estimated expenditures to appropriate state agencies as of July 1, 1986. Government Code section 7583.

This legislation required the annual Short-Doyle plan for each county of include a description of the services required by Government Code sections 7571 and 7576, as well as the cost of those services,. Welfare and Institutions Code section 5651(g).

XIV

No appropriation was included in Chapter 1747 of the Statutes. of 1984, although there was provision thatlocal agencies and school districts may pursue remedies available under Chapter 3 (commencing with section 2201) of Part 4 of Division 1 of the Revenue and Taxation Code. Section 5 of Chapter 1747 of the Statutes of 1984.

Chapter 1274 of the Statutes of 1985 included some funding for mental health services pursuant to Government Code sections 7570 et seq. Funds reported by the Department of Education and verified by the Department of Finance pursuant to section 4 of Chapter 1747 of the Statutes of 1984 were to be transferred on July 1, 1986 to the appropriate state departments responsible for the services specified in Chapter 26 (commencing with section 7570) of Division 7 of Title 1 of the Government Code and designated in each child's IEP. Section 16, Chapter 1274 of the Statutes of 1985. The sum of $1,600,000 was appropriated from the General Fund to the Department of Mental Health for purposes of conducting assessments and participating in developing IEPs during the period of March 1, 1986 through June 30, 1986. Section 18 of Chapter 1274 of the Statutes of 1985. Notwithstanding the county Short-Doyle match requirement of the Welfare and Institutions Code section 5707, these expenditures were to be funded on a basis of 100 percent state funds during the period March 1, 1986 through June 30, 1986. Id. The legislation further stated that reimbursement to local agencies and school districts should be made pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost does not exceed $500,000, shall be made from the State Mandates Claims Fund. Section 17 of Chapter 1275 of the Statutes of 1985.

Item 4440-131-001 of Section 2.00 of Chapter 186 of the Statutes of 1986 (1986 Budget Act) provided $2,000,000 to the Department of Mental Health in Fiscal Year 1986-87 for local assistance for assessments and case management relative to special education for special education children pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985. Section 3 of Chapter 1133 of the Statutes of 1986 amended this provision to allow for the use of these funds for all services local mental health agencies are required to provide pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, including treatment services.

Item 6100-161-001 of Section 2.00 of Chapter 188 of the Statutes 1986 (1986 Budget Act) also provided for a transfer of up to $2,700,000 during Fiscal Year 1986-87 from the Department of Education to the Department of Mental Health for the purpose of conducting assessments pursuant to Government Code sections 7572 and 7572.5. Section 4 of Chapter 1133 of the Statutes of 1986 amended this item to allow for transfer of these funds for mental health treatment services pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 as well. Item 6100-161-001 also made available for transfer from the Department of Education to the Department of Social Services $5,400,000 for the cost of out-of-home placement of IEP children pursuant to Welfare and Institutions Code section 18350 et seq.

Item 6100-161-001 of the 1986 Budget Act also required local education agencies to report to the Superintendent of Public Instruction the total costs incurred providing noneducational services in the 1985-86 Fiscal Year to IEP children who received mental health services pursuant to IEPs or who were classified as seriously emotionally disturbed and placed out-of-home pursuant to IEPs. The Superintendent was directed to reduce funding to any education agency which he determines engaged in willful failure to report accurate data by 150 percent of the amount reported in error. The Auditor General was directed to review the data reported by local education agencies to determine if the amounts reported were accurate. Based on the Auditor General's recommendations, the Superintendent was authorized to transfer additional amounts to the State Departments of Mental Health and Social Services, provided that the total amount transferred did not exceed the amounts spent by local educational agencies in the 1985-86 Fiscal Year for residential care and mental health services for children pursuant to IEPs.

XV

The law pertaining to the funding, organization, and operation of community mental health services in California, known as the "Short-Doyle Act", is contained almost exclusively in Part 2 (commencing with section 5600) of Division 5 of the Welfare and Institutions Code. The Short-Doyle Act was enacted in 1979 to organize and finance community mental health services for the mentally disordered in every county through locally administered and locally controlled community mental health programs. Before that time, state hospitals played a large role in the provision of mental health ser-

vices. The Short-Doyle Act was a step in the de-institutionalization of the mentally ill.

The Short-Doyle Act was intended to efficiently utilize state and local resources, to integrate state-operated and community programs into a unified mental health system, to ensure appropriate utilization of all mental health professions, to provide a means for local government participation in determining need for and allocation of mental health resources, to establish a uniform ratio of local and state government responsibility for financing mental health services, and to provide a means for allocating state mental health funds according to community needs. The goals of Short-Doyle community mental health programs are threefold: to assist persons who are institutionalized because of mental disorder, or who have a high risk of becoming so, to lead lives which are as normal and independent as possible; to assist persons who experience temporary psychological problems which disrupt normal living to return as quickly as possible to a level of functioning which enables them to cope with their problems; and to prevent serious mental disorders and psychological problems. Welfare and Institutions Code section 5600.

The Short-Doyle Act provides that a county must give priority to services required for acute patients and involuntary patients. Welfare and Institutions Code section 5651.3. Each county must consider and make provisions for certain other priority populations: the chronically mentally ill, including those who are homeless; mentally disturbed children and adolescents, including juvenile sex'offenders and juvenile victims of sex offenses; mentally ill elderly, including those who are isolated; mentally ill inmates and, mentally ill wards of juvenile detention facilities, and mentally ill nuisance offenders to prevent inappropriate placement in the justice system; and underserved populations,, including ethnic minorities, refugees, veterans, and other victims of posttraumatic stress disorders, and individuals diagnosed as both mentally ill and developmentally disabled. Welfare and Institutions Code section 5651.1.

Short-Doyle services are to be provided through community mental health services covering an entire county, or counties, established by the Board of Supervisors of each county. Welfare and Institutions Code section 5602. In most counties, the community mental health service area is the county, and the local mental health agency is an agency of the county. This is true in the County of Santa Clara.

Generally, each county is required under the Act to develop and adopt a mental health plan annually specifying services to be provided in county facilities, in state hospitals, and through private agencies. Welfare and Institutions Code section 5650.

The annual Short-Doyle plan must include a detailed presentation of expected expenditures and revenues. Chapter 1274 of the Statutes of 1985 also required that the plan include a description of services required by Government Code sections 7571 and 7576 (which is the subject of this Test Claim).

Two alternative Short-Doyle planning and reimbursement methods exist: the county Short-Doyle plan and the negotiated net amount contract. Unless a county is selected by the Department of Mental Health and elects to enter into a negotiated net amount contract with the State, the Board of Supervisors must adopt and submit to the Department of Mental Health an annual county plan ("Short-Doyle plan") for mental health services to the county. Welfare and Institutions Code section 5650. The Department reviews and approves the Short-Doyle plan. The county Short-Doyle plan is deemed a contractual arrangement between the state and the county. Welfare and Institutions Code section 5707.

Community mental health services are funded from a combination of sources: fee revenue from patients and third parties (such as insurance companies), grants from non-profit organizations, Medicare and federal Medi-Cal benefits from the federal government, Short-Doyle allocations and Short-Doyle Medi-Cal from the State, and required Short-Doyle "match" and voluntary "overmatch" though the county.

Among the major features of the Short-Doyle Act are provisions relating to the allocation of state funds to community mental health services. Through the Short-Doyle Act, state general funds are distributed to counties to provide partial funding for community mental health services. In theory, and with a few exceptions, the net cost (cost less revenues such as grants, patient fees, third party reimbursement, Medicare, and federal portion of Medi-Cal) of all services specified in approved county Short-Doyle plans or covered under the negotiated net amount contract is financed on a basis of 90 percent state funds (the "Short-Doyle allocation" and the state portion of Medi-Cal) and 10 percent county funds (the "required county match"). Welfare and Institutions Code section 5705.

Alternatively, subject to State approval, a county may elect to use the negotiated net amount (NNA) contract method in lieu of the annual Short-Doyle plan and budget. Welfare and Institutions Code section 5705.2. The NNA is a contract between the Department of Mental Health and the electing county. The NNA concept differs from the cost reimbursementconcept of the Short-Doyle plan. Through the NNA, a county contractually agrees to make certain mental health services available, and the state agrees to allocate to the county a fixed Short-Doyle amount. The NNA contract contains a statement of units of certain modes of service which the county agrees to make available (the "dedicated capacity"). The county bears the financial risk in providing any and all mental health services to the population described and enumerated in the contract to the dedicated capacity limit. The State bears the risk that fewer units of service will need to be provided, and bears the risk that the county can provide the services at a cost saving. Any savings may be retained by the county as long as such funds are used for mental health services, including the defraying of operating and capital costs.

XVI

In the County of Santa Clara, community mental health services are provided through the Mental Health Bureau of the Department

of Health, which is the local mental health agency for the County of Santa Clara. Under direction from the Board of Supervisors for the County, the Mental Health Bureau administers the Short-Doyle funds, provides mental health services, and monitors contracts with Short-Doyle contract providers of mental health services.

Except for services provided under the legislation that is the subject of this Test Claim, families or patients are charged for assessment and treatment services provided by the County, based on the family's liability as determined by the Uniform Method for Determining Ability to Pay (UMDAP). Insurance, Medi-Cal and Medicare are billed to the maximum extent possible.

XVII

Prior to the legislation that is the subject of this Test Claim, none of the services to be provided under the Short-Doyle contracts were specifically referenced to serving IEP needs, With two exceptions, the Fiscal Year 1985-86 Short-Doyle contract agencies rendered services independent of the IEP process or requirements, charged parents based on UMDAP liability, and collected insurance, Medi-Cal and Medicare. The exceptions were two Short-Doyle agencies which also had contracts with local educational agencies to provide IEP-related services. These two agencies rendered IEP-related assessment and treatment services for the local educational agencies with which they had contracts, and received partial funding for these services from the local educational agencies instead of through parent fees, Medi-Cal and insurance.

XVIII

The County negotiated net amount (NNA) contracts with the State of California for both Fiscal Year 1985-86 and 1986-87.

During the Fiscal Year 1985-86, the year prior to the year that is the subject of this Test Claim, the County Mental Health Bureau submitted a mental health budget (excluding state hospital services) of $35,552,792. The non-categorical Short-Doyle allocation (including the state portion of federal Medi-Cal) received from the state general funds was $21,640,430. The County provided $6,431,014 ($2,018,400 in required match and $4,412,614 in "overmatch", general County funds committed to mental health programs at the discretion of the Board of Supervisors). The remaining amount, $5,977,481, was from non-County, non-State sources such as grants, patient fees and insurance, federal Medi-Cal and Medicare.

During the Fiscal Year 1986-87, the year that is the subject of this Test Claim, the County Mental Health Bureau submitted a mental health budget (excluding state hospital services) of $43,215,710. The state's non-categorical Short-Doyle allocation to the County was $22,515,326, which represented an increase from Fiscal Year 1985-86 of 4% (1% cost of living increase and. 3% for program expansion). State funding for categorical funding was $3,682,166, including $222,955 to fund the program subject to this Test Claim. The County provided

$7,481,097 ($2,547,225 in required match and $4,933,872 in "overmatch") . The estimated revenue from non-County, non-State sources was $9,537,122.

XIX

The Budget Act of 1986 allocated $2,000,000 to the State Department of Mental Health for assessments, treatment, and case management services, and made available for transfer from the State Department of Education to the State Department of Mental Health an additional $2,700,000 for assessments and mental health treatment services for IEP children. Item 4440-131-001, Chapter 186, section 2.00, Statutes of 1986; Chapter 1133, section 3, Statutes 1986. Of these amounts, $222,955 was allocated to the County of Santa Clara for Fiscal Year 1986-87. There was no required County match for this amount.

Additional amounts were to be transferred from the State Department of Education to the State Department of Mental Health if reports of local educational agencies indicated higher costs during Fiscal Year 1985-86 for services that are the subject to this Test Claim. Relatively low figures were reported initially. The Auditor General's Report showed wide discrepancies among school districts in the manner in which they reported their costs, and it was determined by the State Auditor General that the figures submitted were unreliable. An additional audit was to be conducted. Counties did not receive additional allocations for Fiscal Year 1986-87 as a result of these audits,

XX

Prior to the passage of Chapter.1747 of the Statutes of 1984, the County of Santa Clara, and local mental health programs generally, were not required to provide IEP assessments for local educational agencies, and were not required to participate in IEP meetings. Local educational agencies had these responsibilities. The County of Santa Clara is neither a local educational agency nor special education local plan area (SELPA), and has a fiscally independent Office of Education which is not involved in this Test Claim. The county mental health program and county welfare department had no statutory roles in the IEP process 'prior to this legislation.

XXI

Prior to the implementation of the legislation that is the subject of this Test Claim, County mental health clinicians did not participate in the IEP process in a formal manner. Frequently, if a child in therapy had an IEP, and the therapist was an employee of the County, the child's therapist voluntarily participated in the IEP process to a limited extent. Neither the therapist nor the County was required to participate. In each case, the therapist became involved at the invitation of the parent or the educational agency, after parental consent had been obtained. Depending upon insurance coverage, eligibility and ability to pay, parents, insurance, Medi-Cal and Medicare were billed for the services. The therapist did not sub-

mit an IEP assessment to the team and was not an IEP decision maker. The therapist may have discussed the case with the person conducting the assessment for the IEP team, or may have attended the IEP meeting. However, the therapist's presence at the IEP meeting was not required.

XXII

Prior to the implementation of legislation that is the subject of this Test Claim, representatives from the local mental health program did not have case management responsibilities for children placed out-of-home pursuant to IEPs. In Fiscal Year 1985-86, the County of Santa Clara did not have a responsibility to provide case management services.

Prior to the legislation that is the subject of this Test Claim, the Mental Health Bureau provided some case management services for the most severely mentally disturbed children: those placed in Napa State Hospital or receiving inpatient services at Don Lowe Pavilion, the County's acute psychiatric hospital. Generally, these children were dangerous to themselves or others and/or met the criteria of gravely disabled as a result of a mental disorder. All of the Santa Clara County children at state hospitals were in LPS conservatorships. These case management services did not overlap with IEP case management services, as the acute hospital and state hospital placements were not placements pursuant to IEPs.

Prior to the full implementation of the legislation that is the subject of this Test Claim, in Santa Clara County, the departments of social services and probation also provided some case management services unrelated to IEP case management services for children who were wards or dependents of the court. Counties were not required to provide these services. In Santa Clara County., parents were billed for these services, based on ability to pay. Not all children receiving these case management services were in IEPs, and few were in out-of-home placement pursuant to IEPs. Case management responsibilities did not include IEP case management responsibilities, even for children who had IEPs.

XXIII

Generally, patients or other responsible parties are charged fees for mental health services, determined by their ability to pay. Welfare and Institutions Code section 5716. If a patient is covered by insurance, insurance companies are billed for any covered services, subject to the patient's consent.

Medi-Cal and Medicare are billed for covered services to Medi-Cal and Medicare patients. Cost recovery from the Medi-Cal program is limited to the federal portion of Medi-Cal for the year that is the subject of this Test Claim, as the County in that year had a NNA contract with the State. Under this contract, the amount of Short-Doyle allocation includes the state portion of Medi-Cal for Short-Doyle services.

XXIV

The Fiscal Year 1986-87 cost to the County for providing mental health assessments, case management, and treatment required by the legislation that is the subject of this Test Claim exceed the $222,955 specifically allocated to the County by the State for this program. The excess costs place this Test Claim within the jurisdiction of the Commission on State Mandates.

XXV

Handicapped children needing mental health treatment to take advantage of a free, appropriate education under the EHA and the State's implementation of the EHA have an entitlement to receive those services. No other persons served by local mental health programs have an entitlement to mental health services.

The effect of Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985, and Title 2 California Code of Regulations Division 9 is to give the highest priority to individualized education program treatment. If mental health resources are insufficient to meet the entire mental health needs of the community, treatment required by individualized education programs must continue to be provided. patients with more acute illnesses, but without IEPs--including children--may be placed on waiting lists.

With respect to non-IEP mental health services, counties have flexibility to determine treatment priorities in terms of who is served, what kind of treatment they receive, and how often they receive those services.

XXVI

As the assessments and treatment services are specifically required to be provided at no cost to the handicapped child or the child's families, affected local entities do not have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. Some services rendered pursuant to these statutes for Medi-Cal eligible children are covered under Medi-Cal. The legislation does not impact the ability of the County to bill Medi-Cal, and this revenue is included as an off-set to expenses on this Test Claim.

XXVII

The following findings are not based on the "Joint Statements of Fact".

XXVIII

The Fiscal Year 1986-87 cost to Santa Clara County of providing IEP-related mental health services was $2,387,835. The breakdown of these expenses is as follows: $168,146 for IEP assessment and case management services; $1,784,076 for day treatment services; $419,349 for individual therapy services; and $16,264 for group

therapy services. Fiscal year 1986-87 revenues relative to these services is estimated to be $235,869 in federal Medi-Cal revenue. In addition, an insignificant amount of revenue from third party insurance payments was received. State funding of this IEP program in Fiscal Year 1986-87 was $222,955. The net unreimbursed cost of the program is therefore estimated to be $1,929.001.

XXIX

There were some children referred through the IEP process in Fiscal Year 1986-87 who previously had been known to the county mental health system (251 out of 568). Although some of these children previously had been identified as IEP children, it is not clear the extent to which they had IEPs requiring the mental health services they in fact were receiving. To the County's knowledge, none of these children seen by the County were receiving mental health services pursuant to IEPs: the services were rendered by the County independent of the IEP process, and parents and third parties were charged for the services under the County's standard Short-Doyle process. Many of these children may have had IEP-related mental health needs which had not been identified by the local educational agencies prior to the transfer of responsibility to local mental health agencies, and which should have been the responsibility of the local educational agencies, with no contribution required from family or third party insurance. Prior to Fiscal Year 1986-87, the needs of these 251 children may have been partially or fully met through the County in an informal manner, even though they should have been entitled to receive free services through IEPs, as a matter of right.

The 251 children previously known to the mental health system were not individual children the County was mandated to serve prior to Fiscal Year 1986-87.

XXX

The effect of shifting the responsibility for assessing and funding IEP mental health needs away from the agency responsible for identifying those in need of services has been formidable. According to the California State Auditor General, by December 31, 1986 (the end of the first ten months of local mental health agencies' involvement in this process), the number of students referred for noneducational services was more than double the number of special education students who received services during the 1985-86 Fiscal Year.

For Santa Clara County SELPA Area I, which was included in the Auditor General's audit, the escalation in referrals was even more striking: during the period March 1, 1986 to June 30, 1986, more than twice the number of children who received noneducational services during that fiscal year were referred for mental health evaluation. By December 31, 1986, the number of children so referred was nearly triple the number of special education students receiving noneducational services during the immediately preceding fiscal year (1985-86).

Children in need of IEP-related mental health services were under-identified prior to the implementation of Chapter 1747 of the

Statutes of 1984. Generally, children who were referred through this process were in need of mental health services and received IEP recommendations for such services as a result of the referrals. In Santa Clara County during Fiscal Year 1986-87, 494 of the 568 children referred for mental health IEP assessments subsequently received mental health services pursuant to IEPs.

DETERMINATION OF ISSUES

I

Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985 and their implementing regulations mandate a new program or higher level of service on the Mental Health Bureau of the County of Santa Clara as defined in the California Constitution Article XIII B, Section 6.

Article XIII B 56 requires state subvention of funds "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government . . . ." Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, and their implementing regulations, impose on county local mental health agencies "a new program or higher level of service" subject to the constitutional imperative of subvention under Section 6 Article XIII B of the California Constitution.

The Supreme Court of California has determined that "program" has two alternate meanings: "[1] programs that carry out the governmental function of providing services to the public or [2] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.

The legislation that is the subject of this Test Claim is a "program" under either definition. The state chose to carry out a governmental function of providing mental health assessments, treatment, and case management of handicapped children who need supportive services in order to benefit from their education by delegating the responsibility to local mental health agencies. The legislation requires local mental health agencies to provide certain specific services to the public. The responsibilities imposed on local mental health agencies pursuant to this legislation are not imposed upon all residents and entities of the state, only on local mental health agencies.

This is a new program in several ways. Before this legislation, counties in general and local mental health agencies in particular had no formal responsibilities in the IEP process. The legislation requires the local mental health agencies to provide services not hitherto required. This legislation involves the local mental health agencies in the IEP process, with its full panoply of federal and state time lines, rights, and procedures. Prior to this

legislation, educational agencies had the responsibility for providing free, appropriate public education to each handicapped child, including whatever supportive services were necessary in order for that child to benefit from special education. Chapters 1747 and 1274 and their implementing regulations shifted from educational agencies to local mental health agencies substantial financial and program responsibilities for mental health services provided to handicapped children pursuant to the IEP process. The service mandated by this legislation had not previously been mandated by the general state mental health program, the Short-Doyle program.

II

The state argues that Chapters 1747 and 1274 and their implementing regulations do not impose a new program on local mental health agencies because "[c]ommunity mental health programs were already providing assessments and mental health treatment for many handicapped children under the Short-Doyle Act." The argument is unconvincing. It ignores fundamental differences between IEP-related services and Short-Doyle services which existed prior to this legislation:

1. Local educational agencies were responsible for providing IEP-related mental health assessments and treatments. Community mental health programs were not providing IEP-related mental health assessments, and were not formally participating in the IEP process. No community mental health representative was an IEP team member, regardless of the placement possibilities. Community mental health had no IEP team responsibilities, was not responsible for locating out-of-home placement pursuant to IEPs and was not responsible for case management for children placed out-of-home pursuant to IEPs. To the knowledge of the County, the County was not providing any mental health treatment required by individual IEPs prior to this legislation.

2. The IEP program, based on the federal EHA requirements, provides for very specific evaluations and services, to be delivered within certain time limits and with due process safeguards. There is no similar process for Short-Doyle services, no similar time lines for evaluations or reevaluations or delivery of services, no similar definition of what must be included in an evaluation, no mandatory process similar to the IEP meeting process, no similar due process procedure.

3. The Short-Doyle program is not an entitlement program. It is a broad mental health program that grants great discretion to the community mental health system to determine what ser-

vices are to be provided, and to whom. The County determines its service priorities based on program principles and clinical needs. It is the policy of the County that if resources are inadequate to meet demands on a particular mental health center, needs are triaged. Those in most urgent need of treatment are seen; others are placed on waiting lists. Although the Short-Doyle Act sets forth certain priority populations, it does not grant to any individual an entitlement to services. The IEP program, on the other hand, is an entitlement program. If an individual child meets certain criteria, he or she is entitled to services, a right that is enforceable through administrative and judicial remedies. There is no such thing as a waiting list for IEP services. Those services simply must be delivered.

4. Patients receiving Short-Doyle services are charged for the services, based on their UMDAP ability to pay. If the services are covered by insurance or some other third party, collection is made from that source. Families of children receiving IEP-related services are entitled to receive those services free of charge. The parents or child cannot be charged for the services. If the IEP-related services are covered by insurance, any submission of insurance claims to providers must be voluntary, unless such claims would result in neither an increase in premiums, nor a decrease of annual or lifetime insurance benefits, nor a cancellation of the insurance policy.

5. Since the IEP program is an individual entitlement program, the responsibility for providing IEP -related mental health services represents an open-ended financial demand on the County. Each individual child who qualifies for IEP-related services is entitled to receive them. Receipt of the services cannot be contingent on identifying a funding source. Government Code section 7572(d). Through the Short-Doyle program, on the other hand, a community mental health agency cannot be required to expend more for mental health programs than it receives in its state Short-Doyle allocation plus the required county match. Welfare and Institutions Code section 5709,

6. The Short-Doyle Act is designed to organize and finance community mental health services

> in every county through locally administered and locally controlled programs, and to provide a means for allocating state mental health funding according to community needs. Welfare and Institutions Code 5600. The goals of the Act are to assist persons who are institutionalized, or at a high risk of becoming so, because of a mental disorder, lead lives as normal and independent as possible; to assist persons experiencing temporary mental health problems to return to a functioning level; and to prevent serious mental disorders and psychological problems. First priority must be given to services required for acute patients and involuntary patients. Welfare and Institutions Code section 5651.3. Other priority populations do include, mentally disturbed children and adolescents, including juvenile sex offenders and juvenile sex offense victims. Welfare and Institutions Code section 5651.1. However, this population is not synonymous with children entitled to IEP-related mental health services. The most severely mentally ill children, those in acute hospitals, state hospitals, or state hospital alternative programs did not receive their mental health services pursuant to IEPs. Hospital care is deemed "medical services" which is not the kind of supportive service required to be provided under the EHA. 20 U.S.C. section 1401(a)(17). Those mentally disturbed children and adolescents who are to be given first priority -- those in need of acute care and those involuntarily detained -- do not receive their mental health services pursuant to IEPs. Presumably, most juvenile sex offenders, juvenile victims of sex offenses, and wards of juvenile detention facilities -- all of whom are specifically targeted as priority populations -- also do not qualify for IEP-related mental health services.

The Short-Doyle Act is designed to give community control and direction to the complex mental health needs of a county's population. The legislation requiring local mental health agency involvement in the IEP process (Government Code section 7570 et. seq.) is not part of the Short-Doyle Act (Welfare and Institutions Code section 5600 et seq.), and is in fact contrary to it. There is little local control over services to be offered, as the services to be provided are dictated by the specific criteria contained in federal and state law and regulation. The IEP program singles out a narrow population for separate, special treatment, as an entitlement program, outside the priorities of the Short-Doyle Act.

That the IEP program is separate from the Short-Doyle program is evident from the Short-Doyle contract itself. The County's negotiated net amount contract is authorized by, and subject to the provisions of, Welfare and Institutions Code section 5705.2. The Short-Doyle contract between the state and the County of Santa Clara for Fiscal Year 1986-87 is replete with references to the Short-Doyle Act. The introductory provisions of the contract refer to the Short-Doyle Act as the enabling legislation. Exhibit 4, Santa Clara County Negotiated Net Amount Short-Doyle Fiscal Year 1986-87 Contract. The contract defines "client" or "patient" as a person who receives services pursuant to the Short-Doyle Act. Paragraph 27(a).

The body of the Short-Doyle contract makes no references to Government Code section 7572 et seq., nor to any IEP responsibilities. The only specific mention of this program is the reference to the state's $222,955 allocation for the "S.E.P. [IEP] Program" on the tables of Exhibits B and F of the contract.

The increase in the basic Short-Doyle state allocation (excluding allocations for categorically funded programs) from Fiscal Year 1985-86 to 1986-87 was less than four percent ($22,515,326 compared to $21,640,430). If the net unreimbursed cost of the IEP program is to be absorbed by the Short-Doyle program, it would consume over eight-and-a-half percent of the county's general state Short-Doyle allocation for Fiscal Year 1986-87 ($1,929,011 out of $22,515,326).

The Legislature did not intend that the services mandated by Chapters 1747 and 1274 would be part'of, and funded through, the Short-Doyle program. The IEP-related mental health services were never to be funded through the Short-Doyle program. Section 16 of Chapter 1274 provided for a transfer of funds from the State Department of Education to the State Department of Mental Health, Section 17 of Chapter 1274 recognized that the Chapter imposed a mandate and directed that reimbursement to local agencies be made through to State Mandates Claim Process. Chapter 1133 of the Statutes of 1986 further provided for funding for mental health for this program, by providing for a transfer of $2,000,000 from the Department of Education to the Department of Mental Health, to fund the IEP mental health program. This statute also provided that counties were not required to provide county match for this program, unlike the Short-Doyle program, and that the Department of Mental Health was to allocate funds based on individual county needs, in lieu of the Short-Doyle Act allocation. Section 3 of Chapter 1133 of the Statutes of 1986. It also provided for additional transfers from the Department of Education to the Department of Mental Health, based on the Auditor General's report. Id.

Even if it is determined that the services mandated by' Chapters 1747 and 1274 are included in the Short-Doyle program', the services are mandated services for which subvention is required.

III

The legislation that is the subject of this Test Claim does not implement a federal mandate contained in section 504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1974 (P.L. 93-516, 29 U.S.C. 794), together with the implementing regulations, prohibits discrimination against handicapped individuals in any program receiving federal funds. Section 504 does not require counties to give mental health services on a priority basis to handicapped students who receive services pursuant to their IEPs. If anything, Chapters 1947 and 1274 require countries to discriminate against handicapped individuals who are not entitled to mental health services pursuant to IEPs, in violation of Section 504.

The burden of providing public education and related services is on educational agencies, not counties. The section 504 regulation requirement that recipients of federal funding who operate educational programs "...provide a free appropriate public education to each qualified handicapped person..." does not apply to counties, which do not operate a public or elementary or secondary education program. In Santa Clara County, local education agencies provide these services, even to children in the custody of the County, in the Juvenile Hall, Shelter, or Ranches.

IV

The legislation that is the subject of this Test Claim is not state legislation implementing a federal mandate contained in The Education for All Handicapped Children Act of 1975.

The Education for All Handicapped Children Act is not a mandated program. A state may elect or decline to participate. Acceptance of federal funding for education is a state option. But once the option is accepted, its terms and conditions must be met by the recipient. The state, by accepting the federal monies, has agreed to abide by the terms and conditions of the EHA. It now seeks to impose the financial burden of this decision on counties, who do not even receive the federal monies which fund this program.

Section 6 of Article XIIIB of the California Constitution provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service....

In defining reimbursable mandates, Section 9, subdivision (b), of Article B of the California Constitution excludes "[a]ppropriations required for purposes of complying with mandates of the...federal government which, without discretion, require an expenditure" by the governmental entity.

If the state is to receive certain federal grants, the EHA requires that the state participate in the IEP program. Nevertheless', a financially induced choice is not the same as a statutory require-

ment. In City of Sacramento v. State of California, the appellate court twice determined that state legislation requiring local government employers to pay into the state unemployment insurance on behalf of their public employees was not a federal mandate exempt from reimbursement, but a financially induced choice, even though failure to impose such a requirement on local government employers would have resulted in federal de-certification of the State's unemployment insurance program, with a concomitant loss of federal tax credit for the State's private employers. City of Sacramento v. State of California (1980) 156 Cal. App. 3d 182, 196 (Sacramento I); disapproved of on other grounds, to the extent it conflicts, in County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 58; City of Sacramento v. State California (1988) 201 Cal. App. 3d 409.

Similarly, acceptance of federal education monies, which only then requires the state to implement the IEP program, is a financially induced choice, not a federal mandate. In fact, the State is going one step farther than they attempted to go in the City of Sacramento cases. At least in the City of Sacramento cases, federal law did require contribution into the state unemployment insurance fund from all local government employers, if the State program was to be certified. In the present case, nothing in the federal EHA law requires county mental health or county government involvement in the IEP process. Federal law requires states which receives federal funding to have in place a program applying to the state as a whole. See 34 Code of Federal Regulations 5300.1 et seq. It is the State that has the responsibility to design such a program. Federal regulations generally do not dictate which state or local agency will be responsible for program execution. The state could impose the responsibilities on local school districts, as it did before the passage of Chapter 1747. Alternatively, the state could provide the services directly.

Citing the Government Code section 17513 definition of "costs mandated by the federal government," the state asserts that the cost of complying with Chapters 1747 and 1274 are federally mandated because failure to opt into Public Law 94-142 (the EHA) would result in "a substantial monetary loss" in the form of loss of federal education funding. The State asserts that the amount of this loss would be $100,000,000. There is no evidence in the record to support that assertion.

'Even assuming that failure to opt into the EHA would result in a loss of a substantial sum of federal monies to the state, there is no evidence that this would result in a substantial net monetary loss. The net costs of complying with the IEP requirements to the mental health agency of the County of Santa Clara alone is $2,151,966 ($2,387,835 less $235,869 federal Medi-Cal). There are fifty-seven other countries in the state. There are also costs of the Department of Social Services,, for out-of-home placement, and costs of state and local educational agencies, for special education and other supportive or related services. It may well be that the cost of compliance exceeds the funding received.

Even if failure to opt into Public Law 94-142 were to result in substantial monetary loss, Chapters 1747 and 1274 and their imple-

menting regulations are not federally mandated costs as defined by Government Code section 17513, which provides:

> Any increased costs incurred by a local agency... in order to comply with the requirements of a federal statute or regulation...[including] costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state.

Failure to impose on counties -- which do not provide primary or secondary education -- a requirement that counties provide IEP-related mental health services does not result in substantial monetary penalties or loss of funds. It is the failure of state or local educational agencies to do so that would result in the loss of funds. When it opts into the EHA program, the State itself, as well as educational agencies, incur certain obligations. Nothing in the federal law requires involvement of counties in the IEP process. What the state is attempting to do is take the federal monies, and pass along the responsibility to the counties, without the monies. This is precisely the kind of delegation of responsibility which, under the California Constitution, the state must provide subvention funds.

V

The legislation that is the subject of this Test Claim does not merely affirm for the State that which had been declared existing law by actions of the court. No court decisions impose on counties the responsibility of providing services which relate to the provision of educational services.

Court decisions at the federal and state level heard before the enactment of Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, which establishes the rights of handicapped individuals, were decided under due process and equal protection theories. Mills v. Board of Education of the District of Columbia (1972) 348 F. Supp. 866 held that the Board of Education, by failing to provide special education to certain disturbed children, denied due process to the children and the class they represented. Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (1971) 334 F. Supp. 1257 involved the equal access to educational services for retarded children. Neither case involved the imposition on local mental health agencies of responsibilities to provide services supportive to the educational requirements of handicapped children.

VI

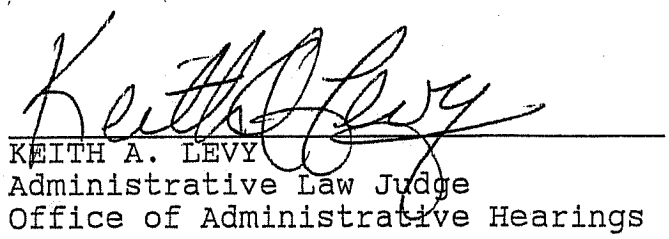
The County of Santa Clara and other affected local entities do not have the authority to levy services charges, fees, or assessments sufficient to pay for the mandated program or increased level of services. Both federal and state law provide that services that are the subject of the Test Claim must be provided at no cost to

parent or child, and federal law prohibits affected local entities from requiring that parents use insurance benefits to pay for the services provided if using such benefits would result in a decrease in coverage or an increase in the cost of coverage.

ORDER

The Test Claim, filed by the County of Santa Clara, is granted. The County of Santa Clara shall submit parameters and guidelines to the Commission for its consideration.

Dated: March 28, 1989



KEITH A. LEVY
Administrative Law Judge
Office of Administrative Hearings

AGENDA

COMMISSION ON STATE MANDATES

Public Hearing
Thursday, November 30, 1989
10:00 a.m.
State Capitol, Room 437
Sacramento, California

A. ROLL CALL

RULEMAKING AND INFORMATIONAL HEARINGS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8.

B. MINUTES

Item 1 Hearing of October 26, 1989

C. PARAMETERS AND GUIDELINES

Item 2 Chapter 980, Statutes of 1984
State Controller's Office
Manual of Accounting and Audit Guidelines for Municipal and Justice Courts
Prorations of Fines and Court Audits

D. STATEWIDE COST ESTIMATE

Item 3 Chapter 1659, Statutes of 1984
Emeroencv Procedures, Earthcruakes and Disasters

E. SCHEDULE OF APPROPRIATION DEFICIENCIES

Item 4 State Controller's Office
1987-88 Budget Act
Schedule of Appropriation Deficiencies

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

F. STATEMENTS OF DECISION

Item 5 Chapter 1327, Statutes of 1984
Chapter 1286, Statutes of 1985
Short-Dovle Targeted Supplement Fund

Item 6 Public Law 99-519
Title 40, CFR, Part 763(e)
Asbestos Containins Materials in Schools

G. ADMINISTRATIVE LAW JUDGE DECISION

Item 7 Chapter 1747, Statutes of 1984
Chapter 1274, Statutes of 1985
Title 2, CCR, Division 9
Handicapped and Disabled Students

H. TEST CLAIMS

Item 8 Chapter 841, Statutes of 1981
Welfare and Institutions Code
sections 5325, 5326, 5326.1, 5326.9,
5328, and 5500 through 5550
Title 9, CCR, Sections 863, et seq.
Patients' Rights Advocates

Note: All back-up material and supporting documentation for this meeting is available for public inspection at the office of the Commission on State Mandates, Robert W. Eich, 1414 K Street, Suite 315, Sacramento, California; (916) 323-3562.

In addition, a complete copy of the agenda will be available for public inspection at the meeting.

WP0015c-1

ITEM 7

PROPOSED ADMINISTRATIVE LAW JUDGE DECISION
Approved Mandate
Chapter 1747, Statutes of 1984;
Chapter 1274, Statutes of 1985;
Title 2, California Code of Regulations, Division 9
Handicapped and Disabled Students

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Hearing: 11/30/89
File: **CSM-4282**
Staff: Stephen R. Lehman
WP 0500s

PROPOSED ADMINISTRATIVE LAW JUDGE DECISION
Approved Mandate
Chapter 1747, Statutes of 1984;
Chapter 1274, Statutes of 1985;
Title 2, California Code of Regulations, Division 9
Handicapped and Disabled Students

Executive Summary

This item, which was continued from the September 21, 1989 Commission hearing, is a proposed statement of decision from an Administrative Law Judge (ALJ) regarding a test claim submitted by the County of Santa Clara.

The Attorney General's Office (AG) represented the Department of Finance, Department of Mental Health, and the Department of Education in this matter. The AG recommends the Commission reject the proposed statement of decision because the conclusions reached by the ALJ are erroneous since they are based on a misunderstanding of the applicable provisions of law and court decisions.

The County of Santa Clara recommends the Commission adopt the proposed ALJ decision because the ALJ has issued a comprehensive proposed decision setting forth factual determinations and thoroughly analyzing the legal issues presented.

In reviewing the ALJ decision, it is apparent that the ALJ considered the positions of all the parties to this test claim. Therefore, staff concludes that the AG's argument was not persuasive to the ALJ and recommends the Commission adopt the ALJ's proposed statement of decision.

Claimant

County of Santa Clara

Chronology

8/17/87	Test Claim filed with the Commission on State Mandates (Commission).
1/28/88	Commission hearing on options for adjudicating the test claim. Commission refers claim to Office of Administrative Hearings.
12/1/88	Test claim hearing before an Administrative Law Judge (ALJ).
4/25/89	Staff receives proposed decision from ALJ.
5/31/89	Attorney General's Office requests continuance from July 27, 1989 hearing. Claim set for September 21, 1989.
9/21/89	Commission hearing. The attorney representing the state was unable to attend the Commission hearing. Commission continues the proposed ALJ decision to its November 30, 1989 hearing.

Claim Summary

Prior to July 1, 1986, the State Department of Education (SDE), through school districts and county offices of education, was responsible for the education and care of special education students. However, Chapter 1747, Statutes of 1984 (Chapter 1747/84), Chapter 1274, Statutes of 1985 (Chapter 1274/85), and Title 2, California Code of Regulations (CCR), sections 60000 et seq., shifted the responsibility of providing psychotherapy and other mental health-services for pupilswith exceptional needs from the SDE to the Department of Mental Health (DMH)'. Also, the responsibility of providing residential care for seriously emotionally disturbed students was shifted from the SDE to the Department of Social Services (DSS). To facilitate this transfer of responsibilities, the Budget Act of 1986 provided for the transfer of $8.1 million of special education funds from-the SDE. The DMH received $2.7 million, and the DSS received $5.4 million. In addition, the Budget Act of 1986 allocated $2 million to the DMH to determine if special education students need noneducational services.

The County of Santa Clara alleges that as a result of providing mental health assessments, case management, and treatment for children who are residents of the county, it has incurred unreimbursed costs mandated by the state in the amount of $1,929,011 during the 1986-87 fiscal year.

Staff Note

Due to the complexity and detail of the positions and submittals of the parties involved in this decision, staff will not restate in detail the positions of the parties or the ALJ decision. However, the ALJ decision and the positions of the parties regarding the ALJ decision are attached.

Summary of Proposed ALJ Decision

The proposed decision from the ALJ finds that Chapter 1747/84, Chapter 1274/85, and Title 2, CCR, sections 60000 et seq., mandate a new program or higher level of service on the claimant's Mental Health Bureau. The ALJ determined that such statutes and regulations require counties to provide mental health assessments, treatment, and case management to handicapped children who are in need of such supportive services in order to benefit from their Individualized Education Program (IEP).

Prior to Chapter 1747/84, Chapter 1274/85, and Title 2, CCR, sections 60000 et seq., the SDE, through the school districts and county offices of education, was solely responsible for the education and care of special education students through the IEP.

The ALJ concluded that the statutes and regulations in question have shifted the responsibility of providing psychotherapy and other mental health services for pupils with exceptional needs from local education agencies to counties; thus, requiring county mental health departments to provide a higher level of service.
(Attachment A)

Departmental Recommendations

The Attorney General (AG), representing the Department of Finance (DOF), DMH, and SDE, recommends the Commission reject the proposed decision from the ALJ. The AG states that the conclusions reached by the ALJ are erroneous because they are based on a misunderstanding of the applicable provisions of law and court decisions.

The AG concludes that Chapter 1747/84, Chapter 1274/85, and Title 2, CCR, sections 60000 et seq., are ". . . fundamentally a response to the mandates of the equal protection clause of the, 14th Amendment as enunciated in Smith v. Robinson (supra). These pieces of legislation only set forth the intricate but

required details of how these constitutional mandates are to be implemented and represent policy determinations regarding the details of how these constitutional mandates are to be implemented and represent policy determinations regarding the details of implementation which were enacted by the Congress and by the State Legislature, in turn."

The AG also states that with the possible exception of the required county participation in the IEP process and the required IEP related case management, counties are not required to increase Short-Doyle expenditures or add new services. The AG believes that only a redirection of resources is involved.

Based upon the above, the AG recommends the Commission reject the proposed ALJ decision.
(Attachment B)

Claimant's Position

The claimant recommends the Commission adopt the proposed ALJ decision because the ALJ has issued a comprehensive proposed decision setting forth factual determinations and thoroughly analyzing the legal issues presented.

In rebuttal to the AG's recommendation, the claimant states that neither optional nor mandatory federal law, whether through cases or statutes, require local governments which do not provide educational services to provide IEP related services to handicapped students. Moreover, even if there is a federal mandate involving mental health services for handicapped students, then the mandate is on either'the state or the local educational agencies who receive the federal education funds. Therefore, the claimant maintains that the transfer to counties of the responsibility of providing mental health services to handicapped students has imposed a new program or higher level of service that is subject to reimbursement.

In addition, the claimant states that Chapter 1747/84 and Chapter 1274/85 established a new program that is not part of the Short-Doyle program. Specifically, the statutes at issue are set forth in the Government Code, not in the Short-Doyle Act (Welfare and Institutions Code section 5600 et seq.). The claimant further states that although Chapter 1274/85 amended Welfare and Institutions Code section 5651 to reference the services, required by Government Code sections 7571 and 7576, this one particular reference to the Government Code does not make the Government Code provisions a part of the Short-Doyle program'. Consequently, the claimant refutes the AG's allegation that only a redirection of Short-Doyle resources is involved in the required county participation in the IEP process and the required IEP related case management.

Based upon the foregoing, the claimant recommends the Commission adopt the ALJ's proposed statement of decision. (Attachment C)

Staff Analvsis

Issue: Should the Commission adopt the proposed ALJ decision?

At its hearing of September 21, 1989, the Commission continued action on the proposed decision because the attorney representing the state in this matter was unable to attend the Commission hearing. In addition, the commission discussed the possibility of a decision being rendered in the litigation of Huff v. Commission on State Mandates by the Commission's November hearing, and that the Huff decision may provide some direction on how the Commission should act on this claim. Staff would note that even though the parties involved in the Huff case completed the trial portion, they are currently preparing written briefs to the court. It is unlikely that the court will issue a decision until sometime in 1990 and there is also the possibility that one of the parties may file an appeal on the Superior Court's decision.

In any case, it is the position of staff, and the claimant, that the decision in Huff will not have any bearing on this claim because the laws involved in the Huff case are applicable to local educational agencies, and the laws involved in this claim are only applicable to county mental health agencies. Therefore, staff does not believe that the Huff decision, concerning state Education Code provisions, will have any affect on how the Government Code provisions involved in this claim will impact county mental health programs.

Staff would note that in reviewing the ALJ's administrative record, the evidence and arguments presented by the parties are generally the same arguments being presented to the Commission at this hearing. Staff believes that the ALJ's decision is supported by the record in this matter. Furthermore, staff and the claimant agree that the ALJ's decision is correct in finding the provisions of Chapter 1747, Statutes of 1984, Chapter 1274, Statutes of 1985, and their implementing regulations, have resulted in a reimbursable state mandated program.

Staff would note that the Commission has the following three options regarding the proposed statement of decision:

1. Adopt the ALJ's proposed decision.

2. Refer the decision back to the ALJ with instructions to take additional evidence, and reconsider the proposed decision in light of the additional evidence.

3. The Commission, itself, could decide the claim at this hearing or at a future hearing, with or without the taking of additional evidence.

The Commission's authority for the second and third options are found in subdivision (d) of section 1188.1 of the Commission's regulations. This subdivision reads:

> "If the proposed decision of the hearing officer or hearing panel is not adopted by the commission, the commission itself may decide the case upon the record, including the transcript, with or without taking additional evidence or may refer the case to the same hearing panel or hearing officer to take additional evidence. If the case is so assigned to a hearing panel or hearing officer, the hearing panel or hearing officer shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are a part of the record of the prior hearing. A copy of such proposed decision shall be furnished to each party as prescribed in subdivision (c)."

Staff would note that the ALJ has conducted an evidentiary hearing and issued the decision based upon the evidence and testimony presented at that evidentiary hearing. Consequently, the Commission would be acting properly if it were to adopt the proposed statement of decision.

Staff Recommendation

Staff recommends the Commission adopt the ALJ's proposed statement of decision (Attachment A), for the following reasons:

1. The ALJ has conducted an evidentiary hearing and issued a decision based upon the evidence and testimony presented at that evidentiary hearing.

2. After reviewing the. ALJ's record, it is staff's position that the proposed statement of decision is supported by the record.

3. It is staff's position that referring the decision back to the ALJ with instructions to take additional evidence and to reconsider the proposed decision in light of the additional evidence, is not likely to alter the decision.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the	)	
TEST CLAIM OF THE COUNTY OF SANTA CLARA HANDICAPPED AND DISABLED STUDENTS	)	OAH NO. N-30939
Respondent.	)	

PROPOSED DECISION

On December 1, 1988, in Sacramento, California, Keith A. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Harlan E. Van Wye, Deputy Attorney General, represented the California State Departments of Finance, Education, and Mental Health.

Susan A. Chapman, Deputy County Counsel, represented the County of Santa Clara.

Evidence was received and the record remained open for the submission of post hearing briefs. The opening brief from the State of California was received on January 30, 1989 and marked as Exhibit D. The opening brief from the County of Santa Clara was received on January 30, 1989 and marked as Exhibit 8. Reply briefs were received from the State of California and the County of Santa Clara on February 27, 1989 and marked as Exhibits E and 9 respectively, The matter was thereupon submitted.

I

The County of Santa Clara filed a Test Claim with the Commission on State Mandates under the provisions of Revenue and Taxation Code section 2231 and Government Code Division 4 Part 7. Santa Clara County alleges that Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes 1985 and their implementing regulations, relating to the provision of certain mental health services for handicapped and disabled students, impose a mandate on the County as defined by the California Constitution and Government Code section 17514(a).

II

On January 28, 1988, this matter was referred to the Office of Administrative Hearings by the Commission on State Mandates for a

hearing. The Commission requested that the following issues be addressed in the decision as well as any others deemed appropriate by the Administrative Law Judge:

A. Does Chapter 1747, Statutes 1984; Chapter 1274, Statutes 1985, and Division 9, of Title 22, of the California Administrative Code mandate counties to implement a new program or higher level of service in an existing program within the meaning of Government Code section 17514 and section 6 of Article XIII b of the California Constitution?

B. Do the statutes in question implement a federal mandate, specifically, section 504 of the Rehabilitation Act of 1973, and Public Law 94-142?

C. Has the claimant incurred unreimbursed costs, from state or federal funds, as a result of any activities mandated by these statutes and regulations?

D. If the statutes in question are found to require a new program or higher level service, do the affected local entities have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service as discussed in Government Code section 17556(d)?

E. Do any of the other provisions for denying a test claim, as set forth in Government Code section 17556, apply to this claim?

III

Following a prehearing conference, the parties, at the suggestion of the Administrative Law Judge, arrived at a "Joint Statement of Facts", by which the matter was submitted. The following findings are based on that Joint Statement of Facts.

IV

The fundamental component of federal law prohibiting discrimination against handicapped individuals in any program receiving federal funds was enacted by Congress in 1973 as Public Law 93-112, Title V, section 504 (codified at Title 29 U.S. Code section 794). "Section 504" requires the promulgation of regulations by each agency of the federal government as may be necessary to carry out the provisions of section 504 and other laws providing protection to the handicapped. At least 23 federal agencies and departments have promulgated "504 regulations."

Congress soon recognized that this general protection was inadequate to address the special needs of handicapped school

children. In 1976, the "Education for All Handicapped Children Act", 20 U.S.C. section 1400 et seq. ("EHA") was enacted. shortly thereafter, "504 regulations" were enacted (now recodified as 34 Code of Federal Regulations, Part 104) which require that recipients of federal funding which operate a public or elementary or secondary education program"... provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. Part 104.33. The EHA and its implementing regulations, 34 C.F.R. sections 300.1 et seq., establish procedural and substantive standards for educating handicapped students. The EHA also incorporates by reference state substantive and procedural standards concerning the education of handicapped students. 20 U.S.C. section 1401(18); 34 C.F.R. section 300.4. In order to receive federal funds, a state must adopt a plan specifying how it will comply with federal requirements. 20 U.S.C. sections 1412 and 1414(a).

V

Under the EHA, handicapped children are guaranteed the right to receive a free appropriate public education which emphasizes special education, and related services designed to meet their unique educational needs. 20 U.S.C. sections 1400(c) and 1412. "Special education" means specially designated instruction to meet the unique needs of a handicapped child, including classroom instruction and instruction in physical education, as well as home instruction and instruction in hospitals and institutions. 20 U.S.C. section 1401(a)(16).

Related services are defined by statute to include transportation and such developmental, corrective, and other supportive 'supplemental services as may be required to assist a handicapped child to benefit from special education. 20 U.S.C.. section 1401(a)(17). Supportive services include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, counseling services, and limited medical services. Related services are to be provided at no cost to parents or children. If placement is a public or private residential program is necessary to provide special education and, related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. section 300.302.

VI

Handicapped children are defined as children who are mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or health impaired, or children with specific learning disabilities, who by reason thereof require special education and related services. 20 U.S.C. section 1401(1).

VII

The EHA provides a specific mechanism for insuring that handicapped children receive a free appropriate public education: the

Individualized Education Program (IEP). The IEP is a written statement for a handicapped child that is developed and implemented in accordance with federal IEP regulations. 34 C.F.R. section 300.340; 34 C.F.R. section 300.346. The state educational agency of a state receiving federal funding must insure that each public agency develops and implements an IEP for each of its handicapped children. 34 C.F.R. section 300.341.

The IEP process begins when a child is identified as possibly being handicapped. He or she must be evaluated in all areas of suspected handicaps by a multidisciplinary team, which includes a teacher or specialist with knowledge in the area of suspected disability. Parents also have the right to obtain an independent assessment of their child by a qualified professional. School districts are required to consider the independent assessment as part of their educational planning for the pupil. 34 C.F.R. section 300.503.

If it is determined that the child is handicapped within the meaning of EHA, an IEP meeting must take place. Participants in the IEP meeting (the "IEP team") include a representative of the local educational agency, the child's teacher, one or both of the child's parents, the child if appropriate, and other individuals, at the discretion of the parent or agency. 34 C.F.R. section 300.344.

VIII

The written IEP is an educational prescription which includes statements of the child's present levels of educational performance, annual goals (including short term instructional objectives), and specific special education and related services to be provided to the child and the setting in which the services will be provided along with the projected dates for initiation of services and the anticipated duration of the services. It also includes appropriate objective criteria, evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved. 20 U.S.C. section 1414(a)(S); 34 C.F.R. sections 300.340-349. This document serves as a commitment of resources necessary to enable a handicapped child to receive needed special education and related services, and becomes a management tool, a compliance and monitoring document, and an evaluation device to determine the extend of the child's progress.

Each public agency must have an IEP in effect at the beginning of each school year for every handicapped child who is receiving special education from that agency. The IEP must be in effect before special education and related services are provided, and special education and related services set out in a child's IEP must be provided as soon as possible after the IEP is finalized. 34 C.F.R. section 300.342. Meetings must be conducted at least once a year to review and, if necessary, revise each handicapped child's IEP. More frequent meetings may take place if needed.

IX

California elected to participate in the EHA and adopted a state plan and enacted a series of statutes and regulations designed

to comply with federal requirements. Education Code sections 7570 et seq.; and section 56000 et seq.; Government Code section 7570 et seq.; Title 2 California Code of Regulations sections 60000 et seq.; and Title 5 California Code of Regulations section 3000 et seq.

The Legislature has established its intent to assure receipt of federal funding, including the funds available for services to handicapped children. Government Code section 7560. A single line of responsibility with regard to the education of all handicapped children as required by the EHA was established. The responsibility for supervising education and related services for handicapped children specifically required pursuant to the federal requirements was delegated to the Superintendent of Public Instruction. Government Code section 7561; Education Code section 56135.

X

In California, public education services are directly delivered through school districts throughout the state. In addition, there are county offices of education and county superintendents of schools which have certain responsibilities for overseeing educational services within counties. The relationship of school districts and counties varies from county to county. In some counties, there is only one school district, covering residents of the county. In other counties, there are several school districts., Some school districts cross county lines.

The governing board of each school district must elect the organizational structure which will serve special education needs. One option is for a school district, in conjunction with one or more districts, to submit to the Superintendent a joint local plan which provides a governing structure and administrative support for a system for determining the responsibility for participating agencies for the education of each individual with exceptional needs residing within the special education local plan area. Special districts of this type are known as SELPA districts.

There are 33 school districts in the County of Santa Clara. All have elected under Education Code section 56170(c) to join with the county office of education to submit special education plans to the State Superintendent of Schools, forming seven SELPA districts in the County. Five of the SELPAs serve more than one school district. Two serve single school districts (San Jose Unified School District and Santa Clara Unified School District).

The Santa Clara County Office of Education was established as an entity separate from the County of Santa Clara by the Board of Supervisors in 1973, pursuant to the authority of Education Code section 1043 (formerly section 658). It is governed by the County Board of Education, and is fiscally independent from the County of Santa Clara. The County Office of Education is administered by the County Superintendent of Schools.

While the details of the seven SELPA plans vary, under the plans submitted to the State Superintendent, the County Office of

Education has some responsibility in each SELPA plan. The County Office of Education receives special education monies from the State, including regional service funds and program specialist funds. After withholding an amount to cover the administrative costs of SELPA administration, the monies are disbursed to the different SELPAs. Each SELPA has its own budge, which is managed either by the SELPA administrator at the County Office of Education or by the local education districts themselves. The County Office of Education is not responsible for the IEPs for any children, although it does operate some programs for severely handicapped children.

XI

Chapter 797 of the Statutes of 1980 added Part 30 (commencing with section 56000) to Division 4 of Title 2 of the Education Code, to implement the EHA. This legislation sets forth the basic California IEP process for identifying special education children and providing special education and related services necessary for a child with exceptional needs to benefit from a free appropriate public education.

Before July 1, 1986, local educational agencies (school districts and county offices of education) were responsible for the education of special education students, including the provision of related services necessary for the child to benefit from education. This included responsibilities for identifying and assessing children with suspected handicaps, as well as the responsibility for providing related services (including mental health services) required in individual IEPs. Local educational agencies were financially responsible for the provision of mental health services required in the IEP.

XII

Chapter 1747 of the Statutes of 1984 added Chapter 26 to Division 7 of Title 1 of the Government Code and amended section 11401 of the Welfare and Institutions Code. This legislation shifted some of the IEP responsibilities for related services which previously had been held by local educational agencies to local mental health programs.

This legislation requires psychotherapy and other mental health assessments for special education children with suspected mental health handicaps or mental health needs to be conducted by qualified mental health professionals, as specified in regulations developed by the State Department of Mental Health. Government Code section 7572(c). Mental health services may be added to a child's IEP only if a formal assessment is conducted and the qualified mental health professional conducting the assessment recommends the service in order for the child to benefit from special education. Government Code section 7572(d).

This legislation provides that the State Department of Mental Health, or designated community mental health service, is responsible for the provision of psychotherapy or other mental health services, if required in a handicapped child's IEP. Government Code section 7576.

The child's family shall not be liable for the cost of such treatment services. Government Code section 7582.

This legislation requires the expansion of the IEP team to include a representative of the county mental health department and a representative of the county welfare department if the child is classified as seriously emotionally disturbed (SED) and any member of the IEP team recommends out-of-home placement based on relevant assessment information. Government Code section 7572.5(a). The expanded team must review the assessment to determine whether the child's needs can be met through a combination of nonresidential services, whether residential services will enable the child to benefit from educational services, and whether residential services are available which will address the child's needs and ameliorate the conditions leading to the SED designation. Government Code section 7572.5(b).

If the IEP requires residential placement, a case manager must be selected from the public agency representatives on the team. The IEP must include provisions for review of case progress, of the continuing need for residential placement, of the compliance with the IEP, and of the progress toward ameliorating the SED condition. There must be a review by the full IEP team every six month. Government Code section 7572.5(c). Aid in the form of AFDC (Aid to Families with Dependent Children) is provided for any child under the age of 18 who is placed out of home pursuant to an IEP. Welfare and Institutions Code section 11401(b)(l)(D).

This legislation required each local agency affected by the legislation to report to the Department of Finance through appropriate state agencies either an estimate of expenditures which previously were borne by it and which 'would be shifted to another agency as a result of this legislation or an identification of its responsibility for expenditures which would be acquired by the agency as a result of this legislation. Government Code section 7583. The original estimates were to be submitted no later than March 15, 1985 to the state agencies. Actual shifts in funding were to be reported annually by March 15 in subsequent years. Id. The Department of Finance was directed to recommend appropriate adjustments in the annual Budge Act to reflect shifts in expenditures. Id. The March 15, 1985 report was to include an estimate of the special education expenditures, for Fiscal Year 1984-85 for psychotherapy, the number of children receiving psychotherapy at the time of the April pupil count, the name of the agency providing the psychotherapy, including the name of the agency paying for such services. Section, 4 of Chapter 1747 of the Statutes of 1984.

This legislation was originally scheduled to become operative July 1, 1985. Later legislation delayed the full implementation until July 1, '1986. During a "window period" from March 1, 1986 through June 30, 1986, local mental health agencies received referrals from local educational agencies, conducted assessments, participated in IEP meetings to develop IEPs for the 1986-87 school year, but were not responsible for providing the treatment services.

Chapter 1274 of the Statutes of 1985 amended Chapter 26 of Division 7 of Title 1 of the Government Code, and amended sections 5651, 10950, and 11401 and added Chapter 6 to Part 6 of Division 9 of the welfare and Institutions Code. This legislation made certain technical changes and modified the responsibilities concerning IEP mental health services and made further changes to implement this program.

This legislation requires that the regulations be developed by Departments of Health Services and Mental Health in consultation with the Department of Education. Government Code section 7572(c).

This legislation requires the person who conducted the IEP mental health assessment to review and discuss his or her recommendations with the parent and appropriate IEP team members, and to attend the IEP team meeting if requested. Government Code section 7572(d)(l). If an independent assessment for the provision of related mental health services is submitted to the IEP team, that assessment must be reviewed by the mental health professional who conducted the assessment for the public agencies. Government Code section 7572(d)(2). Disputes between a parent and IEP team members regarding related services recommendations must be resolved pursuant to Education Code sections 56500 et seq. Government Code section 7572(d)(e).

This legislation eliminated the requirement of inclusion of a representative from the county department of social services on the expanded IEP team if the child is classified as seriously emotionally disturbed and any member of the IEP team recommends out-of-home placement. Government Code section 7572.5(a). The legislation clarified that, in order for a child to be placed out-of-home pursuant to an IEP, the expanded IEP team must determine whether residential care is necessary for the child to benefit from educational services, Government Code section 7572.5(b). This legislation specifies that the county mental health department is case manager for SED children for whom residential placement has been called for on IEPs, and requires that an appropriate residential facility be identified on the IEP.. Government Code section 7572.5(c). The county mental health agency may delegate this responsibility to the county welfare department, but the county mental health department remains financially responsible. Government Code section 7572.5(c)(1). Funding for out-of-home placement was shifted from the AFDC program to a special program. Welfare and Institutions Code sections 18350 et seq. Upon receipt of proper documentation from the State Department of Mental Health or the county mental health agency, the county welfare department is authorized to make payments to licensed residential care facilities for children placed pursuant to IEPs, based on the AFDC rate for the facility. Welfare and Institutions Code section 18351(a). These costs are reimbursed by the State Department of Social Services, and are funded from a separate appropriation in the budget, Welfare and Institutions Code sections 18351(b) and 18355. The child or his or her parent or' parents is not liable for the cost of 24-hour out-of-home care for SED children. Welfare and Institutions Code 18350.

This legislation provided that the State Department of Mental Health, or any community mental health service designated by the Department shall be responsible for the provision of psychotherapy or other mental health services, as defined by the regulations. Government Code section 7576.

This legislation clarified that assessments and therapy treatment services provided under programs of the State Departments of Health Services or Mental Health, or their designated local agencies, rendered to a child referred for IEP assessment, or a child with an IEP, are exempt from financial eligibility standards and family repayment requirements. Government Code section 7582. In no event should the inclusion of necessary related services on a child's IEP be contingent upon identifying the funding source. Government Code section 7572(d).

This legislation eliminated the reporting of estimated expenditures to appropriate state agencies as of July 1, 1986. Government Code section 7583.

This legislation required the annual Short-Doyle plan for each county of include a description of the services required by Government Code sections 7571 and 7576, as well as the cost of those services. Welfare and Institutions Code section 5651(g).

XIV

No appropriation was included in Chapter 1747 of the Statutes of 1984, although there was provision that local agencies and school districts may pursue remedies available under Chapter 3 (commencing with section 2201) of Part 4 of Division 1 of the Revenue and Taxation Code. Section 5 of Chapter 1747 of the Statutes of 1984.

Chapter 1274 of the Statutes of 1985 included some funding for mental health services pursuant to Government Code sections 7570 et seq. Funds reported by the Department of Education and verified by the Department of Finance pursuant to section 4 of Chapter 1747 of the Statutes of 1984 were to be transferred on July 1, 1986 to the appropriate state departments responsible for the services specified in Chapter 26 (commencing with section 7570) of Division 7 of Title 1 of the Government Code and designated in each child's IEP, Section 16, Chapter 1274 of the Statutes of 1985. The sum of $1,600,000 was appropriated from the General Fund to the Department of Mental Health for purposes of conducting assessments and participating in developing IEPs during the period of March 1, 1986 through June 30, 1986. Section 18 of Chapter 1274 of the Statutes of 1985. Notwithstanding the county Short-Doyle match requirement of the Welfare and Institutions Code section 5707, these expenditures were to be funded on a basis of 100 percent state funds during the period March 1, 1986 through June 30, 1986. Id. The legislation further stated that reimbursement to local agencies and school districts should be made pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost does not exceed $500,000, shall be made from the State Mandates Claims Fund. Section 17 of Chapter 1275 of the Statutes of 1985.

Item 4440-131-001 of Section 2.00 of Chapter 186 of the Statutes of 1986 (1986 Budget Act) provided $2,000,000 to the Department of Mental Health in Fiscal Year 1986-87 for local assistance for assessments and case management relative to special education for special education children pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985. Section 3 of Chapter 1133 of the Statutes of 1986 amended this provision to allow for the use of these funds for all services local mental health agencies are required to provide pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, including treatment services.

Item 6100-161-001 of Section 2.00 of Chapter 188 of the Statutes 1986 (1986 Budget Act) also provided for a transfer of up to $2,700,000 during Fiscal Year 1986-87 from the Department of Education to the Department of Mental Health for the purpose of conducting assessments pursuant to Government Code sections 7572 and 7572.5. Section 4 of Chapter 1133 of the Statutes of 1986 amended this item to allow for transfer of these funds for mental health treatment services pursuant to Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 as well. Item 6100-161-001 also made available for transfer from the Department of Education to the Department of Social Services $5,400,000 for the cost of out-of-home placement of IEP children pursuant to Welfare and Institutions Code section 18350 et seq.

Item 6100-161-001 of the 1986 Budget Act also required local education agencies to report to the Superintendent of Public Instruction the total casts incurred providing noneducational services in the 1985-86 Fiscal Year to IEP children who received mental health services pursuant to IEPs or who were classified as seriously emotionally disturbed and placed out-of-home pursuant to IEPs. The Superintendent was directed to reduce funding to any education agency which he determines engaged in willful failure to report accurate data by 150 percent of the amount reported in error. The Auditor General was directed to review the data reported by local education agencies to determine if the amounts reported were accurate. Based on the Auditor General's recommendations, the Superintendent was authorized to transfer additional amounts to the State Departments of Mental Health and Social Services, provided that the total amount transferred did not exceed the amounts spent by local educational agencies in the 1985-86 Fiscal Year for residential care and mental health services for children pursuant to IEPs.

XV

The law pertaining to the funding, organization, and operation of community mental health services in California, known as the "Short-Doyle Act", is contained almost exclusively in Part 2 (commencing with section 5600) of Division 5 of the Welfare and Institutions Code. The Short-Doyle Act was enacted in 1979 to organize and finance community mental health services for the mentally disordered in every county through locally administered and locally controlled community mental health programs. Before that time, state hospitals played a large role in the provision of mental health ser-

vices. The Short-Doyle Act was a step in the de-institutionalization of the mentally ill.

The Short-Doyle Act was intended to efficiently utilize state and local resources, to integrate state-operated and community programs into a unified mental health system, to ensure appropriate utilization of all mental health professions, to provide a means for local government participation in determining need for and allocation of mental health resources, to establish a uniform ratio of local and state government responsibility for financing mental health services, 'and to provide a means for allocating state mental health funds according to community needs. The goals of Short-Doyle community mental health programs are threefold: to assist persons who are institutionalized because of mental disorder,. or who have a high risk of becoming so, to lead lives which are as normal and independent as possible; to assist persons who experience temporary psychological problems which disrupt normal living to return as quickly as possible to a level of functioning which enables them to cope with their problems; and to prevent serious mental disorders and psychological problems. Welfare and Institutions Code section 5600.

The Short-Doyle Act provides that a county must give priority to services required for acute patients and involuntary patients. Welfare and Institutions Code section 5651.3. Each county must consider and make provisions for certain other priority populations: the chronically mentally ill, including those who are homeless; mentally disturbed children and adolescents, including juvenile sex offenders and juvenile victims of sex offenses; mentally ill elderly, including those who are isolated; mentally ill inmates and, mentally ill wards of juvenile detention facilities, and mentally ill nuisance offenders to prevent inappropriate placement in the justice system; and underserved populations, including ethnic minorities, refugees, veterans, and other victims of posttraumatic stress disorders, and individuals diagnosed as both mentally ill and developmentally disabled. Welfare and Institutions Code section 5651.1.

Short-Doyle services are to be provided through community mental health services covering an entire county, or counties, established by the Board of Supervisors of each county. Welfare and Institutions Code section 5602. In most counties, the community mental health service area is the county, and the local mental health agency is an agency of the county, This is true in the County of Santa Clara.

Generally, each county is required under the Act to develop and adopt a mental health plan annually specifying services to be provided in county facilities, in state hospitals, and through private agencies. Welfare and Institutions Code section 5650.

The annual Short-Doyle plan must include a detailed presentation of expected expenditures and revenues. Chapter 1274 of the Statutes of 1985 also required that the plan include a description of services required by Government Code sections 7571 and 7576 (which is the subject of this Test Claim).

Two alternative Short-Doyle planning and reimbursement methods exist: the county Short-Doyle plan and the negotiated net amount contract. Unless a county is selected by the Department of Mental Health and elects to enter into a negotiated net amount contract with the State, the Board of Supervisors must adopt and submit to the Department of Mental Health an annual county plan ("Short-Doyle plan") for mental health services to the county. Welfare and Institutions Code section 5650. The Department reviews and approves the Short-Doyle plan. The county Short-Doyle plan is deemed a contractual arrangement between the state and the county. Welfare and Institutions Code section 5707.

Community mental health services are funded from a combination of sources: fee revenue from patients and third parties (such as insurance companies), grants from non-profit organizations, Medicare and federal Medi-Cal benefits from the federal government Short-Doyle allocations and Short-Doyle Medi-Cal from the State, and required Short-Doyle "match" and voluntary "overmatch" though the county.

Among the major features of the Short-Doyle Act are provisions relating to the allocation of state funds to community mental health services. Through the Short-Doyle Act, state general funds are distributed to counties to provide partial funding for community mental health services. In theory, and with a few exceptions, the net cost (cost less revenues such as grants, patient fees, third party reimbursement, Medicare, and federal portion of Medi-Cal) of all services specified in approved county Short-Doyle plans or covered under the negotiated net amount contract is financed on a basis of 90 percent state funds (the "Short-Doyle allocation" and the state portion of Medi-Cal) and 10 percent county funds (the "required county match"). Welfare and Institutions Code section 5705.

Alternatively, subject to State approval, a county may elect to use the negotiated net amount (NNA) contract method in lieu of the annual Short-Doyle plan and budget. Welfare and Institutions Code section 5705.2. The NNA is a contract between the Department of Mental Health and the electing county. The NNA concept differs from the cost reimbursement concept of the Short-Doyle plan. Through the NNA, a county contractually agrees to make certain mental health services available, and the state agrees to allocate to the county a fixed Short-Doyle amount. The NNA contract contains a statement of units of certain modes of service which the county agrees to make available (the "dedicated capacity"). The county bears the financial risk in providing any and all mental health services to the population described and enumerated in the contract to the dedicated capacity limit. The State bears the risk that fewer units of service will need to be provided, and bears the risk that the county can provide the services at a cost saving. Any savings may be retained by the county as long as such funds are used for mental health services, including the defraying of operating and capital costs.

XVI

In the County of Santa Clara, community mental health services are provided through the Mental Health Bureau of the Department

of Health, which is the local mental health agency for the County of Santa Clara. Under direction from the Board of Supervisors for the County, the Mental Health Bureau administers the Short-Doyle funds, provides mental health services, and monitors contracts with Short-Doyle contract providers of mental health services.

Except for services provided under the legislation **that** is the subject of this Test Claim, families or patients are charged for assessment and treatment services provided by the County, based on the family's liability as determined by the Uniform Method for Determining Ability to Pay (UMDAP). Insurance, Medi-Cal and Medicare are billed to the maximum extent possible.

XVII

Prior to the legislation that is the subject of this Test Claim, none of the services to be provided under the Short-Doyle contracts were specifically referenced to serving IEP needs. With two exceptions, the Fiscal Year 1985-86 Short-Doyle contract agencies rendered services independent of the IEP process or requirements, charged parents based on UMDAP liability, and collected insurance, Medi-Cal and Medicare. The exceptions were two Short-Doyle agencies which also had contracts with local educational agencies to provide IEP-related services. These two agencies rendered IEP-related assessment and treatment services for the local educational agencies with which they had contracts, and received partial funding for these services from the local educational agencies instead of through parent fees, Medi-Cal and insurance.

XVIII

The County negotiated net amount (NNA) contracts with the State of California for both Fiscal Year 1985-86 and 1986-87.

During the Fiscal Year 1985-86, the year prior to the year that is the subject of this Test Claim, the County Mental Health Bureau submitted a mental health budget (excluding state hospital services) of $35,552,792. The non-categorical Short-Doyle allocation (including the state portion of federal Medi-Cal) received from the state general funds was $21,640,430. The County provided $6,431,014 ($2,018,400 in required match and $4,412,614 in "overmatch", general County funds committed to mental health programs at the discretion of the Board of Supervisors). The remaining amount, $5,977,481, was from non-County, non-State sources such as grants, patient fees and insurance, federal Medi-Cal and Medicare.

During the Fiscal Year 1986-87, the year that is the subject of this Test Claim, the County Mental Health Bureau submitted a mental health budget (excluding state hospital services) of $43,215,710. The state's non-categorical Short-Doyle allocation to the County was $22,515,326, which represented an increase from Fiscal Year 1985-86 of 4% (1% cost of living increase and 3% for program expansion). State funding for categorical funding was $3,682,166, including $222,955 to fund the program subject to this Test Claim. The County provided

$7,481,097 ($2,547,225 in required match and $4,933,872 in "overmatch"). The estimated revenue from non-County, non-State sources was $9,537,122.

XIX

The Budget Act of 1986 allocated $2,000,000 to the State Department of Mental Health for assessments, treatment, and case management services, and made available for transfer from the State Department of Education to the State Department of Mental Health an additional $2,700,000 for assessments and mental health treatment services for IEP children. Item 4440-131-001, Chapter 186, section 2.00, Statutes of 1986; Chapter 1133, section 3, Statutes 1986. Of these amounts, $222,955 was allocated to the County of Santa Clara for Fiscal Year 1986-87. There was no required County match for this amount.

Additional amounts were to be transferred from the State Department of Education to the State Department of Mental Health if reports of local educational agencies indicated higher costs during Fiscal Year 1985-86 for services that are the subject to this Test Claim. Relatively low figures were reported initially. The Auditor General's Report showed wide discrepancies among school districts in the manner in which they reported their costs, and it was determined by the State Auditor General that the figures submitted were unreliable. An additional audit was to be conducted. Counties did not receive additional allocations for Fiscal Year 1986-87 as a result of these audits.

XX

Prior to the passage of Chapter 1747 of the Statutes of 1984, the County of Santa Clara, and local mental health p'rograms generally, were not required to provide IEP assessments for local educational agencies, and were not required to participate in IEP meetings. Local educational agencies had these responsibilities. The County of Santa Clara is neither a local educational agency nor special education local plan area (SELPA), and has a fiscally independent Office of Education which is not involved in this Test Claim. The county mental health program and county welfare department had no statutory roles in the IEP process 'prior to this legislation.

XXI

Prior to the implementation of the legislation that is the subject of this Test Claim, County mental health clinicians did not participate in the IEP process in a formal manner. Frequently, if a child in therapy had an IEP, and the therapist was an employee of the County, the child's therapist voluntarily participated in the IEP process to a limited extent. Neither the therapist nor the County was required to participate. In each case, the therapist became involved at the invitation of the parent or the educational agency, after parental consent had been obtained. Depending upon insurance coverage, eligibility and ability to pay, parents, insurance, Medi-Cal and Medicare were billed for the services. The therapist did not sub-

mit an IEP assessment to the team and was not an IEP decision maker. The therapist may have discussed the case with the person conducting the assessment for the IEP team, or may have attended the IEP meeting. However, the therapist's presence at the IEP meeting was not required.

XXII

Prior to the implementation of legislation that is the subject of this Test Claim, representatives from the local mental health program did not have case management responsibilities for children placed out-of-home pursuant to IEPs. In Fiscal Year 1985-86, the County of Santa Clara did not have a responsibility to provide case management services.

Prior to the legislation that is the subject of this Test Claim, the Mental Health Bureau provided some case management services for the most severely mentally disturbed children: those placed in Napa State Hospital or receiving inpatient services at Don Lowe Pavilion, the County's acute psychiatric hospital. Generally, these children were dangerous to themselves or others and/or met the criteria of gravely disabled as a result of a mental disorder. All of the Santa Clara County children at state hospitals were in LPS conservatorships. These case management services did not overlap with IEP case management services, as the acute hospital and state hospital placements were not placements pursuant to IEPs.

Prior to the full implementation of the legislation that is the subject of this Test Claim, in Santa Clara County, the departments of social services and probation also provided some case management services unrelated to IEP case management services for children who were wards or dependents of the court. Counties were not required to provide these services. In Santa Clara County, parents were billed for these services, based on ability to pay. Not all children receiving these case management services were in IEPs, and few were in out-of-home placement pursuant to IEPs. Case management responsibilities did not include IEP case management responsibilities, even for children who had IEPs.

XXIII

Generally, patients or other responsible parties are charged fees for mental health services, determined by their ability to pay. Welfare and Institutions Code section 5716. If a patient is covered by insurance, insurance companies are billed for any covered services, subject to the patient's consent.

Medi-Cal and Medicare are billed for covered services to Medi-Cal and Medicare patients. Cost recovery from the Medi-Cal program is limited to the federal portion of Medi-Cal for the year that is the subject of this Test Claim, as the County in that year had a NNA contract with the State. Under this contract, the amount of Short-Doyle allocation includes the state portion of Medi-Cal for Short-Doyle services.

XXIV

The Fiscal Year 1986-87 cost to the County for providing mental health assessments, case management, and treatment required by the legislation that is the subject of this Test Claim exceed the $222,955 specifically allocated to the County by the State for this program. The excess costs place this Test Claim within the jurisdiction of the Commission on State Mandates.

XXV

Handicapped children needing mental health treatment to take advantage of a free, appropriate education under the EHA and the State's implementation of the EHA have an entitlement to receive those services. No other persons served by local mental health programs have an entitlement to mental health services.

The effect of Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985, and Title 2 California Code of Regulations Division 9 is to give the highest priority to individualized education program treatment. If mental health resources are insufficient to meet the entire mental health needs of the community, treatment required by individualized education programs must continue to be provided. patients with more acute illnesses, but without IEPs--including children--may be placed on waiting lists.

With respect to non-IEP mental health services, counties have flexibility to determine treatment priorities in terms of who is served, what kind of treatment they receive, and how often they receive those services.

XXVI

As the assessments and treatment services are specifically required to be provided at no cost to the handicapped child or the child's families, affected local entities do not have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. Some services rendered pursuant to these statutes for Medi-Cal eligible children are covered under Medi-Cal. The legislation does not impact the ability of the County to bill Medi-Cal, and this revenue is included as an off-set to expenses on this Test Claim.

XXVII

The following findings are not based on the "Joint Statements of Fact".

XXVIII

The Fiscal Year 1986-87 cost to Santa Clara County of providing IEP-related mental health services was $2,387,835. The breakdown of these expenses is as follows: $168,146 for IEP assessment and case management services; $1,784,076 for day treatment services; $419,349 for individual therapy services; and $16,264 for group

therapy services. Fiscal year 1986-87 revenues relative to these services is estimated to be $235,869 in federal Medi-Cal revenue. In addition, an insignificant amount of revenue from third party insurance payments was received. State funding of this IEP program in Fiscal Year 1986-87 was $222,955. The net unreimbursed cost of the program is therefore estimated to be $1,929.001.

XXIX

There were some children referred through the IEP process in Fiscal Year 1986-87 who previously had been known to the county mental health system (251 out of 568). Although some of these children previously had been identified as IEP children, it is not clear the extent to which they had IEPs requiring the mental health services they in fact were receiving. To the County's knowledge, none of these children seen by the County were receiving mental health services pursuant to IEPs: the services were rendered by the County independent of the IEP process, and parents and third parties were charged for the services under the County's standard Short-Doyle process. Many of these children may have had IEP-related mental health needs which had not been identified by the local educational agencies prior to the transfer of responsibility to local mental health agencies, and which should have been the responsibility of the local educational agencies, with no contribution required from family or third party insurance. Prior to Fiscal Year 1986-87, the needs of these 251 children may have been partially or fully met through the County in an informal manner, even though they should have been entitled to receive free services through IEPs, as a matter of right.

The 251 children previously known to the mental health system were not individual children the county was mandated to serve prior to Fiscal Year 1986-87.

XXX

The effect of shifting the responsibility for assessing and funding IEP mental health needs away from the agency responsible for identifying those in need of services has been formidable. According to the California State Auditor General, by December 31, 1986 (the end of the first ten months of local mental health agencies' involvement in this process), the number of students referred for noneducational services was more than double the number of special education students who received services during the 1985-86 Fiscal Year.

For Santa Clara County SELPA Area I, which was included in the Auditor General's audit, the escalation in referrals was even more striking: during the period March 1, 1986 to June 30, 1986, more than twice the number of children who received noneducational services during that fiscal year were referred for mental health evaluation. By December 31, 1986, the number of children so referred was nearly triple the number of special education students receiving noneducational services during the immediately preceding fiscal year (1985-86).

Children in need of IEP-related mental health services were under-identified prior to the implementation of Chapter 1747 of the

Statutes of 1984. Generally, children who were referred through this process were in need of mental health services and received IEP recommendations for such services as a result of the referrals. In Santa Clara County during Fiscal Year 1986-87, 494 of the 568 children referred for mental health IEP assessments subsequently received mental health services pursuant to IEPs.

DETERMINATION OF ISSUES

I

Chapter 1747 of the Statutes of 1984, Chapter 1274 of the Statutes of 1985 and their implementing regulations mandate a new program or higher level of service on the Mental Health Bureau of the County of Santa Clara as defined in the California Constitution Article XIII B, Section 6.

Article XIII B §6 requires state subvention of funds "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government . . . ." Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, and their implementing regulations, impose on county local mental health agencies "a new program or higher level of service" subject to the constitutional imperative of subvention under Section 6 Article XIII B of the California Constitution.

The Supreme Court of California has determined that "program" has two alternate meanings: "[1] programs that carry out the governmental function of providing services to the public or [2] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.

The legislation that is the subject of this Test Claim is a "program" under either definition. The state chose to carry out a governmental function of providing mental health assessments, treatment, and case management of handicapped children who need supportive services in order to benefit from their education by delegating the responsibility to local mental health agencies. The legislation requires local mental health agencies to provide certain specific services to the public. The responsibilities imposed on local mental health agencies pursuant to this legislation are not imposed upon all residents and entities of the state, only on local mental health agencies.

This is a new program in several ways. Before this legislation, counties in general and local mental health agencies in particular had no formal responsibilities in the IEP process. The legislation requires the local mental health agencies to provide services not hitherto required. This legislation involves the local mental health agencies in the IEP process, with its full panoply of federal and state time lines, rights, and procedures. Prior to this

legislation, educational agencies had the responsibility for providing free, appropriate public education to each handicapped child, including whatever supportive services were necessary in order for that child to benefit from special education. Chapters 1747 and 1274 and their implementing regulations shifted from educational agencies to local mental health agencies substantial financial and program responsibilities for mental health services provided to handicapped children pursuant to the IEP process. The service mandated by this legislation had not previously been mandated by the general state mental health program, the Short-Doyle program.

II

The state argues that Chapters 1747 and 1274 and their implementing regulations do not impose a new program on local mental health agencies because "[c]ommunity mental health programs were already providing assessments and mental health treatment for many handicapped children under the Short-Doyle Act." The argument is unconvincing. It ignores fundamental differences between IEP-related services and Short-Doyle services which existed prior to this legislation:

1. Local educational agencies were responsible for providing IEP-related mental health assessments and treatments. Community mental health programs were not providing IEP-related mental health assessments, and were not formally participating in the IEP process. No community mental health representative was an IEP team member, regardless of the placement possibilities. Community mental health had no IEP team responsibilities, was not responsible for locating out-of-home placement pursuant to IEPs and was not responsible for case management for children placed out-of-home pursuant to IEPs. To the knowledge of the County, the County was not providing any mental health treatment required by individual IEPs prior to this legislation.

2. The IEP program, based on the federal EHA requirements, provides for very specific evaluations and services, to be delivered within certain time limits and with due process safeguards. There is no similar process for Short-Doyle services, no. similar time lines for evaluations or reevaluations or delivery of services, no similar definition of what must be included in an evaluation, no mandatory process similar to the IEP meeting process, no similar due process procedure.

3. The Short-Doyle program is not an entitlement program. It is a broad mental health program that grants great discretion to the community mental health system to determine what ser-

vices are to be provided, and to whom. The County determines its service priorities based on program principles and clinical needs. It is the policy of the County that if resources are inadequate to meet demands on a particular mental health center, needs are triaged. Those in most urgent need of treatment are seen; others are placed on waiting lists. Although the Short-Doyle Act sets forth certain priority populations, it does not grant to any individual an entitlement to services. The IEP program, on the other hand, is an entitlement program. If an individual child meets certain criteria, he or she is entitled to services, a right that is enforceable through administrative and judicial remedies. There is no such thing as a waiting list for IEP services. Those services simply must be delivered.

4. Patients receiving Short-Doyle services are charged for the services, based on their UMDAP ability to pay. If the services are covered by insurance or some other third party, collection is made from that source. Families of children receiving IEP-related services are entitled to receive those services free of charge. The parents or child'cannot be charged for the services. If the IEP-related services are covered by insurance, any submission of insurance claims to providers must be voluntary, unless such claims would result in neither an increase in premiums, nor a decrease of annual or lifetime insurance benefits, nor a cancellation of the insurance policy.

5. Since the IEP program is an individual entitlement program, the responsibility for providing IEP -related mental health services represents an open-ended financial demand on the County. Each individual child who qualifies for IEP-related services is entitled to receive them. Receipt of the services cannot be contingent on identifying a funding source. Government Code section 7572(d). Through the Short-Doyle program, on the other hand, a community mental health agency cannot be required to expend more for mental health programs than it receives in its state Short-Doyle allocation plus the required county match. Welfare and Institutions Code section 5709.

6. The Short-Doyle Act is designed to organize and finance community mental health services

in every county through locally administered and locally controlled programs, and to provide a means for allocating state mental health funding according to community needs. Welfare and Institutions Code 5600. The goals of the Act are to assist persons who are institutionalized, or at a high risk of becoming so, because of a mental disorder, lead lives as normal and independent as possible; to assist persons experiencing temporary mental health problems to return to a functioning level; and to prevent serious mental disorders and psychological problems. First priority must be given to services required for acute patients and involuntary patients. Welfare and Institutions Code section 5651.3. Other priority populations do include, mentally disturbed children and adolescents, including juvenile sex offenders and juvenile sex offense victims. Welfare and Institutions Code section 5651.1. However, this population is not synonymous with children entitled to IEP-related mental health services. The most severely mentally ill children, those in acute hospitals, state hospitals, or state hospital alternative programs did not receive their mental health services pursuant to IEPs. Hospital care is deemed "medical services" which is not the kind of supportive service required to be provided under the EHA. 20 U.S.C. section 1401(a)(17). Those mentally disturbed children and adolescents who are to be given first priority -- those in need of acute care and those involuntarily detained -- do not receive their mental health services pursuant to IEPs. Presumably, most juvenile sex offenders, juvenile victims of sex offenses, and wards of juvenile detention facilities -- all of whom are specifically targeted as priority populations -- also do not qualify for IEP-related mental health services.

The Short-Doyle Act is designed to give community control and direction to the complex mental health needs of a county's population. The legislation requiring local mental health agency involvement in the IEP process (Government Code section 7570 et. seq.) is not part of the Short-Doyle Act (Welfare and Institutions Code section 5600 et seq.) , and is in fact contrary to it. There is little local control over services to be offered, as the services to be provided are dictated by the specific criteria contained in federal and state law and regulation. The IEP program singles out a narrow population for separate, special treatment, as an entitlement program, outside the priorities of the Short-Doyle Act.

That the IEP program is separate from the Short-Doyle program is evident from the Short-Doyle contract itself. The County's negotiated net amount contract is authorized by, and subject to the provisions of, Welfare and Institutions Code section 5705.2. The Short-Doyle contract between the state and the County of Santa Clara for Fiscal Year 1986-87 is replete with references to the Short-Doyle Act. The introductory provisions of the contract refer to the Short-Doyle Act as the enabling legislation. Exhibit 4, Santa Clara County Negotiated Net Amount Short-Doyle Fiscal Year 1986-87 Contract. The contract defines "client" or "patient" as a person who receives services pursuant to the Short-Doyle Act. Paragraph 27(a).

The body of the Short-Doyle contract makes no references to Government Code section 7572 et seq., nor to any IEP responsibilities. The only specific mention of this program is the reference to the state's $222,955 allocation for the "S.E.P. [IEP] Program" on the tables of Exhibits B and F of the contract.

The increase in the basic Short-Doyle state allocation (excluding allocations for categorically funded programs) from Fiscal Year 1985-86 to 1986-87 was less than four percent ($22,515,326 compared to $21,640,430). If the net unreimbursed cost of the IEP program is to be absorbed by the Short-Doyle program, it would consume over eight-and-a-half percent of the county's general state Short-Doyle allocation for Fiscal Year 1986-87 ($1,929,011 out of $22,515,326).

The Legislature did not intend that the services mandated by Chapters 1747 and 1274 would be part of, and funded through, the Short-Doyle program. The IEP-related mental health services were never to be funded through the Short-Doyle program. Section 16 of Chapter 1274 provided for a transfer of funds from the State Department of Education to the State Department of Mental Health. Section 17 of Chapter 1274 recognized that the Chapter imposed a mandate and directed that reimbursement to local agencies be made through to State Mandates Claim Process. Chapter 1133 of the Statutes of 1986 further provided for funding for mental health for this program, by providing for a transfer of $2,000,000 from the Department of Education to the Department of Mental Health, to fund the IEP mental health program. This statute also provided that counties were not required to provide county match for this program, unlike the Short-Doyle program, and that the Department of Mental Health was to allocate funds based on individual county needs, in lieu of the Short-Doyle Act allocation. Section 3 of Chapter 1133 of the Statutes of 1986. It also provided for additional transfers from the Department of Education to the Department of Mental Health, based on the Auditor General's report. Id.

Even if it is determined that the services mandated by Chapters 1747 and 1274 are included in the Short-Doyle program, the services are mandated services for which subvention is required.

III

The legislation that is the subject of this Test Claim does not implement a federal mandate contained in section 504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1974 (P.L. 93-516, 29 U.S.C. 794), together with the implementing regulations, prohibits discrimination against handicapped individuals in any program receiving federal funds. Section 504 does not require counties to give mental health services on a priority basis to handicapped students who receive services pursuant to their IEPs. If anything, Chapters 1947 and 1274 require countries to discriminate against handicapped individuals who are not entitled to mental health services pursuant to IEPs, in violation of Section 504.

The burden of providing public education and related services is on educational agencies, not counties. The section 504 regulation requirement that recipients of federal funding who operate educational programs "...provide a free appropriate public education to each qualified handicapped person..." does not apply to counties, which do not operate a public or elementary or secondary education program. In Santa Clara County, local education agencies provide these services, even to children in the custody of the County, in the Juvenile Hall, Shelter, or Ranches.

IV

The legislation that is the subject of this Test Claim is not state legislation implementing a federal mandate contained in The Education for All Handicapped Children Act of 1975.

The Education for All Handicapped Children Act is not a mandated program. A state may elect or decline to participate. Acceptance of federal funding for education is a state option. But once the option is accepted, its terms and conditions must be met by the recipient. The state, by accepting the federal monies, has agreed to abide by the terms and conditions of the EHA. It now seeks to impose the financial burden of this decision on counties, who do not even receive the federal monies which fund this program.

Section 6 of Article XIIIB of the California Constitution provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service....

In defining reimbursable mandates, Section 9, subdivision (b), of Article B of the California Constitution excludes "[a]ppropriations required for purposes of complying with mandates of the...federal government which, without discretion, require an expenditure" by the governmental entity.

If the state is to receive certain federal grants, the EHA requires that the state participate in the IEP program. Nevertheless, a financially induced choice is not the same as a statutory require-

ment. In City of Sacramento v. State of California, the appellate court twice determined that state legislation requiring local government employers to pay into the state unemployment insurance on behalf of their public employees was not a federal mandate exempt from reimbursement, but a financially induced choice, even though failure to impose such a requirement on local government employers would have resulted in federal de-certification of the State's unemployment insurance program, with a concomitant loss of federal tax credit for the State's private employers. City of Sacramento v. State of California (1980) 156 Cal. App. 3d 182, 196 (Sacramento I); disapproved of on other grounds, to the extent it conflicts, in County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 58; City of Sacramento v. State California (1988) 201 Cal. App. 3d 409.

Similarly, acceptance of federal education monies, which only then requires the state to implement the IEP program, is a financially induced choice, not a federal mandate. In fact, the State is going one step farther than they attempted to go in the City of Sacramento cases. At least in the City of Sacramento cases, federal law did require contribution into the state unemployment insurance fund from all local government employers, if the State program was to be certified. In the present case, nothing in the federal EHA law requires county mental health or county government involvement in the IEP process. Federal law requires states which receives federal funding to have in place a program applying to the state as a whole, See 34 Code of Federal Regulations 5300.1 et seq. It is the State that has the responsibility to design such a program. Federal regulations generally do not dictate which state or local agency will be responsible for program execution. The state could impose the responsibilities on local school districts; as it did before the passage of Chapter 1747. Alternatively, the state could provide the services directly.

Citing the Government Code section 17513 definition of "costs mandated by the federal government," the state asserts that the cost of complying with Chapters 1747 and 1274 are federally mandated because failure to opt into Public Law 94-142 (the EHA) would result in "a substantial monetary loss" in the form of loss of federal education funding. The State asserts that the amount of this loss would be $100,000,000. There is no evidence in the record to support that assertion.

Even assuming that failure to opt into the EHA would result in a loss of a substantial sum of federal monies to the state; there is no evidence that this would result in a substantial net monetary loss. The net costs of complying with the IEP requirements to the mental health agency of the County of Santa Clara alone is $2,151,966 ($2,387,835 less $235,869 federal Medi-Cal). There are fifty-seven other countries in the state. There are also costs of the Department of Social Services, for out-of-home placement, and costs of state and local educational agencies, for special education and other supportive or related services. It may well be that the cost of compliance exceeds the funding received.

Even if failure to opt into Public Law 94-142 were to result in substantial monetary loss, Chapters 1747 and 1274 and their imple-

menting regulations are not federally mandated costs as defined by Government Code section 17513, which provides:

> Any increased costs incurred by a local agency... in order to comply with the requirements of a federal statute or regulation...[including] costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state.

Failure to impose on counties -- which do not provide primary or secondary education -- a requirement that counties provide IEP-related mental health services does not result in substantial monetary penalties or loss of funds, It is the failure of state or local educational agencies to do so that would result in the loss of funds. When it opts into the EHA program, the State itself, as well as educational agencies, incur certain obligations. Nothing in the federal law requires involvement of counties in the IEP process, what the state is attempting to do is take the federal monies, and pass along the responsibility to the counties, without the monies. This is precisely the kind of delegation of responsibility which, under the California Constitution, the state must provide subvention funds.

V

The legislation that is the subject of this Test Claim does not merely affirm for the State that which had been declared existing law by actions of the court. No court decisions impose on counties the responsibility of providing services which relate to the provision of educational services.

Court decisions at the federal and state level heard before the enactment of Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, which establishes the rights of handicapped individuals, were decided under due process and equal protection theories. Mills v. Board of Education of the District of Columbia (1972) 348 F. Supp. 866 held that the Board of Education, by failing to provide special education to certain disturbed children, denied due process to the children and the class they represented. Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (1971) 334 F. Supp. 1257 involved the equal access to educational services for retarded children. Neither case involved the imposition on local mental health agencies of responsibilities to provide services supportive to the educational requirements of handicapped children.

VI

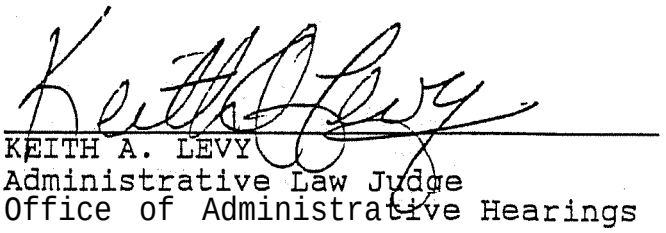
The County of Santa Clara and other affected local entities do not have the authority to levy services charges, fees, or assessments sufficient to pay for the mandated program or increased level of services. Both federal and state law provide that services that are the subject of the Test Claim must be provided at no cost to

parent or child, and federal law prohibits affected local entities from requiring that parents use insurance benefits to pay for the services provided if using such benefits would result in a decrease in coverage or an increase in the cost of coverage.

ORDER

The Test Claim, filed by the County of Santa Clara, is granted. The County of Santa Clara shall submit parameters and guidelines to the Commission for its consideration.

Dated: March 28, 1989



KEITH A. LEVY
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

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STATE MANDATES

In the Matter of TEST CLAIM OF SANTA CLARA COUNTY REGARDING HANDICAPPED AND DISABLED STUDENTS	OAR NO. N-30939

RESPONSE TO PROPOSED DECISION ON
BEHALF OF THE STATE OF CALIFORNIA

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In the Matter of	)	
	)	OAR NO. N-30939
TEST CLAIM OF SANTA CLARA COUNTY	)	
REGARDING HANDICAPPED AND	)	RESPONSE TO PROPOSED
DISABLED STUDENTS	)	DECISION ON BEHALF OF THE
	)	STATE OF CALIFORNIA

INTRODUCTION

This matter, now coming before the Commission on State Mandates as a Proposed Decision by the Administrative Law Judge, is a Test Claim filed by Santa Clara County ("County") related to the provision of mental health services pursuant to Individualized Education Programs ("IEP"). The claim alleges that, taken together, Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985 (along with their implementing regulations) impose a "mandate" on the County, as that term is used in Section 6 of Article XIII B of the California Constitution. The state denies this contention.

This claim relates to fiscal years 1985-86 and 1986-87. During those fiscal years, County received state mental health funding through the Short-Doyle Act in excess of thirty-one million and thirty-two million dollars, respectively. The amount set forth in the claim represents less than 6 percent of the State funding received by County for those fiscal years.

EARLIER BRIEFS

The State submitted briefs (Opening Brief, submitted January 27, 1989: Reply Brief, submitted February 24, 1989)

earlier which set forth in some detail the arguments advanced by the State as to why this claim does not set forth a reimbursable mandate. The State will not repeat the contents of those documents in any detail here, but would urge a re-reading of those briefs for a full understanding of the State's positions. However, to help put the subsequent portions of this response in context, a summary of the State's main arguments is offered here.

A. The costs claimed by County relate to services mandated by the federal government by Section 503 of the Rehabilitation Act of 1973 (as amended) and Public Law 94-142 and, thus, are not State mandates, but a delineation of the right of children to have a free education.

B. Chapters 1747 and 1274 and their implementing regulations affirm and implement that which had been declared existing law by action of the courts, as enunciated by the United States Supreme Court in Smith v. Robinson (1984) 468 U.S. 992. Regardless of the legislation in question, children have a right recognized by the United States Constitution to a free education which includes the related services provided pursuant to the legislation in question.

C. Chapters 1747 and 1274 do not impose a "new program" or a "higher level of service" in that the legislation in question does not mandate County to provide mental health services it was previously not required to provide. Under existing law counties must provide mental health services. The State and each county share in the cost of providing mental health services pursuant to the Short-Doyle Act.

D. While certain mandates were recognized by the Legislature, the Legislature did not recognize Chapters 1747 and 1274 as a mandate of new mental health services.

E. The mental health services required by Chapters 1747 and 1274 are not distinct from Short-Doyle mental health services. Both the State and the counties have treated mental health services provided pursuant to the legislation in question as services that are funded in accordance with the Short-Doyle Act, and, not only has Short-Doyle funding been provided to County for these services, but Short--Doyle funding continues to be available for reimbursement to County for these services.

WHY THE PROPOSED DECISION IS ERRONEOUS

A. General Comments

Many of the conclusions in the determination of issues set forth in the Proposed Decision are based on a misunderstanding of the applicable provisions of law and court decisions.

The discussion of each determination in the Proposed Decision focuses exclusively on the express provisions of law or the express holding in court decisions, and the conclusions are based on whether the words "County" or "county mental health" are contained in express terms. This completely ignores the necessary and inescapable implications which have been found by the courts to flow from various provisions of law, regardless of whether particular catch words are expressly stated in those provisions.

B. Specific Comments

I.

FEDERAL MANDATE

(CONSTITUTIONAL/STATUTORY ASPECT)

In Section III of the Determination of Issues (pages 22 and 23), the Proposed Decision concludes that Chapters 1747 and 1274 "do not implement a federal mandate contained in Section 504 of the Rehabilitation Act of 1973." This conclusion is based on the observation that Section 504 does not expressly require "counties to give mental health services on a priority basis to handicapped students who receive services pursuant to their IEPs." This observation fails to take into account that Section 504 has been viewed by the United States Supreme Court to impose almost the same requirements as Public Law No. 94-142. The court noted that "because both statutes [Section 504 and Public Law 94-142] are built around fundamental notions of equal access to State programs and facilities, their substantive requirements, as applied to the rights of a handicapped child to a public education, have been interpreted to be strikingly similar." (emphasis added) Smith v. Robinson (1984) 468 U.S. 992, at 1017.

Moreover, in Smith the court stated that Public Law 94-142 ". . . is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education. We concluded above that in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal

Protection Clause required that they be ensured access to public education." Smith v. Robinson supra at 1016. Therefore, it must be concluded and recognized that Public Law 94-142 is a codified expression of certain inchoate rights, and that Chapters 1747 and 1274 represent the State's response and implementation of those rights.

Section 504, then, does constitute a federal mandate, does impose requirements "strikingly similar" to Public Law 94-142, and is required to be implemented in California. In implementing this federal mandate, California has chosen the counties, political subdivisions of the State, to be responsible for part of the implementation. This does not, however, alter the fact that the legislation in Chapters 1747 and 1274 is implementing a federal mandate imposed by Section 504.

In Section V of the Determination of Issues, the Proposed Decision concludes that Chapters 1747 and 1274 do not "merely affirm for the State that which had been declared existing law by actions of the courts." Again, this conclusion is based on the observation that no court decisions expressly impose on counties the responsibility of providing services in connection with IEPs. The Proposed Decision goes on to say that two of the federal cases cited by the State were decided under "due process and equal protection theories," as if this somehow renders those decisions meaningless in the context of this test claim.

Certainly, those court decisions did not expressly impose IEP responsibilities on counties. That issue was not

before the court in those cases. However, this focus on whether the word "counties" appears in the decisions of those cases misses the significance of those cases entirely, Both Mills and Pennsylvania, prior to the enactment of Section 504 and Public Law 94-142, held in essence that handicapped individuals have a right to certain special services, The fact that these cases were decided on constitutional due process and equal protection theories only re-enforces the proposition that handicapped students are entitled under the United States Constitution to certain special services, like those provided in connection with IEPs.

II.

SHORT-DOYLE ASPECT

The conclusion contained in Section II (page 22) of the Proposed Decision that the Legislature did not intend that the services to be provided by local mental health programs pursuant to Chapters 1747 and 1274 would be part of, and funded through, the Short-Doyle program is clearly erroneous.

That those services may be funded through the Short-Doyle program is clearly evidenced by the provisions of the Short-Doyle Act (Sections 5600 et seq. W&IC).

Specifically , a description of the services required by Sections 7571 (relating to assessments) and 7576 (relating to mental health services provided by community mental health programs) of the Government Code, including the costs of those services, is required to be included in the annual Short-Doyle plan for each county (Sub.(g), Sec. 5651 W&IC).

That services specified in a county Short-Doyle plan are to be funded under the Short-Doyle program is clearly evidenced by the provisions of Section 5705 of the Welfare and Institutions Code. Sections 5705 provides, in pertinent part, ". . . The net cost of all services specified in the approved county Short-Doyle plan shall be financed on a basis of 90 percent state funds and 10 percent county funds . , . the cost of services shall be the actual cost . . . or a negotiated net amount or rates approved by the Director of Mental Health as provided in Section 5705.2 . . ."

Thus, it is apparent by the express language of the Short-Doyle Act that the Legislature clearly intended that services provided by county community mental health programs pursuant to Chapters 1747 and 1274 be part of, and funded through, the Short-Doyle program.

The Short-Doyle Act specifically requires that mental health services be provided to children. Moreover, the Act also includes maintenance of effort requirements with regard to children's services. Specifically , Welfare and Institutions Code section 5704.5 provides that counties cannot decrease their proportion of mental health expenditures for children, unless they can demonstrate that the need for such services has decreased. Further , Welfare and Institutions Code section 5704.6 requires that, with certain except ions, counties must spend 50 percent of each noncategorical augmentation for children's services until children's services represent 25 percent of a county's total mental health program.

Additionally, a number of children receiving mental health services pursuant to the legislation in question were already one of the five identified priority populations under Welfare and Institutions section 5651.1 and the legislation in question simply identified them as having head-of -the-line privileges.*

In point of fact, psychiatric assessments and case management, as well as other mental health services, are all exactly the types of services which have traditionally been funded through the Short-Doyle program. The conclusion that mental health services provided by counties pursuant to the legislation in question are funded pursuant to the Short-Doyle Act is consistent with both previous, as well as current, practice, since both the Department of Mental Health and the counties have always treated these services as being funded in accordance with the Short-Doyle program.

The Proposed Decision, on page 22, states that the "IEP-related mental health services were never to be funded through the Short-Doyle program," but fails to set forth any logical, cognizable rationale for such a conclusion. The Proposed

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* It is conceivable that, the required participation in formulating the IEPs and the required IEP-related case management, may be viewed by the Commission as new services. However, County is not required to increase non-Short-Doyle expenditures to provide these services. Only a redirection of Short-Doyle funds is involved, and only a slight one, at that. The legislation in question really only gives certain clients "head of the line" privileges, not unlike those contained in other parts of the Short-Doyle program.

Decision points to two instances when funding was transferred from the Department of Education to the Department of Mental Health (Section 16 of Chapter 1274 and Section 3 of Chapter 1133, 1986) as if these funding transfers somehow, ipso facto, prove that IEP-related mental health services are not mental health services reimbursable in accordance with the Short-Doyle Act.

However, a transfer of funding from Education to Mental Health does not in any way support the conclusion that the services are not Short-Doyle reimbursable. In fact, just the opposite conclusion would be much more logical, since the funding transfers constitute a recognition that, previously, these specific services were funded through Education and now through Mental Health. A shift in funding logically follows a shift in primary responsibility. The long-standing, traditional method of funding mental health services provided by counties is through the Short-Doyle program. There is no reason why these mental health services were intended to be treated any differently than the funding mechanism. Thus, at the most, if any of the services are found by the Commission to represent a mandate, only the 10 percent county share should be-reimbursed as a mandate, since the remaining 90 percent is reimbursable under Short-Doyle Act.

The Proposed Decision also points to Section 17 of Chapter 1274 as recognizing that ". . . the Chapter imposed a mandate and directed that reimbursement to local agencies be made through to [sic] State Mandates Claim Process." However, Chapter 1274 contains mandates potentially subject to reimbursement. The Legislative Counsel's Digest for Chapter 1274 identifies those

mandates, but, significantly, did not identify IEP related mental health services as a mandate. The courts have held that it is presumed that the Legislature, in enacting bills, reads and is guided by the Legislative Counsel's Digest. (Maben v. Superior Court (1967) 255 (Cal.App.2d 708, 713; People v. Superior Court (Douglas), (1979) 24 Cal.3d 428, 434). Therefore, the fact that the Legislative Counsel's Digest does not identify IEP related mental health services as a aandate is extremely significant and leads necessarily to a conclusion exactly opposite to the one contained in the Proposed Decision.

Finally, the Proposed Decision makes reference to the fact that Chapter 1132 of the Statutes of 1986 initially waived the usually required 10 percent county match. But, does temporarily waiving the match suddenly mean that these services are not Short-Doyle reimbursable? Just the opposite. Waiving the match makes these services 100% Short-Doyle reimbursable during the waiver period. Moreover, the Legislature has many times previously waived the County match, sometimes for particular programs, and sometimes for the whole Short-Doyle program itself. An examination of the history of Welfare and Institutions Code section 5705 reveals that during fiscal years 1979-80 and 1980-81, no County match was required at all for county community mental health services statewide. If the logic of the Proposed Decision were accepted, then during those years there was no Short-Doyle program at all (no services reimbursable by Short-Doyle funds). This was obviously not the case.

Thus, the conclusion in the Proposed Decision that IEP-related mental health services are not Short-Doyle reimbursable is based on misinterpretations of the legislation, misunderstanding about the Short-Doyle program, and faulty reasoning. What is more, such a conclusion would be inconsistent with all previous findings by the Commission which have involved claims related to the Short-Doyle program.

CONCLUSION

This then is the crux of the argument presented by the State: that the courts had already established that handicapped students were entitled under the U.S. Constitution to these kinds of services. Section 504, Public Law 94-142, and Chapters 1747 and 1274 all in essence implement what had already been established in the courts. Chapters 1747 and 1274 are not a mere response to a federal financial "carrot," rather they are fundamentally a response to the mandates of the equal protection clause of the 14th Amendment as enunciated in Smith v. Robinson (supra). These pieces of legislation only set forth the intricate but required details of how these constitutional mandates are to be implemented and represent policy determinations regarding the details of implementation which were enacted by the Congress and by the State Legislature, in turn.

With the possible exception of the required participation in formulating the IEPs and the required IEP-related case management, County is not required to increase Short-Doyle expenditures or add new services. Only a redirection of resources is

involved, and only a slight one, at that: The legislation really only gives certain clients "head of the line" privileges, not unlike those contained in other parts of the Short-Doyle program. Moreover, the therapeutic/treatment modalities involved are exactly like what County provides to non-IEP clients. If the legislation contains any reimbursable mandate at all, it would be limited solely to the role in formulating IEPs and to case management. In no way could a reimbursable mandate be said to exist with respect to the provision of mental health services.

For these reasons, the State urges the Commission on State Mandates to reject the conclusions reached in the Proposed Decision by the Administrative Law Judge.

Dated: July 25, 1989

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Re: *Test Claim of Santa Clara County Regarding Handicapped and Disabled Students*

OAR No. N-30939

I, JUDIE A. BRICE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 350 McAllister Street, Suite 6000, San Francisco, California 94102. I served a true copy of the attached

RESPONSETOPROPOSEDDECISIONON
BEHALF OF THE STATE OF CALIFORNIA

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Susan Chapman
Deputy County Counsel
70 W. Hedding Street
San Jose, CA 95110

Each envelope was then, on July 26, 1989, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on July 26, 1989, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

JUDIE A. BRICE
(Type Name)

Judie A. Brice
DECLARANT

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of the TEST CLAIM OF COUNTY OF SANTA CLARA REGARDING MENTAL HEALTH SERVICES FOR HANDICAPPED AND DISABLED STUDENTS	)	OAH NO. N-30939

REBUTTAL ON BEHALF OF CLAIMANT COUNTY OF SANTA CLARA
TO RESPONSE OF STATE OF CALIFORNIA
TO PROPOSED DECISION OF THE COMMISSION ON STATE MANDATES

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In the Matter of TEST CLAIM OF SANTA CLARA COUNTY REGARDING MENTAL HEALTH SERVICES FOR HANDICAPPED AND DISABLED STUDENTS	OAR NO. N-30939 REBUTTAL OF SANTA CLARA COUNTY TO RESPONSE OF STATE OF CALIFORNIA TO THE PROPOSED DECISION OF THE COMMISSION ON STATE MANDATES

I. INTRODUCTION

The County of Santa Clara ("County") filed a test claim with the Commission on State Mandates for Fiscal Year 1986-87 seeking a determination that Chapter 1747 of the Statutes of 1984 and Chapter 1274 of the Statutes of 1985, together with their implementing regulations, impose a mandate on the County for which subvention is required under Section 6 of Article XIII B of the California Constitution. Chapters 1747 and 1274 and their implementing regulations require'the County to provide free mental health assessment of handicapped and disabled students upon appropriate referral from the students' school districts, as well as to provide free mental health treatment which is included in the students' Individualized Education Programs ("IEPs") because the services are necessary for those students to benefit from a free, appropriate education. This legislation also imposed upon the County other substantive and procedural requirements relating to the IEP process.

The IEP process is an implementation of an optional federal program. Under the federal Education for All Handicapped Act (Public Law No. 94-142, or "EHA"), any state which accepts federal grants for education must provide a free, appropriate public education to its handicapped and disabled students, along with supportive services which are necessary for the child to benefit from that education. States accepting those federal funds also must comply with the detailed substantive and procedural requirements of the EHA. Under the EHA, each handicapped child qualifying for IEP services has an entitlement to receive them: an entitlement which can be enforced in administrative or judicial proceedings.

California had opted into this program by accepting federal grants for education. Chapters 1747 and 1274 and their implementing regulations transfer to county mental health agencies the State's responsibility to provide mental health services under the EHA, which previously had been assigned to local educational agencies.

The Commission referred the test claim to an Administrative Law Judge for a proposed decision. The County and the State submitted a Joint Statement of Facts and Positions to the Administrative Law Judge. The facts are uncontroverted. At issue are interpretation of those facts and application of legal principles. The Administrative Law Judge issued a Proposed Decision holding that the legislation mandates a new program for which subvention is required. The Proposed Decision concludes that Chapters 1747 and 1274 do not implement a federal mandate. The Proposed Decision finds that the County received $222,955 from

the State in fiscal year 1986-87 to fund this program; its cost was $2,387,835. For fiscal year 1986-87, the County received $22,515,326 in general Short-Doyle funding from the State. The Proposed Decision holds that general Short-Doyle monies received from the State funded the Short-Doyle program, anti did not reimburse the County for the costs of this new program. The unreimbursed cost of complying with the mandate in fiscal year 1986-87 was $1,929,011.

II. GENERAL COMMENTS

This test claim has been the subject of extensive briefing; and the Administrative Law Judge issued a comprehensive Proposed Decision setting forth factual determinations and thoroughly analyzing the legal issues presented. This brief is limited to rebutting the State's Response to the Proposed Decision. The arguments presented in the County's Opening and Response Briefs will not be repeated. The County urges the Commission to re-read these for a full understanding of the County's position.

Two fundamental issues are presented by this test claim; The first is whether Chapters 1747 and 1274 and their implementing regulations merely affirm and implement that which is required under federal law, through the Equal Protection and Due Process clauses of the U.S. Constitution (as established by the courts); 'through Sections 503 and 504 of the Rehabilitation Act of 1973 (as amended), or through the Education for All Handicapped Act (Public Law No. 94-142, or "EHA"). The State's response to the Proposed Decision, and this Rebuttal, address the Constitutional and

Section 504 aspects of this issue. (For a thorough discussion of whether the EHA is a federal mandate, the Commission is referred to pages 22-27 of the County's Opening Brief and pages 22-29 of the County's Response Brief.) Neither the Constitution nor the Rehabilitation Act of 1973 establishes an entitlement to mental health services necessary for a handicapped child to benefit from education. Federal law does not require local government mental health providers to provide free mental health services to any group, much less to a narrow class of individuals.

The second fundamental issue concerns the interrelation between the IEP-related services required by Chapters 1747 and 1274 and the pre-existent Short-Doyle community mental health program: whether Chapters 1747 and 1274 impose a "new program" or "higher level of service" beyond the services the County must provide pursuant to the Short-Doyle Act and, if so, whether the County is reimbursed for those services through Short-Doyle funding received from the State.

Clearly, involvement in the IEP process, with its very specific substantive and procedural provisions, is a "new program" for counties. The mental health services which must be provided constitute a "higher level of service" than the County previously was required to provide. The services are outside the Short-Doyle Act, contrary to it; and are not reimbursed by Short-Doyle funding. In fact, utilizing Short-Doyle funds for this purpose jeapordizes the County's ability to fulfill its Short-Doyle responsibilities, and jeapordizes the health and safety of the mentally disordered residents of the County.

III. REBUTTAL TO STATE'S RESPONSE TO PROPOSED DECISION

A. FEDERAL MANDATE ISSUE (CONSTITUTIONAL/STATUTORY ASPECT)

The County's costs of complying with Chapters 1747 and 1274 and their implementing regulations are not "costs mandated by the federal government. " The State, in its Response to the Proposed Decision, argues that the services mandated by Chapters 1747 and 1274 are federally mandated by Section 504 of the Rehabilitation Act of 1973, or by the caselaw decided on Equal Protection and Due Process theories which preceded Section 504.

In essence, Section 504 and the caselaw which preceded it require a state offering public education to provide education and training to all its children, including those who are handicapped. "[W]here the state has undertaken to provide it, [public education] is a right which must be made available to all on equal terms." Mills v. Board of Education of District of Columbia (1972) 348 F.Supp. 866, 875, citing Brown v. Board of Education (1954) 347 U.S. 483, 493. See also Pennsylvania Association for Retarded Children v. Commonwealth (1971) 334 F.Supp. 866.

Contrary to the assertions of the State in its Response to the Proposed Decision, neither Mills nor Pennsylvania held that handicapped individuals had a right to special services such as mental health services. For that matter, neither case held that children had a constitutional right to public education. They held only that if public education is offered, it must be offered to all. Whether entities undertaking to provide public education

were required to provide supportive services was not addressed in these cases; certainly they did not reach the issue of whether all public entities were required to be drawn into the educational process.

Section 504 states that no otherwise qualified individual may be excluded from participation, denied the benefits of, or subject to discrimination under any federally funded program, solely by reason of his handicap. In the educational arena, Section 504 requires participants of federal funding which operate a public elementary or secondary education program to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. Part 104.33. The County does not operate a public or secondary education program, and receives no federal funds to do so. Section 504, therefore; does not require the the County to provide public education to handicapped students.

The County, in its Short-Doyle program, serves handicapped individuals, particularly those whose handicap is mental or emotional. No one is excluded by reason of his or her handicap; Section 504 does not require the County to give one group of handicapped individuals special treatment: If anything, Section 504 requires the County not to discriminate against all handicapped persons who do not receive IEP-related services; many of whom are more seriously impaired and more in need of mental health services than those receiving services pursuant to IEPs.

Chapters 1747 and 1274 require such discrimination, by creating for one class of persons an entitlement to free services

which counties may, at their discretion, provide to others for a fee based upon ability to pay. Counties are not required to meet all the mental health needs of its residents. Outside the IEP-process, no individual, no matter how needful he may be, has an enforceable individual right to receive mental health services. Disregarding the obligations arising from Chapters 1747 and 1274, counties are not required expend county general funds for mental health services beyond the required county Short-Doyle match. Board of Supervisors of the County of Los Angeles v. Superior Court (1989) 207 Cal.App.3d 552.

Moreover, neither the Equal Protection clause nor Section 504 creates unlimited demands on local government. In Mills, the court held that the Board of Education could not exclude handicapped children from its public education system. The decision did not, however, require the Board to increase its funding of education. Rather, if funds were insufficient to finance all needed services and programs, the court held that available funds should be expended equitably so that no child would be entirely excluded from a publicly supported education; Mills v. Board of Education, supra, at 876. This Equal Protection principle, if applied to the County's mental health system; would require the County to expend its limited funds in an equitable manner to meet the mental health needs of all of its residents:

Section 504 relief is limited to remedies requiring reasonable funding and reasonable administrative burdens to remove barriers to the handicapped. See Garrity v. Gallen (1981) 522 F.Supp. 121. Section 504 requires even-handed treatment of handicapped individuals, not extensive, costly modification of existing

programs or affirmative action programs on their behalf. Southeastern Community College v. Davis (1979) 442 U.S. 397, 410. In contrast, Chapters 1747 and 1274 and their implementing regulations impose unreasonable, excessive burdens on the County and go beyond the purposes of removing barriers to the handicapped.

The State argues that because Section 504 and the Equal Protection caselaw which preceded it establish rights of a handicapped child to public education, the requirement to provide supportive mental health services is a federal mandate on counties. The County does not provide public education. How can it be required, under Equal Protection or Section 504, to provide educational benefits or education related services to certain handicapped children? It is the State and public educational entities which have undertaken to provide public education, and are thus required to provide equal education. It is they who receive federal funds for education.

Imposing education related responsibilities on the County or county mental health agencies is not a "necessary and inescapable implication" of the law as the State argues. The reason the law does not "expressly" impose the burden of providing education related supportive services on counties is that counties do not have an obligation to provide "equal education" to all or an obligation to provide services to compensate for inequalities or inequities in the educational system.

The State also errs in asserting that the requirements of Section 504 and the Equal Protection clause are equivalent to the requirements of the EHA. The EHA intends to accommodate the

Section 504 and Equal Protection claims of handicapped children for insured access to public education, but establishes a much more comprehensive scheme of substantive and procedural rights than was established under Section 504. Smith v. Robinson (1984) 468 U.S. 992, 1011-18. It is precisely on the issue of whether a state providing education must provide supportive services, such as mental health services, that the EHA established rights not clearly in existence before. In Smith, the Court noted that prior to the EHA, courts "had expressed confusion about the extent to which Section 504 requires special services necessary to make public education accessible to handicapped children." Id. at 1018.

The State's argument also distorts the state law on mandates: The federal and court mandate exceptions are entity specific. If state law merely codifies federal law or caselaw, the state is not required to provide subvention. Thus, if federal law required all public entities, or all counties, to adopt a program, state subvention to counties for the costs of complying with the implementing state legislation would not be required.

In the present case, neither optional nor mandatory federal law, whether through cases or statutes, require local governments which do not provide education to provide IEP-related services: If there is a federal mandate involving mental health services for handicapped students--and; as discussed, this is far from established-- the mandate is either on the state or the public educational agencies who ultimately receive the federal education funds. Transferring these responsibilities to counties creates precisely the kind of program for which subvention is required.

B. SHORT-DOYLE ASPECT

1. Using Short-Doyle resources to fund IEP services conflicts with the federal EHA program.

Federal educational grants are intended to augment, not supplant, existing resources for handicapped children. Assurance of this fact is a requisite for approval of the State Plan and the receipt of federal funding. 20 U.S.C. Section 1413(a)(9). Prior to the implementation of Chapters 1747 and 1274, local educational agencies received federal educational grants through the State to fund the special education and supportive services (including mental health services necessary for a handicapped child to benefit from his or her education) for which they were responsible;

The Short-Doyle program operated as a separate, existing resource for handicapped children. Although the Short-Doyle program is directed at the mental health needs of the entire community, it specifically provides for the needs of children; Mentally disturbed children and adolescents are listed as one of the priority populations of the Short-Doyle Act. Welfare & Institutions Code section 5651.1. Counties have certain responsibilities for maintenance of efforts for children and for increasing funding to children's services through future augmentations to their Short-Doyle budgets. Welfare & Institutions Code section 5704.5. The County has been in compliance with these provisions.

Handicapped children in the County thus had two public resources for the satisfaction of their mental health needs: local educational agencies, for IEP-required services, and the County mental health agency; for Short-Doyle mental health

services. Short-Doyle serves a much broader range of children's mental health needs than the IEP program, as has been set forth in detail in the County's Opening Brief.

Now, handicapped children have only one public resource for the satisfaction of their mental health needs: the County. When the responsibility for conducting mental health assessments and providing IEP-required mental health services was passed to the County in fiscal year 1986-87, the County received $222,955, yet its costs were $2,387,835. If the existing Short-Doyle program is to absorb the unreimbursed cost, the mental health resources for handicapped children will be substantially reduced, as will the mental health resources of all residents of the County. Without additional funding, absorption of the IEP costs through the Short-Doyle program cannot occur without a substantial reduction of mental health services provided by the County. This necessarily is a supplantation of State and local funds for handicapped children. Clearly, this is in violation of the intent of the EHA. It may jeapordize the State Plan and the federal funding for education it secures.

2. Chapters 1747 and 1274 impose a new program, separate from the Short-Doyle Program.

The Short-Doyle Act is designed to organize and finance community mental health services in every county through locally administered and controlled programs, and to provide a means for allocating state mental health funding according to community needs. Welfare and Institutions Code section 5600. The Short-Doyle Act grants great discretion to the County to determine what services are to be provided, and to whom. The County

determines its service priorities based on program principles and clinical needs. The goals and extensive requirements of the Act, as well as the County's Short-Doyle contractual obligations, have been set forth in detail in the Joint Statement of Facts and Positions and in the briefs previously filed by the County. The Short-Doyle Act is designed to give community control and direction to the complex mental health needs of a county's population. This is antithetical to the precise responsibilities to individuals required by the IEP process.

Chapters 1747 and 1274 establish a new program which is not part of the Short-Doyle program. The statutes are set forth in the Government Code, not in the Short-Doyle Act (Welfare & Institutions Code section 5600 et seq.). Chapter 1274 did amend Welfare and Institutions Code section 5651, within the Short-Doyle Act, to require Short-Doyle plans to include a description of services required by Government Code sections 7571 and 7576. This one reference does not make such services Short-Doyle services;

When Chapters 1747 and 1274 were enacted, the legislature did not add handicapped students needing IEP-related mental health services to the list of priority populations, although it did have before it the subject matter when enacting the IEP legislation; Nor did it include the IEP statutes within the Short-Doyle Act itself. The clear inference from this is that the legislature did not intend either to include these services within the Short-Doyle Act or to add to the Short-Doyle priority populations handicapped children requiring IEP-related mental health services. Estate of McDill (1975) 14 Cal.3d 831, 837-38.

Moreover, the Welfare & Institutions Code section 5651

Short-Doyle requirement is not applicable to the County. The County has elected to enter into a negotiated net amount contract with the State, and has no Short-Doyle plan. The negotiated net contract Short-Doyle contract with the State, which sets forth the County's Short-Doyle responsibilities, does not require the County to provide IEP-related services. The only interface between this contract and the County's IEP-related responsibilities is that the State chose to include its $222,955 allocation to the County for this program within the contract budget.

The program is new and fundamentally different from the Short-Doyle program because it is an entitlement program, unlike any of the other mental health programs operated by the County; Having to provide mental health services on an entitlement basis is a revolutionary responsibility for the County. Having to provide those services at no cost to the recipient or his or her family, regardless of the recipient's financial resources is also revolutionary.

The State attempts to dodge its responsibilities by asserting that the program is not "new" because the County was providing similar mental health services before. Yet the facts clearly show that this legislation requires the County to do things it never did before, as is set forth in detail in the Joint Statement of Facts and Positions and the briefs previously submitted by the County. Prior to this legislation, the County had no official involvement in the IEP process. Local educational agencies were responsible for providing or funding IEP-related services; including mental health services.

The State asserts that the County was already providing

assessments and mental health treatment under the Short-Doyle program. This is true. The assessments and treatment which are to be provided under Chapters 1747 and 1274, however, are fundamentally different and new. Assessments must conform to the statutory and regulatory educational requirements for IEP assessments. They must be in writing not just in the child's chart, but in a document submitted to the IEP team. The assessment must justify the recommendation and may be used in administrative or judicial proceedings to enforce a child's IEP rights. Similarly; IEP-related mental health treatment, focused as it must be on the educational needs of the child, is fundamentally different from services directed to the general mental health needs of the client which the County provided before:

Most IEP-referred children were new to the county mental health system. Certainly, there is some overlap of children who may receive Short-Doyle services and children who are entitled to receive IEP-required mental health services. In fiscal year 1986-87, there were some children referred through the IEP process who previously had received services through the county mental health system on an ability-to-pay fee basis; The County, however, was not mandated to serve them; and was certainly not required to provide free services regardless of family income.

3. The costs of complying with Chapters 1747 and 1274 are not reimbursed through the Short-Doyle Program.

The State asserts that funding has been provided through the Short-Doyle program. It has not. The State Short-Doyle responsibilities of the County and the Short-Doyle allocation scheme pre-existed this mandate. The Short-Doyle State funding

which the County received in fiscal year 1986-87 was essentially the same as its allocation for the prior year, with a mere four percent increase. The Short-Doyle responsibilities of the County were not decreased for fiscal year 1986-87. It is clear that the Legislature did not intend that these monies be robbed to pay for the cost of providing IEP-required mental health services.

Under the theory advanced by the State, the State could impose on the counties requirements to implement unlimited specialized free entitlement programs, provided they are loosely for mental health assessment and treatment services. The State cavalierly suggests that Short-Doyle funds could then be used to fund these programs, disregarding the fact that the County's Short-Doyle obligations and responsibilities--including specific responsibilities to maintain certain levels of service--were not reduced to accommodate this increased responsibility.

The State in its Response Brief to the Proposed Decision minimizes the impact on the County's Short-Doyle program of requiring Chapters 1747 and 1274 services through Short-Doyle funding. The State begins with a factual error. asserting that the County received in excess of $31 million and and $32 million in state Short-Doyle funding for the fiscal years 1985-86 and 1986-87, respectively, thus calculating that the amount of the claim represents "less than 6 percent of the State funding" for the year in question. This is flatly in error. The State non-categorical Short-Doyle funds received by Santa Clara County for fiscal year 1986-87 (the year for which this claim is filed) was $22.5 million, not $32 million. See Joint Statement of Facts and Positions, page 49.

Toward the end of its brief the State characterizes the use of Short-Doyle funds for this program as requiring only a "slight" redirection of resources. Given the comprehensive range of services which the County is required to provide through its Short-Doyle contract, and given the tremendous mental health needs of residents of the County, particularly those handicapped by mental or emotional disorders. absorption of 8.5 percent of the Short-Doyle budget to finance IEP-related services is much more than a "slight" redirection of resources: it is a profound crippling of the entire Short-Doyle program.

The IEP-related mental health services were never to be funded through the Short-Doyle program. Section 16 of Chapter 1274 provided for a transfer of funds from the State Department of Education to the State Department of Mental Health. Counties were not required to provide county match for this program and that the Department of Mental Health was to allocate funds based on individual county needs, rather than based on standard Short-Doyle Act allocation procedures. Section 3 of Chapter 1133 of the Statutes of 1986. (The County's $222,955 allocation was the result of this "individual county needs" formula, based on inaccurate data submitted by local educational agencies.) Chapter 1133 of the Statutes of 1986 further provided for funding for mental health for this program, by providing for a transfer of $2,000,000 from the Department of Education to the Department of Mental Health, to fund the IEP mental health program. Additional transfers were to be made from the Department of Education to the Department of Mental Health, based on a later audit (though no additional funds were received by the County).

Taken together, these provisions indicate a legislative intent to fully fund this program.

Section 17 of Chapter 1274 recognized that the Chapter imposed a mandate and directed that reimbursement to local agencies be made through to State Mandates Claim Process. The legislative counsel's disclaimer, like a legislative disclaimer, is not binding, pacticuliary when the characterization is the product of an attempt to avoid the imposition of financial responsibility. City of Sacramento v. State of California (1984) 156 Cal.App.3d 182, 196-97.

IV. CONCLUSION

That the IEP-related services were never to be funded through Short-Doyle is clear through the devastating impact on local mental health programs if Short-Doyle funds are used to fund IEP-mandated services. Th'e County cannot meet its Short-Doyle contract obligations and cover the unreimbursed costs of its IEP-required services with its Short-Doyle allocation and required match. In fiscal year 1986-87, the County was able to meet its obligations only because it contributed to its Short-Doyle program approximately $4.9 million in County general funds beyond its required county match. It is not required to do so.

Yet without increased funding, some of the fundamental needs of the County's residents with the most serious mental disorders will go unmet. Where could cuts be made? In outpatient cafe for the chronically mentally ill to prevent hospitalization? In alternative residential treatment for children who are so seriously disturbed that they would otherwise be placed in the state hospital? In acute services for psychotic or suicidal or

dangerous individuals? The mental health needs of the county are too critical, and the Short-Doyle funding already too thin, to absorb the loss in funding which results from utilizing Short-Doyle funds to pay for the cost of this newly-mandated program. State subvention must be provided.

According, the County urges adoption of the Proposed Decision of the Commission on State Mandates which was prepared by the Administrative Law Judge.

Respectfully submitted,

STEVEN WOODSIDE,
County Counsel

Dated: August 15, 1989

Susan A. Chapman
Deputy County Counsel

Attorneys for County of
Santa Clara

BEFORE THE COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

CASE OAH No. N-30939

In the Matter of	)
	)
THE TEST CLAIM OF SANTA CLARA	)
COUNTY REGARDING MENTAL HEALTH	)
SERVICES FOR HANDICAPPED AND	)
DISABLED STUDENTS	)

PROOF OF SERVICE BY MAIL

I, Robin L. Bostwick, declare that:

I am employed in the County of Santa Clara, California. I am over. the age of eighteen years and not a party to the within action or cause. My business address is 70 West Hedding Street, Ninth Floor, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served the within REBUTTAL OF SANTA CLARA COUNTY TO RESPONSE OF STATE OF CALIFORNIA TO PROPOSED DECISION OF COMMISSION ON STATE MANDATES by placing a true copy thereof in an envelope addressed to:

Harlan E. Van Wye, Deputy Attorney General
Office of the Attorney General
350 McAllister Street, Suite 6000
San Francisco, CA 94102-3600

Commission on State Mandates
1130 K Street LL50
Sacramento, CA 95814

which envelope was then sealed, with postage fully prepaid thereon, on August 17. 1989 and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, on the above-referenced date in the ordinary course of business; there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on August 17, 1989, at San Jose, California,
CCP§1013a(3)

Robin L. Bostwick

STATE OF CALIFORNIA

COMMISSION ON STATE MANDATES

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COMMISSION
STATE MANDATES

PUBLIC HEARING

Thursday, November 30, 1989
10:00 A.M.

Room 447
State Capitol Building
Sacramento, California

KT AN RECORDING

7712 GARDEN GATE DR. . CITRUS HEIGHTS, CA 95621 (916) 969-4182

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Robert Martinez

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2 ALSO PRESENT (Continued)

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4 Wm. J. Wiedner, State Department of Mental Health

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1 the determination that yes, in fact, this is the kind of
2 thing that consistently we want to be moving on, we'd be
3 prepared to take action on it, So if that could be the
4 order -- why don't we -- we had a motion and a second. Any
5 further discussion on it?
6 Okay. All those in favor, aye?
7 MEMBERS: Aye.
8 CHAIRPERSON GOULD: Opposed? Motion passes.
9 Thank you.
10 MS. MILLER: Mr. Chair? May I make a suggestion?
11 A pre-hearing conference might be appropriate in this case
12 to focus the issues and take care of some of the time-
13 consuming discussion,
14 CHAIRPERSON GOULD: Okay.
15 EXECUTIVE DIRECTOR EICH: That's a good idea.
16 We'll set one up.
17 CHAIRPERSON GOULD: Okay. We'll have staff
18 pursue that, Thank you.
19 EXECUTIVE DIRECTOR EICH: Mr. Chairman and
20 Members, the next item on the agenda would be item number 7.
21 CHAIRPERSON GOULD: Okay.
22 ASSISTANT EXECUTIVE DIRECTOR LEHMAN: Item 7 is
23 a proposed statement of decision from an administrative law
24 judge regarding a test claim submitted by the County of
25 Santa Clara on handicapped and disabled students.

The Attorney General's Office, representing the State in this matter, recommends the Commission reject the proposed decision because the conclusions reached by the administrative law judge are erroneous. The County of Santa Clara recommends the Commission adopt the proposed decision because the ALJ has issued a comprehensive decision setting forth factual determinations which thoroughly analyze the legal issues before it.

In reviewing the ALJ decision, it is apparent to staff that all positions from all parties were considered, and apparently the position of the Attorney General's Office was not persuasive to the ALJ. Therefore, staff is recommending that the Commission adopt the ALJ decision.

Would you state your names, please.

MS. CHAPMAN: Susan Chapman, Deputy County Counsel for the County of Santa Clara, appearing for the County of Santa Clara.

MR. VAN WYE: Good morning, ladies and gentlemen. Harlan Van Wye, Deputy Attorney General for the State.

CHAIRPERSON GOULD: Well, I appreciate both of the principal attorneys who have been involved in this case being here. Obviously, this is one that the Commission decided to listen to arguments from both of you to understand your perspective on the issue, and I know we've all reviewed the background materials associated with it. So I think

1 some summary comments might be very helpful to us in
2 understanding your perspective on it.
3 Ms. Chapman, could we ask you to go first and
4 kind of give us your perspective on the situation?
5 MS. CHAPMAN: Certainly, Thank you. First of
6 all, I'd like to state very briefly that this is really a
7 simple case of the State transferring a substantial
8 responsibility from one political entity, or group of
9 entities, the school districts, to the County of Santa Clara,
10 And it's clear -- I know the Commission has had an oppor-
11 tunity to look at the supporting papers. It's very clear
12 that it requires the County of Santa Clara to do things that
13 it was not required to do before. And it's very clear and
14 uncontroverted that the costs of doing the services required
15 by this legislation is in the neighborhood of $2 million for
16 this one year.
17 So very simply, it's a transfer of responsibility
18 frorn the Department of Education to the County Mental Health
19 Department . So that's a summary statement. And then if
20 you'd like, I will go into more detail as to the specific
21 issues,
22 CHAIRPERSON GOULD: okay. That would be helpful.
23 MS. CHAPMAN: To do that at the present time?
24 CHAIRPERSON GOULD: Yeah. Members of the
25 Commission, you've all read -- are there specific questions,

1 or would you like to have her do more of a background?

2 MEMBER SHUMAN: I'd prefer to hear her

3 presentation.

4 CHAIRPERSON GOULD: Okay. We'd like to hear

5 you summarize, please.

6 MS. CHAPMAN: Several issues, primarily legal

7 issues, were presented by this case, And I'd like to direct

8 first what I think is the real issue, the heart of the

9 issue, and that has to do with the relationship of this

10 program to the Short-Doyle program.

11 Chapter 1747 in 1984 and 1274 of 1985 do mandate

12 a new program and a higher level of service as defined by

13 the Constitution. And it's fundamentally different from the

14 Short-Doyle plan. The Short-Doyle plan, as you know, is the

15 program for community-based mental health programs. The

16 statutes that set forth the responsibilities of the Short-

17 Doyle program are found in the Welfare and Institutions

18 Code. And from time to time, you have issues about whether

19 certain additions to that program by new legislation create

20 mandates within the Short-Doyle program.

21 This is something different. This legislation is

22 in the Government Code, It's not part of the Short-Doyle

23 program. And, in fact, if the Department of Mental Health

24 in allocating its funding to the various counties had done

25 it separately, not involving it in the Short-Doyle program,

1 the only issue that we would have before us now is the fact
2 that we have an underfunded mandate because it's clear that
3 the Legislature thought it was a mandate, that they intended
4 to fund it. I think it was -- the reason that we are so
5 short in funding is that the need for services was greatly
6 underestimated in that program. There is nothing in the
7 Legislation that says it's part of Short-Doyle. There's
8 nothing that directed the Department of Mental Health to
9 include it in the Short-Doyle program or in the Short-Doyle
10 funding.
11 And the effect of trying to do that, trying to
12 take on this very big responsibility of providing mental
13 health services to handicapped students, to provide case
14 management services if they're placed out of home, to check
15 on them to make sure that the placement is proper, that
16 they're receiving the proper treatment, to provide the
17 treatment, to sit in on IEP meetings, all of that shifts
18 such a substantial portion of the Short-Doyle budget, if it
19 has to come from the Short-Doyle budget, such a substantial
20 portion away from the Short-Doyle budget, that the purposes
21 of Short-Doyle cannot be fulfilled.
22 In the County of Santa Clara, we fortunately were
23 able to meet our obligations under the Short-Doyle plan and
24 our obligations to provide mental health services to handi-
25 capped students. But we did that by using extra dollars

1 from our County general fund over and above the money that
2 we were required to provide for mental health services.
3 Some of the things that make this program so very
4 different from Short-Doyle have to do with the nature of the
5 Education of Handicapped Act, which is an entitlement
6 program. Under that program, the State program and the
7 federal program, a handicapped student who needs mental
8 health services in order to take advantage of his education
9 is entitled to receive those services at no cost. That's an
10 entitlement program, He's entitled to receive them within a
11 certain timeframe. There are certain due process rights
12 attached to it. And if he doesn't receive those services
13 free in a timely manner, he can go into district court, sue
14 the County, and you would be out of pocket for paying for
15 placement, We could also be out of pocket for attorney's
16 fees.
17 There is nothing like this in the mental health
18 plan, in the Short-Doyle plan. No one has an entitlement to
19 mental health services. No particular individual has an
20 entitlement to mental health services in the Short-Doyle
21 plan. No one. And a recent case decided that the County is
22 not obligated to expend anything more for Short-Doyle mental
23 health services other than its allocation from the State
24 plus its required match. so that's very different.
25 Another thing that's different is that these

1 services have to be provided free, It happens in our county
2 that quite a number of the students who are receiving these
3 services come from wealthy families, come from families who
4 are employed by corporations who have good insurance plans
5 that would cover psychiatric or mental health services. In
6 the Short-Doyle program, they would be required to pay for
7 the services based on their ability to pay: and if they had
8 insurance, they would be required to use their insurance.
9 They cannot be required to pay at all, and all we can do is
10 ask them, please, if they will use their insurance. And if
11 using their insurance would result in any negative effect,
12 say on the lifetime cap on insurance, they cannot be
13 required to use that insurance. So that's another very
14 fundamental difference.
15 This also represents -- and this is one other
16 thing that's very troubling -- is an open-ended financial
17 demand on the county. As I said, for the other mental
18 health services, we cannot be required to pay more than our
19 Short-Doyle allocations plus our required match, Here,
20 there's no limit as long as the kids come forward and
21 they're required to have services under their IEP, we are
22 required to provide them, There's no cap. There's no stop
23 on that. We can't say, "I'm sorry, We just ran out of
24 'money and nobody else gets services for the rest of the
25 year, or we're only going to take the top 10 percent of you

1 who are most in need." The effect of trying to use the
2 Short-Doyle money, which I think the Legislature did not
3 intend, and I think is incorrect to fund this program, is
4 that we can't provide what we are required to provide under
5 the Short-Doyle program and under our Short-Doyle contract.
6 For example, in -- and bear with me -- in 1986-87
7 Santa Clara County had a contract with the State Department
8 of Mental Health for Short-Doyle services. And as part of
9 that contract, we agreed to provide a certain level of
10 services in certain areas. We agreed to provide outreach
11 services that -- at a level that would give an estimated
12 cost of $2.5 million. We promised to provide or to have
13 ready to provide 24-hour care that would cost $14.9 million,
14 $5 million for day treatment, $16 million for outpatients.
15 And for many of these things, you would never use these for
16 these kind of students. These students are not going to be
17 receiving 24-hour care or outreach services as part of their
18 IEPs.
19 And what happens is, there's only -- only certain
20 children quality for IEP services. Not all mentally ill
21 children qualify for the services, There's a strict defini-
22 tion -- as I'm sure you know going over through the papers,
23 there has to be an impact over several years that has to
24 impact their ability to be educated. Their difficulties
25 have to show in several different spheres of their lives.

1 It cannot be because they're simply conduct disordered. It
2 cannot be simply because they've suffered a recent traumatic
3 event, It cannot be that it's a result of immigration. And
4 so by -- because of that definition, most -- many, many of
5 our young people who are in need of mental health services
6 are in greater need of mental health services than the
a students who are served under the IEPs. All our children in
8 state hospitals are in greater need of mental health
9 services. They don't have their mental health services
10 provided for them on their IEPs because that does not allow
11 for hospital-level care. Students -- children in the state
12 hospital alternative programs -- and that's also a high-cost
13 item -- they are not receiving those services through their
14 IEPs. There can be children who are suicidal who -- there
15 can be children who -- one area of functioning is school,
16 but everything else is a mess. And they're suffering
17 serious emotional difficulties. There can be children
18 referred from juvenile court. There can be children that
19 have suffered recent tragedies of rape or death or other
20 things that have not gone on long enough. There can be a
21 child who has suffered a recent schizophrenic break, a first
22 break, and would not be entitled to IEP services because it
23 hadn't gone on long enough, but certainly would be in need
24 of services.
25 And taking the money from Social Services to fund

1 this program makes us unable to meet the Short-Doyle demand
2 in our contract obligations. And I believe there was not --
3 there's nothing in the legislation that would indicate that
4 it was intended to be part of Short-Doyle. Our contention
5 is it's not part of Short-Doyle. It's clearly a mandate,
6 clearly asks us to do things we did not have to do before,
7 c1.earl.y transfers the responsibility from one agency to
8 another: and, on that basis, it is a mandate.
9 Other issues have been raised about whether it's
10 a federal mandate or whether it's something required by due
11 process and equal protection. I think those items are red
12 herrings. I would rather defer discussion of that. If the
13 Commission feels those really are critical issues -- the
14 Attorney General argued that those are critical issues -- I
15 would discuss those at that time.
16 Briefly, on -- it's not a federal mandate or
17 something that's -- there was nothing in case law or federa
18 mandate or state mandate before this legislation that
19 required counties who do not provide education to provide
20 mental health services to allow students to benefit from
21 education. Nothing. There's no case, no statute, no
22 regulation, nothing that would require somebody who's not
23 involved in the education process to provide supportive
24 services -- to be required to provide supportive services in
25 order for a child to benefit from his education.

CHAIRPERSON GOULD: Okay. Other questions from Members?

MEMBER SHUMAN : Not at this point.

CHAIRPERSON GOULD: Okay, fine. Mr. Van Wye

MR. VAN WYE: Yes. First, let me thank the Commission for the courtesies that have been extended and also thanks to Ms. Chapman and the staff of Santa Clara County for working very cooperatively with the State authorities to, I think, present a record hopefully that's very succinct and detailed; and I trust that it provides the Members the type of information that they need.

Let me first comment on a bit of background, from my perspective as a former Deputy County Counsel and former General Counsel for a county Office of Education, it would seem to me that what happened with this legislation is, in no small part, a transfer of the fact that before the legislation occurred, the identification -- the primary responsibility for identifying and the primary responsibility for funding handicapped services was integrated within the education establishment. The legislation bifurcated responsibility for identification and responsibility for financing. And I can certainly understand where the County feels that they have a problem in this area, and I can understand why they feel that it's a mandate,

I would sugges to the Commission for the reasons

that we've outlined in the several briefs that we have filed in this regard that it is not. One thing that I think is particularly striking is that classically when you get a mandate situation, what you have is a transfer of a program or a financial responsibility from the State to a local entity, and that's what the Constitution is designed to deal with. In fact, the State has not really transferred anything from the State to a local entity. what they've done, if at all, is to rearrange certain priorities within the local agency structure.

One of the things that strikes me as particularly complex about the interrelation of education, and as anybody has ever had the temerity to dip into the Education Code and practice that archane field of law, you know that as the Court of Appeal said in Horton v. Whipple back in 1922, that anybody that tries to make total sense of all the provisions of the then School Code is doomed to failure. What is significant, of course, is that while the County of Santa Clara has a fiscally independent County Office of Education, this decision that's going to be coming out of this Commission is going to be relating to every county in the State of California, as you well know. Many of the county Offices of Education are fiscally and totally integrated within the county structure, and so to the extent that County Superintendents of Schools, County Offices of

1 Education provide education services for the handicapped,
a which of course most if not all of them do under Section
3 56000 of the Education Code, what you're talking about is
4 some shifting within a county structure.
5 So I think that in dealing -- should a mandate
6 ultimately be discovered in the process of identifying what
7 those mandates are, that's something that's going to have to
8 be taken into account.
9 It was mentioned by Ms. Chapman that there's
10 something special because this is not in the Welfare and
11 Institutions Code but rather it's in the Government Code.
12 I think the Members of this Commission are obviously
13 familiar with the fact that the Government Code is probably,
14 by far, the largest code in the State of California. And
15 when statutes impact on multiple agencies, the statutes
16 are frequently for convenience placed in the Government
17 Code, one only needs to think of the Education and
18 Employment Relations Act, which was placed in the Government
19 Code as the Education and Employment Relations Act, and as
20 the Public Employment Relations Board expanded its jurisdic-
21 tion, other aspects were brought in. But multi-
22 jurisdictional, multi-entity type of things oftentimes find
23 their way in the Government Code. And I certainly think
24 that that's not dispositive in any respect.
25 Ms. Chapman stated that the Legislature did not

1 recognize a mandate -- or recognized a mandate in the
2 AB 3632. I would refer you to the brief that we filed
3 before this Commission, our final brief in response,
4 indicating that in that very legislation, other items were
5 recognized as a mandate by the Legislature, but this speci-
6 fically was not. And I would submit that that's fairly
7 strong evidence that the Legislature in fact did not see
8 this as a mandate.
9 It's clear that in large part, the Short-Doyle
10 Act does not provide -- or strike that. It's clear in large
11 part the Short-Doyle Act provides the county with a great
82 deal of discretion, the local mental health agencies with a
13 great deal of discretion, in deciding where their mental
14 health funds are to go and how they are to go. But as we
15 pointed out in our briefings, that discretion is not
16 entirely unfettered, and that the Legislature has seen to
17 impose certain requirements of certain general priorities on
18 the counties with regard to the expenditures of their
19 Short-Doyle funds.
20 We would submit that what has happened in this
21 case is that the counties have been not directed to do, in
22 large part, anything new. We would submit they haven't been
23 directed to do anything substantially new at all. It's all
24 of the same type of things that the County Mental Health
25 Services have been doing for years and years and years, well

1 antedating SB 90.

2 What we see is that the Legislature has said to
3 the counties, "When you're doing this, certain populations
4 have head-of-the-line privileges." And that population is
5 identified as people who, as we pointed out in our briefs,
6 have been recognized under federal law, both 94.142, 504,
7 and the case law, that handicapped individuals, handicapped
8 students, have certain rights.

9 The legislation in question that we're dealing
10 with today essentially says to the County Mental Health
11 people, "By the way, these folks have certain priority
12 rights, so serve them first." And while I can understand
13 and appreciate that there is some impact in reducing the
14 ability of the county to be flexible in arranging its
15 priorities within the expenditures under the Short-Doyle, I
16 think that the record will show that that's only a minute
17 percentage of the county's overall Short-Doyle budget. I
18 haven't had an opportunity to really look at it during the
19 counsel's remarks, but I believe it's in the six to eight
20 percent range, And I may be wrong; and if I am, I stand
21 corrected. But it's not a -- it's not an overall
22 devastating amount on Short-Doyle.

23 And these, of course -- the nature of the
24 services providing mental health services to individuals is
25 precisely the type of things that County Mental Health

1 Agencies are in business to provide, so it's not --
2 certainly not putting together a new program.
3 Theoretically, the counsel for the county said
4 that it's an open-ended requirement. I would say that that
5 certainly is only in theory because of the vast amounts of
6 money that are being spent by County Mental Health, and this
7 is only a very small percentage of them.
8 Ms. Chapman also remarked about how the entitle-
9 ment -- it's an entitlement program and that that's a
10 difference from Short-Doyle. But let me suggest that the
11 entitlement to this does not really derive from the Act
12 itself. The entitlement to free public education derives,
13 in part, from the federal legislation, the Education for the
14 Handicapped Act. But I would submit that that entitlement
15 in California, were it put to a test, derives much, much
16 earlier. It derives right now from Article IX, Section 5 of
17 the California Constitution, which establishes the common
18 school system and provides that the Legislature shall
19 maintain -- and reads, and I quote, "The Legislature shall
20 provide for a system of common schools by which a free
21 school shall be kept up and supported in each district at
22 least six months in every year after the first year in which
23 a school has been established." That section not only comes
24 from the Constitution as it was revised in 1872, the
2% annotations indicate that that derives from the Constitution

1 of 1849, the very basic document under which the State of
2 California was founded. Beyond that, it derives in American
3 history from the Northwest Ordinance, which was passed by
4 the Continental Congress in 1787, which set aside one
5 section of every 36 for the support of a free common and
6 public school system, So it's a very 'ancient concept in
7 United States and California law.
8 We don't think that what is really being required
9 -- and this is extensively briefed in our briefs, and I
10 won't belabor the point -- we don't think that what is being
18 required is a higher level of service of the county. Short-
12 Doyle provides a great deal, a massive amount, of
13 flexibility of the county. In fact, it's designed for
14 flexibility. The record is clear that the County of Santa
15 Clara has historically chosen to supplement its mental
16 health and Short-Doyle funds beyond the 10 percent required
17 match and provides a considerable amount of general funding
18 for its mental health program. I would submit that this
19 mental health program and the way that the mental health
20 program is carried out in Santa Clara County as shown in the
21 record and as I believe is undisputed is one in which the
22 County has a very, very high degree of flexibility. They
23 retain control. They can, to a very great extent, do what
24 they want with it. The County can certainly work with its
25 school districts, can work with the County Office of

1 Education, and the people in the mental health aspects of
2 the County certainly work with the other agencies in
3 administering what is required.
4 If any mandate-- and we don't concede that there
5 is a mandate that has been created -- but if a mandate has
6 been created by this legislation in question, we would
a submit that the only mandate that has been created is the
8 mandate related to the assessment after identification of
9 students to deem whether or not they should be entitled to
10 mental health services, which is specifically dovetailed
11 into the federal requirements and possibly some case
12 management cost . But the basic underlying provision of
83 mental health services to the county, to the residents of
14 the county, is precisely what the County Mental Health
15 Agencies have been set up and funded by Short-Doyle to do,
16 It's precisely the job that they exist to do. The only
17 imposition that this legislation has had on that fundamental
18 underlying requirement is the fact that it has identified
19 one population within that as having a priority.
20 The legislation in question does not give these
21 people an entitlement to free services; rather, the free
22 services derive from federal law. The free -- both in the
23 statutory and in the case law that's been cited in our
24 briefs. And above and beyond that, the entitlement to a
25 free education derives from the California Constitution all

1 the way back to 1849 at the founding of the State of
2 California. A case has not been cited in our briefs, and it
3 struck me, literally, as I was sitting here this morning, is
4 the famous California Supreme Court case of Mejnares v.
5 Newton, which is a 1956 case involving the requirement that
6 the school district that services the Big Sur provide 'free
7 bus transportation of children who were living way up in the
8 mountains above Big Sur so that they could take advantage of
9 public education. This was something that the Supreme Court
10 just basically said, ingrained within the California system
11 is that when you provide educational-related services, that
12 they be provided free.
13 I think that what the County, and understandably,
14 is trying to do is to remove itself from the political
15 processes of going to the Legislature on an annual basis for
16 Short-Doyle funding. And it's understandable if you can
17 create a mandate that will be funded out of a different
18 source, that that obviously has the tendency to make life a
19 little bit easier. But I think that there's really no
20 mandate as such created here; or if it is, it's only a very
21 limited mandate related to the assessment process, And that
22 to attempt to carve out an exception to the general rule
23 that local agencies and all political entities within the
24 State of California need to fight out their political
25 battles in the committees and the floors of the Legislature,

1 is not something that should be promoted here.

2 I certainly stand ready to answer any quest ons

3 if the Members have any of the State,

4 MEMBER CREIGHTON: Yes, I have a question.

5 CHAIRPERSON GOULD: Mr. Creighton.

6 MEMBER CREIGHTON: Yes. Mr. Van Wye, are you

7 suggesting that in some of these ancient statutes that you

8 referred to, going back to the Continental Congress, that

9 they -- the schools systems under those statutes routinely

10 accepted handicapped children until this more recent

11 legislation?

12 MR. VAN WYE: I am not an expert in the history

13 of handicapped legislation in other states other than

14 California.

15 MEMBER CREIGHTON: But you have -- you've

16 referred to those statutes.

17 MR. VAN WYE: Right.

18 MEMBER CREIGHTON: That's why I asked my quest ion.

19 MR. VAN WYE: I'm referring to the general

20 prospect, the general concept that education systems, when

21 they are provided, public education systems are provided at

22 no cost. That's a historical American concept, and it's

23 been enshrined in the California Constitution since 1849.

24 MEMBER CREIGHTON: Thank .....

25 MEMBER SHUMAN: Well, bu in that regard, you're

1 not arguing that every student has a right to have a school
2 nurse available to him or free medical treatment or some-
3 thing of that nature, are you?
4 MR. VAN WYE: I'm not suggesting that every
5 student has the right to a free school nurse. But it seems
6 fairly clear from -- and I think Smith v. Robinson in the
7 Pennsylvania case that we cited in our briefs -- the United
8 States Supreme Court has identified the fact that handi-
9 capped children, as a matter of equal protection, are
10 entitled to participate in the educational programs to the
I? extent that they are able and that it would seem clear from
12 those decisions that to the extent that supplemental
13 services are required to enable them to benefit from
14 legislation -- benefit from education, that those services
15 probably have to be provided as a matter of constitutional
16 law. Now, what has happened, of course, is that this -- in
17 Public Law 94.142, the Education for the Handicapped Act,
18 the 94th Congress identified this, set up a federal funding
19 mechanism, and invited all the states to join. Historically,
20 all the states, but one, joined very quickly, New Mexico
21 being the last hold-out. It finally realized that it had to
22 get, in the program because of the massive amount of litiga-
23 tion that was taking place down in New Mexico,
24 Now, while theoretically, I said it's possible --
25 and I know it's been argued that theoretically this is a

1 voluntary program that the State of California participates
2 in 94.142 on a voluntary basis, I would submit that that's
3 almost a disingenuous position. I just cannot conceive in
4 1989 that any state could opt out of the 94.142 scheme. I
5 -- the legislation that would -- the litigation that would
6 ensue on equal protection grounds make this the type of
7 federal program that I submit is -- it's illusory to say
8 that this is an optional federal program. I think it has
9 the patina of an option: but when you look at the substance
10 of the 94.142 scheme, to say that the State of California or
11 any other state could not participate in that program, I
12 just don't think that that's a position that can be upheld.
13 MEMBER SHUMAN: Is that the federal legis ation
14 you're referring to?
15 MR. VAN WYE: Right. 94.142 is the --
16 MEMBER SHUMAN: That requires -- as you put it,
17 that requires the free services?
18 MR. VAN WYE: Right. And the federal legislation
19 of course, tracks the basic concept which has existed in
20 this country since the Northwest Ordinances of 1797. I gfew
21 up in Ohio, which is the first state that came into the
22 Union out of the old Northwest Territories, and I remember,
23 again as I was thinking of the California Constitution
24 literally on the road up this morning from the Bay Area, I
25 recalled my ancient high school history about how this was a

very important concept, And this is a concept of free education that is so deeply ingrained in the American ethic, and it's deeply ingrained in the California ethic, that the fact that the counties cannot charge students who might otherwise be able to pay whereas they could charge for other Short-Doyle services from people that can pay derives not from the legislation that we're dealing with here, AB 3632, but it derives rather from, in our case principally, the California Constitution, But it's well ingrained in federal law. And, to my knowledge, it's ingrained in the state law of every state of the Union,

MEMBER SHUMAN: I'm not sure about the breadth of your argument here. It sounds to me that you would argue that anything that falls within the rubric of education takes on this constitutional aura and, therefore, could never be considered a mandate, state-reimbursable mandate.

MR. VAN WYE: I'm not sure if I would -- I don't think -- 1 certainly would not go that far. For instance, the mandates that arose out of SB 160, when the Education and Employment Relations Act was passed, Those certainly would not take on that type of rubric. And also, the underlying funding formulas for state education, the underlying concepts, the underlying programs for state education, were in place well before SB 90 and well before the constitutional amendment of, I believe, approximately 1980, when the

1 SB 90 concept was enshrined in the Constitution.

2 so I -- to answer your question, Mr. Shuman, I'd
3 have to take a look on an individual basis at a given
4 program to see whether there was a constitutional enshrine-
5 ment, The thrust of my argument vis-a-vis the Constitution
6 is basically that the reason the County can't charge other-
7 wise wealthy students for the provision of these services
8 that they could with regard to other noneducationally-
9 related Short-Doyle services derives not from the legisla-
10 tion in question that we're dealing with today, but it
QQ derives from sources of much longer lineage and much greater
12 authority,

1% CHAIRPERSON GOULD: I have a question for
14 Ms. Chapman. Maybe you can help me understand your argument
15 a little bit.

16 Let's take a circumstance in which clients which
17 have traditionally been part of the Short-Doyle prograrn
18 within a county, and the Legislature makes a determination
19 that there is an entitlement aspect to a certain group
20 within that population, and they say, "These people shall be
21 served. They shall receive services. And they shall
22 receive services from under the umbrella funding that is
2% provided under the Short-Doyle," Tell me how your view of
24 the mandate relationship that you've argued would interpret
25 that circumstance.

MS. CHAPMAN: If you're with something within the Short-Doyle Act and within the Short-Doyle program that specifically said, "You are to treat under Short-Doyle certain people specially," we would argue that that would -- and provide certain services that we necessarily were not required to provide before, although we may or may not have -- we would argue that as to our required match, that that is a mandate; that it is a mandate, but that it's a funded mandate through Short-Doyle, except to the extent that there's a 10 percent required county match,

CHAIRPERSON GOULD: Okay. So you allow for the fact that the Legislature can make a determination as to the priorities within the Short-Doyle program.

MS. CHAPMAN: And certainly has many times.

CHAIRPERSON GOULD: Okay.

MS. CHAPMAN: There have been additions that you must have patients' rights advocates, that you must provide for some jail diversion programs for the mentally ill, any number of programs that come before the Commission, and I believe many of them have been found to be mandates and would be -- and would be subject to reimbursement insofar as the county's required match is concerned.

CHAIRPERSON GOULD: Okay. Yet in your concluding arguments regarding the situation, you make reference to the fact that if we are to take these responsibilities and fund

1 them out of Short-Doyle, that clearly there will be some
2 needs that go unmet. It kind of speaks to adequacy of
3 funding, if you will; and, although I appreciate that
4 circumstance, and in my experience in dealing with the
5 counties, I have heard probably more times than I wish to
6 reiterate concerns regarding the adequacy of mental health
7 funding at the local level, that's clearly a concern and a
8 pressure -- I guess what I'm trying to do is to not look at
9 the question of funding adequacy, because I think that's
10 almost a separate question, but the question of how when the
11 state or the federal government determines a priority for a
12 certain group of people within a block grant such as Short-
13 Doyle do we address the question of whether there's a
14 mandate, recognizing that there may be people who fall out
15 the bottom, if you will, from a priority standpoint.
16 MS. CHAPMAN: Okay. If I could back up a little
17 and then maybe ask you to ask your question again, because I
18 think maybe there's a point that needs to be clarified.
19 When Mr. Van Wye referred to children having an entitlement
20 to a free public education and certain supportive services,
21 all of the legislation and the case law have to do with
22 those services being provided by the people who provide
23 education. The County of Santa Clara does not provide
24 education. So any entitlement that's coming down on a
25 federal level or on a state level insofar as the general

1 program is concerned has to do with the responsibilities for
2 education.
3 And I might point out that under the federal law
4 that there's an exchange, that the federal government says,
5 "You adopt Education for All Handicapped Act with all its
6 procedural and substantive requirements, and we will give
7 you some grant money. And that grant money goes to your
8 Department of Education to be distributed to local educa-
9 tional agencies to fund those programs, " What's happened
10 here is the money that filtered down, because we promised as
11 a state that we would have that program -- filters down to
12 the local education agencies, and it doesn't filter to the
13 Department of Mental Health. But now the responsibility for
14 providing a good portion of those services has been
15 transferred to us.
16 CHAIRPERSON GOULD: Okay. It would be helpful
17 for me to listen to someone who can detail what's happened
18 in the funding scheme, And I don't know if there's someone
19 here who could refresh our memories, or maybe either one of
20 you can, in relation to transfer of resources from the
21 education system to the social services and mental health
22 system. And in conjunction --
23 MS. CHAPMAN: In -- for 1986-87, the transfer to
24 our county for the responsibility to mental health was about
25 $200,000. Our net unreimbursed cost came to $1.9 million.

As a side note --

CHAIRPERSON GOULD: Where was that money transferred to?

MS. CHAPMAN: Pardon?

CHAIRPERSON GOULD: What program was it transferred to?

MS. CHAPMAN: It was included in our -- in -- as an addition to the Short-Doyle allocation. However, there is nothing in our Short-Doyle contract that requires us to provide the services that we're talking about, what we see as a mandate, pursuant to this legislation. There's no reference to those responsibilities in our contract at all, although there are very specific references to what our priorities are, what we promise we will deliver, the populations we promise to serve. This legislation did not change the priorities, populations. It did not add this to the Short-Doyle program.

CHAIRPERSON GOULD: In terms of background, I thought I read that of the caseload, there were some 251 individuals that were already involved in Short-Doyle services. Is that incorrect?

MS. CHAPMAN: No, that is correct. There were -- of the referrals that we received in 1986-87, or for that year, there were 251 students out of the 568 students who were referred who had previously been receiving services.

1 And I think that raises a question that will have
2 to be perhaps grappled with during parameters and guidelines
3 should the Commission find that this is a mandate. You
4 know, we previously were providing some level of service to
5 some of these children. And so should there be some sort of
6 reduction or offset or something, I think that's a question
7 that's important and has to be addressed at some point.
8 But we were -- first of all, we were not required
9 to serve those 257 -- or 251 students, That year, we had an
10 optional overmatch of $4.4 million that allowed us to serve
11 -- to provide the level of service that we did provide.
12 CHAIRPERSON GOULD: Yeah.
13 MS. CHAPMAN: And that may not continue to be an
14 option in the future.
15 CHAIRPERSON GOULD: Uh-huh.
16 MS. CHAPMAN: As the counties become more and
17 more strapped, even the County of Santa Clara, which has
18 such a high dedication to providing mental health services,
19 may not be able to continue to overmatch.
20 CHAIRPERSON GOULD: Yeah.
21 MS. CHAPMAN: That may not be an option any
22 longer.
23 CHAIRPERSON GOULD: I appreciate that, and I
24 realize that there are counties in different situations in
25 terms of their ability to overmatch. That kind. of gets to

1 the funding adequacy question. And I guess I'm still
2 wrestling with the mandate issue.
3 YOU know, you mentioned that the Legislature
4 recognized that it was a mandate. And Mr. Van Wye said that
5 within the legislation, some specific elements of it were
6 identified as being a mandate, and this piece was not.
7 What's your perception on what occurred there?
8 MS. CHAPMAN: To be honest, Mr. Gould, I do not
9 have that right at my fingertips. But I know that on -- I
10 believe it was in the second legislation that went through
11 the -- 1747, that it was recognized that it did -- that it
12 was a mandate,
13 Let me add something else that I think is
14 interesting and I think reflects what the true intent was.
15 The year following '86-'87, Santa Clara County received a
16 huge jump in the amount of allocation for these services.
17 And I think what really happened was that people thought
18 that this would not be an expensive program.
19 CHAIRPERSON GOULD: Uh-huh.
20 MS. CHAPMAN: Not many students had been identi-
21 fied as being seriously emotionally disturbed. Not many
22 students had been identified as needing mental health
23 services. The school districts were sort of in a position
24 of not wanting to identify them; because if they did, they'd
25 have to provide the services. The Auditor General's report

1 certainly substantiates that. I think they see the jump as
2 two and a half times the number of referrals once the
3 responsibility of providing the service was passed on to
4 Mental Health. And so once it became clear that this really
5 was a big responsibility, the funding or a large part of the
6 funding came through in the following year. So we may be
7 just dealing with an anomaly for one year that we really had
8 our problems because it was not anticipated that the level
9 of services required would be so high.
10 CHAIRPERSON GOULD: Ms. Whetstone, you've joined
11 us. Is there something you'd like to add to the
12 proceedings?
13 MS. WHETSTONE: I was just going to provide
14 further clarification on your questions about the funding if
15 you still have that question.
16 CHAIRPERSON GOULD: Okay. I think that would be
17 helpful.
18 MR. VAN WYE: Let me just add before she starts,
19 for the record, we -- that issue on the -- that you raised
20 regarding what was identified in this legislation as
21 containing a mandate is found at pages 9 and 10 of our
22 response that we filed, the final brief that we filed,
23 before this Commission.
24 MS. WHETSTONE: And I think some of this has been
25 brought up by Ms. Chapman already, but basically the first

1 year of the program, there was a combination of the transfer
2 of money from education, and an additional general fund
3 appropriation that went to the counties to provide for these
4 services,
5 As was stated, there was an Auditor General's
6 review of what education had reported was being sent, and
7 that showed that there was some -- you know, there was an
8 increase that was -- which also tied to the increase in
9 appropriation which came from the State. The next year,
10 there was also a significant increase in state funding. So
11 the first year, it was a combination of a transfer and new
12 money. And the second year, there was new money added as
13 well.
14 The only other comment I was going to make is
15 just talking about the cl ents that had already been seen by
16 the mental health system, what has been in our earlier
17 briefs is to point out that there is a requirement for
18 maintenance of effort for children services in the mental
19 health statutes. And an addition, there's a requirement
20 that if there's new money, that "x" percent goes to
21 children.
22 So, again, they already were being required to
23 provide services to children.
24 MR. VAN WYE: I -- it seems to me explicit, if
25 not -- implicit if not explicit in Ms. Chapman 's comments

1 was the thought that when a Short-Doyle requirement is laid
2 onto a county, the amount of funding that the county seeks
3 is the 10 percent county match. It would seem that what we
4 have here is clearly a requirement to provide these mental
5 health services is placed on the county mental health system
6 by the Government Code, which system is created within the
7 Welfare and Institutions Code. And it couldn't be more
8 clear that the Short-Doyle -- the system created by Short-
9 Doyle is charged with providing these services. And the
10 fact that the legislation in question was, because it's
11 multi-faceted legislation, it involves both mental health
12 and education, so rather than putting it in the Education
13 Code, we're putting it in the Welfare and Institutions Code,
14 the Legislature for reasons of convenience placed it in the
15 Government Code would certainly not seem to me to be in any
16 way dispositive that this was not an aspect of the Short-
17 Doyle program as created by the Legislature.
18 When you have these multi-jurisdictional, if you
19 will, multi-agency, multi-governmental conceptual aspects,
20 they're frequently, if not almost exclusively, placed in the
21 Government Code. And so I think that the provisions of the
22 Government Code certainly implicitly, if not explicity,
23 alter the Short-Doyle program. So this is inherently within
24 Short-Doyle, and we think that it's appropriate to be funded
25 out of Short-Doyle.