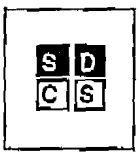

SAN DIEGO CITY SCHOOLS

EUGENE BRUCKER EDUCATION CENTER
4100 Normal Street, San Diego, CA 92103-8363

(619) 725-7785
Fax (619) 725-7564

OFFICE OF RESOURCE DEVELOPMENT
apalkowitz@sandi.net

RECEIVED
JUL 08 2005
COMMISSION ON STATE MANDATES

Sent by Facsimile

July 7, 2005

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Subject: Comments on Staff Analysis: ***Standardized Testing and Reporting***
Case No.: 04-RL-9723-01

Dear Ms. Higashi:

During the hearing on May 26, 2005 Mr. Shelton on behalf of the California Department of Education initially raised the following arguments:

1) U.S. Department of Education (USDE) requested the State of California to remedy recommendations in the NCLB program or face severe and certain penalties;
2) Mr. Shelton given the opportunity will provide documentation to support "the threat" of severe and certain penalties to satisfy Mr. Sharkey's comments those mere possibilities is inadequate.

The documents submitted by CDE, approximately one hundred pages, are unsuccessful in proving the above assertions. The documents indicate only two states (out of fifty) received nominal fines for noncompliance. Mr. Shelton's declaration fails to identify specifically the severe and certain penalties directly related to the USDE's recommendations and findings to the State of California.

The experiences of California and of other states show that noncompliance with the requirements of NCLB leads to fiscal penalties imposed or the treat of such fiscal penalties by the U.S. Department of Education (USDE). Those

> *amounts threatened in written or oral form have ranged from fines taken against state NCLB administrative funding to the full loss of NCLB grant funding. (Shelton declaration; paragraph 6)*

The documentation submitted by CDE discloses the following:

> *In October of 2003 the USDE informed the Minnesota Department of Education (MDE) that ten percent of the MDE's Title I Part A administrative funds ($112,964) would be withheld from the MDE as a result of Minnesota's failure to use current assessment data for middle and high schools in its computation of Adequate Yearly Progress (AYP) for those schools.*
>
> *In January of 2005 the USDE informed the Texas Education Agency (TEA) that four percent of the TEA's Title I Part A administrative funds ($444,282) would be withheld from the TEA as a result of Texas' failure to use report AYP for its schools prior to the start of the school year.*

The above examples of fines are unmistakably not severe and certain penalties and fail to meet the criteria set by the courts to elevate the programs to a mandate due to "intent to coerce". A further review of the documents submitted by CDE obviously demonstrates there was not a threat of severe and certain penalties; to the contrary CDE was complimented on their efforts.

> *The enclosed report contains a listing of the critical monitoring elements in each of the areas, a description of the scope of the monitoring review, and the findings, recommendations and commendations that the team cited as a result of the review. The ED team was impressed with the efforts of your staff to implement statewide the many requirements of the selected Title I and Title X programs of the ESEA. (Letter dated December 10, 2004 from USDE)*

The above illustrations attempting to demonstrate the certain and severe penalties confronting the State of California have been interpreted by staff incorrectly to conclude NCLB is a mandate due to the implied "intent to coerce". This erroneous conclusion is contrary to the previous analysis that stated the following:

"First, NCLB itself provides that it is not mandatory on the states":

> *Nothing in this subchapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction. Thus, NCLB states that its purpose is not to mandate, direct or control a state or local education agency, and not to require states to incur costs that NCLB does not cover. Withholding state administration funds is the*

sole consequence of noncompliance mentioned in NCLB. (this section is single spaced indented)

Staff's previous conclusion was as follows:

California freely chose to enact the STAR program that complies with IASA. Moreover, the STAR program goes beyond IASA by (1) testing all pupils in grades 2-11, not only pupils in Title I schools: (2) testing second graders, not required by IASA; (3) testing all pupils annually in mathematics or reading/language arts, while IASA required testing pupils once in grades 3-5, grades 6-9, and grades 10-12. Thus, in enacting STAR, California exercised a true choice to comply with IASA by going beyond IASA requirements. The same is true for NCLB. STAR requirements also exceed those of NCLB because the STAR program: (1) tests second graders (NCLB testing starts in third grade); (2) tests high school pupils annually (NCLB requires testing once during grades 9-11). Thus, the STAR program goes beyond federal requirements, indicating true choice in implementation of IASA and NCLB.

In summary, staff finds that this record does not support a finding that STAR is a federal mandate under IASA or NCLB because the penalties have not been shown to be certain or severe, and because California exercised true choice in implementing the federal programs as evidenced by the STAR program requirements that exceed those in IASA or NCLB.

Based on the foregoing, it is obvious the documentation submitted by CDE fails to provide clear and convincing evidence of NCLB possessing "intent to coerce". Accordingly, the Commission must conclude NCLB is not a mandate and federal funds received by a claimant are not a reduction to the mandate reimbursement claim.

Please contact me with any questions or comments.

Sincerely,

Arthur M. Palkowitz

AMP/tr

PROOF OF SERVICE

RE: *Standardized Testing and Reporting*, Case Number 04-RL-9723-01

I am employed in the County of San Diego, State of California. I am over 18 years of age and not a party to the within entitled action; my business address is 4100 Normal Street, Room 3209, San Diego, California 92103.

On July 7, 2005, I served the foregoing document(s) described as: **Comments on Staff Analysis**

On the person/parties in this action by faxing and placing a true and correct copy thereof enclosed in a sealed envelope(s) with postage thereon fully prepaid in the United States Mail at San Diego, California, with first-class postage thereon fully prepaid.

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite #300
Sacramento, CA 95814

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

Executed on July 7, 2005 in San Diego, California.

Tenya Rushing