BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: San Diego Unified School District, Claimant	)	**No. CSM-4476** Education Code Section 48209.1 Education Code Section 48209.9 Chapter 1262, Statutes of 1994 Education Code Section 48209.7 Chapter 915, Statutes of 1993 *Choice Transfer Appeals*

PROPOSED STATEMENT OF DECISION

This claim was heard by the Commission on State Mandates (Commission) on March 28, 1996, in Sacramento, California, during a regularly scheduled hearing.[1]

Mr. Keith Petersen appeared on behalf of the San Diego Unified School District, Dr. Carol Berg appeared on behalf of the Education Mandated Cost Network, and Mr. James M. Apps and Mr. Scott Hannan appeared on behalf of the Department of Finance. Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the Commission finds:

ISSUE

Do the provisions of Education Code sections 48209.1 and 48209.9, as amended by Chapter 1262, Statutes of 1994, and section 48209.7, as amended by Chapter 915, Statutes of 1993, impose a new program or higher level of service in an existing program upon school districts within the meaning of section 6 of article XIIIB of the California Constitution?

BACKGROUND AND FINDINGS OF FACT

[1] This test claim also had been heard, and continued, on October 26, 1995, and January 25, 1996.

The test claim was filed with the Commission on April 3, 1995, by the San Diego Unified School District.

The elements for filing a test claim, as specified in section 1183 of Title 2 of the California Code of Regulations, were satisfied.

Education Code section 48209.1, as amended by Chapter 1262/94, states the following:

(a) The governing board of any school district may accept interdistrict transfers. No school district that receives an application for attendance under this article is required to admit pupils to its schools. If, however, the governing board elects to accept transfers as authorized under this article, it shall, by resolution, elect to accept transfer pupils, determine and adopt the number of transfers it is willing to accept under this article, and ensure that pupils admitted under the policy are selected through a random, unbiased process that prohibits an evaluation of whether or not the pupil should be enrolled based upon his or her academic or athletic performance. Any pupil accepted for transfer shall be deemed to have fulfilled the requirements of Section 48204.

(b) Either the pupil's school district of residence, upon notification of the pupil's acceptance to the school district of choice pursuant to subdivision (c) of Section 48209.9, or the school district of choice may prohibit the transfer of a pupil under this article or limit the number of pupils so transferred if the governing board of the district determines that the transfer would negatively impact any of the following:

(1) The court-ordered desegregation plan of the district.

(2) The voluntary desegregation plan of the district that meets the criteria of Section 42249.

(3) The racial and ethnic balance of the district.

(c) The school district of residence shall not adopt policies that in any way block or discourage pupils from applying for transfer to another district. (Additions or changes are indicated by underline.)

Education Code section 48209.7, as added by Chapter 160/93 and amended by Chapter 915/93, states the following:

(a) A school district of residence with average daily attendance greater than 50,000 may limit the number of pupils transferring out each year under this article to 1 percent of its current year estimated average daily attendance.

(b) A school district of residence with average daily attendance less than 50,000 may limit the number of pupils transferring out under this article to 3 percent of its current year estimated average daily attendance and may limit the maximum number of pupils transferring out under this article for the duration of the program authorized by this article to 10 percent of the average daily attendance for that period.[2] (Additions or changes are indicated by underline.)

Education Code section 48209.9, as amended by Chapter 1262/94, states the following:

(a) Commencing January 1, 1994, any application for transfer under this article shall be submitted by the pupil's parent or guardian to the school district of choice that has elected to accept transfer pupils pursuant to Section 48209.1 prior to January 1 of the school year

[2] Article 1.5 was added by Stats.1993, c.160 (A.B.19), section 1, becomes inoperative July 1, 2000 and is repealed Jan. 1, 2001, under the provisions of section 48209.16.

preceding the school year for which the pupil is to be transferred. This application deadline may be waived upon agreement of the pupil's school district of residence and the school district of choice. No applications shall be submitted after January 1, 1999.

(b) The application shall be submitted on a form provided for this purpose by the State Department of Education and may request enrollment of the pupil in a specific school or program of the district.

(c) Not later than 90 days after the receipt by a school district of an application for transfer, the governing board of the district shall notify the parent or guardian in writing whether the application has been provisionally accepted or rejected or of the pupil's position on any waiting list. Final acceptance or rejection shall be made by May 15 preceding the school year for which the pupil is to be transferred. In the event of an acceptance, that notice shall be provided also to the school district of residence. If the application is rejected, the district governing board shall set forth in the written notification to the parent or guardian the specific reason or reasons for that determination, and shall ensure that the determination, and the specific reason or reasons therefor, are accurately recorded in the minutes of the board meeting in which the determination was made.

(d) <u>The parent or guardian of a pupil who is prohibited from transferring pursuant to either subdivision (b) of Section 48209.1 or Section 48209.7 may appeal the decision to the county board of education.</u>

(e) Final acceptance of the transfer is applicable for one school year and will be renewed automatically each year unless the school district of choice through the adoption of a resolution withdraws from participation in the program and no longer will accept any transfer pupils from other districts. However, if a school district of choice withdraws from participation in the program, high school pupils admitted under this article may continue until they graduate from high school. (Additions or changes are indicated by <u>underline</u>.)

The Commission on State Mandates determined on April 28, 1995, that when a school district elects to become a school district of choice (the receiving district in the choice transfer process) under Education Code section 48209.1 of Chapter 160/93, such election is a voluntary, permissive act and, accordingly, not a reimbursable state mandated program.[3]

For the school district of residence (the sending district in the choice transfer process), the Commission also determined in CSM-4451 that a limited state mandated activity exists in section 48209.1, subdivision (b). That subdivision states that the "... school district of residence ... may prohibit the transfer of a pupil under this article..." and the permissive "may" thus seemingly avoids any subsequent reimbursable state mandated duties specified in section 48209.1. Nevertheless, the Commission determined that a district of residence, only when subject to a court-ordered desegregation plan, must confirm that the proposed transfer does not negatively impact such plan. This activity constitutes a reimbursable state mandated program.

However, because this activity has already been recognized for reimbursement in a separate test claim, the Commission determined that no reimbursable state mandated program exists in section 48209.1 for the purposes of this test claim.[4] The Commission found that the changes which have been made to section 48209.1 since its previous decision on this section serve to provide technical clarifications in subdivisions (a) and (b). In the new subdivision (c), however, the Legislature made clear a policy that school districts of residence are not to adopt policies which block or discourage pupils from applying for transfer to another district. None of these changes subsequent to the Chapter 160/93 amendment would appear to negate the Commission's decision on CSM-4451. Finally, despite claimant's contention that the Chapter 1262/94 amendment to section 48209.9 impacts the CSM-4451 Commission determination on section 48209.1, the Commission disagreed and determined that section 48209.1 contains no reimbursable state mandated program.

Regarding Education Code section 48209.7, the Commission's Statement of Decision (CSM-4451) also addressed this section and stated that no reimbursable state mandated program exists regarding school districts of residence. Section 48209.7 provides a mathematical limitation that a school district of residence may use in the event that it decides to prohibit a pupil from leaving its district to attend a school district of choice. Similarly, in this test claim, CSM-4476, the Commission again determined that the use of the word "may" makes district limitations under section 48209.7 permissive. The Commission noted that no substantive changes have been made to section 48209.7 which would negate its April 28, 1995 determination on this section. Although claimant contends that the Chapter 1262/94 amendment to section 48209.9 impacts the CSM-4451 Commission determination on section 48209.7, the Commission disagreed and determined that section 48209.7 contains no reimbursable state mandated program.

Regarding Education Code section 48209.9, Chapter 1262/94, added subdivision (d) to this section, which provides, "[t]he parent or guardian of a pupil who is prohibited from transferring pursuant to either subdivision (b) of Section 48209.1 or Section 48209.7 may appeal the decision to the county board of education."

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[3] See Statement of Decision, CSM-4451, School District of Choice, adopted on April 28, 1995.
[4] See Statement of Decision, CSM-4451, School District of Choice, adopted on April 28, 1995.

Because the parent/guardian has a new statutory right to appeal a transfer that was prohibited under these two sections, the county board of education has no option but to respond to that appeal (regardless of whether or not the denial was discretionary on the part of the school district).

No prior requirements regarding this matter existed in law. The Commission therefore determined that the parent/guardian's authority to appeal a denied transfer imposes a reimbursable state mandated program upon county boards of education.

Further, although not explicitly required, the county board must first establish an appropriate process for these appeal hearings. Claimant states the appeals process could be modeled after the complex process provided for in sections 46601 and 46602.

Although recognizing the need for a process, the Commission disagreed with claimant's suggestion of using sections 44601 and 44602 as a model for the parameters and guidelines. The Commission noted that the Legislature, in enacting subdivision (d), did not spell out elaborate procedures similar to those contained in sections 46601 and 46602; further, the Legislature could have simply incorporated by reference the provisions of sections 46601 and 46602, but did not. The Commission also observed that new subdivision (c) to section 48209.1 was added along with subdivision (d) to section 48209.9. (See Chapter 1262/94.) Subdivision (c) states that, "[t]he school district of residence shall not adopt policies that in any way block or discourage pupils from applying for transfer to another district." The Commission found that subdivision (c) expressly warns school districts of residence to not purposefully discourage the utilization of the school district of choice vehicle and, therefore, school districts will indeed heed and follow such directive.

The Commission found that simple, non-complex appeals procedures were contemplated by the Legislature in light of the admonition set forth in subdivision (c), rather than the elaborate procedures such as those contained in sections 46601 and 46602. Therefore, the Commission determined that simple, non-complex appeals procedures fall within the scope of the statutory provisions and, accordingly, should be employed in the parameters and guidelines. Moreover, the Commission found that a simple process is appropriate in view of the limited state mandated activity associated with the appeals process upon school districts of residence as described below.

Claimant asserted that school districts of residence are required to participate in and respond to the county board's appeal process. Although this section implicitly requires district of residence participation, such activity is not considered reimbursable if it results from a discretionary denial on the part of the district. Section 48209.1 states that the district of residence, "may prohibit the transfer of a pupil under this article". Likewise, section 48209.7 states in both subdivisions (a) and (b) that the district of residence "may limit...". The inclusion of the word "may" in both of these sections makes transfer denials permissive. Accordingly, the Commission determined that any required statutory activity (such as participation in the appeal process by any school district) resulting from a section 48209.1 or 48209.7 denial is *not* reimbursable as a *state mandated activity* because of the discretion initially exercised in the decision to deny. (See *City of Merced* v. *State of California* (1984) 153 Cal.App.3d 777, 783; *County of Contra Costa* v. *State of California* (1986) 177 Cal. App.3d 62, 79.)

The one exception, as noted in the Commission's Statement of Decision for CSM-4451, would be a district of residence subject to a court-ordered desegregation plan which must confirm that the proposed transfer does not negatively impact that plan. At its April 28, 1995 hearing, the Commission determined that this confirmation activity imposes a reimbursable state mandated program upon a district of residence.

Correspondingly, the Commission determined that the district of residence's participation in and response to a county board of education's appeal process, under subdivision (d) of section 48209.9, resulting only from a denied transfer based on the negative impact upon that district's court-ordered desegregation plan, constitutes a reimbursable state mandated activity.

Finally, the Commission found that none of the previous Commission determinations as addressed in the claimant's August 15, 1995 rebuttal are comparable to this claim. Independently of these previous determinations, the Commission determined that the permissive "may" in sections 48209.1 and 48209.7 clearly does not impose a new program or higher level of service upon school districts (as previously determined in CSM-4451).

Further, even with the addition of section 48209.9, which allows for denied transfer appeals due to section 48209.1 or 48209.7, the Commission determined that no language in any of these three sections explicitly or implicitly requires the monitoring of racial or ethnic balances or limits as claimant alleged. The Commission reviewed claimant's assertion that

school districts would be acting arbitrarily to either approve or deny the transfer without considering its impact on the ethnic balance of the district, since according to claimant, school districts have a pre-existing constitutional duty to equalize the demographics of its schools. The case cited by claimant, *Long Beach Unified School District* v. *State of California*, (1990) 225 Cal.App.3d 155, and other cases reviewed by the Commission did not support claimant's assertion that Education Code section 48209.1, subdivision (b)(3), required school districts to check "the racial and ethnic balance of the district" before approving or denying a choice transfer. (See *Crawford* v. *Board of Education* (1976) 17 Cal.3d 280.) Accordingly, the Commission rejected claimant's contention that school districts have a pre-existing constitutional duty to equalize the demographics of its schools or to maintain a certain racial and ethnic balance.

Finally, the Commission acknowledged the closing testimony from the Department of Finance which noted that the Legislature's use of the terms "may" and "shall" in closely related sections was significant because of the Legislature's awareness of their use of the two terms and that if the Legislature had wanted to make a statute mandatory, this was clearly within their purview. (Transcript, Commission Hearing, March 28, 1996, pp. 71-72.)

APPLICABLE LAW RELEVANT TO THE DETERMINATION OF A REIMBURSABLE STATE MANDATED PROGRAM

The applicable law relevant to this determination of a reimbursable state mandated program is Government Code section 17500 and following, and section 6 of Article XIIIB of the California Constitution, and related case law.

CONCLUSION

Based on the foregoing, the Commission approves the test claim in part. The Commission finds that the parent/guardian's authority to appeal a denied transfer contained in section 48209.9, subdivision (d), imposes a reimbursable state mandated program upon county boards of education. Because the parent/guardian has a new statutory right to appeal a transfer that was prohibited under section 48209.1 or section 48209.7, the county board of education has

no option but to respond to that appeal (regardless of whether or not the denial was discretionary on the part of the school district). Further, although not explicitly required, the county board must first establish an appropriate, non-complex process for these appeal hearings, which shall be addressed in the parameters and guidelines. No requirements regarding this matter existed in law prior to January 1, 1975.

The Commission concludes that the district of residence's participation in and response to a county board of education's appeal process, under subdivision (d) of section 48209.9, resulting solely from a denied transfer based on the negative impact upon that district's court-ordered desegregation plan, constitutes a reimbursable state mandated activity.

Further, the foregoing conclusions pertaining to the requirements contained in Education Code sections 48209.1, 48209.7 and 48209.9 are subject to the following conditions:

> The determination of a reimbursable state mandated program does not mean that all increased costs claimed will be reimbursed. Reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office.

Finally, the Commission concludes that no reimbursable state mandated programs exist in section 48209.1, section 48209.7, or in the remainder of section 48209.9 for the purposes of this test claim.

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