BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 313, 60810, 60811, 60812; Statutes 1997, Chapter 936, Statutes 1999, Chapter 78, Statutes 1999, Chapter 678, Statutes 2000, Chapter 71 Filed on June 13, 2001 By Modesto City School District, Claimant	No. 00-TC-16 *California English Language Development Test* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on September 30, 2004)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

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PAULA HIGASHI, Executive Director Date

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STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 30, 2004. Mike Brown, representing MCS Education Services, appeared on behalf of the claimant, Modesto City School District. Susan Geanacou and Lenin Del Castillo appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

A. Test Claim Legislation

The legislative history of Assembly Bill No. 748 (Stats. 1997, ch. 936) outlined the challenge posed by English-learner pupils as follows:

> Approximately 1.3 million students enrolled in California's public K-12 system are English learners (also called "limited-English-proficient," or LEP pupils). This amounts to approximately 20% of the K-12 population. English learners also make up approximately 40% of the population in the first two grades of school. Approximately 78% of English learners statewide speak Spanish as their primary language, and roughly 4% of English learners speak Vietnamese as their primary language.[1]

[1] Assembly Floor analysis, Assembly Bill No. 748 (1997-1998 Reg. Sess.) as amended September 4, 1997, page 3.

The CELDT was instituted for the following reasons:

> (1) To identify pupils who are limited English proficient.
> (2) To determine the level of English language proficiency of pupils who are limited English proficient.
> (3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.[2]

Statutes 1997, chapter 936 requires the Superintendent of Public Instruction (SPI) to review existing tests that assess English-language development (of limited English proficient or L.E.P. or English-learner pupils) for specified criteria, and to report to the Legislature with recommendations. If no existing test meets the criteria, the SPI is required to explore the option of a collaborative effort with other states to develop a standardized test or series of tests and authorizes the SPI to contract with a local education agency to develop the test or series of tests or to contract to modify an existing test or series of tests (§ 60810).[3] It also requires the State Board of Education (SBE) to approve standards for English-language development for pupils whose primary language is other than English (§ 60811).

Statutes 1999, chapter 78 amended section 60810 to require the SPI and SBE to release a request for proposals for the development of the test no later than August 15, 1999, and select a contractor by September 15, 1999, for the test to be available for administration during the 2000-01 school year. It also amends section 60811 to require the SPI to develop the standards for English-language development by July 1, 1999.

Statutes 1999, chapter 678 added section 313 to require English-learner pupils be tested upon enrollment and annually until they are redesignated as English proficient. Section 60812 was also added to require the SPI to post the test results on the Internet. Finally, the bill included the statement:

> It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.[4]

Statutes 2000, chapter 71 amended section 313 to clarify that the English-language assessment must be conducted at a time appointed by the SPI, and clarifies that districts are authorized to test more than once.

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[2] Education Code section 60810, subdivision (d).

[3] Statutory references are to the Education Code unless otherwise indicated.

[4] Statutes 1999, chapter 678, section 4.

B. Prior and Preexisting State Law

The Chacon – Moscone Bilingual Bicultural Education Act of 1976 (§§ 52160-52178), as amended,

> [S]et forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs [sic] was to increase fluency in the English language for L.E.P. students. Secondarily, the 'programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, …' (§ 52161.)[5]

The Chacon - Moscone Act's sunset provision was enacted in 1987 (§ 62000.2, subd. (d)), but funding continued "for the intended purposes of the program." As stated in one of the sunset statutes, "The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative…." (§ 62002). The sunset statute also provided for termination of bilingual education categorical funding, as follows:

> [I]f the [SPI] determines that a school district or county superintendent of schools fails to comply with the purposes of the funds apportioned pursuant to Section 62003, the [SPI] may terminate the funding to that district or county superintendent beginning with the next succeeding fiscal year.[6]

Thus, "even after the Act's provisions became inoperative, bilingual education continued to be the norm in California public schools by virtue of the extension of funding for such programs provided in section 62002."[7] In 1987, the California Department of Education (CDE) issued a program advisory on how the sunset statutes affected bilingual education.[8] The advisory outlined the funding requirements for bilingual education, including spending funds for the general purposes of the program and identification and allocation formulas.

In 1998, the voters adopted Proposition 227 (§§ 300 – 340, not including § 313). It requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year.[9] The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative

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[5] *McLaughlin v. State Board of Education* (1999) 75 Cal.App. 4th 196, 203-204.

[6] Education Code section 62005.5.

[7] *McLaughlin v. State Board of Education, supra,* 75 Cal.App. 4th 196, 204.

[8] Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2, California State Department of Education, August 26, 1987.

[9] Education Code section 305.

instructional technique.[10] Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English.[11]

The regulations implementing Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300 – 11316) cover topics such as how to determine whether the pupil is English proficient, duration of services, reclassification, monitoring, documentation, annual assessment, census, advisory committees, parental exception waivers, community-based English tutoring, and notice to parents or guardians.[12]

Statutes 1999, chapter 678, the test claim statute that added section 313, included a statement that it was supplementary to rather than amendatory of Proposition 227.[13]

C. Preexisting Federal Law

Title VI of the Civil Rights Act (42 U.S.C. § 2000d) prohibits discrimination under any program or activity receiving federal financial assistance.

The Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal educational opportunity for national origin minority students. It states, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

> The term "appropriate action" used in that provision indicates that the federal legislature did not mandate a specific program for language instruction, but rather conferred substantial latitude on state and local educational authorities in choosing their programs to meet the obligations imposed by federal law. *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F. 2d 1030, 1040.

Federal cases, however, have interpreted section 1703 (f) to require testing students' English-language skills.[14]

According to *Castaneda v. Pickard,* "…proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the

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[10] *McLaughlin v. State Board of Education, supra,* 75 Cal.App. 4th 196, 217.

[11] Education Code section 305.

[12] These were pled as part of Test Claim 03-TC-06, *California English Language Development Test II.*

[13] "The Legislature finds and declares that this act provides an assessment mechanism that is supplementary to, rather than amendatory of, the English Language In Public Schools Initiative Statute (Proposition 227, approved by the voters at the June 2, 1998, primary election)." Statutes 1999, chapter 678, section 3.

[14] *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989; and *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503.

program itself."[15] The *Castaneda* court also devised a three-part test to determine whether a program complies with section 1703 (f):

> First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. … [S]econd … would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. … Finally … [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.[16]

In *Keyes*, the court found violations by a Denver school district of section 1703 (f) of the EEOA. The court held the school district's bilingual program was "flawed by the failure to adopt adequate tests to measure the results of what the district is doing. …The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy."[17]

In 1994, Congress enacted the Improving America's School's Act (IASA) that required an annual assessment of English proficiency." In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. NCLB requires states, by school year 2002-2003, to "provide for an annual assessment of English proficiency …of all students with limited English proficiency…." (20 U.S.C. § 6311 (b)(7)). One of the requirements of the assessment system is that it "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." (34 C.F.R. § 200.2 (b)(2) (2002).) The assessment system, like all the NCLB requirements, is merely a condition on grant funds (20 U.S.C. § 6311 (a)(1)) that is not otherwise mandatory (20 U.S.C. §§ 6575, 7371).

D. Related Test Claims

A separate test claim, 03-TC-06, *California English Language Development Test II*, pleads the other statutes[18] and regulations[19] related to the California English Language Development Test. The CELDT II claimant alleges activities such as parent notices, language census, determination

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[15] *Castaneda v. Pickard, supra*, 648 F. 2d 989, 1014.

[16] *Id.* at pages 1009-1010.

[17] *Keyes v. School Dist. No. 1, supra*, 576 F. Supp. 1503, 1518.

[18] Education Code sections 48985 and 52164 – 52164.6. Statutes 1977, chapter 36, Statutes 1978, chapter 848, Statutes 1980, chapter 1339, Statutes 1981, chapter 219, Statutes 1994, chapter 922.

[19] California Code of Regulations, title 5, sections 11300 – 11316. Test claim 03-TC-06 also includes the title 5 regulations (§§ 11510 – 11517) for the CELDT, such as parental notification, record keeping, test security, and district and test site coordinators' duties.

of primary language, assessment of language skills, census review and correction, designation of pupils as limited English proficient, reports to CDE, and reclassification of pupils.

In March 2004, the Commission adopted its Statement of Decision on *High School Exit Examination* (HSEE), 00-TC-06 (2004). The decision includes a finding on California Code of Regulations, title 5, section 1217.5, which requires school districts to evaluate pupils to determine if they possess sufficient English-language skills at the time of the HSEE to be assessed with the test. Because former Education Code section 51216 already required English-language assessments, the Commission found that section 1217.5 constitutes a reimbursable mandate only for the activity of determining whether an English-learner pupil has sufficient English-language skills to be tested.

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

A) Field testing the CELDT as required by the CDE;
B) Initial assessment of all K-12 students with a home language other than English;
C) Annual assessment of all students not classified as English proficient using the CELDT;
D) Adherence to all requirements and performance of all activities detailed in the CELDT Test Coordinator's Manual or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements;
E) Training district staff regarding the test claim activities;
F) Drafting or modifying policies and procedures to reflect the test claim activities; and
G) Any additional activities identified as reimbursable during the parameters and guidelines phase.

Claimant responds to DOF's comments (summarized below) that the CELDT is not federally mandated. Claimant contends that the following activities represent reimbursable state-mandated activities: (1) initially assess every K-12 student with a home language other than English, and (2) annually assess all students not classified as English proficient. Claimant argues that the state has gone beyond the requirements found in federal law, imposing a state mandate for the CELDT. Specifically, claimant asserts:

> While federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, these requirements does [sic] not preclude reimbursement for the activities and costs imposed upon school districts by the test claim legislation. Moreover, Title VI, and its regulations, as well as OCR, [Office of Civil Rights of the U.S. Department of Education] do not specify how states and school districts must comply with the Civil Rights Act of 1964. …

Claimant points out that before enactment of the test claim legislation, school districts had a choice as to which assessment instrument the district would use to determine students' English proficiency and subsequent placement in appropriate classes. According to OCR, assessments

must include some objective measure of the student's English-language ability, but does not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. Claimant states that CELDT is not required under federal law.

According to claimant:

> Federal law only requires state and local educational agencies to ensure that all students have equal access to a state's core curriculum. This goal can be accomplished in countless ways, through numerous different assessments. California has chosen *one* assessment that *all* school districts must use, the CELDT. [Emphasis in original.] … Since federal law is silent as to how equal opportunities are to be achieved at the state and local levels, the imposition of a single program or assessment [the CELDT] … represents costs imposed upon school districts by the state. The state, not Title VI or the OCR, mandates that school districts administer the CELDT at the required intervals. For this reason, the activities imposed upon school districts by the test claim legislation are the result of state, not federal, law.

Claimant did not plead activities regarding reclassification of pupils from English learner to English proficient. Therefore, this decision makes no findings on Education Code section 313, subdivision (d), regarding reclassification procedures.[20]

Claimant did not file comments on the draft staff analysis.

State Agency Position

DOF filed comments in August 2001, stating the following regarding the activities claimant pled: First, field-testing is embedded in the testing and not separate from it. Second, federal law also requires students to be assessed for English proficiency. Districts should incur savings as the state is providing funding to the CDE to cover the costs of test development, distribution and related costs previously borne by school districts. CELDT's inclusion of reading and writing implements federal requirements. The OCR enforces Title VI of the Civil Rights Act of 1964, and has stated that assessment of non-English proficient pupils should include reading, writing, and comprehension. OCR has stated that oral language testing only is inadequate, so this is a federal and not a state mandate. Third, regarding annual assessment, OCR has stated that maintaining pupils in an alternative language program longer than necessary to achieve the program's goal could violate anti-segregation provisions of Title VI regulations. Further, the OCR has stated that exit criteria employed by the district should be based on objective standards, such as standardized test scores. Thus, schools that do not repeatedly assess their non-English speaking students in a timely manner using a standardized test may violate federal law. Thus, annual assessment is not a state mandate. Fourth, adherence to CDE or publisher manuals

[20] It is likely that reclassification would be analyzed in test claim 03-TC-06, *California English Language Development Test II*, as one of the activities pled pursuant to California Code of Regulations, title 5, section 11303.

should be offset by the current per pupil district apportionment[21] to the extent these activities exceed the previous requirements. Fifth, as to training and policies and procedures, any marginal costs should be offset by the current CELDT per pupil district apportionment and any savings resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

In August 2004, after the draft staff analysis was issued, DOF submitted comments agreeing with the analysis. No other state agency commented on the test claim.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[22] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[23] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[24] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[25] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[26]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state

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[21] Although not stated by DOF, the state budget apportioned $5 per pupil for the English Language Development Test during Fiscal Years 2002-2003, and 2003-2004.

[22] Article XIII B, section 6 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, 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."

[23] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[24] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[25] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[26] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

policy, but does not apply generally to all residents and entities in the state.[27] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[28] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[29] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[30]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[31] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[32]

Issue 1: Does the test claim legislation impose state-mandated activities on school districts within the meaning of article XIII B, section 6?

The issue is whether any of the following statutes constitute state-mandated activities that are subject to article XIII B, section 6.

A. Duties of the Superintendent of Public Instruction (§§ 60810 subds. (a) (c) & (d), 60811 & 60812)

These sections require the SPI to develop the test, create standards for English-language development, and post test results on the website. They also specify the criteria for the SPI-developed test. Because these provisions do not mandate school districts to perform an activity, sections 60810 – 60812 (except § 60810, subd. (b)) are not subject to article XIII B, section 6.

B. Initial and annual assessment (§§ 313 & 60810 subd. (b))

Subdivision (b) of section 313 requires the SPI to develop procedures for conducting English-language assessment and reclassification. Subdivisions (a) and (c) of section 313 require school

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[27] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875; reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[28] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878. *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[29] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[30] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[31] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[32] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

districts to assess English-language proficiency for English-learner pupils, and subdivision (c) requires the CELDT to be administered to English-learner pupils upon initial enrollment and annually thereafter until the pupil is redesignated as English proficient. Subdivision (b) of section 60810 specifies the subjects to be tested, such as:

> English reading, speaking, and written skills, except that pupils in kindergarten and grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English. (§ 60810, subd. (b)).

The Commission finds that English-language assessment provisions of section 313 and 60810, subdivision (b), do not constitute a state-mandate on two independent grounds. First, the English-language assessment requirements of Education Code sections 313 and 60810, subdivision (b), do not impose state-mandated activities because their requirements are in preexisting federal law, discussed below. Second, English-Language assessment is not a new program or higher level of service because it was required by prior and preexisting state law, as discussed in issue 2 below.

Preexisting Federal Law Requires English-language Assessment

If an activity is required by federal law, it does not impose state-mandated duties.[33] In *City of Sacramento v. State of California,*[34] local governments sued for subvention of costs for implementing a 1978 statute that required extending mandatory coverage under the state's unemployment insurance law to state and local governments and nonprofit corporations. The California Supreme Court held that the state statute implemented a federal mandate within the meaning of article XIII B, section 9, subdivision (b), of the California Constitution,[35] and therefore does not impose a state mandate.

Similarly, in *Hayes v. Commission on State Mandates*, the court held that the federal Education of the Handicapped Act (EHA) is a federal mandate.[36] Citing the *City of Sacramento* case, the *Hayes* court held, "state subvention is not required when the federal government imposes new costs on local governments." *Hayes* also held,

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[33] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70; *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1581.

[34] *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 70.

[35] "Article XIII B, section 9 (b), defines federally mandated appropriations as those 'required for purposes of complying with mandates of…the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly.'" *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 70.

[36] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1592.

> To the extent the state implemented the act [EHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such … are state mandated and subject to subvention.[37]

Claimant argues that although federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, this does not preclude reimbursement. Claimant asserts that Title VI of the EEOA and its regulations do not specify how states and school districts must comply with the Civil Rights Act of 1964.

The Commission disagrees. Section 1703 (f) of the EEOA, as interpreted by the *Castaneda* and *Keyes* cases cited below, requires states and school districts to conduct English-language assessments to comply with Title VI of the EEOA.

The EEOA (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal opportunity for national origin minority and English-learner pupils. The provision at issue is, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

In *Castaneda v. Pickard*,[38] the Fifth Circuit Court of Appeal interpreted section 1703 (f) of the EEOA in examining English-learner programs of the Raymondville, Texas Independent School District. The court devised the three-part test cited on page 5 above in determining whether the district's program complies with section 1703 (g).[39] According to *Castaneda*, "…proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."[40] The court also stated:

> Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during

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[37] *Id.* at page 1594.

[38] *Castaneda v. Pickard, supra,* 648 F. 2d 989.

[39] *Id*. at pages 1009-1010.

[40] *Id.* at page 1014; accord, *Teresa P. v. Berkeley Unified School Dist*. (1989) 724 F. Supp. 698, 715-716.

> the language remediation program can it be determined that such irremediable deficiencies are not being incurred.[41]

Moreover, in *Keyes v. School Dist. No. 1,*[42] the court held a Denver school district violated section 1703 of the EEOA, in part because of the district's,

> …failure to adopt adequate tests to measure the results of what the district is doing. …The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy"[43]

Castaneda and *Keyes* affirm that a language assessment test such as the CELDT is required to comply with the EEOA, or more specifically, 20 U.S.C. section 1703 (f). The Commission finds it persuasive that *Castaneda* is relied on by CDE as authority for various English-language learner education regulations,[44] and *Keyes* and *Castaneda* were relied on in a CDE program advisory[45] regarding the minimum school districts duties in light of the 1987 sunset of the bilingual education statutes.[46] CDE's interpretation of the law in this area is entitled to deference.[47]

As stated above, in *Hayes* the court ruled that to the extent the state implements federal law by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention.[48] However, there is no evidence that the state implemented federal law by choosing to impose any newly required acts. The Legislature included the following statement enacted as part of Statutes 1999, chapter 678 (that added section 313).

> It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.[49]

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[41] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 1014.

[42] *Keyes v. School Dist. No. 1, supra,* 576 F. Supp. 1503.

[43] *Id.* at page 1518.

[44] For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

[45] Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, pursuant to Education Code sections 62000 and 62000.2, California State Department of Education, August 26, 1987, pages 17-18.

[46] Education Code sections 62000.2 and 62002.

[47] *Yamaha v. State Board of Equalization* (1998) 19 Cal.4th 1, 6-7.

[48] *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564, 1594.

[49] Statutes 1999, chapter 678, section 4.

This statement is evidence of legislative intent to comply with, but not exceed, federal requirements for assessing English-learner pupils. Specifically, it indicates that the state has not chosen to implement federal law by imposing any requirements on school districts beyond the requirements of 20 U.S.C. section 1703 (f) and the cases cited above.

Therefore, the Commission finds that sections 313 and 60810, subdivision (b), do not impose state-mandated duties on school districts within the meaning of article XIII B, section 6 because preexisting federal law requires testing.

Issue 2: Does the test claim statute impose a new program or higher level of service on school districts subject to article XIII B, section 6?

The Commission also finds, as alternative grounds for denial, that English-language assessment is not a reimbursable state mandate because it is not a new program or higher level of service.

To determine if the "program" is new or imposes a higher level of service subject to article XIII B, section 6, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[50]

In rebuttal comments, claimant argues that while assessments must include some objective measure of the student's English-language ability, they do not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. In the test claim, claimant cited prior law as Education Code section 52164.1 and California Code of Regulations, title 5, section 4303, arguing that although language assessment was required under prior law, the CELDT is a new instrument. Claimant also argues that the CELDT requires assessing students in grade 2 in reading and writing as well as listening and speaking, whereas section 52164.1 did not require reading and writing skills to be assessed for pupils in grades 1 and 2.

The Commission does not rely on section 52164.1 or section 4303 of the title 5 regulations because of their 1987 sunset provisions.[51] As to claimant's argument regarding a school district losing the option of which assessment it may choose, that is not a reason to find a reimbursable mandate. In *County of Los Angeles v. Commission State Mandates* (2003) 110 Cal. App. 4th 1176, 1194, the court held that a loss of flexibility does not rise to the level of a state-mandated reimbursable program.

Before enactment of the test claim statute, language assessments were required on request by the pupil or parent, and were required to obtain a diploma. (Former § 51216, subds. (a) & (b), which

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[50] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[51] Education Code section 62000.2, subdivision (d). Also, section 62002 states, "The funds shall be used for the intended purposes of the program, but *all relevant statutes and regulations* adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5." [Emphasis added.] Section 62002.5 concerns parent advisory committees and school site councils.

were not part of the bilingual education act that sunset in 1987.) Also, annual testing was alluded to in section 305 (enacted as Proposition 227, effective June 1998) that states:

> [A]ll children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.

It is necessary to test annually to determine the pupil's progress in the immersion program, and to determine if the pupil needs longer than one year in sheltered English immersion.

A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[52] A higher level of service also requires specific actions on the part of the school district.[53]

There is nothing in the record to indicate that the CELDT is a higher level of service than the school districts' assessments under prior law.

Moreover, before the test claim statute was enacted, the voters enacted Proposition 227 in 1998.[54] In CDE's regulations on Proposition 227, CDE interpreted the initiative to require English-language assessments. California Code of Regulations, title 5, section 11301,[55] subdivision (a) states:

> For purposes of "a good working knowledge of English" pursuant to Education Code Section 305 and "reasonable fluency in English" pursuant to Education Code Section 306 (c), an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments.

This regulation was operative July 23, 1998, well before the January 2000 effective date of section 313 (Stats. 1999, ch. 678). Therefore, because English-language assessment required by the test claim statute is not a new program or higher level of service, the Commission finds that it is not a reimbursable state-mandated program.

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[52] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[53] *Long Beach, supra*, 225 Cal.App.3d 155, 173.

[54] Proposition 227 was effective June 3, 1998. Section 313 of the Education Code was enacted by Statutes 1999, chapter 678, effective January 1, 2000.

[55] This regulation was pled as part of Test Claim 03-TC-06, *California English Language Development Test II.*

CONCLUSION

The Commission finds that Education Code sections 313, 60810, 60811, and 60812, as added or amended by Statutes 1997, chapter 936, Statutes 1999, chapters 78 and 678, and Statutes 2000, chapter 71, do not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.