BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Government Code Sections 7570, 7571, 7572, 7572.5, 7572.55, 7573, 7576, 7579, 7582, 7584, 7585, 7586, 7586.6, 7586.7, 7587, 7588;

Statutes 1984, Chapter 1747; Statutes 1985, Chapter 107; Statutes 1985, Chapter 759; Statutes 1985, Chapter 1274; Statutes 1986, Chapter 1133; Statutes 1992, Chapter 759; Statutes 1994, Chapter 1128; Statutes 1996, Chapter 654; Statutes 1998, Chapter 691; Statutes 2001, Chapter 745; Statutes 2002, Chapter 585; and Statutes 2002, Chapter 1167; and

California Code of Regulations, Title 2, Sections 60000-60610;

Filed on June 27, 2003 by the County of Stanislaus, Claimant; and

Filed on June 30, 2003, by the County of Los Angeles, Claimant.

Case No.: 02-TC-40/02-TC-49

Handicapped & Disabled Students II

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 May 26, 2005*)

STATEMENT OF DECISION

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

_____ _____

PAULA HIGASHI, Executive Director Date

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STATE OF CALIFORNIA

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Government Code Sections 7570, 7571, 7572, 7572.5, 7572.55, 7573, 7576, 7579, 7582, 7584, 7585, 7586, 7586.6, 7586.7, 7587, 7588;

Statutes 1984, Chapter 1747; Statutes 1985, Chapter 107; Statutes 1985, Chapter 759; Statutes 1985, Chapter 1274; Statutes 1986, Chapter 1133; Statutes 1992, Chapter 759; Statutes 1994, Chapter 1128; Statutes 1996, Chapter 654; Statutes 1998, Chapter 691; Statutes 2001, Chapter 745; Statutes 2002, Chapter 585; and Statutes 2002, Chapter 1167; and

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(*Adopted on May 26, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 26, 2005. Leonard Kaye and Paul McIver appeared on behalf of the County of Los Angeles. Pam Stone represented and appeared on behalf of the County of Stanislaus. Linda Downs appeared on behalf of the County of Stanislaus. Nicholas Schweizer and Jody McCoy appeared on behalf of the Department of Finance

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 4-0.

BACKGROUND

This test claim addresses amendments to the Handicapped and Disabled Students program (also known as, Assembly Bill 3632) administered by county mental health

departments. The Handicapped and Disabled Students program was initially enacted in 1984, as the state's response to federal legislation that guaranteed disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education (Individuals with Disabilities Education Act, or IDEA). Before 1984, the state adopted a comprehensive statutory scheme in the Education Code to govern the special education and related services provided to disabled children.[1] Among the related services, called "designated instruction and services" in California, the following mental health services are identified: counseling and guidance, psychological services other than the assessment and development of the IEP, parent counseling and training, health and nursing services, and social worker services.[2] The state and the local educational agencies (school districts and county offices of education) provided all related services, including mental health services, to children with disabilities.

In 1984 and 1985, the Legislature enacted Assembly Bill 3632 (Stats. 1984, ch. 1747, and Stats. 1985, ch. 1274), to shift the responsibility and funding for providing mental health services for students with disabilities from local educational agencies to county mental health departments. AB 3632 added Chapter 26.5 to the Government Code (§§ 7570 et seq.), and the Departments of Mental Health and Education adopted emergency regulations (Cal. Code Regs., tit. 2, §§ 60000-60610) to require county mental health departments to:

- Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement.
- Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team.
- Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.
- Act as the lead case manager, as specified in statute and regulations, if the IEP calls for residential placement of a seriously emotionally disturbed pupil.
- Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils.
- Provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP.
- Participate in due process hearings relating to issues involving mental health assessments or services.

[1] Education Code section 56000 et seq. (Stats. 1980, ch. 797.)

[2] Education Code section 56363.

Past and Pending Commission Decisions on the Handicapped and Disabled Students Program

On April 26, 1990, the Commission adopted a statement of decision in *Handicapped and Disabled Students* (CSM 4282). The test claim was filed by the County of Santa Clara on Statutes 1984, chapter 1747; Statutes 1985, chapter 1274; and on California Code of Regulations, title 2, sections 60000 through 60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)). The Commission determined that the activities of providing mental health assessments, psychotherapy and other mental health treatment services, as well as assuming expanded IEP responsibilities, were reimbursable as a state-mandated program under article XIII B, section 6 of the California Constitution beginning July 1, 1986. Activities related to assessments and IEP responsibilities were found to be 100 per cent (100%) reimbursable. Psychotherapy and other mental health treatment services were found to be ten per cent (10%) reimbursable due to the cost sharing methodology in existence under the Short-Doyle Act for local mental health services. On January 11, 1993, the Sixth District Court of Appeal, in an unpublished decision, sustained the Commission's decision in CSM 4282.[3]

In May 2000, the Commission approved a second test claim relating to this program, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (CSM 97-TC-05). The test claim on *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) was filed on Government Code section 7576, as amended by Statutes 1996, chapter 654, the corresponding regulations (Cal. Code Regs, tit. 2, §§ 60100 and 60200), and on a Department of Mental Health Information Notice Number 86-29. The test claim in *Seriously Emotionally Disturbed Pupils* addressed only the counties' responsibilities for out-of-state residential placements for seriously emotionally disturbed pupils, and has a reimbursement period beginning January 1, 1997.

In addition, there are two other matters currently pending with the Commission relating to the test claim statutes and regulations. In 2001, the Counties of Los Angeles and Stanislaus filed requests to amend the parameters and guidelines on the original test claim decision, *Handicapped and Disabled Students* (CSM 4282). The counties request that the parameters and guidelines be amended to delete all references to the Short-Doyle cost-sharing mechanism for providing psychotherapy or other mental health services; to add an activity to provide reimbursement for room and board for in-state placement of pupils in residential facilities; and to amend the language regarding the reimbursement of indirect costs. The request to amend the parameters and guidelines was scheduled on the Commission's March 2002 hearing calendar. But at the request of the counties, the item was taken off calendar, and is still pending. If the Commission approves the counties'

[3] *County of Santa Clara v. Commission on State Mandates* (Jan. 11, 1993, H009520) [nonpub. Opn.]).

request to amend the parameters and guidelines, the reimbursement period for the new amended portions of the parameters and guidelines would begin on July 1, 2000.[4]

The second matter currently pending with the Commission is the reconsideration of the *Handicapped and Disabled Students* test claim (04-RL-4282-10) that was directed by Statutes 2004, chapter 493 (Sen. Bill No. 1895).

This test claim, *Handicapped and Disabled Students II*, presents the following issues:

- Does the Commission have the jurisdiction to rehear in this test claim the statutes and regulations previously determined by the Commission to constitute a reimbursable state-mandated program in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05)?
- Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the test claim statutes and regulations impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes and regulations impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Claimants' Position

The claimants contend that the test claim statutes and regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County of Los Angeles, according to its test claim, is seeking reimbursement for the following activities:

- Mental health assessments and related treatment services, including psychotherapy, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management.
- Placement in a residential facility outside the child's home, including the provision of food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance with respect to the child, and reasonable travel to the child's home for visitation.
- Due process hearings, notifications, resolution requirements.
- Preparation of interagency agreements.

The County of Stanislaus is seeking reimbursement for the activities required by statutory and regulatory amendments to the original program. The County of Stanislaus takes no position on the issue of providing residential services to the child.

[4] California Code of Regulations, title 2, section 1183.2.

The Counties of Los Angeles and Stanislaus filed comments on the draft staff analysis, which are addressed in the analysis of this claim.

Position of the Department of Finance

The Department of Finance filed comments on the test claims describing the Department's position on funding and the requested costs for residential treatment. With respect to funding, the Department contends the following:

- For claims for mental health treatment services provided before fiscal year 2000-01, eligible claimants are entitled to reimbursement for ten percent (10%) of their costs only. The Department argues that Bronzan-McCorquodale Act of 1991 was intended to replace the Short-Doyle Act, and provides ninety percent (90%) of the funding to counties for mental health treatment services for special education pupils.
- Eligible claimants are entitled to 100 per cent (100%) reimbursement for mental health treatment services beginning July 1, 2001. The Department states that section 38 of Statutes 2002, chapter 1167, increased the percentage of state reimbursement for treatment costs from ten percent (10%) to 100% for services delivered in fiscal year 2001-02 and subsequent years.

The Department of Finance states the following with respect to residential treatment costs:

> ….The [Department of Social Services (DSS)] sets reasonable board and care rates for in-state placement facilities based on specified criteria. To allow community mental health services to pay an unspecified and unregulated "patch" above and beyond the reasonable rate established by the DSS, could be extremely expensive and [would] provide no additional mental health services to the disabled child. The State would no longer be able to determine fair and reasonable placement costs. It is clear that Section 62000 [of the DSS regulations] intended that community mental health services defer to DSS when it came to board and care rate setting for in-state facilities. The state mandate process should not be used to undermine in-state rate setting for board and care in group homes.[5]

The Department of Finance filed comments on the draft staff analysis arguing that the Handicapped and Disabled Students program is federally mandated under the current federal law and that some of the activities recommended for approval do not increase the level of service required of counties and, thus, should be denied.

Position of the Department of Mental Health

The Department of Mental Health filed comments on the draft staff analysis that state in relevant part the following:

> After full review, [Department of Mental Health] wishes to state that it concurs with the comments made by the Department of Finance, but that [Department of Mental Health] has no objections, suggested

[5] Department of Finance comments filed October 7, 2003.

modifications, or other comments regarding the submission to the Claimants.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[6] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[7] "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."[8] 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.[9] 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.[10]

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 policy, but does not apply generally to all residents and entities in the state.[11] 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.[12] A "higher level of service" occurs

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[6] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

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

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

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

[10] *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 District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (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.)

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

when the new "requirements were intended to provide an enhanced service to the public."[13]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[14]

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.[15] 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."[16]

Issue 1: Does the Commission have jurisdiction to rehear in this test claim the statutes and regulations previously determined by the Commission to constitute a reimbursable state-mandated program in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05)?

The claimants have included the following statutes and regulations in this test claim:

- Government Code sections 7570 et seq., as added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter, 107.
- Government Code section 7576, as amended by Statutes 1996, chapter 654.
- Sections 60000 through 60610 of the joint regulations adopted by the Departments of Mental Health and Education to implement the program. The claimants do not, however, identify the version of the regulations for which they are claiming reimbursement.

As indicated in the Background, the statutes and some of the regulations identified in the paragraph above were included in two prior test claims that the Commission approved as reimbursable state-mandated programs. In 1990, the Commission adopted a statement of decision in *Handicapped and Disabled Students* (CSM 4282) approving Government Code sections 7570 et seq., as added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter, 107, and sections 60000 through 60610 of the emergency regulations (filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86,

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

[14] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

[16] *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, 1817.

No. 28)) as a reimbursable state-mandated program. The Legislature has directed the Commission to reconsider this decision.[17]

In 2000, the Commission adopted a statement of decision in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) approving Government Code section 7576, as amended by Statutes 1996, chapter 654, and the corresponding regulations (Cal. Code Regs, tit. 2, §§ 60100 and 60200) as a reimbursable state-mandated program for the counties' responsibilities for out-of-state residential placements for seriously emotionally disturbed pupils.

It is a well-settled principle of law that an administrative agency, like the Commission, does not have jurisdiction to retry a question that has become final. If a prior final decision is retried by the agency, without the statutory authority to retry or reconsider the case, that decision is void.[18]

In the present case, the Commission does not have the statutory authority to rehear in this test claim the statutes and regulations previously determined by the Commission to constitute a reimbursable state-mandated program in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05).

At the time these test claims were filed, Government Code section 17521 defined a "test claim" as the first claim, including claims joined or consolidated with the first claim, filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. The Commission's regulations allowed the filing of more than one test claim on the same statute or executive order only when (1) the subsequent test claim is filed within sixty (60) days from the date the first test claim was filed; and (2) when each test claim is filed by a different type of claimant or the issues presented in each claim require separate representation. (Cal. Code Regs., tit. 2, §§ 1183, subd. (i).) This test claim was filed more than sixty days from the date that *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) were filed. In addition, all three test claims were filed by the same type of claimant; counties. There is no evidence in the record to suggest that the same statutes already determined by the Commission to constitute a reimbursable state-mandated program in the prior test claims require separate representation here.

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[17] See reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10).

[18] *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697, where the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made is conclusive of the issues involved in the decision as though the adjudication had been made by the court; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final.

Finally, Government Code section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the Statement of Decision is issued. Since the two prior decisions in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) were adopted and issued well over 30 days ago, the Commission does not have the jurisdiction in this test claim to reconsider the same statutes and regulations pled and determined in prior test claims.

As recognized by the California Supreme Court, the purpose behind the statutory scheme and procedures established by the Legislature in Government Code section 17500 et seq. was to "avoid[] multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created."[19]

Therefore, the Commission does not have the jurisdiction in this test claim over the following statutes and regulations:

- The Government Code sections in Chapter 26.5 considered in *Handicapped and Disabled Students* (CSM 4282) that were added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter, 107, and that have not been amended by the remaining test claim legislation. These statutes are Government Code sections 7571, 7572.5, 7573, 7586, 7586.7, and 7588.
- Government Code section 7576, as amended by Statutes 1996, chapter 654, as it relates to out-of-state placement of seriously emotionally disturbed pupils.
- California Code of Regulations, title 2, sections 60000 through 60610 (filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)). These regulations were repealed and were superceded by new regulations, effective July 1, 1998.[20]
- California Code of Regulations, title 2, sections 60100 and 60200 (filed as emergency regulations on July 1, 1998 (Register 98, No. 26) and refiled as final regulations on August 9, 1999 (Register 99, No. 33)) as they relate to the out-of-state placement of seriously emotionally disturbed pupils.

Issue 2: Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?

The activities performed by counties under the Handicapped and Disabled Students program are mandated by the state and not by federal law

[19] *Kinlaw, supra,* 54 Cal.3d at page 333.

[20] See History of the regulations (Cal. Code Regs., tit. 2, §§ 60000 et seq.), notes 8 and 9.

The test claim statutes and regulations implement the federal special education law (IDEA) that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services designed to meet the pupil's unique educational needs.

The Department of Finance argues that the activities performed by counties under the Handicapped and Disabled Students program are federally mandated and, thus, reimbursement is not required under article XIII B, section 6 of the California Constitution. The Commission disagrees.

In 1992, the Third District Court of Appeal, in *Hayes v. Commission on State Mandates*, determined that the federal law at issue in the present case, IDEA, imposes a federal mandate on the states.[21] The *Hayes* case involved test claim legislation requiring school districts to provide special education services to disabled pupils. The school districts in the *Hayes* case alleged that the activities mandated by the state that exceeded federal law were reimbursable under article XIII B, section 6 of the California Constitution.

The court in *Hayes* determined that the state's "alternatives [with respect to federal law] were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event."[22] The court concluded that the state had no "true choice" but to participate in the federal program and, thus, there was a federal mandate on the state.[23]

Although the court concluded that the federal law was a mandate on the states, the court remanded the case to the Commission for further findings to determine if the state's response to the federal mandate constituted a state-mandated new program or higher level of service on the school districts.[24] The court held that if the state "freely chose" to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate. The court's holding is as follows:

> In our view the determination whether certain costs were imposed upon the local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. *If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government*.[25] (Emphasis added.)

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[21] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.

[22] *Hayes, supra*, 11 Cal.App.4th at page 1591.

[23] *Ibid*.

[24] *Ibid*.

[25] *Id.* at page 1593-1594.

Here, pursuant to the court's holding in *Hayes*, the state "freely chose" to impose the costs upon the counties as a means of implementing the federal IDEA program.

Federal law does not require the state to impose any requirements relating to special education and related services on counties. At the time the test claim legislation was enacted, the requirements under federal law were imposed only on states and local educational agencies.[26] In 1997, Congress amended the IDEA to "strengthen the requirements on ensuring provisions of services by non-educational agencies …" (Sen. Rep. 105-17, dated May 9, 1997.) The amendment clarified that the state or local educational agency responsible for developing a child's IEP could look to non-educational agencies to pay for or provide those services the educational agencies are otherwise responsible for. The amendment further clarified that if a non-educational agency failed to provide or pay for the special education and related services, the state or local educational agency responsible for developing the IEP remain ultimately responsible for ensuring that children receive all the services described in their IEPs in a timely fashion and the state or local educational agency shall provide or pay for the services.[27] Federal law, however, does not require states to use non-educational agencies to pay for or provide services. A state's decision regarding how to implement the IDEA is still within the discretion, or the "free choice," of the state. The Department of Finance agrees with this interpretation of federal law. The Department states the following:

> While subparagraph (A) of paragraph (11) of subdivision (a) of Sec. 612 states that the state educational agency is responsible for ensuring for the provision of IDEA services, subparagraph (B) states that "[s]ubparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State." This makes clear that Federal IDEA anticipates that agencies other than educational agencies *may be* responsible for providing services and absorbing costs related to the federal legislation. Indeed, subparagraph (A) of paragraph (12) lays out specific guidelines for the assigning of responsibility for services among various agencies.
>
> DOF contends that the fact that *the state has chosen through AB 3632* and related legislation to make mental health services related to individual education plans (IEPs) the responsibility of mental health agencies does not, in and of itself, trigger mandate reimbursement through Article XIII B, section 6 as the responsibilities in question are federally mandated and

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[26] Title 34 Code of Federal Regulations section 300.2.

[27] Title 20 United States Code sections 1412 (a)(12)(A), (B), and (C), and 1401 (8); Title 34 Code of Federal Regulations section 300.142. (See also, Letters from the Department of Education dated July 28, 1998 and August 2, 2004, to all SELPAs, COEs, and LEAs on the requirements of 34 C.F.R. 300.142; and *Tri-County Special Education Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 578, where the court stated that "it is clear the Legislature could reassign administration of IDEA programs to a different entity if it chose to do so.".)

federal law allows the state to choose the agency or agencies responsible for service. (Emphasis added.)[28]

Accordingly, the activities performed by counties under the Handicapped and Disabled Students program are mandated by the state and not by federal law. Thus, the actual increased costs incurred as a result of the activities in the program that constitute a mandated new program or higher level of service are reimbursable within the meaning of article XIII B, section 6.

Several test claim statutes and regulations do not mandate counties to perform an activity and, thus, are not subject to article XIII B, section 6

In order for a statute or an executive order to be subject to article XIII B, section 6 of the California Constitution, the statutory language must mandate or require local governmental agencies to perform an activity or task. [29]

Here, there are several statutes included in the test claim that are helpful in understanding the Handicapped and Disabled Students program. But they do not require counties to perform an activity or task. These statutes are Government Code sections 7570, 7584, and 7587.[30]

In addition, non-substantive changes and amendments that do not affect counties were made to Government Code sections 7572, 7582, and 7585 by the test claim statutes. These amendments do not impose any state-mandated activities on counties.[31, 32]

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[28] Department of Finance comments on the draft staff analysis.

[29] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284; *Department of Finance, supra,* 30 Cal.4th at page 736; Gov. Code, § 17514.

[30] Government Code section 7570 provides that ensuring a free and appropriate public education for children with disabilities under federal law and the Education Code is the joint responsibility of the Superintendent of Public Instruction and the Secretary of Health and Welfare. Government Code section 7584 defines "disabled youth," "child," and "pupil." Government Code section 7587 requires the Departments of Education and Mental Health to adopt regulations to implement the program.

[31] Government Code section 7572, as originally added in 1984 and amended in 1985, addresses the assessment of a student, including psychological and other mental health assessments performed by counties. The 1992 amendments to Government Code section 7572 substituted the word "disability" for "handicap," and made other clarifying, non-substantive amendments. Government Code section 7582 states that assessments and therapy treatment services provided under the program are exempt from financial eligibility standards and family repayment requirements. The 1992 amendment to section 7582 substituted "disabled child or youth" for "handicapped child." Government Code section 7585 addresses the notification of an agency's failure to provide a required service and reports to the Legislature. The 2001 amendments to section 7585 corrected the spelling of "administrative" and deleted the requirement for the Superintendent of

Furthermore, the Commission finds that Government Code section 7579, as amended by the test claim legislation, does not impose any state-mandated duties on county mental health departments. As originally enacted, Government Code section 7579 required courts, regional centers for the developmentally disabled, or other non-educational public agencies that engage in referring children to, or placing children in, residential facilities, to notify the administrator of the special education local plan area (SELPA) in which the residential facility is located before the pupil is placed in an out-of-home residential facility. The intent of the legislation, as stated in subdivision (c), was to "encourage communication between the courts and other public agencies that engage in referring children to, or placing children in, residential facilities, and representatives of local educational agencies."

The 2002 test claim statute (Stats. 2002, ch. 585) amended Government Code section 7579 by adding subdivision (d), to require public agencies other than educational agencies that place a child in a residential facility located out of state, without the involvement of a local educational agency, to assume responsibility for educational and non-educational costs of the child. Government Code section 7579, subdivision (d), states the following:

> Any public agency other than an educational agency that places a disabled child or child suspected of being disabled in a facility out of state without the involvement of the school district, SELPA, or COE [county office of education] in which the parent or guardian resides, shall assume financial responsibility for the child's residential placement, special education program, and related services in the other state unless the other state or its local agencies assume responsibility.

Government Code section 7579, subdivision (d), however, does not apply to county mental health departments. The duty imposed by section 7579 to pay the educational and non-educational costs of a child placed in an out-of-state residential facility is a duty imposed on a placing agency, like a court or a regional center for the developmentally

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Public Instruction and the Secretary of Health and Welfare to submit yearly reports to the Legislature on the failure of an agency to provide a required service.

[32] The County of Los Angeles, in comments to the draft staff analysis for this test claim, addresses a finding made on the reconsideration of the original *Handicapped and Disabled Students* claim (04-RL-4282-10), relating to Government Code section 7572 and the counties' attendance at IEP meetings following a mental health assessment of a pupil. The County's comments are not relevant to this test claim, however. The language in Government Code section 7572 relating to the county's attendance at an IEP meeting following an assessment was added by the Legislature in 1985. As indicated in the analysis, the Commission does not have jurisdiction in this test claim to address the statutes or activities originally added by the Legislature in 1984 and 1985. The Commission does have jurisdiction in this test claim over Government Code section 7572, as amended by Statutes 1992, chapter 759. But the 1992 amendments to section 7572 were non-substantive and do not impose any additional state-mandated activities on counties.

disabled, that fails to seek the involvement of the local educational agency. This consolidated test claim has been filed on behalf of county mental health departments.[33]

This conclusion is further supported by section 60510 of the regulations. Section 60510 of the regulations was adopted in 1998 (filed as an emergency regulation on July 1, 1998 (Register 98, No. 26) and refiled as a final regulation on August 9, 1999 (Register 99, No. 33)) to implement Government Code section 7579. The regulation requires "the court, regional center for the developmentally disabled, or public agency other than an educational agency" to notify the SELPA director before placing a child in a facility and requires the agency to provide specified information to the SELPA. Section 60510 is placed in article 7 of the regulations dealing with the exchange of information between "Education and Social Services." Article 7 is separate and apart from, and located after, the regulations addressing mental health related services. Accordingly, the Commission finds that Government Code section 7579, and section 60510 of the regulations, do not impose any state-mandated duties on county mental health departments.

Finally, the County of Stanislaus requests reimbursement for section 60400 of the regulations (filed as an emergency regulation on July 1, 1998 (Register 98, No. 26) and refiled as a final regulation on August 9, 1999 (Register 99, No. 33)). Section 60400, on its face, does not mandate any activities on counties. Rather, section 60400 of the regulations addresses the requirement imposed on the Department of Health Services to provide the services of a home health aide when the local educational agency considers a less restrictive placement from home to school for a pupil. The statutory authority and reference for this regulation is Government Code section 7575, which requires the Department of Health Services, "*or any designated local agency administering the California Children's Services*," to be responsible for occupational therapy, physical therapy, and the services of a home health aide, as required by the IEP. The claimants, however, did not plead Government Code section 7575 in their test claims. In addition, there is no evidence in the record that local agencies administering the California Children's Services program have incurred increased costs mandated by the state. Accordingly, the Commission finds that section 60400 of the regulations does not impose any state-mandated activities on county mental health departments.

Accordingly, Government Code sections 7570, 7572, 7579, 7582, 7584, 7585, and 7587, as amended by the test claim legislation, and sections 60400 and 60510 of the regulations do not impose state-mandated duties on counties and, thus, are not subject to article XIII B, section 6 of the California Constitution.

[33] The declarations submitted by the claimants here are from the county mental health departments. (See declaration of Paul McIver, District Chief, Department of Mental Health, County of Los Angeles; and declaration of Dan Souza, Mental Health Director for the County of Stanislaus.)

The remaining test claim statutes and regulations constitute a "program" within the meaning of article XIII B, section 6

The remaining test claim statutes and regulations consist of the following:

- Government Code sections 7572.55 (as added in 1994), and 7576 and 7586.6 (as amended in 1996); and
- With the exception of sections 60400 and 60510 of the regulations, the joint regulations adopted by the Departments of Mental Health and Education (Cal. Code Regs, tit. 2, §§ 60000 et seq.), which took effect as emergency regulations on July 1, 1998 (Register 98, No. 26) and became final on August 9, 1999 (Register 99, No. 33).

In order for the test claim statutes and regulations to be subject to article XIII B, section 6 of the California Constitution, the statutes and regulations must constitute a "program." The California Supreme Court, in the case of *County of Los Angeles* v. *State of California*[34], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or 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. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[35]

The test claim statutes and regulations involve the special education and related services provided to pupils. In 1988, the California Supreme Court held that education of handicapped children is "clearly" a governmental function providing a service to the public.[36] Thus, the remaining test claim statutes and regulations qualify as a program that is subject to article XIII B, section 6 of the California Constitution.

Issue 3: Do the remaining test claim statutes and regulations impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

This test claim addresses the statutory and regulatory changes made to the existing Handicapped and Disabled Students program. The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. "Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[37] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately

[34] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[35] *Carmel Valley Fire Protection Dist., supra,* 190 Cal.App.3d at 537.

[36] *Lucia Mar Unified School District, supra,* 44 Cal.3d at page 835.

[37] *County of Los Angeles, supra,* 43 Cal.3d at page 56; *San Diego Unified School District, supra,* 33 Cal.4th at page 874.

before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[38]

As indicated above, the original statutes in Chapter 26.5 of the Government Code were added by the Legislature in 1984 and 1985. In addition, pursuant to the requirements of Government Code section 7587, the Departments of Mental Health and Education adopted the first set of emergency regulations for the program in 1986. Although the history of the regulations states that the first set of emergency regulations were repealed on June 30, 1997, by operation of Government Code section 7587, and that a new set of regulations were not operative until one year later (July 1, 1998), the Commission finds, as described below, that the initial set of emergency regulations remained operative after the June 30, 1997 deadline, until the new set of regulations became operative in 1998. Thus, for purposes of analyzing whether the remaining test claim legislation constitutes a new program or higher level of service, the initial emergency regulations, and the 1984 and 1985 statutes in Chapter 26.5 of the Government Code, constitute the existing law in effect immediately before the enactment of the test claim legislation.

Government Code section 7587 required the Departments of Mental Health and Education to adopt emergency regulations by January 1, 1986, to implement the Handicapped and Disabled Students program. The statute, as amended in 1996 (Stats. 1996, ch. 654), further states that the emergency regulations "shall not be subject to automatic repeal until the final regulations take effect on or before June 30, 1997." Section 7587 states, in relevant part, the following:

> …For the purposes of the Administrative Procedure Act, *the adoption of the regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare*. These regulations shall not be subject to the review and approval of the Office of Administrative Law and *shall not be subject to automatic repeal until the final regulations take effect on or before June 30, 1997*, and the final regulations shall become effective immediately upon filing with the Secretary of State. Regulations adopted pursuant to this section shall be developed with the maximum feasible opportunity for public participation and comments. (Emphasis added.)

The final regulations were not adopted by the June 30, 1997 deadline. Nevertheless, the courts have interpreted the time limits contained in statutes similar to Government Code section 7587 as directory and not mandatory. When a deadline in a statute is deemed directory, then the action required by the statute remains valid.[39] The California Supreme Court describes the general rule of interpretation as follows:

> Time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent. [Citation omitted.] "In ascertaining

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

[39] *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145.

> probable intent, California courts have expressed a variety of tests. In some cases focus has been directed at the likely consequences of holding a particular time limitation mandatory, in an attempt to ascertain whether those consequences would defeat or promote the purpose of the enactment. . . .Other cases have suggested that a time limitation is deemed merely directory 'unless a consequence or penalty is provided for failure to do the act within the time commanded. [Citation omitted.] As *Morris v. County of Marin* [citation omitted] held, the consequence or penalty must have the effect of invalidating the government action in question if the limit is to be characterized as "mandatory."[40]

As determined by the California Supreme Court, time limits are usually deemed directory unless a contrary intent is expressly provided by the Legislature or there is a penalty for not complying with the deadline. In the present case, the plain language of Government Code section 7587 does *not* indicate that the Legislature intended the June 30, 1997 deadline to be mandatory, thus making the regulations invalid on that date. If that was the case, the state would be acting contrary to federal law by not having procedures in place for one year regarding the assessment, special education, and related services of a child suspected of needing mental health services necessary to preserve the child's right under federal law to receive a free and appropriate public education.[41] Instead, the plain language of the statute expresses the legislative intent that the regulations are "deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare." This language supports the conclusion that the Legislature intended the original regulations to remain valid until new regulations were adopted.

This conclusion is further supported by the actions of the affected parties after the June 30, 1997 deadline. In 1998, individual plaintiffs filed a lawsuit seeking a writ of mandate directing the Departments of Mental Health and Education to adopt final regulations in accordance with Government Code section 7587.[42] As indicated in the petition for writ of mandate, the plaintiffs asserted that the original emergency regulations were enforced and applied after the June 30, 1997 deadline, that the Office of

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[40] *Ibid*.

[41] The requirements of the federal special education law (the Individuals with Disabilities Education Act (IDEA)) have been determined to constitute a federal mandate on the states. (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.) Under federal law, states are required to provide specially designed instruction, at no cost to the parent, to meet the unique needs of a disabled pupil, including classroom instruction and related services, according to the pupil's IEP. (U.S.C., tit. 20 §§ 1400 et seq.; 34 C.F.R. § 300.343.) Related services include psychological services. (34 C.F.R. § 300.24.) Pursuant to federal regulations on the IEP process, the pupil must be evaluated in all areas of suspected disabilities by a multidisciplinary team. (34 C.F.R. § 300.502.)

[42] *McLeish and Ryan v. State Department of Education, et al*., Sacramento Superior Court, Case No. 96CS01380.

Administrative Law did not provide notice of repeal of the regulations, and that the original emergency regulations were never deleted from the California Code of Regulations.[43] Ultimately, the parties stipulated to a judgment and writ that subsequent emergency regulations would be filed on or before July 1, 1998, to supercede the original emergency regulations, and that on or before September 24, 1999, the final regulations would be in full force and effect.[44] Thus, the parties affected by the original emergency regulations continued to act as if the regulations were still in effect.

Therefore, the Commission finds that the initial set of emergency regulations remained operative after the June 30, 1997 deadline, until the new set of regulations became operative in 1998. Thus, for purposes of analyzing whether the remaining test claim legislation constitutes a new program or higher level of service, there is no time gap between the original emergency regulations and the subsequent regulations adopted in July 1998. The initial emergency regulations, and the 1984 and 1985 statutes in Chapter 26.5 of the Government Code, constitute the valid, existing law in effect immediately before the enactment of the test claim legislation.

Accordingly, the issue before the Commission is whether the remaining test claim legislation [Gov. Code, § 7572.55, as added in 1994, and §§ 7576 and 7586.6, as amended in 1996, and the joint regulations adopted by the Departments of Mental Health and Education (Cal. Code Regs, tit. 2, §§ 60000 et seq.), which took effect as emergency regulations on July 1, 1998 (Register 98, No. 26) and became final on August 9, 1999 (Register 99, No. 33)] imposes a new program or higher level of service when compared to the legal requirements in effect immediately before the enactment of the test claim legislation, by increasing the actual level of governmental service provided in the existing program.

A. Interagency Agreements (Gov. Code, § 7586.6; Cal. Code Regs., tit. 2, § 60030)

Government Code section 7586.6

Government Code section 7586.6 was added by the test claim legislation in 1996 to address, in part, the interagency agreements between counties and local educational agencies. Government Code section 7586.6, subdivision (b), states the following:

> It is the intent of the Legislature that the designated local agencies of the State Department of Education and the State Department of Mental Health update their interagency agreements for services specified in this chapter at the earliest possible time. It is the intent of the Legislature that the state and local interagency agreements be updated at least every three years or earlier as necessary.

The plain language of Government Code section 7586.6, subdivision (b), states the "legislative intent" that the local interagency agreements be updated at least every three years or earlier as necessary.

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[43] See Petition for Writ of Mandamus, paragraphs 42 and 43, *McLeish, supra*.

[44] See Writ of Mandamus, *McLeish, supra*.

The Commission finds that Government Code section 7586.6 does not impose a new program or higher level of service. Even if legislative intent were determined to constitute a mandated activity, updating or renewing the interagency agreements every three years is not new and the level of service required of counties is not increased. Under prior law, former section 60030, subdivision (a)(2), of the regulations adopted by the Departments of Mental Health and Education required the local mental health director[45] and the county superintendent of schools to renew, and revise if necessary, the interagency agreements every three years or at any time the parties determine a revision is necessary.

Accordingly, the Commission finds that Government Code section 7586.6 does not impose a new program or higher level of service.

California Code of Regulations, title 2, section 60030

Section 60030 of the joint regulations governs the interagency agreements between counties and local educational agencies. Under prior law, the original emergency regulations required the development of an interagency agreement that included "a delineation of the process and procedure" for the following nine (9) items:

- Interagency referrals of pupils, which minimize time line delays. This may include written parental consent on the receiving agency's forms.
- Timely exchange of pupil information in accordance with applicable procedures ensuring confidentiality.
- Participation of mental health professionals, including those contracted to provide services, at IEP team meetings pursuant to Government Code sections 7572 and 7576.
- Developing or amending the mental health related service goals and objectives, and the frequency and duration of such services indicated on the pupil's IEP.
- Transportation of individuals with exceptional needs to and from the mental health service site when such service is not provided at the school.
- Provision by the school of an assigned, appropriate space for delivery of mental health services or a combination of education and mental health services to be provided at the school.
- Continuation of mental health services during periods of school vacation when required by the IEP.
- Identification of existing public and state-certified nonpublic educational programs, treatment modalities, and location of appropriate residential placements, which may be used for placement by the expanded IEP program team.

[45] Local mental health director is defined as "the officer appointed by the governing body of a county to manage a community mental health service." (Cal. Code Regs., tit. 2, § 60020, subd. (e).)

- Out-of-home placement of seriously emotionally disturbed pupils in accordance with the educational and treatment goals on the IEP.[46]

In addition, former section 60100, subdivision (a), of the regulations required the local mental health program and the SELPA liaison to define the process and procedures for coordinating services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils. These requirements remain the law.

Section 60030 of the regulations, as replaced by the test claim legislation in 1998, now requires that the interagency agreement include a "delineation of the procedures" for seventeen (17) items. In this regard, section 60030, subdivision (c), requires that the following additional eight (8) procedures be identified in the interagency agreement:

- Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
- A host county[47] to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
- Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)

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[46] Former California Code of Regulations, title 2, section 60030, subdivision (b).

[47] A "host county" is defined to mean the county where the pupil with a disability is living when the pupil is not living in the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (d).) The "county of origin" is defined as the county in which the parent of the pupil with disability resides. If the pupil is a ward or dependent of the court, an adoptee receiving adoption assistance, or a conservatee, the county of origin is the county where this status currently exists. (Cal. Code Regs., tit. 2, § 60020, subd. (b).)

- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

According to the final statement of reasons prepared by the Departments of Education and Mental Health for the regulations, the section on interagency agreements was "expanded because experience in the field has shown that many local interagency agreements are not effective." The final statement of reasons further states that the regulation "requires stronger interagency agreements in order to improve local agencies' ability to adhere to the timelines required by law."[48]

Since the interagency agreement must now contain additional information, the Commission finds that section 60030 of the regulations imposes a new program or higher level of service for the one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures:

- Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
- A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
- Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)

[48] Final Statement of Reasons, pages 10-11.

- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)[49]

B. Referral and Mental Health Assessment of a Pupil (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045)

Government Code section 7576, as amended by the 1996 test claim statute (Stats. 1996, ch. 654), and sections 60040 and 60045 of the regulations govern the referral of a pupil suspected of needing mental health services to the county for an assessment. Under prior law, Government Code section 7572 and former section 60040 of the regulations required counties to perform the following referral and assessment activities:

- Review the following educational information of a pupil referred to the county by a local education agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
- If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
- If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.
- Assess the pupil within the time required by Education Code section 56344.

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[49] The Counties of Los Angeles and Stanislaus, in comments to the draft staff analysis, argue that revising the interagency agreement in accordance with section 60030 of the regulations is not a one-time activity. The County of Los Angeles argues "the negotiation, development, and periodic revision and review of Interagency Agreements require a variety of time consuming activities over an extended period of time." The County of Stanislaus contends that the interagency agreement is a living, breathing document. However, as indicated in the analysis, periodic renewal and revision of the agreements, which are ongoing activities, are not new. Counties were required to perform these activities every three years under the prior regulations. (Former Cal. Code Regs., tit. 2, § 60030.) Reimbursement for the ongoing activities of renewing the interagency agreements every three years and revising if necessary are addressed in the reconsideration of the original *Handicapped and Disabled Students* program (04-RL-4282-10).

- If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.
- Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.
- Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
- In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
- Review independent assessments of a pupil obtained by the parent.
- Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
- In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

These activities are still required by law. However, the test claim legislation requires counties to perform additional activities. For example, Government Code section 7576, subdivision (b)(1), mandates a new program or higher level of service by requiring the county and the local educational agency to "work collaboratively to ensure that assessments performed *prior to referral* are as useful as possible to the community mental health service [i.e., the county] in determining the need for mental health services and the level of services needed." (Emphasis added.)

In addition, Government Code section 7576, subdivision (g), and section 60040, subdivision (g), mandate a new program or higher level of service by requiring a county that receives a referral for a pupil with a different county of origin, to forward the referral within one working day to the county of origin. The county of origin shall then have the programmatic and fiscal responsibility for providing or arranging for the provision of necessary services for the pupil.

Furthermore, section 60045 of the regulations addresses the assessment of a pupil and imposes new, required activities on counties. Under prior law, counties were required to determine if a mental health assessment of a pupil is necessary. (Former Cal. Code Regs., tit. 2, § 60040, subd. (d).) Section 60045 retains that requirement, and also

requires that if the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and local educational agency of the county determination within one working day. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(1).)

Section 60045, subdivision (a)(2), now requires that if the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral.

Section 60045, subdivision (b), provides that "if a mental health assessment is determined to be necessary," the community mental health service shall notify the local educational agency, develop a mental health assessment plan, and provide the plan and a consent form to the parent." Under prior law, counties were required to develop a mental health assessment plan and provide a consent form for the assessment to the parent. (Former Cal. Code Regs., tit. 2, § 60040, subd. (d).) However, the activities to notify the local educational agency when an assessment is determined necessary, and to provide the assessment plan to the parent are new activities.

Although section 60045, subdivisions (a) and (b), includes language that implies that the activities are within the discretion of the county (e.g., the activity is required "if no mental health assessment is determined necessary"), the Commission finds that these activities are mandated by the state when necessary to provide the pupil with a free and appropriate education under federal law. Under the rules of statutory construction, section 60045, subdivisions (a) and (b), must be interpreted in the context of the entire statutory scheme so that the statutory scheme may be harmonized and have effect.[50] In addition, it is presumed that the administrative agency, like the Departments of Mental Health and Education, did not adopt a regulation that alters the terms of a legislative enactment.[51] Federal law, through the IDEA, requires the state to *identify*, locate, and evaluate *all* children with disabilities, including children attending private schools, who are in need of special education and related services.[52] The state is also required by federal law to conduct a full and individual initial evaluation to determine whether a child has a qualifying disability, and the educational needs of the child.[53] In addition, Government Code section 7572, subdivision (a), requires that a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service. In cases where the pupil is suspected of needing mental health services, the state has delegated to the counties the activity of assessing the need for service. Accordingly, the Commission finds that the section 60045, subdivisions (a) and (b), mandate the following new activities that constitute a new program or higher level of service:

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[50] *Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781-782.

[51] *Wallace v. State Personnel Board* (1959) 168 Cal.App.2d 543, 547.

[52] 20 United States Code section 1412, subdivision (a)(3).

[53] 20 United States Code section 1414, subdivision (a).

- If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and local educational agency of the county determination within one working day.
- If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral.
- Notify the local educational agency when an assessment is determined necessary.
- Provide the assessment plan to the parent.

Furthermore, section 60045, subdivision (c), requires counties to perform a new activity to "report back to the referring [local educational agency] or IEP team within 30 days from the date of the receipt of the referral . . . if no parental consent for a mental health assessment has been obtained." The Commission finds this activity constitutes a new program or higher level of service.

The Commission further finds that section 60045, subdivision (d), mandates a new program or higher level of service on counties by requiring counties to notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. This activity was not required under prior law.

The Commission also finds that section 60045, subdivision (f)(1), mandates a new program or higher level of service on counties by requiring counties to provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. As enacted before the test claim legislation, Government Code section 7572, subdivision (d)(1), requires that the parent be notified in writing of this parental right. But Government Code section 7572, subdivision (d)(1), does not specify the agency that is required to provide the written notice. Thus, section 60045, subdivision (f)(1), delegates the responsibility to the county.

Finally, section 60045, subdivision (h), mandates a new program or higher level of service by requiring the county of origin to prepare statutorily required IEP reassessments. Pursuant to federal law, yearly reassessments are required to determine the needs of the pupil.[54]

C. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)

The Departments of Education and Mental Health adopted a new regulation in section 60055 to address the interim placement of a pupil receiving mental health services pursuant to an existing IEP following the pupil's transfer to a new school district. Section 60055 states the following:

> (a) Whenever a pupil who has been receiving mental health services, pursuant to an IEP, transfers into a school district from a school district in another county, the responsible LEA [local educational

[54] 34 Code of Federal Regulations, section 300.343.

agency] administrator or IEP team shall refer the pupil to the local community mental health service [county] to determine appropriate mental health services.

(b) The local mental health director or designee shall ensure that the pupil is provided interim mental health services, as specified in the existing IEP, pursuant to Section 56325 of the Education Code, for a period not to exceed thirty (30) days, unless the parent agrees otherwise.

(c) An IEP team, which shall include an authorized representative of the responsible community mental health service, shall be convened by the LEA to review the interim services and make a determination of services within thirty (30) days of the pupil's transfer.

According to the final statement of reasons, section 60055 "conforms with and implements Education Code section 56325 which ensures that special education pupils continue to receive services after they transfer into a new school district or SELPA. This section is intended to address implementation problems in these situations reported by the field in which eligible pupils were denied services due to an inter-county transfer."[55]

The Commission finds that section 60055 mandates a new program or higher level of service on counties, following a pupil's transfer to a new school district, by requiring them to perform the following activities:

- Provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.
- Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.

D. Participate as a Member of the IEP Team When Residential Placement of a Pupil is Recommended (Gov. Code, § 7572.55; Cal. Code Regs., tit. 2, § 60100)

Under existing law, when a child is assessed as seriously emotionally disturbed and any member of the IEP team recommends residential placement, the IEP team shall be expanded to include a representative of the county. The expanded IEP team is required to review the assessment and determine whether: (1) the child's needs can reasonably be met through any combination of nonresidential services, preventing the need for out-of-home care; (2) residential care is necessary for the child to benefit from educational services; and (3) residential services are available, which address the needs identified in the assessment and which will ameliorate the conditions leading to the seriously emotionally disturbed designation. The expanded IEP team is also required to consider all possible alternatives to out-of-home placement. (Gov. Code, § 7572.5, former Cal. Code Regs, tit. 2, § 60100.) Finally, the expanded IEP team is required to document the

[55] Final Statement of Reasons, page 20.

pupil's educational and mental health treatment needs that support the recommendation for the placement. (Former Cal. Code Regs, tit. 2, § 60100, subd. (e).)

These activities remain the law and counties are currently eligible for reimbursement for their participation on the expanded IEP team.[56] However, the test claim legislation amended the law with respect to the activities performed by the expanded IEP team.

In 1994, the Legislature added section 7572.55 to the Government Code (Stats. 1994, ch. 1128). Government Code section 7572.55, subdivision (c), requires the expanded IEP team, when a recommendation is made that a child be placed in an *out-of-state* residential facility, to develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school.

In addition, section 60100 of the regulations, as adopted in 1998, requires the expanded IEP team to perform the following activities:

- The expanded IEP team shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)
- The expanded IEP team shall ensure that placement is in accordance with admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)

The Department of Finance contends that these activities performed by the expanded IEP team do not constitute a new program or higher level of service. The Department states the following:

> It is our interpretation that there is no meaningful difference between the requirements under the prior regulations and the new regulations with respect to identifying, analyzing, and documenting all alternatives to residential placement. The existing activities of considering "all possible alternatives to out-of-home placement" and documenting "the pupil's educational and mental health treatment needs that support the recommendation for the placement" would already include the development of a plan for using less restrictive and in-state alternatives and documentation of the reasons why these alternatives were rejected. It is not clear that the new requirements cited above impose a new or higher level of service.[57]

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[56] For this reason, the Commission agrees with a comments filed by the Counties of Los Angeles and Stanislaus on the draft staff analysis that the county's participation on the expanded IEP team occurs when there is a recommendation for out-of-home placement, regardless of whether the recommendation is for a facility in the state or a facility out of the state. This test claim, however, addresses only the new activities required by the Government Code sections and regulations for which the Commission has jurisdiction (i.e., Gov. Code, § 7572.55, as added by Stats. 1994, ch. 1128, and the 1998 regulations.)

[57] Department of Finance comments to the draft staff analysis.

The Commission disagrees. First, the activity required by Government Code section 7572.55, subdivision (c), to develop a plan for using less restrictive alternatives and in-state alternatives when a recommendation is made that a child be placed in an out-of-state facility, is a new requirement. Government Code section 7572.55 was *added* by the test claim legislation. Under prior law, the expanded IEP team was only required to "consider" all possible alternatives to residential placement. The express language of prior law did not require the expanded IEP team to develop a plan for using less restrictive alternatives specifically for out-of-state placements. Thus, the Commission finds that Government Code 7572.55, subdivision (c), imposes a new program or higher level of service with regard to the counties' participation on the expanded IEP team.

The Commission further finds that the two activities mandated by section 60100 are new activities, not required under prior law. Section 60100, subdivision (c), requires the expanded IEP team to document the alternatives to residential placement that were considered and the reasons why they were rejected. Under prior law, the expanded IEP team was required to "consider" all possible alternatives to residential placement. Prior law also required the expanded IEP team to document the pupil's educational and mental health treatment needs that support the final recommendation for the placement. But prior law did not require the expanded IEP team to document the alternatives to residential placement that were considered by the team and the reasons why the alternatives were rejected. Thus, the Commission finds that section 60100, subdivision (c), imposes a new program or higher level of service.

Moreover, the Commission finds that the activity required by section 60100, subdivision (j), imposes a new program or higher level of service by requiring, for the first time, that the expanded IEP team ensure that placement is in accordance with admission criteria of the facility.

Finally, when the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in residential care, counties are now required to ensure that: (1) the mental health services are specified in the IEP in accordance with federal law; and (2) the mental health services are provided by qualified mental health professionals.[58] (Cal. Code Regs., tit. 2, § 60100, subd. (i).) Counties were not required to perform these activities under prior law. Therefore, the Commission finds that the activities required by section 60100, subdivision (i), constitute a new program or higher level of service.

E. Case Management Duties for Pupils Placed in Residential Care (Cal. Code Regs., tit. 2, §§ 60100, 60110)

Under existing law, Government Code section 7572.5, subdivision (c)(1), requires the county to act as the lead case manager if the review of the expanded IEP team calls for residential placement of the seriously emotionally disturbed pupil. The statute further

[58] Section 60020 defines "qualified mental health professional" to include the following licensed practitioners of the healing arts: a psychiatrist; psychologist; clinical social worker; marriage, family and child counselor; registered nurse, mental health rehabilitation specialist, and others who have been waivered under Welfare and Institutions Code section 5751.2.

requires that "the mental health department shall retain financial responsibility for provision of case management services." Former section 60110, subdivision (a), required the following case management duties:

- Convene parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.
- Complete the local mental health program payment authorization in order to initiate out of home care payments.
- Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
- Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
- Facilitate the enrollment of the pupil in the residential facility.
- Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
- Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.
- Coordinate the six-month expanded IEP team meeting with the local education agency administrator or designee.

Sections 60100 and 60110 of the regulations, as adopted in 1998, require county case managers to perform the following new activities not required under prior law:

- Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)[59]
- When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with

[59] Although the regulation requires the county case manager to plan for the educational needs of a pupil placed in a residential facility, the local educational agency is ultimately responsible for "providing or arranging for the special education and non-mental health related services needed by the pupil. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(2); Final Statement of Reasons, p. 24.)

admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)[60]

- Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).) Under prior law, the expanded IEP team identified the placement. (Former Cal. Code Regs., tit. 2, § 60100, subd. (f).)
- Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)
- Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)
- Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)[61]

The Commission finds that the new activities bulleted above constitute a new program or higher level of service.

In addition, the language for some of the case management activities required under existing law was amended by section 60110 of the test claim legislation. Thus, the issue is whether the amended language mandates an increase in the level of service provided by the county case manager.

For example, existing law required counties to "conven[e] parents and representatives of public and private agencies in accordance with subsection (f) of Section 60100 in order to identify the appropriate residential placement." (Former Cal. Code Regs., tit. 2, § 60110,

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[60] A "community treatment facility" is defined in section 60025 of the regulations to mean "any residential facility that provides mental health treatment services to children in a group setting which has the capacity to provide secure confinement. The facility's program components shall be subject to program standards developed and enforced by the State Department of Mental Health pursuant to Section 4094 of the Welfare and Institutions Code."

[61] Welfare and Institutions Code section 4094.5, subdivision (e)(1), states in relevant part that "[t]he child shall, prior to admission, have been determined to be in need of the level of care provided by a community treatment facility, by a county interagency placement committee …"

subd. (c)(1).) Section 60110, subdivision (c)(1), as replaced by the test claim legislation, amended the regulation, in relevant part, by requiring the county case manager to include "educational staff" in the meeting. The Commission finds that the requirement to include "educational staff" in the meeting does not increase the level of service required by county case managers. The old regulation required county case managers to convene the meeting with "representatives of public agencies." For purposes of this program, "representatives of public agencies" includes educational staff.[62] Thus, section 60110, subdivision (c)(1), does not impose a new program or higher level of service.

Furthermore, former section 60110, subdivision (c)(8), required case managers to conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services as required by the IEP. That requirement remains the law. However, section 60110, subdivision (c)(8), as replaced by the test claim legislation, requires the case manager to also evaluate "the continuing stay criteria" of a pupil placed in a community treatment facility on a quarterly basis:

> In addition, for children placed in a community treatment facility, an evaluation shall be made within every 90 days of the residential placement of the pupil to determine if the pupil meets the continuing stay criteria as defined in Welfare and Institutions Code section 4094 and implementing mental health regulations.

Pursuant to Department of Mental Health regulations, the continuing stay criteria require the case manager and the community treatment facility psychiatrist to evaluate and document the continued placement of the pupil in the community treatment facility.[63]

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[62] See section 60000 of the regulations, which provides that "this chapter applies to the State Departments of Mental Health, Social Services, and their designated local agencies, and the California Department of Education, school districts, county offices, and special education local plan areas."

[63] California Code of Regulations, title 9, section 1924, defines the "continuing stay criteria" for this program as follows:

> (b) Individuals who are special education pupils identified in paragraph (4) of subdivision (c) of Section 56026 of the Education Code and who are placed in a CTF [community treatment facility] prior to age eighteen (18) pursuant to Chapter 26.5 of the Government Code may continue to receive services through age 21 provided the following conditions are met:
>
> (1) They continue to satisfy the requirements of subsection (a) [documentation by the CTF psychiatrist and the case manager supporting the continued placement of the pupil in the community treatment facility];
>
> (2) They have not graduated from high school;
>
> (3) They sign a consent for treatment and a release of information for CTF staff to communicate with education and county mental health

The Commission finds that the evaluation every 90 days of the continuing stay criteria of a pupil placed in a community treatment facility, as required by section 60110, subdivision (c)(8), constitutes a new program or higher level of service.

Finally, under prior law, the expanded IEP team was required to review the case progress, the continuing need for out-of-home placement, the extent of compliance with the IEP, and progress toward alleviating the need for out-of-home care "at least every six months." (Gov. Code, § 7572.5, subd. (c)(2).) In addition, former section 60110, subdivision (c)(10), required case managers to "coordinate the six-month expanded IEP team meeting with the local educational agency administrator or designee."

Section 60110, subdivision (c)(10), as adopted by the test claim legislation in 1998, replaced the requirement imposed on the case manager to "coordinate" the expanded six-month IEP team meeting, with the requirement to "schedule and attend" the six-month expanded IEP team meeting. Section 60110, subdivision (c)(10), states the following:

> Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement.

The Commission finds that section 60110, subdivision (c)(10), increases the level of service required of counties. Under the prior requirement, case managers were required to coordinate the expanded IEP team meeting every six months. Case managers are now required to schedule the meeting. The activities of "coordinating" and "scheduling" are different. To "coordinate" means to "to place in the same order, class, or rank; to harmonize in a common effort; to work together harmoniously." To "schedule" means "to plan or appoint for a certain date or time." [64] In addition, although a representative from the county is a member of the IEP team, there was no requirement that the case manager, who may be a different person than the IEP team member, attend the IEP team meeting.[65] Therefore, the Commission finds that section 60110, subdivision (c)(10), of the regulations constitutes a new program or higher level of service for the activity of scheduling and attending the six-month expanded IEP team meetings.

> professionals after staff have informed them of their rights as an adult;
>
> (4) A CTF obtains an exception from the California Department of Social Services to allow for the continued treatment of the young adult in a CTF… .

[64] Webster's II New College Dictionary (1999) pages 248, 987.

[65] Existing law authorizes the county to delegate the case management responsibilities to the county welfare department. (Gov. Code, § 7572.5, subd. (c)(1).)

F. Authorize Payments to Out-Of-Home Residential Care Providers (Cal. Code Regs., tit. 2, § 60200, subd. (e))

Pursuant to existing law, counties are financially responsible for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed pupil placed in an out-of-home residential facility. The residential and non-educational costs include the costs for food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. (Gov. Code, § 7581, former Cal. Code Regs., tit. 2, § 60200, subd. (e), Welf. & Inst. Code, § 15200, subd. (c)(1).) The counties' financial responsibility for the residential and non-educational costs of pupils placed out of the home remain the law today.

In addition, former section 60200 of the regulations required the county welfare department to issue the payments to providers of out-of-home facilities in accordance with Welfare and Institutions Code section 18351, upon receipt of authorization documents from the State Department of Mental Health *or* a designated county mental health agency. The authorization documents are required to include information sufficient to demonstrate that the child meets all eligibility criteria established in the regulations for this program. (Welf. & Inst. Code, § 18351.)

The county welfare department is still required to issue payments to the residential facilities under section 60200, subdivision (e), of the regulations, as replaced in 1998. However, the regulation now requires the county community mental health service to authorize the payment to the residential facility before the county welfare agency can issue the payment. Subdivision (e) states, "[t]he community mental health service shall be responsible for authorizing payment to the facilities listed in Section 60025 based upon rates established by the Department of Social Services in accordance with Sections 18350 through 18356 of the Welfare and Institutions Code."

The Department of Finance contends that "[a]ccording to the Department of Social Services, there is no meaningful difference between the requirements under the prior regulations and the new regulations with respect to authorizing payments to the out-of-home residential facilities." The Department further states that "the child's mental health caseworker is already required to participate in the development of the IEP, and this IEP could constitute the authorizing paperwork that is presented to the county child welfare department to initiate payment for residential treatment." Thus, the Department argues that "[i]t is not clear that the new requirement . . . would impose a new or higher level of service."[66]

The Commission disagrees with the Department's interpretation of section 60200 of the regulations. The same rules of construction applicable to statutes govern the interpretation of administrative regulations. Thus, the Commission, like a court, should attempt to ascertain the intent of the regulating agency.[67]

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[66] Department of Finance comments to the draft staff analysis.

[67] *Goleta Valley Community Hospital v. Department of Health Services* (1984) 149 Cal.App.3d 1124, 1129.

As indicated above, prior law specified that either the Department of Mental Health or a designated county mental health agency provided the authorization documents before payment to the residential facility could be issued. According to the final statement of reasons prepared by the Departments of Mental Health and Education for the 1998 regulations, section 60200, subdivision (e), now assigns the responsibility of authorizing payments to the residential facilities solely to the county community mental health service. The final statement of reasons also states that it is the responsibility of the county to determine that the residential placement meets all of the criteria established in Welfare and Institutions Code sections 18350 through 18356. The final statement of reasons for this regulation expressly provides the following:

> Subsection (e) assigns the responsibility for authorizing payment for board and care to the community mental health service. It is the responsibility of the community mental health service to determine that the residential placement meets all of the criteria established in Sections 18350 through 18356 of the Welfare and Institutions Code. These sections of code also refer to Section 11460 of the Welfare and Institutions Code which state that rates will be established by CDSS, and outline certain requirements in order for facilities to be eligible for payment."[68]

Thus, compliance with section 60200, subdivision (e), of the regulations requires the counties to determine that the residential placement meets all of the criteria established in the Welfare and Institutions Code before authorizing payment. The final statement of reasons suggests that the requirement to authorize payment to residential facilities may not be satisfied by simply providing the IEP to the county welfare department.

The Department of Social Services has not provided the Commission with any comments on this test claim. In addition, the argument asserted by the Department of Finance is not supported with documentary evidence or declarations signed under the penalty of perjury, as required by the Commission's regulations. (Cal. Code Regs., tit. 2, § 1183.02, subd. (c).)

Accordingly, the Commission finds that authorizing payments to the residential facilities in accordance with section 60200, subdivision (e), constitutes a new program or higher level of service.

G. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs, tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c))

Pursuant to existing law, counties are required to provide psychotherapy or other mental health treatment services to a pupil, either directly or by contract, when required by the pupil's IEP. (Gov. Code, § 7576; former Cal. Code Regs., tit. 2, § 60200, subd. (b).) Under the former regulations, "psychotherapy and other mental health services" were defined to include the day services and outpatient services identified in sections 542 and 543 of the Department of Mental Health regulations. (Former Cal. Code Regs., tit. 2, § 60020, subd. (a).)

[68] Final Statement of Reasons, page 26.

The regulations adopted by the Departments of Education and Mental Health in 1998 modified these activities. For example, section 60200, subdivision (c)(1), adds new requirements when a pupil receives mental health services in a host county. Under such circumstances, the county of origin (the county where the parent resides, the pupil receives adoption assistance, or where the pupil is a ward of the court, for example) is financially responsible for the mental health services, even though the services are provided in a host county. (Cal. Code Regs., tit. 2, § 60200, subd. (c).) Section 60200, subdivision (c)(1), states the following:

> The host county shall be responsible for making its provider network available and shall provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. Counties of origin shall negotiate with host counties to obtain access to limited resources, such as intensive day treatment and day rehabilitation.

Thus, the Commission finds that section 60200, subdivision (c)(1), of the regulations mandates a new program or higher level of service for the following new activities:

- The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals.
- The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation.

In addition, section 60020, subdivision (i), changed the definition of mental health services. As indicated above, the former regulations defined "psychotherapy and other mental health services" to include the day services and outpatient services identified in sections 542 and 543 of the Department of Mental Health regulations. (Former Cal. Code Regs., tit. 2, § 60020, subd. (a).) Under the prior regulations, these services included the following: day care intensive services, day care habilitative (counseling and rehabilitative) services, vocational services, socialization services, collateral services, assessment, individual therapy, group therapy, medication (including the prescribing, administration, or dispensing of medications, and the evaluation of side effects and results of the medication), and crisis intervention.

Section 60020, subdivision (i), of the regulations, now defines "mental health services" as follows:

> "Mental health services" means mental health assessment and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychotherapy as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. These services shall be provided directly or by contract at the discretion of the community mental health service of the county of origin.

Section 60020 of the test claim regulations continues to include mental health assessments, collateral services, intensive day treatment, and day rehabilitation within the definition of "mental health services." These services are not new.[69]

However, the activities of crisis intervention, vocational services, and socialization services were deleted by the test claim regulations. The final statement of reasons, in responding to a comment that these activities remain in the definition of "mental health services," states the following:

> The provision of vocational services is assigned to the State Department of Rehabilitation by Government Code section 7577.
>
> Crisis service provision is delegated to be "from other public programs or private providers, as appropriate" by these proposed regulations in Section 60040(e) because crisis services are a medical as opposed to educational service. They are, therefore, excluded under both the Tatro and Clovis decisions. These precedents apply because "medical" specialists must deliver the services. A mental health crisis team involves specialized professionals. Because of the cost of these professional services, providing these services would be a financial burden that neither the schools nor the local mental health services are intended to address in this program.
>
> The hospital costs of crisis service provision are explicitly excluded from this program in the Clovis decision for the same reasons.
>
> Additionally, the IEP process is one that responds slowly due to the problems inherent in convening the team. It is, therefore, a poor avenue for the provision of crisis services. While the need for crisis services can be a predictable requirement over time, the particular medical requirements of the service are better delivered through the usual local mechanisms established specifically for this purpose.[70]

Thus, counties are not eligible for reimbursement for providing crisis intervention, vocational services, and socialization services since these activities were repealed as of July 1, 1998.

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[69] The County of Los Angeles, in comments to the draft staff analysis, argues that all activities specified in section 60020, subdivision (i), should be reimbursable under this test claim. The County of Stanislaus filed similar comments. As indicated in the analysis, however, the activities of mental health assessments, collateral services, intensive day treatment, and case management, are not new activities. Counties were required to perform these activities under the prior regulations. (Former Cal. Code Regs., tit. 2, § 60020, subd. (a).) Reimbursement for the activities of mental health assessments, collateral services, intensive day treatment, and case management, are addressed in the reconsideration of the original *Handicapped and Disabled Students* program (04-RL-4282-10).

[70] Final Statement of Reasons, pages 55-56.

Nevertheless, section 60020 of the regulations increases the level of service of counties providing mental health services by including case management services and "psychotherapy" within the meaning of "mental health services." The regulation defines psychotherapy to include both individual and group therapy, based on the definition in Business and Professions Code section 2903. Business and Professions Code section 2903 states in relevant part the following:

> No person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license granted under this chapter, except as otherwise provided in this chapter. The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis; and of constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivations.
>
> The application of these principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups.
>
> Psychotherapy within the meaning of this chapter means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

The Commission finds that providing the services of case management and psychotherapy, as defined in Business and Professions Code section 2903, to a pupil when required by the pupil's IEP constitutes a new program or higher level of service.

Furthermore, under prior law, mental health services included prescribing, administering, and dispensing medications, and evaluating the side effects and results of the medication. Section 60020, subdivision (i), now includes "medication monitoring" within the provision of mental health services. "Medication monitoring" is defined in section 60020, subdivision (f), as follows:

> "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness.

The Department of Finance argues that "medication monitoring" does not increase the level of service provided by counties. The Department states the following:

> It is our interpretation that there is no meaningful difference between the medication requirements under the prior regulations and the new regulations of the test claim. The existing activities of "dispensing of medications, and the evaluation of side effects and results of medication" are in fact activities of medication monitoring and seem representative of all aspects of medication monitoring. To the extent that counties are already required to evaluate the "side effects and results of medication," it is not clear that the new requirement of "medication monitoring" imposes a new or higher level of service.[71]

The Commission disagrees with the Department's interpretation of section 60020, subdivisions (i) and (f), of the regulations, and finds that "medication monitoring" as defined in the regulation increases the level of service required of counties.

The same rules of construction applicable to statutes govern the interpretation of administrative regulations.[72] Under the rules of statutory construction, it is presumed that the Legislature or the administrative agency intends to change the meaning of a law or regulation when it materially alters the language used.[73] The courts will not infer that the intent was only to clarify the law when a statute or regulation is amended unless the nature of the amendment clearly demonstrates the case.[74]

In the present case, the test claim regulations, as replaced in 1998, materially altered the language regarding the provision of medication. The activity of "dispensing" medications was deleted from the definition of mental health services. In addition, the test claim regulations deleted the phrase "evaluating the side effects and results of the medication," and replaced the phrase with "monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness." The definitions of "evaluating" and "monitoring" are different. To "evaluate" means to "to examine carefully; appraise."[75] To "monitor" means to "to keep watch over; supervise."[76] The definition of "monitor" and the regulatory language to monitor the "psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness" indicate that the activity of "monitoring" is an ongoing activity necessary to ensure that the pupil receives a free and appropriate education under federal law. This interpretation is supported by the final statement of reasons for the adoption of the language in section 60020, subdivision (f), which state that the regulation was intended to make it

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[71] Department of Finance comments to draft staff analysis.

[72] *Goleta Valley Community Hospital v. Department of Health Services* (1984) 149 Cal.App.3d 1124, 1129.

[73] *Garrett v. Young* (2003) 109 Cal.App.4th 1393, 1404-1405.

[74] *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 869-870.

[75] Webster's II New College Dictionary (1999) page 388.

[76] *Id.* at page 708.

clear that "medication monitoring" is an educational service that is provided pursuant to an IEP, rather than a medical service that is not allowable under the program.[77]

Neither the Department of Mental Health nor the Department of Education, agencies that adopted the regulations, filed substantive comments on this test claim. Thus, there is no evidence in the record to contradict the finding, based on the rules of statutory construction, that "medication monitoring" increases the level of service on counties.

Therefore, the Commission finds that the activity of "medication monitoring," as defined in section 60020, subdivisions (f) and (i), constitutes a new program or higher level of service.

Finally, section 60050 was added by the test claim legislation to address the completion or termination of IEP health services. In relevant part, section 60050, subdivision (b), states the following:

> When completion or termination of IEP specified health services is mutually agreed upon by the parent and the community mental health service, or when the pupil is no longer participating in treatment, the community mental health service shall notify the parent and the LEA which shall schedule an IEP meeting to discuss and document this proposed change it if is acceptable to the IEP team.

The Commission finds that section 60050, subdivision (b), mandates a new program or higher level of service by requiring counties to notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of the service, or when the pupil is no longer participating in treatment.

H. Participation in Due Process Hearings (Cal. Code Regs., tit. 2, § 60550)

The County of Los Angeles argues that a county's participation in a due process hearing, which resolves disputes between a parent and a public agency regarding special education and related services, is reimbursable. The County further argues that reimbursement should cover the costs for "participation in mediation conferences, travel costs associated with dispute resolution, preparation of witnesses and documentary evidence, as well as participation in administrative hearings …"[78] The Commission disagrees.

Under existing law, due process procedures are in place to resolve disputes between a parent and a public agency regarding the special education and related services, including mental health services provided to a pupil by a county under the Handicapped and Disabled Students program. Government Code section 7586, as originally enacted in 1984, requires all state departments and their designated local agencies, including counties, to be governed by the procedural due process protections required by federal law. Government Code section 7586, subdivision (a), states the following:

> All state departments, and their designated local agencies, shall be governed by the procedural safeguards required in Section 1415 of

[77] Final Statement of Reasons, page 7.

[78] County of Los Angeles' comments to the draft staff analysis.

> Title 20 of the United States Code. A due process hearing arising over a related service or designated instruction and service shall be filed with the Superintendent of Public Instruction. Resolution of all issues shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter.

Pursuant to the former regulations, counties were required to participate in the due process hearings relating to issues involving mental health assessments or services and were required to prepare documentation and provide testimony supporting the county's position. (Former Cal. Code Regs., tit. 2, § 60550.) Counties are currently eligible for reimbursement for their participation in the due process hearings.

The test claim legislation, section 60550 of the regulations, as enacted in 1998, does not increase the level of service provided by counties with respect to the due process hearings. Counties are still subject to the due process hearing procedures as they were under prior law, and are still required to prepare documentation and provide testimony to support its position. According to the final statement of reasons, the amendments in the regulation, with respect to the county, simply reflect the deletion of the Office of Administrative Hearings from the hearing process.

Therefore, the Commission finds that section 60550 does not mandate that counties perform new activities or increase their level of service. Therefore, section 60550 of the regulations does not impose a new program or higher level of service on counties.

I. Compliance Complaints (Cal. Code Regs., tit. 2, § 60560)

The County of Stanislaus requests reimbursement for defending against an allegation that the county has not complied with the regulations for this program, in accordance with section 60560 of the regulations. Section 60560 states that "[a]llegations of failure by an LEA, Community Mental Health Services or CCS to comply with these regulations, shall be resolved pursuant to [sections 4600 et seq. of the Department of Education regulations]."

The Commission finds that the compliance complaint procedure established by section 60560 does not constitute a new program or higher level of service. The compliance complaint procedures, as they relate to the counties' participation in the Handicapped and Disabled Students program, have been in the law since 1991. Section 4650 of the Department of Education regulations (the regulation cited as the authority for section 60560 of the joint regulations in this case) addresses compliance complaints and was adopted in 1991.[79] Section 4650, subdivision (a)(viii), states in relevant part the following:

> For complaints relating to special education the following shall also be conditions for direct state intervention:

[79] California Code of Regulations, title 5, section 4650.

(A) The complainant alleges that a public agency, other than a local educational agency, as specified in Government Code section 7570 et seq., fails or refuses to comply with an applicable law or regulation relating to the provision of free appropriate public education to handicapped individuals …

Therefore, the Commission finds that section 60560 does not constitute a new program or higher level of service.

J. Interagency Dispute Resolution (Cal. Code Regs., tit. 2, §§ 60600, 60610)

The County of Stanislaus requests reimbursement for the counties' participation in interagency dispute resolution procedures, in accordance with sections 60600 and 60610 of the regulations. These regulations implement Government Code section 7585, which was enacted in 1984. Government Code section 7585 provides that whenever any department or local agency designated by that department fails to provide a related service specified in a pupil's IEP, the parent, adult pupil, or any local educational agency shall submit a written notification of the failure to provide the service to the Superintendent of Public Instruction or the Secretary of Health and Welfare. The superintendent and the secretary, or their designees, shall meet to resolve the issue within 15 days. If the issue cannot be resolved, the matter is referred to the Office of Administrative Hearings, whose decision is binding on the parties. Under prior regulations (former section 60610), once the dispute resolution procedures have been completed, the agency determined responsible for the service shall pay for, or provide the service, and shall reimburse the other agency that provided the service, if applicable.

Sections 60600 and 60610, as adopted in 1998, do not change the prior dispute resolution procedures. The level of participation by the county under the interagency dispute resolution procedures remains the same.

Therefore, the Commission finds that sections 60600 and 60610 of the regulations do not mandate a new program or higher level of service on counties.

Issue 4: Do the test claim statutes and regulations impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

As indicated above, the Commission finds that the following activities mandate a new program or higher level of service on counties:

1. Interagency Agreements (Cal. Code Regs., tit. 2, § 60030)

   - The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures:
     - Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)

- A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
- Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)
- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

2. Referral and Mental Health Assessments (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045)

- Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
- A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
- If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)

- If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
- Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
- Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
- Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)
- Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)
- Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)
- The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

3. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)
   - Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.
   - Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.
4. Participate as a Member of the Expanded IEP Team When Residential Placement of a Pupil is Recommended (Gov. Code, § 7572.55; Cal Code Regs., tit. 2, § 60100)
   - When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. (Gov. Code, § 7572.55, subd. (c).)
   - The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)

- The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)
- When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

5. Case Management Duties for Pupils Placed in Residential Care (Cal. Code Regs., tit. 2, §§ 60100, 60110)
   - Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)
   - When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)
   - Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)
   - Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)
   - Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)
   - Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

- Evaluate every 90 days the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)
- Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

6. Authorize Payments to Out-Of-Home Residential Care Providers (Cal. Code Regs., tit. 2, § 60200, subd. (e))
   - Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356.
7. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c))
   - The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)
   - The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)
   - Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
   - Provide individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
   - Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)
   - Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

In order for the activities listed above to impose a reimbursable, state-mandated program under article XIII B, section 6 of the California Constitution, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514.[80] Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service.

Government Code section 17556 states that the Commission shall not find costs mandated by the state, as defined in section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

> (a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
>
> (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.

[80] See also, *Lucia Mar Unified School Dist.*, *supra,* 44 Cal.3d 830, 835.

> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

Except for Government Code section 17556, subdivision (e), the Commission finds that the exceptions listed in section 17556 are not relevant to this claim, and do not apply here. Since the Legislature has appropriated funds for this program, however, Government Code section 17556, subdivision (e), is relevant and is analyzed below.

A. Government Code section 17556, subdivision (e), does not apply to deny this claim

Government Code section 17556, subdivision (e), states the Commission shall not find costs mandated by the state if the Commission finds that:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, *or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate*. (Emphasis added.)

Thus, in order for Government Code section 17556, subdivision (e), to apply to deny this claim, the plain language of the statute requires that two elements be satisfied. First, the statute must include additional revenue that was specifically intended to fund the costs of the state mandate. Second, the appropriation must be in an amount sufficient to fund the cost of the state mandate.

For the reasons provided below, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny this claim.

The reimbursement period of this test claim, if approved by the Commission, would begin July 1, 2001. The Budget Act of 2001 appropriated funds to counties specifically for this program in the amounts of $12,334,000 and $46,944,000.[81] The Budget Act of 2002 appropriated $1000 to counties.[82]

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[81] Statutes 2001, chapter 106, items 4440-131-0001 and 4440-295-0001. Item 4440-295-0001, however, is an appropriation, pursuant to article XIII B, section 6, for the original program approved by the Commission in CSM 4282, *Handicapped and Disabled Students* (Stats. 1984, ch. 1747; Stats. 1985, ch. 1274; and on Cal. Code Regs., tit.2, §§ 60000 through 60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

[82] Statutes 2002, chapter 379, item 4440-295-0001. Item 4440-295-0001 is an appropriation, pursuant to article XIII B, section 6, for the original program added approved by the Commission in CSM 4282, *Handicapped and Disabled Students* (Stats. 1984, ch. 1747; Stats. 1985, ch. 1274; and on Cal. Code Regs., tit.2, §§ 60000 through 60610 (Emergency Regulations filed December 31, 1985, designated effective January 1,

The Commission finds that the amount appropriated in 2001 and 2002 are not sufficient to fund the cost of the state mandate and, thus, the second element under Government Code section 17556, subdivision (e), has not been satisfied. According to the State Controller's Deficiency Report issued on May 2, 2005, the unpaid claims for fiscal year 2001-02 total $124,940,258. The unpaid claims for fiscal year 2002-03 total $124,871,698.[83]

In addition, the Budget Acts of 2003 and 2004 contain appropriations "considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." However, for the reasons provided below, the Commission finds that Government Code section 17556, subdivision (e), has not been satisfied with these appropriations.

The Budget Act of 2003 appropriated $69 million to counties from the federal special education fund to be used exclusively to support mental health services identified in a pupil's IEP and provided during the 2003-04 fiscal year by county mental health agencies pursuant to the test claim legislation. (Stats. 2003, ch. 157, item 6110-161-0890, provision 17.) The bill further states in relevant part that the funding shall be considered offsetting revenue pursuant to Government Code section 17556, subdivision (e):

> This funding shall be considered offsetting revenues within the meaning of subdivision (e) of section 17556 of the Government Code for any reimbursable mandated cost claim for provision of these mental health services provided in 2003-04.

The Budget Act of 2004 similarly appropriated $69 million to counties from the federal special education fund to be used exclusively to support mental health services provided during the 2004-05 fiscal year pursuant to the test claim legislation. (Stats. 2004, ch. 208, item 6110-161-0890, provision 10.) The appropriation in 2004 was made as follows:

> Pursuant to legislation enacted in the 2003-04 Regular Session, of the funds appropriated in Schedule (4) of this item, $69,000,000 shall be used exclusively to support mental health services provided during the

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1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

[83] The Deficiency Report is prepared pursuant to Government Code section 17567. Government Code section 17567 requires that in the event the amount appropriated for reimbursement of a state-mandated program is not sufficient to pay all of the claims approved by the Controller, the Controller shall prorate claims in proportion to the dollar amount of approved claims timely filed and on hand at the time of proration. The Controller shall then issue a report of the action to the Department of Finance, the Chairperson of the Joint Legislative Budget Committee, and the Chairperson of the respective committee in each house of the Legislature that considers appropriations. The Deficiency Report is, thus, an official record of a state agency and is properly subject to judicial notice by the court. (*Munoz v. State* (1995) 33 Cal.App.4th 1767, 1773, fn. 2; *Chas L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 85-87.)

2004-05 fiscal year by county mental health agencies pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of the Government Code and that are included within an individualized education program pursuant to the Federal Individuals with Disabilities Education Act (IDEA).

The Budget Act of 2004 does not expressly identify the $69 million as "offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." But the statute does contain language that the appropriation was made "[p]ursuant to legislation enacted in the 2003-04 Regular Session." As indicated above, it is the 2003-04 Budget Bill that contains the language regarding the Legislature's intent that the $69 million is considered offsetting revenue within the meaning of Government Code section 17556, subdivision (e).

The Commission finds that the Legislature intended to fund the costs of this state-mandated program for fiscal year 2004-05 based on the language used by the Legislature that the funds "shall be considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." Under the rules of statutory construction, it is presumed that the Legislature is aware of existing laws and that it enacts new laws in light of the existing law.[84] In this case, the Legislature specifically referred to Government Code section 17556, subdivision (e), when appropriating the $69 million. Thus, it must be presumed that the Legislature was aware of the plain language of Government Code section 17556, subdivision (e), and that its application results in a denial of a test claim.

But, based on public records, the second element under Government Code section 17556, subdivision (e), requiring that the appropriation must be *in an amount sufficient* to fund the cost of the state mandate, has not been satisfied. According to the State Controller's Deficiency Report issued on May 2, 2005, the amounts appropriated for this program in fiscal years 2003-04 and 2004-05 are not sufficient to pay the claims approved by the State Controller's Office. Unpaid claims for fiscal year 2003-04 total $66,915,606. The unpaid claims for fiscal year 2004-05 total $68,958,263.[85]

[84] *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.

[85] The State Controller's Deficiency Report lists the total unpaid claims for the following fiscal years as follows:

1999 and prior Local Government Claims Bills	$ 8,646
2001-02	124,940,258
2002-03	124,871,698
2003-04	66,915,606
2004-05	68,958,263

This finding is further supported by the 2004 report published by Stanford Law School, which states "$69 million represented only approximately half of the total funding necessary to maintain AB 3632 services."[86]

Accordingly, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny this claim. Eligible claimants are, however, required to identify the funds received during fiscal years 2001-02 through 2004-05 as an offset to be deducted from the costs claimed.[87]

Based on the program costs identified by the State Controller's Office, the Commission further finds that counties do incur increased costs mandated by the state pursuant to Government Code section 17514 for this program. However, as more fully discussed below, the state has amended cost-sharing mechanisms for some of the mandated activities that affect the total costs incurred by a county.

B. Increased costs mandated by the state for providing psychotherapy and other mental health services.

In *Handicapped and Disabled Students* (CSM 4282), the Commission determined that the costs incurred for providing psychotherapy or other mental health treatment services were subject to the Short-Doyle Act. Under the Short-Doyle Act, the state paid 90 percent of the total costs of mental health treatment services and the counties paid the remaining 10 percent. Thus, the Commission concluded that counties incurred increased costs mandated by the state in an amount that equaled 10 percent of the total psychotherapy or other mental health treatment costs. In 1993, the Sixth District Court of Appeal agreed with the Commission's conclusion.[88]

In 1991, the Legislature enacted realignment legislation that repealed the Short-Doyle Act and replaced the sections with the Bronzan-McCorquodale Act. (Stats. 1991, ch. 89, §§ 63 and 173.) The realignment legislation became effective on June 30, 1991. The parties have disputed whether the Bronzan-McCorquodale Act keeps the cost-sharing ratio, with the state paying 90 percent and the counties paying 10 percent, for the cost of psychotherapy or other mental health treatment services for special education pupils.

The Commission finds, however, that the Commission does not need to resolve that dispute for purposes of this test claim. Section 38 of Statutes 2002, chapter 1167 (Assem. Bill 2781) prohibits the funding provisions of the Bronzan-McCorquodale Act from affecting the responsibility of the state to fund psychotherapy and other mental health treatment services for handicapped and disabled pupils and requires the state to provide reimbursement to counties for those services for all allowable costs incurred. Section 38 also states the following:

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[86] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20.

[87] Government Code section 17514; California Code of Regulations, title 2, section 1183.1.

[88] *County of Santa Clara v. Commission on State Mandates*, Sixth District Court of Appeal Case No. H009520, filed January 11, 1993 (unpubl.)

> *For reimbursement claims for services delivered in the 2001-02 fiscal year and thereafter*, counties are *not* required to provide any share of those costs or to fund the cost of any part of these services with money received from the Local Revenue Fund [i.e. realignment funds]. (Emphasis added.)

In addition, Senate Bill 1895 (Stats. 2004, ch. 493, § 6) states that realignment funds used by counties for this program "are eligible for reimbursement from the state *for all allowable costs* to fund assessments, psychotherapy, and other mental health services . . . .," and that the finding by the Legislature is "declaratory of existing law." (Emphasis added.)

Therefore, beginning July 1, 2001, the 90 percent-10 percent cost-sharing ratio for the costs incurred for psychotherapy and other mental health treatment services no longer applies. Since the period of reimbursement for purposes of this reconsideration begins July 1, 2001, and section 38 of Statutes 2002, chapter 1167 is still in effect, all of the county costs for psychotherapy or other mental health treatment services are reimbursable, less any applicable offsets that are identified below.

C. Identification of offsets

Reimbursement under article XIII B, section 6 and Government Code section 17514 is required only for the increased costs mandated by the state. As determined by the California Supreme Court, the intent behind section 6 was to prevent the state from forcing new programs on local governments that require an increased expenditure by local government of their limited tax revenues.[89]

Government Code section 7576.5 states the following:

> If funds are appropriated to local educational agencies to support the costs of providing services pursuant to this chapter, the local educational agencies shall transfer those funds to the community mental health services that provide services pursuant to this chapter in order to reduce the local costs of providing these services. These funds shall be used exclusively for programs operated under this chapter and are offsetting revenues in any reimbursable mandate claim relating to special education programs and services.

Government Code section 7576.5 was added by the Legislature in 2003 (Stats. 2003, ch. 227) and became operative and effective on August 11, 2003. Thus, the Commission finds money received by counties pursuant to Government Code section 7576.5 shall be identified as an offset and deducted from the costs claimed.

In addition, any direct payments or categorical funds appropriated by the Legislature to the counties specifically for this program shall be identified as an offset and deducted from the costs claimed. This includes the appropriations made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amount of $12,334,000

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[89] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of San Diego, supra*, 15 Cal.4th at page 81.

and the $69 million appropriations in 2003 and 2004.[90] The appropriations made by the Legislature in 2001 and 2002, under Item 4440-295-0001 (appropriations of $46,944,000 and $1000, respectively), however, were expressly made pursuant to article XIII B, section 6 for purposes of reimbursing the original program approved by the Commission in CSM 4282, *Handicapped and Disabled Students*.[91] Since the Commission does not have jurisdiction in this test claim over the reimbursement of the statutes and regulations pled in the original test claim (CSM 4282), the Commission finds that the 2001 appropriation of $46,944,000 and the 2002 appropriation of $1000 are not required to be identified as an offset and deducted from the costs claimed here.

Furthermore, to the extent counties obtain private insurance proceeds with the consent of a parent for purposes of this program, such proceeds must be identified as an offset and deducted from the costs claimed. Federal law authorizes public agencies to access private insurance proceeds for services provided under the IDEA if the parent consents.[92] Thus, this finding is consistent with the California Supreme Court's decision in *County of Fresno v. State of California*. In the *County of Fresno* case, the court clarified that article XIII B, section 6 requires reimbursement by the state only for those expenses that are recoverable from tax revenues. Reimbursable costs under article XIII B, section 6, do not include reimbursement received from other non-tax sources.[93]

The Commission further finds that, to the extent counties obtain proceeds under the Medi-Cal program from either the state or federal government for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed. Federal law authorizes public agencies, with certain limitations, to use public insurance benefits, such as Medi-Cal, to provide or pay for services required under the IDEA.[94] Federal law limits this authority as follows:

> (2) With regard to services required to provide FAPE [free appropriate public education] to an eligible child under this part, the public agency-
>
> (i) May not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the Act;
>
> (ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2)

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[90] Statutes 2001, chapter 106, items 4440-131-0001; Statutes 2003, chapter 157, item 6110-161-0890, provision 17; Statutes 2004, chapter 208, item 6110-161-0890, provision 10.

[91] Statutes 2001, chapter 106, item 4440-295-0001; Statutes 2002, chapter 379, item 4440-295-0001.

[92] 34 Code of Federal Regulations section 300.142, subdivision (f).

[93] *County of Fresno, supra,* 53 Cal.3d at page 487.

[94] 34 Code of Federal Regulations section 300.142, subdivision (e).

of this section, may pay the cost that the parent would be required to pay;

(iii) May not use a child's benefits under a public insurance program if that use would

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discrimination of insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.[95]

According to the 2004 report published by Stanford Law School, 51.8 percent of the students receiving services under the test claim legislation are Medi-Cal eligible.[96] Thus, the finds to the extent counties obtain proceeds under the Medi-Cal program from the state or federal government for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed.[97]

Finally, Senate Bill 1895 (Stats. 2004, ch. 493, § 6), states that realignment funds under the Bronzan-McCorquodale Act that are used by a county for the Handicapped and Disabled Students program are not required to be deducted from the costs claimed. Section 6 of Senate Bill 1895 adds, as part of the Bronzan-McCorquodale Act, section 5701.6 to the Welfare and Institutions Code, which states in relevant part the following:

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[95] 34 Code of Federal Regulations section 300.142, subdivision (e)(2).

[96] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20.

[97] In comments to the draft staff analysis, the County of Stanislaus states that counties share in the cost of Medi-Cal and, thus, the local Medi-Cal match should not be offset from the costs claimed under this program. The Commission agrees. Under the Medi-Cal program, "the state's share of costs of medical care and services, county administration, and fiscal intermediary services shall be determined pursuant to a plan approved by the Director of Finance and certified to by the director." (Welf. & Inst. Code, § 14158.5.) Thus, this analysis recommends that *to the extent* a county obtains proceeds under the Medi-Cal program from the state or federal government and that such proceeds pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program, such funds are required to be identified as an offset and deducted from the costs claimed.

> Counties may utilize money received from the Local Revenue Fund [realignment] … to fund the costs of any part of those services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code. *If money from the Local Revenue Fund is used by counties for those services, counties are eligible for reimbursement from the state for all allowable costs* to fund assessments, psychotherapy, and other mental health services allowable pursuant to Section 300.24 of Title 34 of the Code of Federal Regulations [IDEA] and required by Chapter 26.5 … of the Government Code. (Emphasis added.)

Senate Bill 1895 was a budget trailer bill to the 2004 budget. However, for reasons provided below, the language in Welfare and Institutions Code section 5701.6, that realignment funds are not required to be identified as an offset and deducted from the costs claimed, is retroactive and applies to the reimbursement period for this test claim, beginning July 1, 2001.

Welfare and Institutions Code section 5701.6, subdivision (b), states that "[t]his section is declaratory of existing law." Although a legislative statement that an act is declaratory of existing law is not binding on the courts, the courts have interpreted such language as legislative intent that the amendment applies to all existing causes of action. The courts have given retroactive effect to such a statute when there is no constitutional objection to its retroactive application. In this regard, the California Supreme Court has stated the following:

> A subsequent expression of the Legislature as the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. [Citation omitted.] Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. [Citation omitted.] Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question of the legislative body enacting the statute. [Citation omitted.] Thus, where a statute provides that it clarifies or declares existing law, "[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of construction, we must give effect to this intention unless there is some constitutional objection thereto." [Citations omitted.][98]

Thus, the Commission finds that realignment funds used by a county for this mandated program are not required to be identified as an offset and deducted from the costs claimed.

Accordingly, the Commission finds that the following revenue and/or proceeds must be identified as offsets and be deducted from the costs claimed:

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[98] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.

- Funds received by a county pursuant to Government Code section 7576.5.
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes the appropriation made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amounts of $12,334,000 (Stats. 2001, ch. 106, item 4440-131-0001), and the $69 million appropriations in 2003 and 2004 (Stats. 2003, ch. 157, item 6110-161-0890, provision 17; Stats. 2004, ch. 208, item 6110-161-0890, provision 10).
- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source.[99]

CONCLUSION

The Commission concludes that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514 for the increased costs in performing the following activities:

1. Interagency Agreements (Cal. Code Regs., tit. 2, § 60030)
    - The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures:
        - Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
        - A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
        - Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)

[99] *County of Fresno, supra,* 53 Cal.3d at page 487; California Code of Regulations, title 2, section 1183.1, subdivision (a)(8).

- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)
- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

2. Referral and Mental Health Assessments (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045)

- Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
- A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
- If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)
- If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
- Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
- Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)

- Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)
- Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)
- Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)
- The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

3. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)
   - Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.
   - Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.
4. Participate as a Member of the Expanded IEP Team When Residential Placement of a Pupil is Recommended (Gov. Code, § 7572.55; Cal Code Regs., tit. 2, § 60100)
   - When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. (Gov. Code, § 7572.55, subd. (c).)
   - The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)
   - The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)
   - When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

5. Case Management Duties for Pupils Placed in Residential Care (Cal. Code Regs., tit. 2, §§ 60100, 60110)

   - Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)

   - When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)

   - Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)

   - Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)

   - Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)

   - Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

   - Evaluate every 90 days the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility every 90 days. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)

   - Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

6. Authorize Payments to Out-Of-Home Residential Care Providers (Cal. Code Regs., tit. 2, § 60200, subd. (e))

    - Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356.

7. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c))

    - The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

    - The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

    - Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

    - Provide individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

    - Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)

    - Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

The Commission further concludes that the following revenue and/or proceeds must be identified as offsets and deducted from the costs claimed:

- Funds received by a county pursuant to Government Code section 7576.5.
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes the appropriation made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amounts of $12,334,000 (Stats. 2001, ch. 106, items 4440-131-0001), and the $69 million appropriations in 2003 and

2004 (Stats. 2003, ch. 157, item 6110-161-0890, provision 17; Stats. 2004, ch. 208, item 6110-161-0890, provision 10).

- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source.

The reimbursement period for this test claim begins July 1, 2001.[100]

Finally, any statutes and or regulations that were pled in this test claim that are not identified above do not constitute a reimbursable state-mandated program.

[100] Government Code section 17557, subdivision (e).