BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 56523 as added by Statutes of 1990, Chapter 959; and Title 5, California Code of Regulations, Sections 3001 and 3052 Filed on September 28, 1994 By the Butte County Office of Education, San Joaquin County Office of Education, and the San Diego Unified School District, Co-Claimants.	No. CSM-4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on September 28, 2000)* *(Corrected on November 23, 2010)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter. This Decision shall become effective on September 29, 2000.

On November 23, 2010, this Statement of Decision was corrected to add the Butte County Office of Education and the San Joaquin County Office of Education to the caption as Co-Claimants.

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Paula Higashi, Executive Director

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STATEMENT OF DECISION

On September 30, 1999, the Commission first heard this test claim and took no action due to a 3-3 tie vote. On November 30, 1999, the Commission directed staff to hold this test claim until the appointment of the seventh Commission member. The seventh Commission member was appointed in April 2000. On August 24, 2000, the Commission heard this test claim during a regularly scheduled hearing. Therefore, the sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects the vote of the Commission.[1] James Cunningham and Frank Terstegge appeared on behalf of the San Diego Unified School District, Gail Cafferata appeared on behalf of the Butte County Office of Education, and Nona Martinez and Dan Stone appeared on behalf of the Department of Finance.

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

The Commission, by a vote of 5-2, approved this test claim.

BACKGROUND AND FINDINGS

The Legislature found that the state has continually sought to provide an appropriate and meaningful educational program in a safe and healthy environment for all children regardless of

[1] Title 2, California Code of Regulations, section 1188.1, subdivision (g).

possible physical, mental, or emotional disabling conditions.[2] In addition, the Legislature declares that teachers of children with special needs require training and guidance that provides positive ways for working successfully with children who have difficulties conforming to acceptable behavior patterns in order to provide an environment in which learning can occur.[3]

The test claim legislation and the implementing regulations involve special education services for children with disabilities. It requires an IEP team[4] to develop a behavioral intervention plan whenever an individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP.[5] The IEP is a written statement developed in a meeting between the school, the teacher, and the parents. The IEP includes the child's current performance, the annual goals and short-term instructional objectives, specific educational services, and the objective criteria and evaluation procedures to determine whether the objectives are being achieved.[6] Special education services include both *special education*, defined as specially designed instruction to meet the unique needs of a child with disabilities, and *related services*, defined as such developmental, corrective, and other supportive services as may be required to assist a child with disabilities to benefit from special education.[7] There is no prior state law that addresses behavioral intervention plans.

The Test Claim Legislation

Education Code section 56523 requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing behavioral intervention plans, which: (1) include the types of behavioral interventions that can be used; (2) require that a pupil's IEP include a description of behavior interventions that meet certain guidelines; and (3) specify standards and guidelines regarding the use of behavior interventions in emergency situations. In response to Education Code section 56523, the California Department of Education adopted sections 3001 and 3052, which detail school districts' obligations concerning the development and implementation of behavioral intervention plans.

The Commission found that Education Code section 56523 only requires the *State* Superintendent of Public Instruction and the *State* Board of Education to adopt regulations.

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[2] Education Code section 56520.

[3] *Ibid*.

[4] Chapter 5.5, Education Code, sections 56520 et seq. Federal law requires that the IEP team's membership include the individual's parents, at least one regular education teacher of the individual, at least one special education teacher, a local agency representative who is qualified to provide or supervise the provision of special instruction to meet the individual's needs, an individual who can interpret the instructional implications of evaluation results (may be a member listed above), at the parent's or agency's discretion, other individuals who have knowledge or special expertise regarding the child, and whenever appropriate, the disabled individual. (*See* Title 20, United States Code, section 1414, subdivision (d)(1)(B); Title 34, Code of Federal Regulations, section 300.344.)

[5] Title 5, California Code of Regulations, section 3001, subdivision (h).

[6] Title 20, United States Code, section 1401, subdivision (a)(19).

[7] Title 20, United States Code, section 1401(a)(17). The IDEA includes specific services in the related services section, but the text does not limit the provision to those services. These services include transportation, early identification and assessment of disabling conditions in children, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except those medical services that are for diagnostic and evaluation purposes only.

Section 56523, on its face, does not impose any requirements upon school districts and therefore, does not impose any reimbursable state mandated activities upon school districts. However, the Commission noted that this conclusion does not resolve the inquiry as to whether the regulations promulgated pursuant to section 56523 constitute reimbursable state mandated activities upon school districts.

The Commission found that in order for a statute, or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory and regulatory language: (1) must direct or obligate an activity or task upon local governmental entities; and (2) the required activity or task must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[8]

The test claim legislation involves the provision of special education to disabled students enrolled in public education. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Moreover, the test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Therefore, the Commission found that public education constitutes a "program" within the meaning of section 6, article XIII B of the California Constitution.[9]

However, the Commission continued the inquiry to determine if the activities are new or impose a higher level of service and if the activities are mandated by the state. The claimants contended that the test claim legislation and regulations impose a higher level of service by requiring school districts to perform *additional* activities not required under state or federal law.

The Test Claim Regulations

Behavioral Intervention Plans Defined

The test claim legislation and regulations define *behavioral intervention* as the systematic implementation of procedures that result in lasting positive changes in an individual's behavior.[10] Specifically, *behavioral interventions* are the design, implementation, and evaluation of instructional and environmental modifications to produce significant improvements in behavior through skill acquisition and the reduction of problematic behavior.[11] Generally, behavioral intervention plans are implemented for pupils with an IEP.

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[8] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[9] *Long Beach Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 172.

[10] Title 5, California Code of Regulations, section 3001, subdivision (f).

[11] *Ibid*.

The Commission noted that the *behavioral intervention plan* is the written document developed by an IEP team and is integrated into an individual's current IEP when an individual exhibits a serious behavior problem that interferes with the implementation of the individual's IEP.[12] *Serious behavior problems* are behaviors that are self-injurious, assaultive, cause serious property damage, or other severe behavior problems that are pervasive and maladaptive for which the instructional or behavioral approaches in the individual's IEP are ineffective.[13]

SELPA Plan Requirements[14]

Under the test claim legislation's implementing regulations, each SELPA must include procedures in its local plan regarding the systematic use of behavioral interventions.[15] These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures.[16] SELPAs must inform all staff members and parents of these procedures whenever a behavioral intervention plan is proposed.[17]

The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[18]

Development of Behavioral Intervention Plans

An IEP team must supervise all assessment, intervention, and evaluation activities related to an individual's behavioral intervention plan.[19] When a behavioral intervention plan is being developed, the IEP team is expanded to include a behavioral intervention case manager who is trained in behavior analysis including positive behavioral interventions.[20] A *behavioral intervention case manager* is a designated certificated school/district/county staff member or other qualified personnel who has been trained in behavior analysis with an emphasis on positive

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[12] *Id*. at subdivision (h).

[13] *Id*. at subdivision (ah).

[14] SELPA is an acronym for "Special Education Local Plan Area." Title 2, California Code of Regulations, section 60010 defines SELPA as "the service area covered by a special education local plan, and its governance structure created under any of the planning options" set forth in the Education Code.

[15] Title 5, California Code of Regulations, section 3052, subdivision (j).

[16] *Id*. at subdivision (j)(2)(A)-(D).

[17] *Id*. at subdivision (j)(1).

[18] The test claim legislation requires nonpublic schools to develop policies consistent with those specified in the emergency intervention section of the regulations. The Commission found that this requirement does not impose any activities upon public school districts. (*See* Title 5, California Code of Regulations, section 3052, subdivision (k).)

[19] *Id.* at section 3052, subdivision (a)(1).

[20] *Ibid*. Federal law does not require the inclusion of a behavioral intervention case manager in the IEP team. (*See* Title 20, United States Code, section 1414, subdivision (d)(1)(B).)

behavioral interventions.[21] The case manager is not intended to be a new staff person, but rather may be an existing staff member with the appropriate training.[22]

The Commission found that the activities of including in the IEP team and training a staff member to become a behavioral intervention case manager represents a new program or higher level of service because school districts were under no obligation to perform behavioral interventions before the adoption of the test claim legislation's implementing regulations.

Functional Analysis Assessments

A behavioral intervention plan is based on a *functional analysis assessment* of the individual.[23] A *functional analysis assessment* includes a description of the maladaptive behavior and replacement positive behavior, goals and objectives, detailed descriptions of the interventions to be used, schedules for recording the frequency of use of the interventions, how the intervention will be phased out, those interventions to be used at home or other non-educational settings, and dates for plan review.[24] A functional analysis assessment occurs when the IEP team finds that the instructional/behavioral approaches specified in an individual's IEP have been ineffective.[25] The assessment must include: (1) systematic observation of the behavior; (2) the immediate antecedent events associated with that behavior; (3) the consequences to determine the function the behavior serves for the individual;
(4) ecological analysis of the settings in which the behavior occurs most frequently; (5) review of records of health and medical factors that may influence behavior; and (6) review history of behavior including effectiveness of past interventions.[26]

The Commission found that following an assessment, a written report of the results is prepared and provided to the parent.[27] The report includes: (1) a description of the nature and severity of the targeted behavior; (2) a description of the antecedents and consequences that maintain the targeted behavior across all settings in which it occurs; (3) a description of the rate of alternative behaviors, their antecedents and consequences; and (4) recommendations for consideration by the IEP team.[28]

The Commission found that all of the activities associated with functional analysis assessments represent a new program or higher level of service because school districts were under no obligation to perform functional analysis assessments before the adoption of the test claim legislation's implementing regulations.

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[21] Title 5, California Code of Regulations, section 3001, subdivision (g).

[22] *Ibid.*; *Id.* at section 3052, subdivision (a).

[23] *Id*. at section 3052, subdivision (a)(3).

[24] *Ibid*.

[25] *Id*. at section 3052, subdivision (b); *See also* section 3001, subdivision (ah), which provides: "serious behavior problems are behaviors that are self-injurious, assaultive, cause serious property damage, or other severe behavior problems that are pervasive and maladaptive for which the instructional or behavioral approaches in the individual's IEP are ineffective."

[26] *Id*. at subdivision (b)(1)(A)-(F).

[27] *Id*. at subdivision (b)(2).

[28] *Id*. at subdivision (b)(2)(A)-(D).

Upon completion of the functional analysis assessment, the IEP team meets to review the results and, if necessary, develop a behavioral intervention plan.[29] The Commission found that this activity represents a new program or higher level of service because school districts were under no obligation to convene an IEP team meeting specifically for review of functional analysis assessments before the adoption of the test claim legislation's implementing regulations.

Implementation of Behavioral Intervention Plans

In developing a behavioral intervention plan, the IEP team may develop positive programming strategies that address the individual's behavior. Positive programming for behavioral intervention may include: (1) altering the identified antecedent event to prevent the occurrence of the behavior (e.g., change the setting); (2) teaching the individual alternative behaviors or adaptive behaviors that produce the same consequences as the inappropriate behavior; and (3) positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behavior.[30]

The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Once an IEP team has developed and/or modified an individual's IEP to include a behavioral intervention plan, responses to the targeted behavior shall include, but are not limited to: (1) ignoring the behavior, but not the individual; (2) verbal, or verbal and physical redirection; (3) the provision of feedback (e.g., "you are talking too loudly");
(4) the message of the behavior is acknowledged (e.g., "you are having a hard time with your work"); or (5) a brief, physical prompt to interrupt or prevent aggression, self-abuse, or property destruction.[31]

The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Once a behavioral intervention plan is implemented, it is evaluated to measure the frequency, duration, and intensity of the targeted behavior identified in the functional analysis assessment.[32] The teacher, the behavioral intervention case manager, parent or care provider, and others, as

[29] *Id*. at subdivision (c); although subdivision (c) provides that IEP teams shall develop a behavioral intervention plan *if necessary*, section 3001, subdivision (h), defines a behavioral intervention plan as a written document that *is developed* when an individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP. Accordingly, the Commission found that school districts *must* develop a behavioral intervention plan once an individual exhibits a serious behavior problem.

[30] *Id*. at subdivision (d).

[31] *Id*. at subdivision (e).

[32] *Id*. at subdivision (f)(1)-(3).

appropriate, review the evaluation at scheduled intervals determined by the IEP team.[33] If the IEP team determines changes are necessary, the teacher and behavioral intervention case manager conduct additional functional analysis assessments, and based on the outcomes, propose changes to the plan.[34]

The Commission found that these activities represent a new program or higher level of service because school districts were under no obligation to evaluate the effectiveness of behavioral intervention plans or to modify them based on an additional functional analysis assessment before the adoption of the test claim legislation's implementing regulations.

Modifications and Contingent Behavioral Intervention Plans

Minor modifications to the behavioral intervention plan can be made by the behavioral intervention case manager and the parent or parent representative.[35] In addition, the IEP team may develop the behavioral intervention plan in such a way as to allow for alterations or changes to the plan without reconvening the IEP team.[36]

The Commission found that the activities of the behavioral intervention case manager and the IEP team regarding development and modification of behavioral intervention plans represent a new program or higher level of service because school districts were under no obligation to implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Development and Implementation of Emergency Interventions

In instances where the individual's behavior is unpredictable or spontaneous and poses a clear and present danger of serious bodily harm, an emergency intervention approved by the SELPA may be used.[37] School districts must notify the individual's parent and residential care provider within one school day whenever an emergency intervention is used or serious property damage occurs.[38]

Anytime an emergency intervention is used, schools must complete a "Behavioral Emergency Report," place the Report in the individual's file, and immediately forward it to a responsible administrator who must review the Report.[39] The Report includes: (1) the name and age of the individual; (2) the setting/location of the incident; (3) name of staff or others involved; (4) a description of the emergency intervention used and whether the individual currently has a behavioral intervention plan; and (5) injuries sustained by the individual or others.[40]

Anytime a "Behavioral Emergency Report" is written regarding an individual who does not have a behavioral intervention plan, the designated and responsible administrator must, within two

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[33] *Id*. at subdivision (f)(4).

[34] *Id*. at subdivision (f)(5).

[35] *Id*. at subdivision (g).

[36] *Id*. at subdivision (h).

[37] *Id*. at subdivision (i) and (i)(2).

[38] *Id*. at subdivision (i)(5).

[39] *Ibid*.; *Id.* at subdivision (i)(6).

[40] *Id*. at subdivision (i)(5)(A)-(E).

days, convene an IEP team meeting to review the Report, determine the necessity of a functional analysis assessment, and the necessity for an interim behavioral intervention plan.[41]

Anytime a "Behavioral Emergency Report" is written regarding an incident involving previously unseen serious behavior problems or where a previously designed intervention is ineffective for an individual who has a behavioral intervention plan, the IEP team should meet to review the Report and determine if the incident requires the need to modify the plan.[42]

SELPAs are required to collect data on "Behavioral Emergency Reports" and annually report the number of Reports to the California Department of Education and the Advisory Committee on Special Education.[43]

The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Prohibited Behavioral Intervention Plans

Interventions that may cause physical harm, deprivation of sleep or food, humiliation or ridicule, or deprivation of one or more senses are prohibited.[44] The use of restrictive devices that limit mobility, locked seclusion, or inadequate supervision is also prohibited.[45]

The Commission found that the activity of informing school district personnel of the restrictions represents a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Due Process Hearings

The provisions of the test claim legislation that relate to functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the due process hearing procedures specified in the Education Code.[46] Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.

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[41] *Id*. at subdivision (i)(7).

[42] *Id*. at subdivision (i)(8). Although the subdivision provides that the IEP team *should*, not *shall* or *must*, review the incident and current IEP, the Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop or implement behavioral intervention plans before the enactment of the test claim legislation and implementing regulations.

[43] *Id*. at subdivision (i)(9).

[44] *Id*. at subdivision (l).

[45] *Ibid*.

[46] *Id*. at subdivision (m). Education Code section 56501 et seq. details the state's due process procedures, due process hearings, mediation conferences, parent's access to school records, rights of parties, and the use of attorneys at due process hearings.

Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[47]

The Commission found that the test claim legislation's implementing regulations impose a new program upon school districts. However, the Commission noted that the inquiry must continue to determine whether behavioral intervention plans required by the regulations impose costs mandated by the state.

The Commission noted that in order for the test claim legislation to impose a reimbursable program under section 6, article XIII B of the California Constitution, the newly required activities must be state mandated.[48] Government Code section 17556, subdivision (c), provides that the Commission shall not find costs mandated by the state if the Commission finds that the test claim legislation implements a federal law or regulation and resulted in costs mandated by the federal government.[49] Therefore, if the Commission finds that federal law requires the development and implementation of behavioral intervention plans, then the Commission should deny this test claim.

DOF argued that the test claim legislation implements federal requirements as detailed in the IDEA. Specifically, DOF contended that the test claim legislation allows for the provision of a free appropriate public education and related services as required under federal statutes and case law.

Federal Special Education Law and Behavioral Management Plans[50]

The Education for All Handicapped Children Act (Act) of 1975 is the backbone of the federal statutory provisions governing special education.[51] The 1975 Act begins with findings that the special education needs of children with disabilities are not being fully met. Thus, the purpose of the Act is to assist state and local educational efforts in order to assure equal protection of the law and to assure that children with disabilities have available special education and related services designed to meet their unique needs.[52]

The Act also lists substantive definitions, which both clarify the meaning of terms and set out some of the obligations the Act creates. For example, the Act defines *free appropriate public education* as special education and related services that: (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the state

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[47] To be discussed below in Issue 2.

[48] *Lucia Mar Unified School Dist*. v. *Honig* (1988) 44 Cal.3d 830, 835.

[49] Government Code section 17513 provides: "'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district . . . in order to comply with the requirements of a federal statute or regulation. . . ."; In *Hayes* v. *Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593, 1594, the appellate court stated, "the determination whether certain costs were imposed upon a local agency by a federal mandate must focus on the local agency which is ultimately forced to bear the costs and how these costs came to be imposed upon that agency."

[50] The background on federal special education law comes from, Special Education Law and Litigation Treatise, by Mark C. Weber.

[51] In 1990, Congress changed the title of the Act to the "Individuals with Disabilities Education Act."

[52] Title 20, United States Code, section 1400.

educational agency; (3) include an appropriate preschool, elementary, or secondary school education in the state involved; and (4) are provided in conformity with the individualized education program required under federal law.

The Act continues with administration and funding provisions, which include state eligibility requirements. In order to receive federal funding, the state must have a policy that assures all children with disabilities, who meet the age requirements, the right to a free appropriate public education.[53]

Moreover, the eligibility and plan requirements require a system of procedural hearing rights for parents of children with disabilities. These rights include prior written notice when the designation, evaluation, or placement of a child is initiated or changed. They also include the right of children whose parents are not known or available, or who are wards of the state, to have surrogate parents acting in their place. Furthermore, parents or guardians have the right to examine educational records and receive an independent evaluation of the child.[54]

Are Behavioral Intervention Plans Required Under the Federal Statutory Scheme?

The Commission found that the issue of whether behavioral intervention plans are a federal or state mandate relates to whether they can be defined as a *related service* under federal law. Federal law defines *related services* as supportive services required to assist a child with a disability to benefit from special education. Such supportive services include psychological services.[55] The Commission noted that the issue of whether behavioral intervention plans are a related service centers on whether they can be defined as a *psychological service*.

Before the U.S. Department of Education's March 11, 1999, amendments to the implementing regulations for the IDEA,[56] federal law defined *psychological services* as: (1) administering psychological and educational tests, and other assessment procedures; (2) interpreting assessment results; (3) obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (4) consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and (5) planning and managing a program of psychological services, including psychological counseling for children and parents.[57]

The Commission found three reasons why behavioral intervention plans, as defined by the test claim legislation and implementing regulations, were not a *psychological service* and therefore not a *related service* under the IDEA's implementing regulations as they existed before the U.S. Department of Education's March 11, 1999, amendments.

First, the U.S. Department of Education recently amended the definition of *related services* to *include* behavioral interventions in the implementing regulations for the IDEA.[58] Specifically, the *psychological services* definition, as amended, now provides that such services include

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[53] *Id*. at section 1412(1).

[54] *Id*. at section 1415(b)(1)(A).

[55] Title 20, United States Code, section 1401(a)(18); Title 34, Code of Federal Regulations, section 300.24.

[56] The Commission addresses the March 11, 1999, amendments below.

[57] Title 34, Code of Federal Regulations, section 300.24(b)(9).

[58] Title 34, Code of Federal Regulations, section 300.24.

assisting in developing positive behavioral intervention strategies.[59] The fact that the U.S. Department of Education recently *added* behavior interventions to the related service section of the IDEA's implementing regulations is evidence that behavior interventions were not previously considered a related service or psychological service.

Second, under California law, in order to perform behavioral intervention tasks a person is not required to be a licensed psychologist as defined in the Business and Professions Code.[60] Rather, the California Department of Education provides that an individual wishing to develop behavioral intervention plans need only receive training in behavior analysis with an emphasis on positive behavioral interventions.[61] Thus, California's behavioral intervention plans would not qualify under the federal definition of psychological services.

Third, California Department of Consumer Affairs' Counsel to the Board of Psychology and Board of Behavioral Science concluded behavior analysts do not engage in the practice of psychology or the practice of marriage, family, and child counseling. Thus, Consumer Affairs' Counsel concluded that behavioral analysts do not engage in diagnosing mental disorders, but focus on external environmental factors that influence behavior.

Accordingly, the Commission found that behavioral intervention plans were not a *psychological service* or a *related service* under the federal statutory scheme before the March 11, 1999, U.S. Department of Education amendments to the implementing regulations for the IDEA. Further evidence that behavioral intervention plans were not part of federal law when the test claim legislation and implementing regulations were enacted is the fact that Congress made several attempts before finally *adding* such plans to the federal statutory scheme.

In 1995, Congress was unsuccessful in its attempt to amend the IDEA to include provisions relating to behavior management plans. Both the House and Senate introduced bills that were unsuccessful in adding a new section to the IDEA with the following language:

> "In developing an IEP, the IEP team shall . . . in the case of a child whose behavior impedes his or her learning or that of others, consider strategies, including *behavior management plans*, to address that behavior." (Emphasis added.)

In 1996, Congress again was unsuccessful in its attempt to amend the IDEA to include a new section with the following language:

> "An individualized education program team shall develop the IEP. . . . In developing such IEP, the IEP Team . . . shall . . . in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate,

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[59] Title 34, Code of Federal Regulations, section 300.24(b)(9)(vi) as amended on March 11, 1999, by the U.S. Department of Education provides: "(b) *Individual terms defined.* The terms used in this definition are defined as follows: . . . (9) *Psychological services* includes—. . . (vi) Assisting in developing positive behavioral intervention strategies."

[60] Under Business and Professions Code section 2914, an individual wishing to provide psychological services must possess a doctorate in psychology, have two years of supervised professional experience, pass a specialized examination, complete training regarding the detection of alcohol or other chemical abuse, and complete coursework in spousal or partner abuse assessment.

[61] Title 5, California Code of Regulations, section 3052, subdivision (a)(1)-(2).

strategies, including *positive behavior management interventions and strategies* to help the child behave in an appropriate and responsible manner conducive to learning." (Emphasis added.)

On June 4, 1997, Congress successfully amended the IDEA, which states in pertinent part:[62]

"(d) Individualized education programs

"....

"(3) Development of IEP

"....

"(B) Consideration of special factors – the IEP Team shall—

"(i) in the case of a child whose behavior impedes his or her learning or that of others, *consider*, when appropriate, strategies, *including positive behavioral interventions*, strategies, and supports to address that behavior."[63] (Emphasis added.)

The claimants contended that the test claim legislation and implementing regulations were not enacted to implement the IDEA Amendments of 1997. The test claim legislation was enacted in 1990 and the regulations in 1993. Thus, it is not possible to conclude that the test claim legislation and implementing regulations were adopted to implement federal requirements that did not exist at the time.

DOF contended that Congress did not view the recent amendments to the IDEA as a new extension or expansion of children's rights. Rather, DOF took the position that these amendments were meant to clarify federal policies already in place.[64] Thus, DOF concluded that behavioral interventions are not new to federal law and that such interventions have always been required under the IDEA. DOF maintained that the central purpose of the IDEA is to ensure that disabled children receive a free appropriate public education and, since public education is defined to include such related services necessary to achieve this goal, interventions that are necessary to ensure the education of a disabled child are federally mandated under the IDEA.

The Commission found that, although the IDEA paints the special education landscape with broad strokes, the specificity in the test claim legislation and implementing regulations do not fit onto the canvas. The state *requires* school districts to engage in functional analysis assessments and implement behavioral intervention plans whenever a disabled child exhibits serious behavior problems. Under the IDEA, if a disabled child exhibits such behavior, school districts are not tied to one response. Before, and even after, the IDEA Amendments of 1997, school districts are free to consider interventions as a possible approach, but are not required to use them. Furthermore, the Commission found that consideration of strategies, such as behavioral intervention plans, were not an express part of federal law before the enactment of the test claim

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[62] Title 20, United States Code, section 1414.

[63] *Id*. at section 1414(d)(3)(B)(i).

[64] In the Department of Finance's May 6, 1999, response, DOF quoted the following from the House of Representatives Report on the IDEA Amendments of 1997: "It is the Committee's intent that this set of practical and balanced guidelines reinforce and clarify the understanding of Federal policy on this matter, which is currently found in statute, case law, regulations, and informal policy guidance."

legislation and implementing regulations because Congress recently amended the IDEA to *include* consideration, when appropriate, of such strategies in the federal statutory scheme.

Based on the foregoing, the Commission found that behavioral intervention plans are not required under the federal statutory scheme. However, the question remains whether the recent amendments to the IDEA's implementing regulations by the U.S. Department of Education may create a federal mandate to develop and implement behavioral intervention plans.

Are Behavioral Intervention Plans Required Under the U.S. Department of Education's Current Regulations?

Current language in the United States Code only requires an IEP team to *consider* strategies such as positive behavioral interventions when developing a child's IEP. However, regulations recently adopted by the U.S. Department of Education may *require* the inclusion of behavioral intervention strategies in a child's IEP.

The recently amended version of Title 34, Code of Federal Regulations, section 300.346, provides that IEP teams are required to *consider* behavioral interventions in instances where the child's behavior impedes his or her learning or that of others. If, upon considering the use of an intervention, the IEP team determines that intervention is necessary to ensure that the child receives a free appropriate public education, the IEP team *must* include a statement to that effect in the child's IEP.[65] Prior federal regulations did not require the inclusion of behavioral intervention plans in a child's IEP. The U.S. Department of Education adopted the amended regulations on May 11, 1999.[66]

The claimants contended that the U.S. Department of Education's regulations do not require the use of behavioral interventions under the IDEA. The regulations provide that an IEP team shall *consider* interventions, but they are not *required* to develop or implement behavioral intervention plans. Furthermore, section 300.346, subdivision (c), only requires a statement concerning interventions to be placed in a child's IEP, *if* the IEP team deems it necessary. Federal law gives IEP teams the leeway to develop IEPs as they see fit. Federal law does not *require* the development and implementation of behavioral intervention plans.

DOF contended that the new regulations only underscore the point that the U.S. Department of Education is charged with providing explanation, elaboration, and interpretation of the IDEA and the states are responsible for filling in the details. It was DOF's contention that the foregoing amendments to the IDEA's implementing regulations are nothing more than clarifying amendments to ensure special education children are receiving a free appropriate public

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[65] Title 34, Code of Federal Regulations, section 300.346 provides in pertinent part: "(a) . . . (2) Consideration of Special Factors. The IEP team also shall—(i) In the case of a child whose behavior impeded his or her learning or that of others, *consider, if appropriate,* strategies, *including positive behavioral intervention,* strategies, and supports to address that behavior. . . . (c) Statement in IEP. *If,* in considering the special factors described in paragraphs (a)(1) and (2) of this section, *the IEP team determines* that a child needs a particular device or service (including an *intervention,* accommodation, or other program modification) in order for the child to receive [a free appropriate public education], the IEP team *must include a statement to that effect in the child's IEP. . . .*" (Emphasis added.)

[66] Compliance with the new regulations is not required until either the fiscal year 1998 funds that are unobligated by states and school districts become carryover funds (October 1, 1999) or, if earlier, the state receives fiscal year 1999 funding (expected to be available for obligation to states July 1, 1999.)

education in the least restrictive environment. Therefore, DOF concluded that the test claim legislation and implementing regulations are designed to fill in the interstices of the IDEA to achieve the purposes and policies of the Act. And, as such, the test claim legislation and implementing regulations must be considered part and parcel of the federal mandate and not reimbursable as a state mandate.

The Commission found that the U.S. Department of Education's regulations do not require the development and implementation of behavioral intervention plans. The plain language of section 300.346 provides that IEP teams shall *consider* using intervention strategies *if* appropriate. However, there is no language requiring teams to engage in such consideration. Furthermore, it cannot be said that state law is filling in the interstices of federal law. The Legislature has created a new program, one that was not described or outlined in federal law before the adoption of the test claim legislation's implementing regulations. Although behavioral intervention plans may aid the provision of a free appropriate public education to certain disabled children, so may other techniques or services, which IEP teams have at their disposal. The test claim legislation and implementing regulations take a step beyond federal law by *requiring* the use of a technique which, under federal law, IEP teams have *discretion* to use.

DOF further contended that "Assuming that there are in fact several alternative approaches to compliance with a federally mandated program, the fact that a given state, in implementing the mandate, selects only one or two such compliance options changes nothing: *in making that choice, obviously, the state is doing nothing more than adopting a reasonable and appropriate means of complying with the federal mandate*." (Emphasis in original.)

The Commission found that nothing in federal law requires school districts to develop and implement behavioral intervention plans. Under federal law the bottom line is simple; school districts must provide disabled children a free and appropriate public education in the least restrictive environment. If an individual exhibits serious behavior problems, federal law provides a wide array of strategies to address such behavioral problems. However, state law requires the use of one strategy, behavioral intervention plans.

Accordingly, the Commission found that the IDEA's implementing regulations do not require IEP teams to develop and implement behavioral intervention plans.

Cedar Rapids Community School District v. *Garret F.*

DOF cited *Cedar Rapids Community School District* v. *Garret F.* as support for its contention that behavioral intervention plans are required under federal law. Specifically, DOF contended that *Cedar Rapids* stands for the proposition that behavioral intervention plans help guarantee that students receive a free appropriate public education. Accordingly, it concluded that the test claim legislation and implementing regulations are not state mandated, but rather flow from requirements found in the IDEA, its purposes, and case law. The Commission disagreed.

On March 4, 1999, the United States Supreme Court decided *Cedar Rapids Community School District* v. *Garret F.*[67] The issue centered on whether the definition of "related services" in Title 20, United States Code, section 1401, subdivision (a)(17), requires a public school district to provide a ventilator-dependent student with certain nursing services during school hours. When Garret was four years old, his spinal column was severed in a motorcycle accident. As a

[67] *Cedar Rapids Community School Dist.* v. *Garret F.* (1999) 119 S.Ct. 992.

result of the accident, Garret was paralyzed from the neck down and is ventilator dependent, requires assistance with urinary bladder catheterization at least once a day, suctioning of his tracheotomy tube, getting into a reclining position for five minutes of every hour, and ambu-bagging when his ventilator is checked for proper operation. At the time the decision was entered, Garret was a sophomore in the Cedar Rapids Community School District.

The Supreme Court developed a two-part test for determining whether a particular activity falls under the "related service" portion of the IDEA in *Irving Independent School Dist*. v. *Tatro*.[68] Under this test, it must first be determined whether the requested services are included within the phrase "supportive services;" and second it must be determined whether the services are excluded as "medical services."

In *Cedar Rapids*, the District argued that the cost of providing a full-time nurse to attend to Garret's needs while in school was too costly. Therefore, the District's main contention focused on the second part of the test; whether the services Garret requires are excluded as medical services. Specifically, it was contended that Garret's needs fall under the "medical services" exclusion detailed in *Tatro*. In *Tatro*, the Court concluded that the term "medical services" referred only to services that *must* be performed by a physician. The *Tatro* court found that a specific form of health care (clean intermittent catherization) that is often, though not always, performed by a nurse is not an excluded medical service.[69] Therefore, the *Cedar Rapids* court found that it the phrase "medical services" under the IDEA does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as allowable expenses for an income tax medical deduction.

The *Cedar Rapids* court concluded that under the statute, the Court's precedent in *Tatro*, and in accordance with the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

DOF concluded that "from the *Cedar Rapids* case we learn that federal courts interpret the rights of disabled students very broadly under the IDEA, even when such an interpretation requires elaborate substantive services and imposes extremely burdensome costs on local school districts." The Commission agreed with this conclusion. However, the Commission found that acceptance of this conclusion does not support DOF's contention that *Cedar Rapids* stands for the proposition that federal case law requires school districts to develop and implement behavioral intervention plans.

Case Law in Other Jurisdictions

DOF contended that "it is clear that [the following] cases, though not entirely on point, shed important light on the questions here presented and support the Department's argument that the challenged state laws here are reasonably designed to ensure compliance with the federal mandate."[70] The Commission agreed. However, as discussed below, the Commission found that the following cases cited by DOF do not answer the question of whether federal case law mandates that the state require the development and implementation of behavioral intervention plans under certain circumstances.

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[68] *Irving Independent School Dist*. v. *Tatro* (1984) 468 U.S. 883.

[69] *Cedar Rapids Community School Dist.* v. *Garret F.* (1999) 119 S.Ct. 992.

[70] *Ibid*.

In *Chris D.* v. *Montgomery County Board of Education,*[71] the court addressed Chris' need for a free appropriate public education and the school board's inability to provide such an education. For Chris to receive an appropriate education it was determined that he needed training in behavior management and anger control. The court found that Chris' behavior deteriorated to a point where intensive behavior management techniques were required due to the school board's poor response to Chris' special educational needs.

In *Oberti* v. *Board of Education,*[72] the court focused on the IDEA requirements regarding the education of disabled children in regular classroom settings. The court held that the IDEA requires disabled children to receive a free appropriate public education in the least restrictive environment. Regarding the pupil's behavior problems, the court found that the informal behavior plan developed by the school district was inadequate because it did not include the appropriate supplementary aids and services required under the IDEA. The court found that the school district failed to provide the pupil a free appropriate public education in the least restrictive environment because the district failed to provide the necessary supplementary aids and services that would allow the pupil to be educated in a regular classroom setting.

In *Cremeans* v. *Fairland Local School District*[73], the district determined that a pupil, a severely disabled autistic child, could not benefit from education in a regular classroom setting. The IEP drafted for this child stated he needed 24 hours-a-day, 7 days-a-week in-home education and behavior management training. The court held that the school district failed to provide a free appropriate public education for the child because it failed to implement the IEP.

The Commission found the foregoing cases illustrate the point that federal case law recognizes there are a variety of strategies to ensure that disabled children receive a free appropriate public education in the least restrictive environment. These strategies range from behavior management as in *Chris D.*, to 24 hours-a-day, 7 days-a-week in-home education as in *Cremeans*. Accordingly, the Commission found that federal case law does not mandate that the state require school districts to develop and implement behavioral intervention plans whenever an individual exhibits serious behavior problems.

Is the Due Process Hearing Requirement Detailed in the Test Claim Legislation's Implementing Regulations Required Under Federal Law?

The Commission found that the test claim legislation's implementing regulations provide that functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the procedural protections and due process hearing procedures specified in the Education Code for special education.[74]

The 14th Amendment to the Federal Constitution provides that no state may deprive any person of life, liberty, or property without due process of law. The due process provisions of

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[71] *Chris D.* v. *Montgomery County Board of Education* (M.D. Ala. 1990) 743 F.Supp. 1524.

[72] *Oberti* v. *Board of Education* (D.N.J. 1992) 801 F.Supp. 1392.

[73] *Cremeans* v. *Fairland Local School District* (Ohio App. 4th Dist.) 91 Ohio App.3d 668.

[74] Title 5, California Code of Regulations, section 3052, subdivision (m). Education Code section 56501 et seq. details the state's due process procedures, due process hearings, mediation conferences, parent's access to school records, rights of parties, and the use of attorneys at due process hearings.

California's Constitution[75] are identical in purpose and in scope with the due process clause of the 14th Amendment. The IDEA also establishes procedures for according due process to parents and guardians of a disabled child.[76]

However, as the Commission previously noted, the IDEA does not require the development and implementation of behavioral intervention plans – the state does. Therefore, although due process hearings are required under federal law and the IDEA, the provision for due process hearings relating to behavioral intervention plans remains a state mandate. In other words, the Commission found that these hearings would not be required but-for the test claim legislation's implementing regulations.

Therefore, the Commission found that providing due process hearings regarding a child subject to a functional analysis assessment or developing and implementing a behavioral intervention plan represent reimbursable state mandated activities.

Does Government Code Section 17556, Subdivision (e), Preclude the Commission from Finding that the Test Claim Legislation and Implementing Regulations Impose Costs upon School Districts?

DOF contended that:

> "The State of California has already allocated billions of dollars to fund its Special Education program, the vast majority of which is dictated by the IDEA and other federal mandates. Most of this state funding, . . . $1.4 billion, . . . was available to locals to spend on any costs they may have incurred as a result of the state behavioral intervention requirements challenged here. Accordingly, this state revenue, which was manifestly intended to fund the Special Education program, more than offsets any such costs, and leaves the claimants with an untenable, and entirely, moot, test claim."

The Commission recognized that the claimants did not have the opportunity to address DOF's section 17556, subdivision (e) argument.

Section 17556, subdivision (e), sets forth two tests for determining whether the Commission shall find that there are no costs mandated by the state. Under the first test, the Commission shall find that there are no costs mandated by the state if the statute or executive order provides for offsetting savings that result in *no net costs*. The second test of subdivision (e), provides that the Commission shall find there are no costs mandated by the state if the statute or executive order includes additional revenue *specifically intended* to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The Commission found that DOF oversimplifies the application of section 17556, subdivision (e), by concluding that if any funding has been provided for special education that school districts are not entitled to reimbursement for the behavioral intervention plans test claim, even if the Commission finds that the test claim imposes a reimbursable state mandate. The fact that an agency or school district has received funding is only the beginning of the analysis. The

[75] California Constitution, Article I, sections 7, 15.

[76] *See* Title 20, United States Code, section 1415; Title 34, Code of Federal Regulations, sections 300.482-300.487, 300.500-300.515.

Commission must then determine if either of the two tests of section 17556, subdivision (e), apply.

(1) Does the Statute or Executive Order Provide for Offsetting Savings that Result in No Net Costs?

As stated above, under the first test of Government Code section 17556, subdivision (e), the Commission shall not find costs mandated by the state if the statute or executive order provides for *offsetting savings which result in no net costs* to local agencies or school districts.

DOF did not contend that the test claim legislation provides for offsetting savings that result in no net costs to the claimants. Nor did the Commission found any language in either the test claim legislation or implementing regulations that specifically provides for *offsetting savings which result in no net costs* to the claimants. Accordingly, the Commission found that there is no evidence that the test claim legislation provides for *offsetting savings, which result in no net costs* to the claimants. However, the analysis must continue to determine whether the second test of section 17556, subdivision (e), applies.

(2) Does the Statute or Executive Order Include Additional Revenue Specifically Intended to Fund the Costs of the State Mandate in an Amount Sufficient to Fund the Cost of the State Mandate?

As stated above, the second test of Government Code section 17556, subdivision (e), provides that the Commission shall not find costs mandated by the state if the statute or executive order includes additional revenue *specifically intended* to fund the cost of the state mandate in an amount sufficient to fund the cost of the state mandate.

From the plain language of subdivision (e), the Commission looked at the test claim legislation and implementing regulations to determine if there are funds specifically intended to fund the mandate. Based on the documentation provided by the parties and the Commission's review of the test claim legislation, the Commission found that although the state has provided substantial funding for special education, school districts have not received funds *specifically intended* to fund the costs of the state mandate.

CONCLUSION

The Commission concluded that the test claim legislation and implementing regulations impose a reimbursable state mandated program upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514 for the following activities:

- SELPA plan requirements. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subd. (j).)
- Development and implementation of behavioral intervention plans. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subds. (a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subds. (b), (c), and (f).)

- Modifications and contingent behavioral intervention plans. (Cal. Code of Regs., tit. 2, § 3052, subds. (g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subd. (i).)
- Prohibited behavioral intervention plans. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subd. (l).)
- Due process hearings. (Cal. Code of Regs., tit. 2, § 3052, subd. (m).)