

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 37252, 37252.5, 48070, and 48070.5; Statutes of 1981, Chapter 100; Statutes of 1982, Chapter 1388; Statutes of 1983, Chapter 498; Statutes of 1990, Chapter 1263; Statutes of 1998, Chapters 742 and 743;

Filed on June 21, 1999;

By San Diego Unified School District,
Claimant.

No. 98-TC-19

Pupil Promotion and Retention

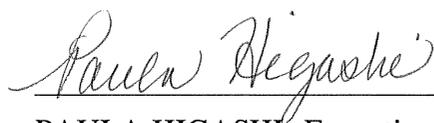
STATEMENT OF DECISION PURSUANT
TO GOVERNMENT CODE SECTION
17500 ET SEQ. ; TITLE 2, CALIFORNIA
CODE OF REGULATIONS, DIVISION 2,
CHAPTER 2.5, ARTICLE 7

(Adopted on May 23, 2002)

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 May 24, 2002.



PAULA HIGASHI, Executive Director

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STATEMENT OF DECISION

The Commission on State Mandates (commission) heard and decided this test claim on April 25, 2002 during a regularly scheduled hearing. Arthur M. Palkowitz appeared for claimant, San Diego Unified School District. Carol Berg appeared on behalf of Education Mandated Cost Network. Ramon de la Guardia and Matt Aguilera appeared on behalf of the Department of Finance.

At the hearing testimony was given, the test claim was submitted, and the vote was taken.

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 approved this test claim by a 5-1 vote.

BACKGROUND AND FINDINGS

Claimant, San Diego Unified School District, submitted a test claim alleging a reimbursable state mandate for school districts to adopt and implement policies regarding the promotion and retention of pupils between specified grade levels, and to offer supplemental instruction, including summer school, to certain students as part of the adopted policies. The claim arises from enactments or amendments to Education Code sections 37252, 37252.5, 48070 and 48070.5 by Statutes of 1981, chapter 100, Statutes of 1982, chapter 1388, Statutes of 1983, chapter 498, Statutes of 1990, chapter 1263 and Statutes of 1998, chapters 742 and 743.

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.' In

¹ ***Long Beach Unified School Dist. v. State of California (1990) 225*** Cal.App.3d 155, 174.

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. 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.² To determine if the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with 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 impose costs mandated by the state.³

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?⁴

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a “program. ” In *County of Los Angeles v. State of California*, the California Supreme Court defined the word “program” within the meaning of article XIII B, section 6 as one 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? The court has held that only one of these findings is necessary to trigger the applicability of article XIII B, section 6.⁶

The commission finds that the test claim legislation constitutes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. First, it constitutes a program that carries out the governmental function of providing a service to the public, to the extent that the test claim legislation requires school districts to engage in new activities related to pupil retention and supplemental instruction. The courts have held that education is a peculiarly governmental function administered by local agencies as a service to the public.⁷

² *County of Los Angeles v. State of California (1987)* 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

³ Government Code section 17514.

⁴ Article XIII B, section 6 of the California Constitution provides: “Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

(a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975. ”

⁵ *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

⁶ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

⁷ *Long Beach Unified School Dist., supra*, 225 Cal.App.3d 155, 172 states, “although numerous private schools exist, education in our society is considered to be a peculiarly governmental function . . . administered by local agencies to provide service to the public. ”

The test claim legislation also satisfies the second test that triggers article XIII B, section 6, to the extent that the test claim legislation requires school districts to engage in pupil retention and supplemental instructional activities solely applicable to public school administration. Accordingly, the commission finds that activities associated with school district pupil promotion and retention policies and supplemental instruction constitute a “program” and, thus, is subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a new program or higher level of service within an existing program upon school districts within the meaning of article XIII B, section 6 of the California Constitution, and “costs mandated by the state” within the meaning of Government Code section 17514?

The claimant contends that the test claim legislation imposes a new program or higher level of service upon school districts by requiring specific new activities related to pupil promotion and retention, and related supplemental instruction, including summer school. The individual issues addressed by this claim meet the test of imposing unique requirements that do not apply generally to all residents and entities in the state. The analysis for finding a reimbursable state mandate generally hinges on whether the legislation requires a school district to engage in a new activity or higher level of service when compared to prior law. Further, reimbursement under article XIII B, section 6 for any new activities is required only if the activities impose “costs mandated by the state.” Government Code section 17514 defines “costs mandated by the state” as any increased cost a local agency is required to incur as a result of test claim legislation that mandates a new program or higher level of service.

DOF, in its comments dated March 26, 2002, raises a threshold issue related to costs, asserting,

when a claim is submitted for multiple statutory mandates, the claimant must establish a prima facie case for each statutory mandate before the Commission determines there is a mandate. In this case, San Diego has only filed a conclusionary claim that “School districts have incurred or will incur costs in excess of \$200 to perform the activities incurred in Section B above. ” (SD Claim, p. 7). This is insufficient to establish that costs have been incurred for each of the four statutes that have been alleged to impose mandates.

The commission’s regulations require that “[a]ny test claim filed with the commission must involve alleged mandated costs exceeding two hundred dollars (\$200.)”⁸ The statutory reference to the two hundred dollar requirement is found in Government Code section 17564, which requires that “[n]o claim shall be made pursuant to Sections 1755 1 and 17561, nor shall any payment be made on claims submitted pursuant to Sections 1755 1 and 17561, unless these claims exceed two hundred dollars (\$200). ” The statutory requirement for claims to exceed two hundred dollars is required for each test claim on a new program or higher level of

⁸ California Code of Regulations, title 2, section 1183, subdivision (h).

service,' and test claim allegations are routinely based upon multiple statutes. The commission finds that the claimant has met the burden for filing a test claim on a new program or higher level of service by providing "[a] statement that actual and/or estimated costs which result from the *alleged mandate* exceed two hundred dollars (\$200)."¹⁰ Thus, the two hundred dollar requirement is for an alleged "new program or higher level of service," pursuant to article XIII B, section 6 of the California Constitution, as described in a test claim filing; there is no requirement that the "alleged mandate" be based on an individual statute, subdivision, section, paragraph, or sentence of law.

Education Code sections 37252, 37252.5, 48070 and 48070.5, are analyzed below for whether they impose mandatory new activities upon school districts related to summer school or the promotion and retention of students, pursuant to article XIII B, section 6, of the California Constitution, and costs mandated by the state, pursuant to Government Code section 17514.

Promotion and Retention Policies

Education Code section 48070. This section, as added by Statutes of 1983, chapter 498¹¹ provides that "the governing board of each school district and each county superintendent of schools shall adopt policies regarding pupil promotion and retention. A pupil shall be promoted or retained only as provided in such adopted policies."

Claimant asserts that no statute or executive order in effect prior to the enactment of the test claim statutes required school districts to adopt or implement a promotion or retention policy. DOF, in its test claim response of July 28, 1999, argues,

With regard to the adoption of pupil promotion and retention policies, we believe that any mandated activity would be minor and incremental in nature. . . . [I]t is commonly known that districts did retain some pupils and promote others prior to any state requirement to do so. The fact that school districts previously retained or promoted students clearly establishes the prior existence of school district policies governing promotion and retention. Therefore, any mandate with regard to promotion or retention would necessarily be offset by the policies already in existence in schools and school districts and be, at most, incremental in nature.

Government Code section 17565 requires that if "a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the . . . school district for those costs incurred after the operative date of the mandate." For the purpose of determining whether the test claim legislation imposes a new program or higher level of service, it is irrelevant whether a school district previously engaged in a particular activity, unless it can be shown that they engaged in the activity while complying with prior law. Due to the 1983 operative date of the legislation, it is likely that school districts

⁹ In addition, Government Code section 17564 requires the two hundred dollar minimum for each reimbursement claim filed with the State Controller, and for each incorrect reduction claim filed with the commission.

¹⁰ California Code of Regulations, title 2, section 1183, subdivision (e)(S).

¹¹ Operative July 28, 1983.

completed the initial one-time activity of developing and adopting policies regarding pupil promotion and retention pursuant to Education Code section 48070 prior to the reimbursement period for this test claim, which begins no earlier than July 1, 1997. In comments dated March 26, 2002, DOF asserts that “San Diego must establish that it adopted these policies within the period of reimbursement . . . the claim for reimbursement should not be entertained unless San Diego can establish it performed mandated activities within the period of reimbursement. ” This argument is one that is true for all claimants at the reimbursement stage. This does not prevent the commission from finding that a new program or higher level of service was created by the test claim legislation. If school districts do not have activities or costs resulting from Education Code section 48070 during the reimbursement period, this will be adequately addressed when they file reimbursement claims with the Office of the State Controller.

Therefore, the commission finds that a new program or higher level of service is imposed upon school districts, and costs mandated by the state, for complying with the following activities:

- The governing board of each school district and each county superintendent of schools shall adopt policies regarding pupil promotion and retention. (One-time activity .)
- The school district shall promote or retain any pupil only as provided in such adopted policies.

Education Code section 48070.5. This section, as added by Statutes of 1998, chapter 742¹² provides that,

(a) In addition to the policy adopted pursuant to Section 48070, the governing board of each school district and each county board of education shall, in those applicable grade levels, approve a policy regarding the promotion and retention of pupils between the following grades:

- (1) Between second grade and third grade.
- (2) Between third grade and fourth grade.
- (3) Between fourth and fifth grade.
- (4) Between the end of the intermediate grades and the beginning of middle school grades which typically occurs between sixth grade and seventh grade, but may vary depending upon the grade configuration of the school or school district.
- (5) Between the end of the middle school grades and the beginning of high school which typically occurs between eighth grade and ninth grade, but may vary depending upon the grade configuration of the school or school district.

¹² Operative January 1, 1999.

(b) The policy shall provide for the identification of pupils who should be retained and who are at risk of being retained in their current grade level on the basis of either of the following:

(1) The results of the assessments administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 and the minimum levels of proficiency recommended by the State Board of Education pursuant to Section 60648.

(2) The pupil's grades and other indicators of academic achievement designated by the district.

(c) The policy shall base the identification of pupils pursuant to subdivision (b) at the grade levels identified pursuant to paragraph (1) and (2) of subdivision (a) primarily on the basis of the pupil's level of proficiency in reading. The policy shall base the identification of pupils pursuant to subdivision (b) at the grade levels identified pursuant to paragraphs (3) through (5) of subdivision (a) on the basis of the pupil's level of proficiency in reading, English language arts, and mathematics.

(d)(1) If either measure identified in paragraph (1) or (2) of subdivision (b) identifies that a pupil is performing below the minimum standard for promotion, the pupil shall be retained in his or her current grade level unless the pupil's regular classroom teacher determines in writing that retention is not the appropriate intervention for the pupil's academic deficiencies. This written determination shall specify the reasons that retention is not appropriate for the pupil and shall include recommendations for interventions other than retention that in the opinion of the teacher are necessary to assist the pupil to attain acceptable levels of academic achievement. If the teacher's recommendation to promote is contingent upon the pupil's participation in a summer school or interim session remediation program, the pupil's academic performance shall be reassessed at the end of the remediation program, and the decision to retain or promote the pupil shall be reevaluated at that time. The teacher's evaluation shall be provided to and discussed with the pupil's parent or guardian and the school principal before any final determination of pupil retention or promotion.

(2) If the pupil does not have a single regular classroom teacher, the policy adopted by the school district shall specify the teacher or teachers responsible for the promotion or retention decision.

(e) The policy shall provide for parental notification when a pupil is identified as being at risk of retention. This notice shall be provided as early in the school year as practicable. The policy shall provide a pupil's parent or guardian the opportunity to consult with the teacher or teachers responsible for the decision to promote or retain the pupil.

(f) The policy shall provide a process whereby the decision of the teacher to retain or promote a pupil may be appealed. If an appeal is made, the burden

shall be on the appealing party to show why the decision of the teacher should be overruled.

(g) The policy shall provide that pupils who are at-risk of being retained in their current grade be identified as early in the school year, and as early in their school careers, as practicable.

(h) The policy shall indicate the manner in which opportunities for remedial instruction will be provided to pupils who are recommended for retention or who are identified as being at risk for retention.

(i) The policy adopted pursuant to this section shall be adopted at a public meeting of the governing board of the school district.

(j) Nothing in this section shall be construed to prohibit the retention of a pupil not included in grade levels identified pursuant to subdivision (a), or for reasons other than those specified in subdivision (b), if such retention is determined to be appropriate for that pupil. Nothing in this section shall be construed to prohibit a governing board from adopting promotion and retention policies that exceed the criteria established in this section.

DOF, in its test claim response of July 28, 1999, argues that Education Code section 48070.5 was merely enacted because “school districts were not carrying out the intent of” Education Code section 48070, as enacted by Statutes of 1983, chapter 498, therefore, “no real basis for reimbursement exists. ” DOF then cites to legislative intent found in section 2 of Statutes of 1983, chapter 498. This language begins,

The Legislature declares its intent to encourage continued reform and improvement of California’s elementary and secondary schools through a series of reforms, incentives and strategies which can provide for the educational, personal and career needs of every pupil. The Legislature believes that our schools should:

...

(d) Provide appropriate and meaningful instruction to meet the variety of future and career goals of students.

(e) Assure that pupils achieve academic proficiency in the essential areas of skill and knowledge.

(f) Identify and respond to the individual educational needs of pupils . . .

DOF concludes,

This statement of legislative intent clearly establishes an expectation that schools would appropriately educate pupils to the point of academic proficiency and take action to ensure that the individual educational needs of pupils were met. This can be reasonably interpreted to mean schools were expected to retain pupils if retention were necessary in order to assure that an individual pupil achieved academic proficiency.

DOF asserts, the fact “ [t]hat school districts were not meeting the reasonable expectations of the People and the intent of the Legislature with regard to educating children and were thus provided additional statutory instruction on the methods of meeting this existing expectation and intent are not grounds for the awarding of a mandate claim,” for the subsequent enactment of Education Code section 48070.5. The commission disagrees.

First, the precatory language found in the statement of legislative intent does not provide any grounds for a mandate determination when the language of the statute itself is clear on its face. As described above, Education Code section 48070, as added by Statutes of 1983, chapter 498,¹³ provides that “the governing board of each school district and each county superintendent of schools shall adopt policies regarding pupil promotion and retention. A pupil shall be promoted or retained only as provided in such adopted policies. ” This clearly required districts to adopt pupil promotion and retention policies, but left much to the discretion of individual school districts. The Legislature did not specify guidelines in statute, leaving the policy-making to individual school districts.

Second, even if the legislative intent language is applicable to Education Code section 48070, by enacting Education Code section 48070.5, the Legislature created a new program or higher level of service by requiring the adoption of a *new* pupil promotion and retention policy, for specific grade levels, pursuant to specific criteria, “*in addition* to the policy adopted pursuant to Section 48070. ”¹⁴ Also, the legislation requires that certain procedures be included in the policies, including a process for parental appeals. All of these activities are new when compared to the prior law regarding pupil promotion and retention policies. Therefore, the commission finds that a new program or higher level of service is imposed upon school districts, and costs mandated by the state, for complying with the following activities:

- The governing board of each school district and each county board of education shall, in those applicable grade levels, approve a policy regarding the promotion and retention of pupils between Second grade and third grade; third grade and fourth grade; fourth and fifth grade; the end of the intermediate grades and the beginning of middle school grades which typically occurs between sixth grade and seventh grade; the end of the middle school grades and the beginning of high school which typically occurs between eighth grade and ninth grade. The policy shall provide for the identification of pupils who should be retained and who are at risk of being retained in their current grade level on the criteria specified in Education Code section 48070.5. (One-time activity .)
- If a pupil is performing below the minimum standard for promotion, the pupil shall be retained in his or her current grade level, unless the pupil’s regular classroom teacher determines, in writing, that retention is not the appropriate intervention for the pupil’s academic deficiencies.

¹³ This legislation is part of the test claim allegations.

¹⁴ Emphasis added, first line of Education Code section 48070.5.

- ⌘ If the teacher's recommendation to promote is contingent upon the pupil's participation in a summer school or interim session remediation program, reassess the pupil's academic performance at the end of the remediation program, and reevaluate the decision to retain or promote the pupil.
- ⌘ Provide and discuss the teacher's evaluation with the pupil's parent or guardian and the school principal before any final determination of pupil retention or promotion.
- Provide parental notification when a pupil is identified as being at risk of retention. Provide a pupil's parent or guardian the opportunity to consult with the teacher or teachers responsible for the decision to promote or retain the pupil.
- ⌘ Provide a process for appeal of teacher's decision to retain or promote a pupil.
- ⌘ Adopt the pupil promotion and retention policy at a public meeting of the governing board of the school district. (One-time activity.)

Summer School and Supplemental Instruction

Education Code section 37252. This section, as added by Statutes of 1981, chapter 100, and amended by Statutes of 1982, chapter 1388, and Statutes of 1990, chapter 1263¹⁵ provided that "the governing board of each district maintaining any or all of grades 7 through 12, inclusive, shall offer summer school instructional programs for pupils . . . who were assessed as not meeting the district's adopted standards of proficiency in basic skills pursuant to . . . Section 51215.¹⁶ For purposes of this section, a pupil shall be considered to be enrolled in a grade immediately upon completion of the preceding grade. The summer school programs shall also be offered to pupils enrolled in grade twelve the prior school year after the completion of grade twelve, and upon the successful completion of the summer program, these pupils may be reassessed for purposes of meeting the district's standards of proficiency."

Claimant asserts that this is the first time that summer school was required of school districts. This claim is supported by *California Teachers Association v. Board of Education* (1980) 109 Cal. App. 3d 738, 744-745. In this case, the complaint alleged that students in the district were being deprived of a constitutional and statutory right to a district-operated free summer school, but the court found that:

¹⁵ Based upon the filing date of this test claim, the reimbursement period begins no earlier than July 1, 1997. Education Code section 37252 was significantly amended by Statutes of 1999, 1st Extraordinary Session, chapter 1, operative January 1, 2000; Statutes of 1999, chapter 78, operative January 1, 2000; and Statutes of 2000, chapter 72, effective July 5, 2000, and chapter 135. No test claim has been filed on the new legislation as it impacts Education Code section 37252. The reimbursement period for activities associated with Education Code section 37252, as last amended by Statutes of 1990, chapter 1263, terminates with the amendments operative January 1, 2000.

¹⁶ Education Code section 51215 provided the criteria for the adoption of standards of proficiency in basic skills by the governing board of each school district maintaining a junior or senior high school. This section was repealed by Statutes of 1999, 1st Extraordinary Session, chapter 1, operative January 1, 2000.

There is no statutory or constitutional support for any contention that summer school classes or programs constitute a mandatory requirement for California school districts. Article IX of the California Constitution does mandate that the Legislature shall provide for a system of free common schools to be operated in each district at least six months in every year. ... Pursuant to the constitutional mandate, the Legislature has also authorized summer schools at the elementary level (Ed. Code, §§ 51730, 51731), as well as high school level (Ed. Code, § 37250). All of these sections provide that the governing body of a district *may* establish and maintain such summer schools. No mandatory requirement of summer school is found in any of these sections, and it must therefore be concluded that the establishment and maintenance of summer school classes and programs is only permissive rather than mandatory.

Statutes of 1981, chapter 100, enacted Education Code section 37252, required for the first time that school districts offering grades 7 through 12 “*shall* offer summer school,” to students who are not achieving basic proficiency skills, as defined by the district’s standards adopted pursuant to Education Code section 51215, prior to the repeal of section 51215 by Statutes of 1999, 1st Extraordinary Session, chapter 1. Thus, the provision of summer school to students in grades 7 through 12, who are deficient in basic proficiency skills, is a new program or higher level of service required of school districts, operative January 1, 1982, and terminating January 1, 2000.

DOF, in its test claim response of July 28, 1999, argues that there are no costs mandated by the state, because “state funding for this program is uncapped,” and,

In addition, to the extent that a school district maintaining a high school incurred any additional costs for the provision of summer school, these costs could be offset to the extent that the school district already offered summer school pursuant to former Education Code Section 5554, as it read on December 31, 1974, which authorized the provision of summer school.

The commission finds these arguments are inadequate to preclude a finding of a new program or higher level of service, and costs mandated by the state. Addressing the latter issue first, additional costs for the provision of summer school cannot be “offset” by the amount a district was previously expending pursuant to voluntary program now that the program is mandatory.¹⁷ As described in *California Teachers Association*, above, summer school was a discretionary program prior to the operation of Education Code section 37252. As discussed regarding pupil promotion and retention policies, Government Code section 17565 requires that if “a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the . . . school district for those costs incurred after the operative date of the mandate. ” Despite the suggestion by DOF, the law does not allow an offset of new, mandatory costs, by those costs previously incurred voluntarily.

¹⁷ Former Education Code section 5554, later renumbered section 37250 by Statutes of 1976, chapter 1010, provided that “The governing board of a district maintaining one or more high schools *may* maintain a summer school at any of such high schools during the period between the close of one academic year and the beginning of the succeeding academic year . . . ” (Emphasis added.)

DOF's other argument is that summer school is already fully funded ("uncapped") by the state and "school districts are reimbursed for their costs based on participation in their districts." Thus, DOF states, Education Code section 37252 does not have a "basis for reimbursement under the mandate claim process since a separate avenue for reimbursement already exists. "

DOF cites to Statutes of 1998, chapter 942, which amended Education Code section 42239, regarding summer school funding. Prior law capped a school district's section 37252 summer school funding at five percent of the district's total enrollment for the prior fiscal year, multiplied by 120 hours, multiplied by the hourly rate of reimbursement. Following amendment by Statutes of 1998, chapter 942, although an increase in funding was provided, a ten percent cap is in place on total reimbursement for pupil attendance in summer school. In response to DOF's argument that summer school funding is uncapped, claimant argues that the district

provided declaration evidence to support the fact that no funding was provided to pay the costs of most of the reimbursable activities and that, with respect to the other activities, school districts will incur costs in excess of any funding provided by the state. The Commission should also take notice of the fact that the appropriation formulas . . . set caps on both the dollar amount and on the percentages of pupils for which school districts can seek funding.

DOF, in its comments of March 26, 2002, again discusses budget appropriations for remedial and core academic summer school programs, arguing that the burden is on the claimant to prove, at the test claim phase, that the funding was "insufficient to meet the costs of the mandate. "

Claimant, in its response of April 1, 2002, correctly argues that this is an issue for the parameters and guidelines :

The revenue can, in the usual course of the mandate process, be addressed by the parameters and guidelines and by the annual claiming process whereby claimants are required by law to report their cost of implementing the mandate from which they must deduct other reimbursements and funds received. To the extent these allocations are made available, and continue to be made available each year (which is not guaranteed), those allocations will reduce reimbursable mandate costs, but does not preclude an initial determination of whether a reimbursable mandate exists.

In order for the commission to find an exception to costs mandated by the state at the test claim phase pursuant to Government Code section 17556, subdivision (e), *the test claim statute* must provide 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. Here, the funding cited by DOF was not part of the test claim legislation, therefore, the commission finds that Government Code section 17556, subdivision (e) does not apply here. However, "All proposed parameters and guidelines must allow for an offset of any other reimbursement received from the federal or state governments. " (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(8).) Thus any funds received for the costs of providing summer school to pupils who were assessed as not meeting

the district's adopted standards of proficiency in basic skills, must be accounted for in the parameters and guidelines and in any reimbursement claims.

The commission finds that a new program or higher level of service is imposed upon school districts, and costs mandated by the state, for complying with the following activity during the reimbursement period:

- The governing board of each district maintaining any or all of grades 7 through 12, shall offer summer school instructional programs for pupils who were assessed as not meeting the district's adopted standards of proficiency in basic skills pursuant to Education Code section 51215. The summer school programs shall also be offered to pupils enrolled in grade 12 the prior school year, who were assessed as not meeting the district's adopted standards of proficiency in basic skills.

Education Code section 37252.5. This section, as added by Statutes of 1998, chapter 743,¹⁸ provides that "(a) The governing board of each district maintaining any or all of grades 2 to 9, inclusive, shall offer programs of direct, systematic, and intensive supplemental instruction to pupils enrolled in grades 2 to 9, inclusive, who have been retained pursuant to Education Code section 48070.5. . . A school district may require a student who has been retained to participate in supplemental instruction programs. Notwithstanding the requirements of this section, the school district shall provide a mechanism for a parent or guardian to decline to enroll his or her child in the program. Attendance in supplemental instructional programs shall not be compulsory within the meaning of Section 48200. "

Subdivision (b) provides that the governing board of each district offering any of grades two through six may offer supplemental instruction to pupils who have been identified as being at risk of retention pursuant to Education Code section 48070.5. An order of priority is specified for which at risk students shall be provided supplemental instruction.

In addition, subdivision (e) provides that each school district shall use results from tests administered under the Standardized Testing and Reporting Program or other evaluative criteria to identify eligible pupils. Subdivision (f) provides that "An intensive remedial program in reading or writing shall, as needed, include instruction in phoneme awareness, systematic explicit phonics and decoding, word attack skills, spelling and vocabulary, explicit instruction of reading comprehension, writing, and study skills."

Further, subdivision (g) requires that "Each school district shall seek the active involvement of parents and classroom teachers in the development and implementation of supplemental instruction programs provided pursuant to this section. "

Claimant asserts that no statute or executive order in effect prior to the enactment of the test claim statutes required school districts to offer supplemental instruction. The commission finds

¹⁸ Operative September 23, 1998. This section was further amended by Statutes of 1999, chapter 78, operative July 7, 1999, and Statutes of 2000, chapter 72, operative July 5, 2000. These amendments are not included in this test claim, however, the activities identified are still required following the amendments. This section includes an automatic repealer, operative January 1, 2003.

that subdivision (a) uses mandatory language to *require* school districts to offer supplemental instruction to students who have been retained pursuant to the district's retention and promotion policies, while subdivision (b) uses discretionary language to *permit* school districts to "offer supplemental instruction to pupils who have been identified as being at risk of retention," to the extent funds are available.

Claimant asserts, however, that subdivision (b), "requires school districts to offer programs of direct, systematic, and intensive supplemental instruction to pupil enrolled in grades 2 to 6, inclusive, with low scores in mathematics, reading or written expression." Despite the discretionary use of the word "may" in the statute, claimant argues that "school districts have no true choice but to offer the programs, " in order to comply with the legislative intent that pupils be provided with supplemental instruction sufficient to assist them in attaining expected levels of academic achievement. The commission disagrees, and finds that the legislative intent is exacted by the use of the word "may," and by providing a list of categories of students who should receive priority for any supplemental services offered by the school district. If subdivision (b) created a mandatory program, there would be no need for the Legislature to specify which at risk students shall be allocated priority for any supplemental services offered by the district.

Finally, the latter subdivisions of Education Code section 37252.5, which specify how funding is to be allocated for each of the programs, further indicate that subdivision (b) is a discretionary program. Regarding programs offered pursuant to subdivision (a), which contains mandatory language, versus any programs provided pursuant to subdivision (b), which contains discretionary language, Education Code section 37252.5, subdivision (i) states, "Any funding provided for the purpose of this section shall first be used by the district to provide services required pursuant to subdivision (a)." The commission finds that this language sufficiently describes the legislative intent that supplemental instruction for at risk students, pursuant to subdivision (b), is only required to the extent that funding is available beyond what is required to fund the mandatory program of supplemental instruction for students who have been retained, described in subdivision (a).

DOF, in its test claim response of July 28, 1999, argues that even the program provided for in subdivision (a) is discretionary, due to the language "A school district *may* require a student who has been retained to participate in supplemental instruction programs." The commission finds that this sentence is taken out of context for this argument. The subdivision begins, "The governing board of each district maintaining any or all of grades 2 to 9, inclusive, *shall* offer programs of direct, systematic, and intensive supplemental instruction to pupils enrolled in grades 2 to 9, inclusive, who have been retained . . ." The "may" language in this instance refers to Education Code section 48200, which establishes compulsory full-time education for persons 6 through 18. The district "may *require*" that a student enroll in supplemental instruction, but a student is not compelled to enroll in supplemental instruction as part of the requirement to attend school full-time. Education Code section 37252.5 provides that a student who is "retained pursuant to Education Code section 48070.5, " shall be offered supplemental instruction, but parents shall be given the opportunity to decline to enroll their child in the program offered. Thus, it is mandatory that school districts offer supplemental instruction to

all pupils in grades 2 to 9 who have been retained pursuant to 48070.5, but parents may refuse to have their child participate.

DOF asserts that Statutes of 1998, chapter 942,

appropriated \$105 million specifically to fund the cost of remedial instruction pursuant to the policies adopted pursuant to (Statutes of 1998, chapters 742 and 743 .) In addition Item 6 1 10- 104-000 1 of the Budget Act of 1999 provides over \$309 million for summer school and remedial programs, \$108 million of which is specifically provided to fund remedial instruction pursuant to Section 37252.5..

Government Code section 17556, subdivision (e), provides that there are no costs mandated by the state if the test claim statute provides offsetting savings or 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. Statutes of 1998, chapter 942, is not the test claim legislation imposing the program. The test claim statute, Statutes of 1998, chapter 743, does not contain any appropriation. Accordingly, Government Code section 17556, subdivision (e) cannot apply; however, “All proposed parameters and guidelines must allow for an offset of any other reimbursement received from the federal or state governments.”¹⁹ Thus any funds received for the costs of providing supplemental instruction to pupils retained pursuant to Education Code section 48070.5, must be accounted for in the parameters and guidelines and in any reimbursement claims. Based upon all of the above, the commission finds that a new program or higher level of service is imposed upon school districts, and costs mandated by the state, for complying with the following activities:

- ⌘ The governing board of each district maintaining any or all of grades 2 to 9, inclusive, shall offer programs of direct, systematic, and intensive supplemental instruction to pupils enrolled in grades 2 to 9, inclusive, who have been retained pursuant to Education Code section 48070.5.
- ⌘ The school district shall provide a mechanism for a parent or guardian to decline to enroll his or her child in the supplemental instruction program.
- ⌘ Each school district shall seek the active involvement of parents and classroom teachers in the development and implementation of supplemental instruction programs provided pursuant to Education Code section 37252.5.

¹⁹ California Code of Regulations, title 2, section 1183.1, subdivision (a)(8).

Conclusion

The commission concludes that Education Code sections 37252, 37252.5, 48070, and 48070.5 require new activities, as specified, which constitute new programs or higher levels of service for school districts within the meaning of section 6, article XIII B of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514. Accordingly, the commission approves this test claim for the following new activities :

- The governing board of each district maintaining any or all of grades 7 through 12, shall offer summer school instructional programs for pupils who were assessed as not meeting the district's adopted standards of proficiency in basic skills pursuant to Education Code section 51215. The summer school programs shall also be offered to pupils enrolled in grade 12 the prior school year, who were assessed as not meeting the district's adopted standards of proficiency in basic skills. (Ed. Code, § 37252 .)²⁰
- The governing board of each district maintaining any or all of grades 2 to 9, inclusive, shall offer programs of direct, systematic, and intensive supplemental instruction to pupils enrolled in grades 2 to 9, inclusive, who have been retained pursuant to Education Code section 48070.5. (Ed. Code, § 37252.5 .)²¹
- The school district shall provide a mechanism for a parent or guardian to decline to enroll his or her child in the supplemental instruction program. (Ed. Code, § 37252.5 .)
- Each school district shall seek the active involvement of parents and classroom teachers in the development and implementation of supplemental instruction programs provided pursuant to Education Code section 37252.5. (Ed. Code, § 37252.5.)
- The governing board of each school district and each county superintendent of schools shall adopt policies regarding pupil promotion and retention. (One-time activity.) (Ed. Code, § 48070.)²²
- The school district shall promote or retain any pupil only as provided in such adopted policies. (Ed. Code, § 48070.)
- The governing board of each school district and each county board of education shall, in those applicable grade levels, approve a policy regarding the promotion

²⁰ As added or amended by Statutes of 1981, chapter 100, and amended by Statutes of 1982, chapter 1388, and Statutes of 1990, chapter 1263. The reimbursement period for this activity concludes upon the operation of the substantive amendments of Statutes of 1999, 1st Extraordinary Session, chapter 1, operative January 1, 2000.

²¹ As added by Statutes of 1998, chapter 743, operative September 23, 1998. This section was amended by Statutes of 1999, chapter 78, operative July 7, 1999, and Statutes of 2000, chapter 72, operative July 5, 2000, however, the activities identified are still required following the amendments. This section includes an automatic repealer, operative January 1, 2003.

²² As added by Statutes of 1983, chapter 498, operative July 28, 1983.

and retention of pupils between second grade and third grade; third grade and fourth grade; fourth and fifth grade; the end of the intermediate grades and the beginning of middle school grades which typically occurs between sixth grade and seventh grade; the end of the middle school grades and the beginning of high school which typically occurs between eighth grade and ninth grade. The policy shall provide for the identification of pupils who should be retained and who are at risk of being retained in their current grade level on the criteria specified in Education Code section 48070.5. (One-time activity.) (Ed. Code, § 48070.5.)²³

- ⚡ If a pupil is performing below the minimum standard for promotion, the pupil shall be retained in his or her current grade level, unless the pupil's regular classroom teacher determines, in writing, that retention is not the appropriate intervention for the pupil's academic deficiencies. (Ed. Code, § 48070.5 .)
- ⚡ If the teacher's recommendation to promote is contingent upon the pupil's participation in a summer school or interim session remediation program, reassess the pupil's academic performance at the end of the remediation program, and reevaluate the decision to retain or promote the pupil. (Ed. Code, § 48070.5.)
- ⚡ Provide and discuss the teacher's evaluation with the pupil's parent or guardian and the school principal before any final determination of pupil retention or promotion. (Ed. Code, § 48070.5.)
- ⚡ Provide parental notification when a pupil is identified as being at risk of retention. Provide a pupil's parent or guardian the opportunity to consult with the teacher or teachers responsible for the decision to promote or retain the pupil. (Ed. Code, § 48070.5.)
- Provide a process for appeal of teacher's decision to retain or promote a pupil. (Ed. Code, § 48070.5.)
- ⚡ Adopt the pupil promotion and retention policy at a public meeting of the governing board of the school district. (One-time activity.) (Ed. Code, § 48070.5.)

Claimant and interested party, Mandated Cost Systems, Inc., each submitted comments regarding the reimbursement of teacher time. Claimant states,

Based on past decisions teachers' time has not been reimbursable if the activity [occurred] during normal classroom hours. Since it is foreseeable teachers will be involved in the activities related to this mandate the decision should include reimbursement of teachers' time incurred during non-normal classroom hours (after school, Saturday, summer .)

²³ As added by Statutes of 1998, chapter 742, operative January 1, 1999.

The commission finds teacher time is reimbursable for the provision of summer school and other supplemental instruction pursuant to Education Code sections 37252 and 37252.5, which by its very nature occurs outside of the normal school schedule.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 958 14.

May 24, 2002, I served the:

Adopted Statement of Decision

Pupil Promotion and Retention, 98-TC- 19
San Diego Unified School District, Claimant
Education Code Sections 37252, 37252.5, 48070, and 48070.5
Statutes of 1998, Chapters 742 and 743, et al.

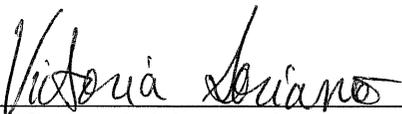
by placing a true copy thereof in an envelope addressed to:

Mr. Arthur M. Palkowitz
Legislative Mandates Specialist
San Diego Unified School District
4100 Normal Street, Room 2148
San Diego, CA 92 103

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 24, 2002, at Sacramento, California.



VICTORIA SORIANO