

ITEM 2
PROPOSED MINUTES
COMMISSION ON STATE MANDATES

State Capitol, Room 447
Sacramento, California
October 30, 2009

Present: Member Tom Sheehy, Chairperson
 Representative of the Director of the Department of Finance
 Member Richard Chivaro, Vice Chairperson
 Representative of the State Controller
 Member Francisco Lujano
 Representative of the State Treasurer
 Member Anne Schmidt
 Representative of the Director of the Office of Planning and Research
 Member Sarah Olsen
 Public Member
 Member J. Steven Worthley
 County Supervisor
 Member Paul Glaab
 City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 10:31 a.m. Executive Director Paula Higashi called the roll.

INFORMATIONAL HEARING AND STAFF REPORT (action)

Item 1 Bureau of State Audits Report, *State Mandates: Operational and Structural Changes Have Yielded Limited Improvements in Expediting Processes and Controlling Costs and Liabilities*

Nancy Patton, Assistant Executive Director presented this report. Ms. Patton stated that the Bureau of State Audits (Bureau) released its follow-up audit report on the mandates process. The Bureau made recommendations to the Commission, the State Controller's Office, and the Department of Finance. The Commission is required to respond to the report within 60 days, six months and one year of the issuance dated and must include a work plan that shows implementation of the recommendations.

The Commission staff recommends the Commission approve the proposed plan for implementing the audit recommendations. Parties were represented as follows: Karen McKenna and Jim Sandberg-Larsen from the Bureau of State Audits; Carla Castaneda from the Department of Finance and Ginny Brummels and Jim Spano from the State Controller's Office.

Ms. McKenna, Bureau of State Audits, stated that the audit released on October 15, 2009 was a follow-up audit to reports that were issued on state mandates in 2002 and 2003. Ms. McKenna highlighted a few of the key issues that were related to the Commission. The Bureau found that although the status of work backlogs had decreased from 2003, there was still a significant backlog of test claims. There were 81 test claims in backlog as of June 2009 and 61 of those were from 2003 or earlier. Also, the average time for completing the test claim process through

the adoption of a statewide cost estimate increased to more than eight years in fiscal year 2008-2009.

The backlog of incorrect reduction claims had grown from 77 in December 2003 to 146 in June 2009 for a total of \$57 million. To the extent that there are unresolved incorrect reduction claims, it creates uncertainty about what constitutes a proper claim. The Bureau recommended that the Commission work with Finance to seek additional resources to reduce its backlogs. In doing so, the staff should prioritize workload and seek efficiencies to the extent possible.

Ms. McKenna stated that the Bureau also examined recently established alternative processes, such as the joint process, where local entities and Finance come up with a reimbursement formula. The processes have the potential to relieve the Commission of some of its workload. However, these alternatives have been infrequently used. They have only been available for less than two years and the state has done little to publicize them.

The Bureau recommended that the Commission and Finance inform local entities of these processes by putting information about the alternatives readily available on their web sites. The Bureau also recommended that the Commission add additional information in its semiannual Report to the Legislature about the status of mandates being developed under alternative processes.

Additionally, the Bureau found that a recent court case had taken away the Legislature's ability to direct the Commission to reconsider its decisions in light of law changes. However, a process that allows mandate determinations to be revised when appropriate is necessary. In light of this, Assembly Budget Subcommittee No. 4 directed Finance, the Legislative Analyst's Office (LAO) and Commission staff to form a working group to come up with a reconsideration process. The Bureau recommended that those efforts continue.

Ms. McKenna stated that now is the time to take another look at various mandate reform ideas that were previously recommended by the LAO, Finance and the Center for Collaborative Policy especially in light of the fact that the liability for state mandates in June 2008 was \$2.6 billion. For example, one recommendation was the use of pilot programs which offer the chance to test programs before they are implemented statewide to get an idea of the costs.

The Bureau established a high-risk audit program where the State Auditor will issue a report listing areas that are significant to the state in terms of challenges. The Bureau has added state mandates to the high-risk audit program and will be periodically reporting to the Legislature.

Chairperson Sheehy asked Commission staff how much the backlog that was cited by the Bureau has been reduced. Ms. Patton responded that in 2003 the backlog was 103 test claims. It is now 51 test claims.

Chairperson Sheehy stated that the backlog has been reduced by over 50 percent. He expressed concern that the audit report did not recognize that the Commission had been successful in reducing the backlog by fifty percent.

Chairperson Sheehy also asked Ms. McKenna if she was aware that the state had over \$60 billion in General Fund deficits when the Bureau made the recommendation that the Commission work with Finance to get more staff.

Ms. McKenna stated that the Bureau understood the challenges and that this issue was discussed at length with Commission staff. The Bureau also understood that the Commission did not have full control over the resources and must work with Finance. The Bureau hopes to shed some visibility on the issue so the Legislature can see the importance of it.

Chairperson Sheehy added that neither Finance nor the Governor makes the final decision on resources. The Legislature appropriates money and approves new positions in the state budget.

Ms. McKenna stated that the Bureau has taken great effort to include the perspective of Commission staff that the resources are not expected from Finance. Nevertheless, the Bureau put the information in the report so the Legislature knows why the backlogs are occurring.

Member Worthley asked if the Bureau recommendation is that all legislation involving a mandate first be submitted as a pilot project before it becomes a general rule or a general law applicable to the whole state.

Ms. McKenna clarified that the recommendations on page 52 of the report are not Bureau recommendations. They are different issues that have been brought up by others that the Bureau thinks merit further discussion.

Carla Castaneda, Department of Finance, stated that the audit report does provide one recommendation for Finance which is to provide additional information on the AB 1222 processes. Finance has met with local agencies to gauge interest. Finance does have regular meetings with local agencies to discuss potential reasonable reimbursement methodologies candidates and legislatively determined mandates candidates.

Ms. Castaneda also stated that the Commission Chair made Finance's position clear that additional resources are not available for the Commission to increase staff. She clarified that while Commission staff was increased several years ago, it has been reduced in recent years due to budget reductions. Finance would look at requests for additional resources in light of budget development processes and the budget situation at the time of the request.

Chairperson Sheehy asked Ms. Castaneda if the Commission staff is subject to the three days per month furlough program and if this is affecting workload. Ms. Castaneda confirmed that they are, and explained that Finance has had discussions about the comment periods for many of the draft staff analyses and how to work around the furlough days.

Chairperson Sheehy stated that he hoped the impact of the furloughs is taken into consideration in the Bureau's follow-up reports because the furlough situation is a real challenge. It not only affects employee morale but also has an impact on the department's ability to deliver its mission at the same level.

Jim Spano, State Controller's Office, stated that the Bureau report recommended that the Controller work with Finance to obtain sufficient resources to meet its responsibility to audit mandate claims and to increase its efforts to fill vacant mandate positions. The Controller has ten vacant positions because of budget reductions. To the extent that the funding is restored, the positions will be filled.

Mr. Spano stated that the report also recommended that the Controller continue to assess the audit coverage and work with Finance to obtain sufficient resources to meet the statutory responsibility. To that extent, the Controller will comply.

Ms. Patton explained that staff has developed a plan to implement the recommendations of the Bureau.

Member Olsen stated that the Legislative Subcommittee conducted a legislative workshop earlier in the day, and one of the recommendations from that workshop was to use the term "modification" instead of "reconsideration" regarding the language pertaining to the process of revisiting mandates when there has been a change. Member Olsen recommended that we also use that term when discussing reconsiderations as part of the plan to implement the BSA audit report.

With a motion by Member Lujano to adopt the staff recommendation with changing the word “reconsideration” to “modification, and a second by Member Worthley, the staff recommendation was adopted by a vote of 7-0.

Allan Burdick, California State Association of Counties, commended the Commission staff and Finance for being proactive in working with cities and counties on the plan for implementing the audit recommendations.

APPROVAL OF MINUTES

Item 1 September 25, 2009

The September 25, 2009 hearing minutes were adopted by a vote of 7-0.

PROPOSED CONSENT CALENDAR

INFORMATIONAL HEARING ON PARAMETERS AND GUIDELINES AND
PARAMETERS AND GUIDELINES AMENDMENTS PURSUANT TO CALIFORNIA
CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES

- Item 7* *Update Boilerplate Language: Child Abduction and Recovery*
05-PGA-26
Family Code Sections 3060 to 3064, 3130 TO 3134.5, 3408, 3411, and
3421; Penal Code Sections 277, 278, and 278.5 ; Welfare And
Institutions Code Section 11478.5
Statutes 1976, Chapter 1399; Statutes 1992, Chapter 162 (AB 2650)
Statutes 1996, Chapter 988 (AB 2936)
State Controller’s Office, Requestor
- Item 8* *Update Boilerplate Language: Sexually Violent Predators*
05-PGA-43
Welfare and Institutions Code Sections 6250 and 6600 through 6608
Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763
(AB 888); Statutes 1996, Chapter 4 (AB 1496)
State Controller’s Office Requestor

PROPOSED STATEWIDE COST ESTIMATES

- Item 9* *Update Boilerplate Language: Domestic Violence Arrest Policies*
05-PGA-29
Penal Code Section 13701, Subdivision (b)
Statutes 1995, Chapter 246 (AB 2789)
State Controller’s Office, Requestor

DISMISSAL OF PROPOSED AMENDMENT TO PARAMETERS AND GUIDELINES

- Item 10* *Withdrawal of Proposed Amendment: Seriously Emotionally Disturbed*
(SED) Pupils: Out-of-State Mental Health Services, 05-PGA-15
Government Code Section 7576
Statutes 1996, Chapter 654
Los Angeles County, Requestor

Member Glaab made a motion to adopt items 7, 8, 9 and 10 on the consent calendar. With a second by Member Lujano, the consent calendar was adopted by a vote of 7-0.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

Item 2 Staff Report (if necessary)

There were no appeals to consider.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PARAMETERS AND GUIDELINES

- Item 6 *Tuition Fee Waivers*, 02-TC-21
Education Code Sections 68044, Subdivisions (a), (b), (c), 68051, 68074, 68075.5, 68076, Subdivision (d), 68077, 68078, Subdivision (b), 68082, 68083, 68084, 68121, 68130.5, and 76140
Statutes 1977, Chapter 36 (AB 447); Statutes 1980, Chapter 580 (AB 2567); Statutes 1981, Chapter 102 (AB 251); Statutes 1982, Chapter 1070 (AB 2627); Statutes 1988, Chapter 753 (AB 3958); Statutes 1989, Chapters 424, 900, and 985 (AB 1237, AB 259, and (SB 716); Statutes 1990, Chapter 1372 (SB 1854); Statutes 1991, Chapter 455 (AB 1745); Statutes 1993, Chapter 8 (AB 46); Statutes 1995, Chapter 389 (AB 723); Statutes 1997, Chapter 438 (AB 1317); Statutes 1998, Chapter 952 (AB 639); Statutes 2000, Chapters 571 and 949 (AB 1346 and AB 632); Statutes 2001, Chapter 814 (AB 540); and Statutes 2002, Chapter 450 (AB 1746)
California Code of Regulations, Title 5, Sections 54012, Subdivisions (b), (c), (d), 54024, Subdivisions (e), (f); 54030, 54032, Subdivision (a); 54041, 54045, Subdivisions (b), (c); 54045.5, subdivision (b); 54046, 54060, Subdivisions (a), (b) Register 77, No. 45 (Nov. 5, 1977); Register 82, No. 48 (Nov. 27, 1982); Register 83, No. 24 (Jun. 11, 1983) Register 86, No. 10 (Mar. 8, 1986); Register 91, No. 23 (April 5, 1991); Register 92, No. 4 (Jan. 24, 1992); Register 95, No. 19 (May 19, 1995); Register 99, No. 20 (May 14, 1999); Register 02, No. 25 (Jun. 21, 2002)
Revised Guidelines and Information, "Exemption from Nonresident Tuition" Chancellor of the California Community Colleges, May 2002
Contra Costa Community College District, Claimant

Eric Feller, Senior Commission Counsel presented this item. Mr. Feller stated that on October 16, 2009, the Department of Finance submitted comments on the proposed parameters and guidelines for the *Tuition Fee Waivers* program. Finance wants language included in the parameters and guidelines that would limit the adoption of rules and regulations to a one-time activity. Staff disagrees because the content of the rules and regulations includes the amount of nonresident tuition, which would change from year to year.

Finance also wants the parameters and guidelines to state that any potential costs of the associated mandate activities for this test claim should be net of any costs incurred when meeting the existing baseline requirement for determining residency status and tuition fees for all students.

Staff disagrees because the Commission already determined that the activities in the Statement of Decision and the parameters and guidelines are a new program or higher level of service, and only those new activities are reimbursable.

All parameters and guidelines currently state: “The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified. Increased cost is limited to the cost of any activity that the claimant is required to incur as a result of the mandate.” The staff recommends the Commission approve the parameters and guidelines without the changes recommended by Finance.

The parties were represented as follows: Keith Petersen representing the test claimant and Ed Hanson and Donna Ferebee from the Department of Finance.

Mr. Hanson stated that Finance requested that the section of the parameters and guidelines that refers to the adoption of regulations related to the method of payment and the method of refund of nonresident tuition fees be a one-time activity.

Finance agrees with staff that the actual refund will vary by year and by student. However, adopting rules and regulations for the method of payment and method of refund is a one-time process.

Mr. Hanson continued that Finance is seeking clarification regarding standard language about offsetting costs. Finance believes that community colleges have always had the requirement to determine residency for all students and nonresident fees for all students. The parameters and guidelines include some additional factors for determining residencies and some additional exemptions to nonresident fees. Therefore, Commission staff determined that it imposed a higher level of service. Finance believes that colleges need to differentiate between what they have been expected to do in determining baseline residency and nonresident fees against the additional requirements that are being imposed by the test claim.

Mr. Feller stated that the language in the Statement of Decision found in the parameters and guidelines reflects what is beyond the baseline requirement for determining residency.

Camille Shelton, Chief Legal Counsel, stated that Finance suggested splitting the activity into two activities so it is a one-time activity to adopt rules and regulations relating to the method of payment, method of nonresident tuition and method of refund for nonresident tuition and an ongoing activity to determine the amount of the refund.

Member Worthley clarified that the methodology would be a one-time expenditure. But the processing would be an ongoing expense that could vary from the numbers and complexity of the individual cases.

Ms. Shelton stated that the Education Code statute cited requires the governing board to determine the amount of the refund each year.

Mr. Feller stated that the amount of refund is based on the fee. The amount of refund of nonresident tuition is the only part that would be ongoing.

Keith Petersen, representing the claimant, stated that, for the seven year period of this test claim, there have been significant changes in the method of payment due to establishing online registration, online scheduling and online payment of fees. Mr. Petersen stated that this needs to be regarded as an application of the law rather than a concern about the activities. Mr. Petersen concurred with the staff recommendation.

With a motion by Member Olsen and a second by Member Worthley, the staff recommendation was adopted by a vote of 6-1 with Chairperson Sheehy voting no.

STAFF REPORTS

Item 12 Legislative Subcommittee Update on Proposed Language Regarding Reconsideration/Amendment of Prior Decisions

Member Olsen explained that a recent court case removed the Legislature's authority to direct the Commission to reconsider old mandate decisions. Therefore, staff from the Legislature, Legislative Analyst's Office, Department of Finance and the Commission has begun working on a new reconsideration process. This morning, the Commission's Legislative Subcommittee conducted a workshop to discuss draft language for this process.

Member Olsen reported on the workshop by stating that there was significant interest provided at the meeting. Personnel primarily from statewide associations came forward to give information.

Member Olsen stated that there is also significant interest in moving this process forward and continuing work on it. The subcommittee would ask for the whole Commission's direction to the staff to make that happen.

There are two processes related to this modification (reconsideration) of mandates. One is a cost-savings process that happens because of external circumstances. The other is a cost-making process. There are different incentives for bringing those two different kinds of cases forward.

There is a possibility of replacing the language that has already been proposed with language that would bring back the cost-savings process that the Commission used to have. It would be coupled with the current mandates process using a sort of exception or exemption to statute of limitations to allow folks to come forward with a modification. This might streamline the process and make it more understandable.

Member Olsen stated that the other issue that was discussed, in light of the audit report, was the new workload and getting staff the necessary resources. This would enable the Commission to decide on significant issues.

Chairperson Sheehy asked what the specific provisions that will generate the most workload are.

Member Olsen reported that the state has some incentive to bring forward cases for reconsideration, where, because of court decisions or because of new federal mandates, there is a potential for state savings by getting out from under the state's requirement to pay for mandates.

There could also be situations where local governments are, because of recent court decisions, performing mandated activities even though a prior decision by the Commission suggested that there was no mandate.

Member Olsen stated that the Legislative Subcommittee would like to look at a cost-recovery process so that folks bringing forward either cost-savings or new mandate cases would have to make some strategic decision whether or not it is worth it to support the process.

Chairperson Sheehy asked how a cost-recovery might work.

Member Worthley suggested a filing fee.

Ms. Higashi suggested a claim for attorney's fees.

Member Glaab stated that cost containment was an overarching concern with the Legislative Subcommittee. Therefore, the Commission needs to be mindful not to implement changes that could trigger doubling the workload by means of readdressing test claims.

Member Glaab stated that testimony from those in attendance made it a clear case to have two steps in the reconsideration process.

Member Olsen suggested that Commission staff continue to work with the interested parties as they proceed forward with language or with developing a proposal.

Chairperson Sheehy asked if a decision must be reached on the draft language.

Ms. Higashi stated that the draft language was created to have a talking point. No further decision is necessary because Item 1, the implementation plan, was adopted to direct Commission staff to continue work on this and to meet a deadline in the Governor's Office for proposed legislation.

Member Worthley suggested looking into the formation of an informal reconsideration or modification process similar to a Reasonable Reimbursement Process (RRM) where the claimant works directly with the Department of Finance to agree on the changes.

Ms. Higashi stated that certain changes can be easily identified for some people and not so easily identified for others. If, however, there are fundamental changes in the finding made by the Commission to go from "approve" to "deny" or "deny" to "partial approve," it is a major action.

Commission staff could explore whether the Legislature wants to expand the legislatively determined mandate but they currently have authority to look at any statute and fund it.

Ms. Shelton stated that when changing the state's liability under the Constitution, the Commission on State Mandates needs to issue a quasi-judicial decision.

Chairperson Sheehy called for public comment on this item.

Richard Hamilton, general counsel with CSBA, respectfully urged the Commission to examine the role it will play in developing the reconsideration or modification process in light of the contentious issues headed its way. The whole process is framed in the issue of saving the state money. It is a way to get around the Commission's duties to hear and decide if the state is creating new tasks or expanding tasks. If the state is doing neither then local government is not entitled to be reimbursed.

Mr. Hamilton stated that the discussion move away from the idea of the Commission reconsidering what it has previously done within the context of what was known at the time. There needs to be a distinction between whether it is a change in law or a change in circumstance. The idea that there could be some informal way to modify parameters and guidelines for changes of circumstances seems very applicable.

Mr. Hamilton asked, concerning the discussion about the need for Commission staffing, what priority is going to be given to the savings effort when there are local governmental entities performing services mandated by the state who are not getting reimbursed. He stated that a liability of at least one billion dollars for K-12 education has been identified.

Geoffrey Neill, California State Association of Counties, aligned himself with the comments of Mr. Hamilton. Mr. Neill pointed out that it is surprising that the staff report and some of the commissioners are referring to savings when talking about changing reimbursement for activities mandated by the state when the Commission is an independent body.

Mr. Burdick stated that the comment raised relative to cost recovery, possibly a filing fee, is troublesome to local government who already has substantial costs involved. He believes that none of the cases before the Commission were frivolous but rather very valid issues. Sometimes, however, the legal system prevents practical reality from being implemented.

Member Olsen commented on the savings issue that Mr. Hamilton raised. Member Olsen does not view this process as a state savings issue but rather an issue to take up changes in the external world that affect mandates.

Member Worthley stated that he is concerned about the idea of charging claimants if the Legislature creates the problem. The Legislature puts the burden on local government to pay for the cost of the problem the Legislature created. There is a basic inequity.

Member Olsen stated that she, too, considers the idea of cost recovery troublesome. It was a creative idea, reflecting the times and the information from staff that funding is not being considered for staffing and recognizing that there could be a significant workload.

Mr. Hamilton stated that as local government is mandated to perform an activity, local government should be paid for it. They are so far behind in getting paid that he takes issue with the idea of the state starting to save money by not paying for what it already owes.

Item 13 Chief Legal Counsel's Report (info)

Ms. Shelton stated that the *Behavioral Intervention* program court case was continued from December 2009 to December 2010 so that the real parties in interest could continue negotiations.

Item 14 Executive Director's Report (info)

Ms. Higashi stated that the Commission needed to discuss the December hearing date which was set for December 3, 2009. She stated they now have scheduling conflicts and proposed December 7, 2009. To date, only consent calendar items are proposed for this hearing. Therefore, Chairperson Sheehy recommended cancelling the December hearing and moving items to January.

Member Glaab suggested keeping the December hearing date available until Ms. Higashi can determine if cancelling the December hearing places a hardship on any party.

Member Glaab and Chairperson Sheehy commented that, relative to the audit report, the reduction in claims occurred due to hard work and planning. He commended Commission staff for the significant reduction.

PUBLIC COMMENT

There was no public comment.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (action).

A. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, [Behavioral Intervention Plans]
2. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. State of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller*, Third District Court of Appeal, Case No. C055700; Sacramento County Superior Court, Case No. 06CS01335 [AB 138; Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]

3. *California School Boards Association, Education Legal Alliance, and Sweetwater Union High School Dist. v. State of California, Commission on State Mandates, and John Chiang, in his capacity as State Controller*, Sacramento County Superior Court, Case No. 07CS01399, [School Accountability Report Cards, SARC]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

B. PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a)(1).

- Personnel Subcommittee Report

Hearing no further comments, Chairperson Sheehy adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation published in the notice and agenda and to confer and receive advice from legal counsel regarding potential litigation. The Commission will also confer on personnel matters and a report from the personnel committee pursuant to Government Code section 11125, subdivision (a)(1).

REPORT FROM CLOSED EXECUTIVE SESSION

At 11:48 a.m., Chairperson Sheehy reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and potential litigation, and also to confer on personnel matters listed on the published notice and agenda pursuant to Government Code section 11126, subdivision (a)(1).

ADJOURNMENT

Hearing no further business, Chairperson Sheehy adjourned the meeting at 11:48 am.

PAULA HIGASHI
Executive Director