

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 447

Sacramento, California

September 26, 2008

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

CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 9:38 a.m.

APPROVAL OF MINUTES

Item 1 August 1, 2008

The August 1, 2008 hearing minutes were adopted by a vote of 5-0. Ms. Schmidt abstained.

PROPOSED CONSENT CALENDAR

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

A. PROPOSED PARAMETERS AND GUIDELINES

Item 7 *Reporting Improper Governmental Activities*, 02-TC-24
Education Code Section 87164
Statutes 2001, Chapter 416, Statutes 2002, Chapter 81
Santa Monica Community College District, Claimant

B. STATEWIDE COST ESTIMATES

- Item 9 *Missing Children Reports, (01-TC-09)*
Education Code Sections 38139, Subdivisions (a) and (b) and 49068.6,
Subdivisions (b) and (d), Statutes of 1986, Chapter 249, Statutes of 1999,
Chapter 832
San Jose Unified School District, Claimant
- Item 10 *Charter Schools III, (99-TC-14)*
Education Code Sections 47605, subdivision (b), and 47635, Statutes 1998,
Chapter 34, Statutes 1999, Chapter 78, California Department of Education
Memo (May 22, 2000)
Western Placer Unified School District and Fenton Ave. Charter School,
Claimants
- Item 11 *Pupil Safety Notices, (02-TC-13)*
Education Code Sections 32242, 32243, 32245, 46010.1, 48904, 48904.3,
48987, Welfare and Institutions Code Section 18285, Statutes 1983,
Chapter 498 (SB 813), Statutes 1984, Chapter 482 (AB 3757), Statutes
1984, Chapter 948, (AB 2549), Statutes 1986, Chapter 196 (AB 1541),
Statutes 1986, Chapter 332 (AB 2824), Statutes 1992, Chapter 445 (AB
3257), Statutes 1992, Chapter 1317 AB 1659), Statutes 1993, Chapter 589
(AB 2211), Statutes 1994, Chapter 1172 (AB 2971), Statutes 1996,
Chapter 1023 (SB 1497), Statutes 2002, Chapter 492 (AB 1859), California
Code of Regulations, Title 5, Section 11523
San Jose Unified School District, Claimant

Member Worthley made a motion to adopt items 7, 9, 10 and 11 on the consent calendar. With a second by Member Olsen, the motion carried by a vote of 6-0.

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.

HEARINGS AND DECISIONS ON CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551 and 17559) (action)

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing.

A. TEST CLAIMS

- Item 3 *Disabled Student Programs and Services, (02-TC-22)*
Education Code Sections 67300, 67301, 67302, 67310, 67311, 67312, and
84850, Statutes 1977, Chapter 36 (AB 447), Statutes 1978, Chapter 1403
(AB 2670), Statutes 1979, Chapters 282 (AB 8) and 1035 (SB 186),
Statutes 1981, Chapter 796 (SB 1053), Statutes 1982, Chapter 251
(AB 1729), Statutes 1983, Chapter 323 (AB 223), Statutes 1985, Chapter

903 (SB 1160), Statutes 1986, Chapter 248 (SB 2451), Statutes 1987, Chapters 829 (AB 746) and 998 (SB 252), Statutes 1990, Chapters 1066 (AB 2625) and 1206 (AB 3929), Statutes 1991, Chapter 626 (AB 1021) Statutes 1992, Chapter 1243 (AB 3090), Statutes 1995, Chapter 758 (AB 446), Statutes 1999, Chapter 379 (AB 422), Statutes 2001, Chapter 745 (SB 1191), and California Code of Regulations, Title 5, Sections 54100, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, 56076 (As Added or Amended by Register 76, No. 51, Register 77, Nos. 12 & 45, Register 79, No. 46, Register 83, No. 18, Register 88, No. 16, Register 91, No. 31, Register 92, No. 12, and Register 93, No. 6), Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*, Issued by the Chancellor's Office, California Community Colleges, January 2, 1997
San Juan Unified School District, Claimant

Chief Legal Counsel Camille Shelton presented this item. She stated that this the Disabled Student Programs and Services (DSPS) test claim addresses the provisions of services which include academic adjustments and auxiliary aids, instructional materials in electronic format and accessible parking to disabled students within the California community colleges system.

Staff recommended that the Commission deny this test claim because community colleges are mandated by federal law, through the Rehabilitation Act of 1973 and the Americans with Disabilities Act, to perform these activities. Although some activities go beyond the requirements of federal law, they are not mandated by the state pursuant to the California Supreme Court's decision in *Kern High School District*, because community colleges perform those activities as a condition of receiving state funding.

Parties were represented as follows: Keith Petersen representing the claimant and Susan Geanacou representing the Department of Finance.

Mr. Petersen indicated that the test claim was filed to obtain reimbursement for the portion of activities that are not federally mandated. He requested the Commission to deny staff's position that because the DSPS program is voluntary it is not reimbursable. The issue is whether the colleges are practically compelled to take that money and to implement the program. He stated that the state currently provides approximately \$115 million in DSPS funding to colleges that provide both federally and state-mandated special education services. Mr. Petersen stated that staff is contending that the colleges can willingly give up that money if they do not want to participate in DSPS. He argues however, that to receive any of their money, colleges must implement the entire DSPS program. Mr. Petersen explained the history of how community colleges received DSPS funding and, and stated that they do not receive adequate money to implement the program. If they do not take the money and do not perform the state portion of the DSPS program, they are still compelled to perform the federal mandate, which was historically supported by state funding prior to the DSPS program.

Ms. Geanacou stated that Finance supports the final staff analysis. She also responded to Mr. Petersen's comments, stating that the only consequence of not complying with these requirements that are in excess of the federal mandate is that they will not receive the funding, and this is not practical compulsion under the *Kern High School District* case.

Mr. Petersen responded that the Commission has the authority to decide what is and is not practical compulsion

Member Worthley asked Mr. Petersen to cite, in the record, the difference between the amount of money paid to the colleges and the actual cost.

Mr. Petersen responded that claims for the actual costs have not yet been filed. Staff would determine at the parameters and guidelines phase which activities are federally driven and subtract those costs. The balance would be the cost. He added that staff has listed those services that appear to be state-driven.

Chairperson Sheehy asked Mr. Petersen if the claimant had figured those costs. Mr. Petersen stated that the claimant must only allege a threshold amount of \$200 in costs in order to file a test claim.

Ms. Shelton clarified that although parties are discussing practical compulsion, it is still a question of law and not a question of equity. She noted that under the *Kern* case, the program was voluntary and there was \$394 million at stake. And, the court ruled that in order for practical compulsion to be found, there must be certain and severe penalties for not complying, independent of the funding. In the matter before you today, if you take away the funding, colleges must still comply with federal law. The intent of the DSPS legislation is to pay for actual costs. The money can be used for salaries, benefits and professional development costs of DSPS certificated and classified personnel and for supplies and materials necessary for the operation of the DSPS program. It cannot be used for indirect costs for the building, lighting heating or legal or audit matters. It does however pay for one-time costs and ongoing costs to provide services to the student.

Mr. Petersen discerned the difference between the issues in the *Kern* case and the matter here, stating that in *Kern*, if the money goes away, the program also goes away. In contrast, under DSPS, the program does not go away. He also responded to Ms. Shelton's comment that certain indirect costs are not covered, stating that because they are not funded, colleges are losing 35 percent of their indirect cost rates because DSPS won't fund the costs.

Member Worthley asked Mr. Petersen if he was saying that because historically the state has reimbursed the districts for some of the federal requirement, that the state is mandated to continue doing that. In other words, if they just pulled all the money away for the federal portion, there would be no compensable claim against the state because the colleges are federally required to perform the services.

Mr. Petersen responded that it's possible. The state could withdraw its funding and local districts would be compelled to continue the federal activities.

Ms. Shelton also stated that under federal law, the state is not required to reimburse any of the community colleges for complying with the federal mandate.

Mr. Petersen responded by saying that, because of the funding structure by the state, the only way to get any significant funds to do any federal or state mandated services is to take on DSPS.

Member Olsen asked Mr. Petersen if he was contending that it's coercion because even if a college district decided to terminate the DSPS program, they would be compelled to do it because parents of the served students would go to court.

Mr. Petersen responded that they would not be compelled to do the state portion if they were not in the DSPS program. Ms. Olsen then asked where is the practical compulsion. Mr. Petersen responded that they still have to continue performing the federal mandate which has always been funded by the state.

Ms. Shelton added that it was funded by the state under the state's vocational rehabilitation program, and before enactment of DSPS, students were receiving overlapping services. Therefore, the Department of Rehabilitation and the Chancellor's Office s came to agreement that the colleges would perform the services and vocational rehabilitation would not. There was no funding in that agreement.

Member Olsen stated that she was trying to clarify the practical compulsion allegation and whether it was based on the parents of DSPS students going to court if a district did not comply with DSPS. Mr. Petersen clarified that the practical compulsion is that school districts still have to continue the federal mandate, which was previously funded by the state. If a district stops participating in the state DSPS program, there would be no funding for providing any service.

Chairperson Sheehy asked Mr. Petersen if he wished to discuss the next issue on instructional materials. Mr. Petersen stated that he would not, because the Commission must decide the threshold issue first.

Member Chivaro moved to adopt the staff recommendations. With a second by Member Lujano, the Commission adopted the staff recommendation to deny the test claim by a vote of 6-0.

B. PROPOSED STATEMENT OF DECISION

Item 4 *Disabled Student Programs and Services, (02-TC-22)*
 See Item 3

Ms. Shelton also presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the *Disabled Student Programs and Services* test claim. Staff recommended that the Commission adopt the proposed Statement of Decision including minor changes.

Member Chivaro made a motion to adopt the proposed Statement of Decision. With a second by Member Lujano, the Statement of Decision was adopted by a vote of 6-0.

Ms. Higashi noted that Items 5 and 6 were postponed at the request of the claimant.

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

PROPOSED PARAMENTERS AND GUIDELINES

Item 8 *Integrated Waste Management Board, (00-TC-07)*
 Public Resources Code Sections 40148, 40196.3, 42920-42928, Public
 Contract Code Sections 12167 and 12167.1, Statutes 1999, Chapter 764,
 Statutes 1992, Chapter 1116, Manuals of the California Integrated Waste
 Management Board
 Santa Monica and South Lake Tahoe Community College Districts,
 Co-Claimants

Camille Shelton, Chief Legal Counsel, presented this item. Ms. Shelton explained that this item is on remand from the Sacramento County Superior Court on a judgment and writ. The *Integrated Waste Management Board* program requires community college districts to develop and adopt waste management plans to divert solid waste from landfills and to submit annual

reports to the Integrated Waste Management Board. The writ issued by the court requires the Commission to amend the parameters and guidelines for this program in two respects: It requires the Commission to amend the offsetting revenue section to require claimants to identify and offset from their reimbursement claims, all revenue generated as a result of implementing their waste plans, without regard to the limitations described in the Public Contract Code.

The second amendment requires that the Commission add an offsetting cost savings section to the parameters and guidelines to require claimants to identify and offset from their reimbursement claims cost savings realized as a result of implementing their plans, consistent with the limitations provided in the Public Contract Code.

Ms. Shelton continued that under the Public Contract Code provisions, community colleges are required to deposit all cost savings that result from implementing their waste plans in the Integrated Waste Management account. Upon appropriation by the Legislature, the funds may be expended by the Integrated Waste Management Board for the purpose of offsetting plan costs. Subject to Board approval, cost savings by a community college that do not exceed \$2,000 annually, are appropriated for expenditure by the community college for the purpose of offsetting their costs. Cost savings exceeding \$2,000 annually may be available for expenditure by the community college only when appropriated by the Legislature. The proposed amendments contain these changes required by the court.

Ms. Shelton added that the Integrated Waste Management Board is requesting that the Commission add more language to the offsetting cost-savings section to require community college districts to: (1) provide information with their reimbursement claims identifying all cost savings resulting from the plans, including costs savings that exceed \$2,000; and (2) to analyze categories of potential cost savings to determine what to include in their claims.

Staff finds that the Board's request for additional language goes beyond the scope of the court's judgment and writ. Therefore, staff recommends that the Commission deny the Board's request and adopt the proposed amendments to the parameters and guidelines as recommended by staff.

Parties were represented as follows: Keith Petersen, an interested party having represented the claimant many years ago; Elliot Block representing the California Integrated Waste Management Board, and Susan Geanacou representing the Department of Finance.

Mr. Block stated that he disagreed with the staff analysis. The Board argues that staff is viewing the court's decision more narrowly than is necessary. The reimbursement claims are difficult to review. The Board is requesting the language to provide additional guidance to help the claims be formulated in a way that they are actually reviewable and usable. He noted that the Board has a pending request to amend the parameters and guidelines to add these additional reporting requirements, and that the staff analysis suggests that the additional reporting requirements could be added prospectively, but not retroactively. He stated that if the parameters and guidelines could have been originally drafted to include this requirement, why can't the parameters and guidelines be amended now to include this guidance.

Chairperson Sheehy asked Mr. Block to clarify the comment that the claims that are being submitted are difficult to review.

Mr. Block reiterated that the claims were incomplete and difficult to review, and pointed out that even Commission staff sought help from the Board when they initially reviewed the claims because there were portions of the claims filed that did not make sense and did not seem to align with the original parameter and guidelines.

Ms. Higashi noted that when the Commission adopted the statewide cost estimate, it requested a summary compilation of the amounts claimed by the community college districts filing timely reimbursement claims with the State Controller's Office. The State Controller's Office report identified the claimant by name, amount claimed and amounts offset and was the basis for the Commission's preparation of the statewide cost estimate.

Ms. Geanacou stated that the Department of Finance, as a co-petitioner before the court, has followed this matter closely. She observed that the cost savings information required in the claims will clearly appear as an offset for reimbursement and is already available in two sources of information if the test claim statutes are complied with.

Ms. Shelton stated that the Commission's jurisdiction in this matter is really limited to the court's writ and the writ directed two specific changes to the parameters and guidelines. She noted that the court found that the information to support cost savings was already provided to the Board in their existing annual report. The court did not indicate that the Board needed additional information. She added that every year, the Board receives a report that describes the calculations of annual disposal reduction and information on changes in waste generated or disposed. Also, this issue can be addressed in the Board's pending request to amend the parameters and guidelines.

Member Worthley moved to adopt the staff recommendations. With a second by member Olsen, the staff recommendation to approve the proposed amendments to the parameters and guidelines was adopted by a vote of 6-0.

STAFF REPORTS

Item 12 Chief Legal Counsel's Report (info)

No report was made.

Item 13 Executive Director's Report (info)

Ms. Higashi introduced our newest analyst Heidi Palchik.

Ms. Higashi also recognized staff member Lorenzo Duran who recently participated in a state agency sponsored fundraiser for the California State Employees Charitable Campaign. He successfully dunked our Commission Chair, Mr. Genest, in the dunk tank.

Ms. Higashi reported the adopted State Budget did not make any new changes to the Commission's budget. Also, the Commission filed the annual workload report with the Director of Finance.

Ms. Higashi proposed changing the November 6th hearing to an alternate date in December. It was decided to find an agreeable date and report it back to the Commission. She also noted that work is continuing on the proposal for delivery of agenda materials.

Ms. Higashi reported that Anne Sheehan, Chief Deputy Director of the Department of Finance, was appointed Director of Corporate Governance, CALSTRS.

Ms. Higashi also noted that the Commission will probably be exploring a hiring freeze exemption.

PUBLIC COMMENT

Chairperson Sheehy introduced Deborah Borzelleri and acknowledged her upcoming retirement. On behalf of the Commission, Chairperson Sheehy presented Ms. Borzelleri with a Resolution recognizing her retirement as a state employee for 35 years and her many accomplishments.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526 (action)

A. PENDING LITIGATION

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; [AB 138; Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]
3. *Department of Finance v. Commission on State Mandates*, Third District Court of Appeal, Case No. C056833, [Peace Officer Procedural Bill of Rights]
4. *San Diego Unified School District v. Commission on State Mandates and California Department of Finance*, San Diego County Superior Court, Case No. 37-2007-00064077-CU-PT-CTL, [Emergency Procedures: Earthquake Procedures and Disasters]
5. *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) and 17526.

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 listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

At 10:48 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 published notice and agenda, and pursuant to Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

Hearing no further business, Chairperson Sheehy adjourned the meeting at 10:50a.m.

A handwritten signature in cursive script, appearing to read "Paula Higashi".

PAULA HIGASHI
Executive Director