

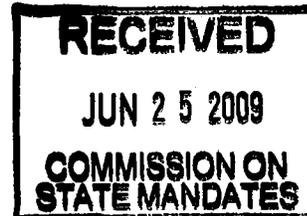
SixTen and Associates Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
E-Mail: Kbpsixten@aol.com

San Diego
5252 Balboa Avenue, Suite 900
San Diego, CA 92117
Telephone: (858) 514-8605
Fax: (858) 514-8645

Sacramento
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834
Telephone: (916) 565-6104
Fax: (916) 564-6103

June 22, 2009



Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: 01-TC-21 Child Abuse and Neglect Reporting (CANR)
San Bernardino Community College District, Claimant
Consolidated with:
00-TC-22 Child Abuse and Neglect (ICAN) Investigative Reports

Dear Ms. Higashi:

I have received the Commission Draft Staff Analysis (DSA) dated May 22, 2009, to which I respond on behalf of the test claimant.

PART I DUTIES IMPOSED ON DISTRICT POLICE DEPARTMENTS AND LAW ENFORCEMENT AGENCIES

College Police and Security Departments

Penal Code Section 11165.9 specifically excludes "district" police or security departments, an exclusion that is sufficiently broad to exclude any K-14 police organization from the duties enumerated in Sections 11165.9, 11166.2, 11168, 11169, et al., listed in the DSA (14-16). The DSA (19) concludes that K-12 police departments are not required to perform these activities and community college police departments are required, but not "mandated," to do so for the purpose of reimbursement. However, the court cases cited in the DSA (19, 20) for this conclusion are not factually similar or legally determinative.

The school districts in *Kern* could have discontinued the variously funded program advisory committees to avoid the mandated agenda requirements. Police or peace officer employees are not an "underlying program," but an employment classification. It is the duties performed that implement the mandate program that are reimbursed, not the type of employee. The DSA inappropriately extends the holding of *Kern* to this

different fact situation. Public school districts are generally not compelled to hire specific types of employees, and the job classification or nature of duties performed has never been a disqualification for reimbursement. Other public school employees have professional and statutory responsibilities that are reimbursed by the state in other mandates and are not excluded from reimbursement because they are not compulsory employees. For example, school counselors implement the currently reimbursed mandate program of Pupil Suspensions, Expulsions and Expulsion Appeals, although these same duties are also implemented by employees who are not counselors. School nurses implement the currently reimbursed programs of Immunization Records, Immunization Record: Hepatitis B, and Scoliosis Screening, although these same duties are also implemented by employees who are not counselors.

In *City of Merced*, the court concluded that the underlying choice of eminent domain was not a mandated method to obtain property for city use. In this claim, the test is not that college districts are compelled, or even choose, to operate a police department or hire peace officers, but if they do, they must comply with the Penal Code requirements to respond to allegations of child abuse and neglect as described in the CANR mandate. There is no preceding discretionary choice of methods here for the district, only the statutory duties of certain employees. Further, assuming that a college district would discontinue its police department or employment of peace officers for the sole purpose of avoiding this mandate, those duties would be performed by local government police agencies, and the state would reimburse those tasks to that agency.

Law Enforcement Agencies

The DSA (21) enumerates the duties of "law enforcement agencies" that do not statutorily exclude school or college police or security departments. The DSA (22) properly concludes that the Legislature's use of this term was intentional. Notwithstanding, the DSA (22) concludes that there is no mandated reimbursement because the "underlying decision" to hire police or peace officers is discretionary, an application of the *Kern* and *Merced* reasoning, which is not factually relevant as described above.

Practical Compulsion to Operate a Police Department

Kern and *Merced* failing to be determinative of the facts in this test claim, the remaining objection is the standard imposed by the findings in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 (hereafter referred to as the POBRA 2009 decision). The Appeals Court concluded that there was nothing in the record before the court to show that school and college districts are practically compelled to exercise their authority to hire peace officers as "the only reasonable means to carry out their core mandatory functions," that is, school safety, and there is no mandatory duty to provide police services within their jurisdiction.

The conclusion in POBRA 2009 is distinguishable because the mandate that is the subject of that case is the due process required when disciplining peace officers that is different and in excess of other public classified employees that only applies by virtue of the statutory status of peace office employees. It was never stated that employee due process was a core or basic function of school and college districts. However, it can be directly concluded that the Penal Code requirements for CANR are within the scope of public and school safety, to prevent the abuse and neglect of children by reporting its occurrence and investigating its causes.

The facts presented in this test claim are not analogous to the facts that determined the cases cited by the Commission. School and college district police and peace officers are classifications of employees performing statutory CANR functions that are relevant to their basic and mandatory school safety responsibility. CANR is not a personnel due process mandate that is merely incidental or consequential to the employee's job classification or legislated status.

PART II. MANDATED REPORTING OF CHILD ABUSE AND NEGLECT

Penal Code Sections 11165.9, 11166, and 11168

The DSA (24) concludes that the duties of mandated reporters accrue to the reporters as "individual citizens" rather than employees of school and college districts. That distinction is not one of the exceptions to finding costs mandated by state listed in Government Code Section 17556. The DSA (24) asserts that "the duties are not being performed on behalf of the employer or for the benefit of the employer, nor are they required by law to be performed using the employer's resources." There are no statutory or court decisions cited that make these alleged distinctions within the scope of Section 17556. Notwithstanding, the public school mandated reporters are mandated reporters by virtue of their employment, that is, public school nurses and public school teachers are school nurses and school teachers because they are employed by school districts. The services provided by public school employees are not performed for their individual or personal benefit, but to provide service to students, which is the statutory duty of the school district employer. The employer resource being consumed is the employee time, compensated by the employer, and such costs have always been reimbursable when the staff time implements a reimbursable mandate.

The DSA (24, 25) notes that the failure to report subjects the mandated reporter to misdemeanor punishment as an individual and thus the public school employer is not subject to punishment. That distinction is not one of the exceptions to findings of costs mandated by state listed in Government Code Section 17556. In this test claim, the DSA does not reach the issue of whether Government Code Section 17556, subdivision (g), regarding new criminal offenses applies because the DSA has already concluded that the mandated reporting duty is individual and not a new program or higher level of service imposed on the public school agency. The individual misdemeanor penalty and subdivision (g) new criminal infraction issues are not ones of first impression. The

issues were included in the Notification to Teachers: Pupils Subject to Suspension or Expulsion mandate approved twice by the Commission, where it was concluded these issues were not determinative of the Government Code Section 17514 issues of a new program or increased level of service.

Definitions of Child Abuse and Neglect

The test claim alleges that the enumeration of additional incidents of child abuse and neglect in the statutes after 1974 results in a higher level of service since each new definition results in a need to report. The DSA (27) asserts that Penal Code Section 273a, enacted well before 1975, is "very broad," apparently sufficiently broad as to "encompass every part of the statutory definitions of child abuse and neglect [added after 1974], as pled." The DSA (27) cites *Williams v Garcetti* for the proposition that a change in language is not necessarily a change in the law, and then concludes that "the same acts of abuse or neglect that are reportable under the test claim statutes were reportable offenses under pre-1975 law." Penal Code Section 11161.5 (added by Chapter 576, Statutes of 1963), the pre-1975 reporting mandate, at subdivision (a), requires reporting incidents of physical injury that appear to have been intentionally inflicted, sexual molestation, or the injuries listed in Section 273a which are intentional acts and not within the scope of child neglect as defined in the statutes added after 1974. The DSA (28) relies on general definitions in other code sections to bootstrap child neglect into the scope of Section 11161.5, a practice contrary to the statutory preference for the specific over the general when determining the meaning of new or amended code sections. The Legislature made numerous and specific additions to Section 11161.5 after 1974 for the specific purpose of expanding the scope of reportable incidents. Each new reportable incident is an additional administrative task for public school employees and thus a higher level of service.

PART III. TRAINING MANDATED REPORTERS

This test claim was filed in June 2002. Penal Code Section 11165.7, as last amended by Chapter 133, Statutes of 2001, stated:

- (b) Volunteers of public or private organizations whose duties require direct contact and supervision of children are encouraged to obtain training in the identification and reporting of child abuse.
- (c) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees' confidentiality rights.
- (d) School districts that do not train the their employees specified in subdivision (a) in the duties of child care custodians mandated reporters under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.

Subdivision (b) clearly indicates that training of volunteers is “encouraged.” However, subdivision (c) clearly indicates that there are training duties “required” by this mandate for school district employees. We can conclude that the Legislature made this distinction having utilized separate subdivisions and specific language. Strangely, the DSA (30) cites a 2004 amendment that adds the words “employers are strongly encouraged” to provide training to assert the proposition that training is “plainly discretionary.” This is a distinctive change in the language in the later statute. It is plainly apparent that the possibility that training school employees was discretionary did not exist until the later amendment of Section 11165.7. At the time the test claim was filed, subdivision (c) stated that training duties were imposed for school district employees by CANR. The fact that subdivision (d) required school districts that did not train employees to report the reasons to the State Department of Education, does not exempt reimbursement of those school districts that did provide training. Neither of the two subdivisions is contingent upon the others.

PART IV. INVESTIGATION OF SUSPECTED CHILD ABUSE INVOLVING THE SCHOOL DISTRICT

Penal Code Section 11165.14 addresses the duty to investigate allegations against school employees made by parents and others to the school district regarding child abuse incidents that occur at school. This is different from the mandated reporting by school employees of suspected abuse or neglect directly to the relevant police department. The DSA (33) concludes that there is nothing in the plain language of the code section that requires school district personnel to assist in the investigation. The DSA (33, 34) cites a publication of the Attorney General that states the school employee’s duty is to report and not investigate. That misses the point. Section 11165.14 is not about mandated reporting by mandated reporters, but the investigation that occurs pursuant to a complaint filed with a school district by a parent or guardian. The parent or guardian is not a mandated reporter and is not complying with CANR when he or she files a complaint with the school district.

The duty of local law enforcement to investigate the complaint arises from the parent complaint, not from a mandated reporter. For that reason, the school employee status as a mandated reporter is not relevant. School district employees need not be legally compelled to respond to a lawful investigation, or coerced, or subject to a penalty. The school district employees would seem to be an essential source of information for incidents that occur on school premises and their cooperation would be the most reasonable method of advancing the investigation. To the extent school district staff time is involved, it is appropriately reimbursable to the school district as a new program or higher level of service that implements a state policy regarding the investigation of child abuse.

PART V. EMPLOYEE RECORDS: ACKNOWLEDGMENTS

Penal Code Section 11166.5, requires employers to obtain a statement from employees that are subject to the mandate reporting law that the employee will comply with the mandated reporting law. The DSA (38) cites *County of Los Angeles* for the conclusion that this code section does not impose requirements that are unique to government and applies generally to all residents and entities in the state. To the contrary, CANR does not apply to all residents and entities in the state, as do payroll tax statutes or elevator safety regulations. This mandate applies to those employers that employ persons who are mandated reporters, and not to those employers that do not.

The requirement to obtain the acknowledgment is conditioned on the employee's status as a mandated reporter. Not all employees are mandated reporters. School districts employ public school teachers to teach students. All other businesses are not school districts. The DSA (38) also asserts that informing newly-employed mandated reporters of their duties is "not inherently a governmental function." CANR is lodged in the Penal Code, is an operation of the state's police power, and no other power is more inherently governmental than the police power.

PART VI. PROCEDURAL DUE PROCESS TO CERTIFY RESPONSES

Title 2, California Code of Regulations, Section 1183.02 states the provisions for the manner in which a test claim may be adjudicated. Subsection (d) of Section 1183.02 explicitly provides:

The written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief.

The requirement of certification in subsection (d) is made without qualification. The requirement expressed in Title 2, CCR Section 1183.02(d) has no caveat, and the language in that regulation is enforced by the word "shall." Any party responding to a test claim must comply with this section of the Commission's regulations. The test claimant asserts that state agency or any party response that is not properly certified should be excluded. This procedural issue has been raised in many other test claims.

The Department of Finance (DOF) submitted a written response to the test claim on November 26, 2002. That response was not properly certified because the letter was not signed under penalty of perjury with a declaration in accordance with subsection (d). The Department of Finance has been a participant in the mandate adjudication process for twenty-five years. The required certification process is not onerous. It would appear that the Department of Finance is intentionally refusing to comply with the due process requirements of the Commission.

However, the DSA asserts, as has the Commission in previous test claim adjudications, that this active disregard of the regulations by the Department of Finance is inconsequential. The DSA (9; fn. 5) asserts that determining whether a state mandate exists "is a pure question of law." The DSA's conclusion is inconsistent with Section 1183.02(c), which does provide separate standards for the form and content of factual vs. legal assertions. Further, Section 1183.02(c) distinguishes assertions of fact and law which necessarily means that adjudicating a mandate may not always be purely a question of law. Otherwise, there would be no need to provide for the manner in which factual representations were brought before the Commission.

The DSA concludes that the lack of certification is cured or irrelevant because factual allegations made in the Department of Finance response are not relied on by the Commission staff in drafting their recommendation to the Commission. Despite the DSA's claim (9; fn. 5) that "factual allegations raised by a party regarding how a program is implemented are not relied upon by staff," the DSA recites the Department of Finance position from its uncertified response at pages 9-10, and addresses the issues and allegations it raised throughout the discussion.

Section 1183.02, subsection (d), makes no distinction between factual and legal allegations, or whether those allegations are ultimately utilized by the Commission. Section 1183.02(d) mandates that *any* response, opposition, or recommendation filed in response to a test claim have the required certification. The DSA assertion that nonfactual allegations do not need to be certified, or are inconsequential, is not supported by the applicable regulations. Therefore, the DOF comments on the test claim should be removed from the DSA because they were not properly certified when submitted.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

1 **DECLARATION OF SERVICE**

2
3 Re: 01-TC-21 San Bernardino Community College District
4 Child Abuse and Neglect Reporting

5
6 I declare:

7
8 I am employed in the office of SixTen and Associates, which is the
9 appointed representative of the above named claimants. I am 18 years of
10 age or older and not a party to the entitled matter. My business address is
11 3841 North Freeway Blvd, Suite 170, Sacramento, CA 95834.
12

13 On the date indicated below, I served the attached letter dated June 22,
14 2009, to Paula Higashi, Executive Director, Commission on State
15 Mandates, to the Commission mailing list updated 10/16/07 for this test
16 claim, and to:

17
18 Paula Higashi, Executive Director
19 Commission on State Mandates
20 980 Ninth Street, Suite 300
21 Sacramento, CA 95814
22

23 **U.S. MAIL:** I am familiar with the business
24 practice at SixTen and Associates for the
25 collection and processing of
26 correspondence for mailing with the
27 United States Postal Service. In
28 accordance with that practice,
29 correspondence placed in the internal mail
30 collection system at SixTen and
31 Associates is deposited with the United
32 States Postal Service that same day in the
33 ordinary course of business.

34
35 **OTHER SERVICE:** I caused such
36 envelope(s) to be delivered to the office of
37 the addressee(s) listed above by:

38 _____
39 (Describe)
40
41

FACSIMILE TRANSMISSION: On the
date below from facsimile machine
number (858) 514-8645, I personally
transmitted to the above-named person(s)
to the facsimile number(s) shown above,
pursuant to California Rules of Court
2003-2008. A true copy of the above-
described document(s) was(were)
transmitted by facsimile transmission and
the transmission was reported as
complete and without error.

A copy of the transmission report issued
by the transmitting machine is attached to
this proof of service.

PERSONAL SERVICE: By causing a true
copy of the above-described document(s)
to be hand delivered to the office(s) of the
addressee(s).

42 I declare under penalty of perjury under the laws of the State of California that the
43 foregoing is true and correct and that this declaration was executed on June 22, 2009, at
44 Sacramento, California.

45
46 
47 _____
Kyle M. Peters

Commission on State Mandates

Original List Date: 7/3/2002
Last Updated: 10/16/2007
List Print Date: 05/22/2009
Claim Number: 01-TC-21
Issue: Child Abuse and Neglect Reporting

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

~~Mr. Raymond Eberhard~~ *Robert Tausch* **Claimant**
San Bernardino Community College District
114 South Del Rosa Drive
San Bernardino, CA 92408
Tel: (909) 382-4021
Fax: (909) 382-0174

Ms. Carol Bingham
California Department of Education (E-08)
Fiscal Policy Division
1430 N Street, Suite 5602
Sacramento, CA 95814
Tel: (916) 324-4728
Fax: (916) 319-0116

Mr. Erik Skinner
California Community Colleges
Chancellor's Office (G-01)
1102 Q Street
Sacramento, CA 95814-6511
Tel: (916) 323-7007
Fax: (916) 322-4783

Mr. Patrick Day
San Jose Unified School District
855 Lenzen Avenue
San Jose, CA 95126-2736
Tel: (408) 535-6572
Fax: (408) 535-6692

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 894059
Temecula, CA 92589
Tel: (951) 303-3034
Fax: (951) 303-6607

Executive Director
State Board of Education
1430 N Street, Suite #5111
Sacramento, CA 95814
Tel:
Fax:

Mr. Paul Steenhausen

Legislative Analyst's Office (B-29)

925 L Street, Suite 1000

Sacramento, CA 95814

Tel: (916) 319-8324

Fax: (916) 324-4281

Mr. Mike Brown

School Innovations & Advocacy

11130 Sun Center Drive, Suite 100

Rancho Cordova, CA 95670

Tel: (916) 669-5116

Fax: (888) 487-6441

Mr. Mark Ginsberg

Department of Social Services (A-24)

Staff Attorney

744 P Street, MS 17-27

Sacramento, CA 95814

Tel: (916) 657-2353

Fax: (916) 657-2281

Mr. David E. Scribner

Scribner & Smith, Inc.

2200 Sunrise Boulevard, Suite 220

Gold River, CA 95670

Tel: (916) 852-8970

Fax: (916) 852-8978

Mr. Michael Johnston

Clovis Unified School District

1450 Herndon Ave

Clovis, CA 93611-0599

Tel: (559) 327-9000

Fax: (559) 327-9129

Ms. Ginny Brummels

State Controller's Office (B-08)

Division of Accounting & Reporting

3301 C Street, Suite 500

Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

Ms. Jeannie Oropeza

Department of Finance (A-15)

Education Systems Unit

915 L Street, 7th Floor

Sacramento, CA 95814

Tel: (916) 445-0328

Fax: (916) 323-9530

Ms. Susan Geanacou

Department of Finance (A-15)

915 L Street, Suite 1280

Sacramento, CA 95814

Tel: (916) 445-3274

Fax: (916) 449-5252

Ms. Jolene Tollenaar

MGT of America

455 Capitol Mall, Suite 600

Sacramento, CA 95814

Tel: (916) 712-4490

Fax: (916) 290-0121
