Hearing Date: March 30, 2005
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ITEM 8
COURT-ORDERED TEST CLAIM REMAND
PROPOSED STATEMENT OF DECISION

Education Code Sections 38048 [renumbered 39831.5], 39831.3 and 39831.5
Vehicle Code Section 22112

Statutes 1994, Chapter 831
Statutes 1996, Chapter 277
Statutes 1997, Chapter 739

School Bus Safety II (97-TC-22)

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the March 30, 2005 hearing on the above-named remanded test claim.[1]

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page two, which accurately reflects the staff recommendation on the remanded test claim. Minor changes to reflect the hearing testimony and the vote count will be included when issuing the final Statement of Decision.

However, if the Commission's vote on Item 7 modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. In the alternative, if the changes are significant, it is recommended that adoption of a Proposed Statement of Decision be continued to the May 2005 Commission hearing.

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code sections 38048 (currently numbered 39831.5), 39831.3 and 39831.5, and Vehicle Code section 22112, as added or amended by Statutes 1994, chapter 831, Statutes 1996, chapter 277, and Statutes 1997, chapter 739; Filed on December 22, 1997, By Clovis Unified School District, Claimant	No. 97-TC-22 (REMAND) ***School Bus Safety II*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Proposed for adoption on March 30, 2005)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this remanded test claim during a regularly scheduled hearing on March 30, 2005. [Witness list will be included in the final Statement of Decision].

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

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision].

BACKGROUND

In 1997, claimant Clovis Unified School District submitted a test claim alleging a reimbursable state mandate for school districts to perform new activities by instructing pupils and informing parents of school bus safety procedures. The test claim statutes are Education Code sections 38048 (currently numbered 39831.5), 39831.3 and 39831.5, and Vehicle Code section 22112, as added or amended by Statutes 1994, chapter 831, Statutes 1996, chapter 277, and Statutes 1997, chapter 739. In the original *School Bus Safety II* Statement of Decision, adopted July 29, 1999, the Commission concluded that the test claim legislation imposed the following reimbursable state-mandated activities:

- Instructing all prekindergarten and kindergarten pupils in schoolbus emergency procedures and passenger safety. (Ed. Code, § 39831.5, subd. (a); Ed. Code, § 38048, subd (a).)
- Determining which pupils in prekindergarten, kindergarten, and grades 1 to 6, inclusive, have not been previously transported by a schoolbus or school pupil activity bus. (Ed. Code, § 39831.5, subd. (a)(1); Ed. Code, § 38048, subd. (a)(1).)

- Providing written information on schoolbus safety to the parents or guardians of pupils in prekindergarten, kindergarten, and grades 1 to 6, inclusive, who were not previously transported in a schoolbus or school pupil activity bus. (Ed. Code, § 39831.5, subd. (a)(1); Ed. Code, § 38048, subd. (a)(1).)
- Providing updates to all parents and guardians of pupils in prekindergarten, kindergarten, and grades 1 to 6, inclusive, on new schoolbus safety procedures as necessary. The information shall include, but is not limited to: (A) a list of schoolbus stops near each pupil's home; (B) general rules of conduct at schoolbus loading zones; (C) red light crossing instructions; (D) schoolbus danger zone; and (E) walking to and from schoolbus stops. (Ed. Code, § 39831.5, subd. (a)(1); Ed. Code, § 38048, subd. (a)(1).)
- Preparing and revising of a school district transportation safety plan. (Ed. Code, § 39831.3, subds. (a), (a)(1), (a)(2)(A), (a)(3), and (b).)
- Determining which pupils require escort. (Vehicle Code section 22112, subd. (c)(3).)
- Ensuring pupil compliance with schoolbus boarding and exiting procedures. (Ed. Code, § 39831.3, subds. (a), (a)(1), (a)(2)(A), (a)(3), and (b).)
- Retaining a current copy of the school district's transportation safety plan and making the plan available upon request by an officer of the Department of the California Highway Patrol. (Ed. Code, § 39831.3, subds. (a), (a)(1), (a)(2)(A), (a)(3), and (b).)
- Informing district administrators, school site personnel, transportation services staff, schoolbus drivers, contract carriers, students, and parents of the new Vehicle Code requirements relating to the use of the flashing red signal lamps and stop signal arms. (Veh. Code, § 22112.)

In *State of California Department of Finance v. Commission on State Mandates* (02CS00994), this decision was challenged in Sacramento County Superior Court. The petitioner, Department of Finance, sought a writ directing the Commission to set aside the prior decision and to issue a new decision denying the test claim, for the following legal reasons:

- The transportation of pupils to school and on field trips is an optional activity because the State does not require schools to transport pupils to school or to undertake school activity trips.
- Prior to the enactment of the test claim legislation, the courts determined that when schools undertook the responsibility for transporting pupils they were required to provide a reasonably safe transportation program.
- To the extent the test claim legislation requires schools to transport pupils in a safe manner and to develop, revise and implement transportation safety plans, the test claim legislation does not impose a reimbursable state mandate because these activities are undertaken at the option of the school district and the legislation merely restates existing law, as determined by the courts, that schools that transport students

> do so in a reasonably safe manner. Therefore the test claim legislation does not require school districts to implement a new program or higher level of service.[2]

On December 22, 2003, the court entered judgment for the Department of Finance, and on February 3, 2004, ordered the Commission to set aside the prior Statement of Decision and to vacate the parameters and guidelines and statewide cost estimate issued with respect to the *School Bus Safety II* test claim. At the March 25, 2004 Commission hearing, the Commission set aside the original *School Bus Safety II* decision and vacated the applicable parameters and guidelines and statewide cost estimate.[3]

However, the court left one issue for remand: the Commission must reconsider the limited issue of whether the federal Individuals with Disabilities Education Act (IDEA) or any other federal law requires school districts to transport any students and, if so, whether the *School Bus Safety II* test claim statutes mandate a higher level of service or new program beyond federal requirements for which there are reimbursable state-mandated costs.

Claimant's Position

Claimant's response to the request for briefing, dated April 26, 2004, follows:

> You notified the claimant on March 26, 2004 that the Commission on State Mandates has adopted an order to set aside the decision on the above referenced test claim pursuant to an order of the Sacramento Superior Court. You requested the claimant to file and serve a brief by April 26, 2004 addressing two limited issues for rehearing. I respond to that request on behalf of the test claimant.
>
> The two issues are:
>
> 1. Whether IDEA or any other federal law requires school districts to transport any students, and if so,
> 2. Whether the test claim statutes mandate a higher level of service or new program beyond federal requirements for which there are reimbursable state-mandated costs.
>
> In the statement of decision for the test claim, adopted July 29, 1999, at footnote 13, the Commission has already made that determination of fact and law in the affirmative.

No further comments were filed after the release of the draft staff analysis.

State Agency's Position

The Commission received no state response to the request for briefing or to the draft staff analysis.

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[2] Petition for Writ of Administrative Mandamus and Complaint for Declaratory Relief, dated July 9, 2002, pages 4-5.

[3] The original *School Bus Safety* (CSM-4433) statement of decision and parameters and guidelines were not part of the subject litigation.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[6] 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.[7] In 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.[8]

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.[9] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

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[4] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[5] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[6] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

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

[8] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[13] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[14]

Issue: The Commission is ordered to rehear the *School Bus Safety II* test claim and issue a decision on this limited question:

- **Does the federal IDEA or any other federal law require school districts to transport any students and, if so, do the *School Bus Safety II* test claim statutes mandate a new program or higher level of service beyond federal requirements for which there are reimbursable state-mandated costs?**

In briefing the *School Bus Safety II* litigation, (*State of California Department of Finance v. Commission on State Mandates* (02CS00994)), the Department of Finance cited the 1992 California Supreme Court decision confirming the constitutionality of Education Code section 39807.5.[15] In that case, the Court found that the provision, which authorizes school districts to

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[12] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[13] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[14] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[15] *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251. Current Education Code section 39807.5 follows (added by Stats. 1999, ch. 646; substantively identical to the law analyzed in *Arcadia*):

> (a) When the governing board of any school district provides for the transportation of pupils to and from schools in accordance with Section 39800, or between the regular full-time day schools they would attend and the regular full-time occupational training classes attended by them as provided by a regional occupational center or program, the governing board of the district may require the parents and guardians of all or some of the pupils transported, to pay a portion of the cost of this transportation in an amount determined by the governing board.
>
> (b) The amount determined by the board shall be no greater than the statewide average nonsubsidized cost of providing this transportation to a pupil on a publicly owned or operated transit system as determined by the Superintendent of Public Instruction, in cooperation with the Department of Transportation.
>
> (c) For the purposes of this section, "nonsubsidized cost" means actual operating costs less federal subventions.

charge fees for pupil transportation, violated neither the free school guarantee nor equal protection clause of the California Constitution. In addition, the Court confirmed that, statutorily, California schools need not provide bus transportation at all. (*Arcadia Unified School Dist., supra,* 2 Cal.4th 251, 264.)

> Without doubt, school-provided transportation may enhance or be useful to school activity, but it is not a necessary element which each student must utilize or be denied the opportunity to receive an education.
>
> This conclusion is especially true in this state, since, as the Court of Appeal correctly noted, *school districts are permitted, but not required, to provide bus transportation*. ([Ed. Code,] § 39800.) If they choose, districts may dispense with bus transportation entirely and require students to make their own way to school. Bus transportation is a service which districts may provide at their option, but schools obviously can function without it. [Fns. omitted, emphasis added.]

Department of Finance's briefing to the court stated:

> There is no reimbursable mandate for activities undertaken at the option or discretion of a local government entity. Actions undertaken without legal compulsion (or threat of penalty for nonparticipation) do not trigger a state mandate and do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program. (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743; 134 Cal.Rptr.2d 237, 249; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.) The test claim statutes all deal with safe practices when students are transported. But since districts are not required to transport pupils, the test claim statutes create no mandate. The transportation of students is a voluntary activity.[16]

By granting the Department of Finance's petition on all but the limited federal law question, the court agreed with the petitioner that the *School Bus Safety II* test claim was not a reimbursable state-mandated program to the extent that the underlying school bus transportation services were discretionary.

Claimant's April 26, 2004 response to the Commission's request for briefing on the remaining federal law issue was: "In the statement of decision for the test claim, adopted July 29, 1999, at

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> (d) The governing board shall exempt from these charges pupils of parents and guardians who are indigent as set forth in rules and regulations adopted by the board.
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> (e) A charge under this section may not be made for the transportation of handicapped children.
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> (f) Nothing in this section shall be construed to sanction, perpetuate, or promote the racial or ethnic segregation of pupils in the schools.

[16] Points and Authorities in Support of Petition for Writ of Mandate, dated September 30, 2003, page 8.

footnote 13, the Commission has already made that determination of fact and law in the affirmative." Footnote 13 follows in its entirety:

> Federal law, under the Individuals with Disabilities Education Act (IDEA), requires states to provide disabled children with special education and related services in the least restrictive environment. Therefore, instruction in schoolbus safety to prekindergarten and kindergarten pupils includes special education pupils with transportation listed in their individualized education program (IEP). The IEP is a written statement developed in a meeting between the school, the teacher, and the parents. The purpose of the IEP is to ensure a disabled child receives a free appropriate public education in the least restrictive environment. The IEP includes related services that may be required. Depending on the needs of the child, these related services may include transportation. The IDEA includes specific services, but is not limited to the provision of those services listed. The enumerated services include *transportation*, early identification and assessment of disabling conditions in children, and medical and counseling services. (Title 20, United States Code, section 1401(a)(17), (19).) Thus, the test claim goes beyond federal requirements in that under IDEA transportation services are discretionary.

Claimant asserts that by this footnote the Commission affirmatively determined that the IDEA requires school districts to transport students. However, the final sentence of the footnote in plain language concludes, "that under IDEA transportation services are discretionary." The Commission notes that the language of the footnote is unclear: initially suggesting that if an IEP determines that transportation is necessary for a particular student, it is required under the IDEA, but then concluding transportation is discretionary under the federal law. Regardless of how the footnote might be interpreted, the July 29, 1999 Statement of Decision, including footnote 13, was set aside by court-order and no longer has any legal effect. Therefore the issue must be re-examined and decided by the Commission.

A primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and *related services* designed to meet their unique needs and prepare them for employment and independent living." (20 U.S.C. § 1400(d)(1)(A), emphasis added.) Consistent with this purpose, the IDEA authorizes federal funding for states that provide disabled children with special education and "related services." "Related services," for the purposes of the IDEA, "means *transportation*, and such developmental, corrective, and other supportive services … as may be required to assist a child with a disability to benefit from special education … ." (20 U.S.C. § 1401(22), emphasis added.) Thus, transportation may be a necessary related service for individual disabled children as part of providing them with "a free appropriate public education." However, the Commission finds no evidence that *school bus* transportation is required in order to comply with the IDEA.

As an example, the California Department of Education periodically files a plan of compliance with the federal government as a condition of receiving IDEA funding. The plan in effect at the time the test claim statutes were enacted provides that "In lieu of providing transportation of an individual, the local education agency may reimburse the parent or nonpublic school or agency subject to a written agreement or contract for cost of actual and necessary travel incurred in transporting the child with disabilities at a rate to be determined by the local education agency governing board, but no less than the rate allowed for travel by the local education agency

employees."[17] Currently, the CDE has guidelines posted to its website, which define transportation options for use in developing an IEP, as follows:

> Considering the identified needs of the pupil, transportation options may include, but not be limited to: walking, riding the regular school bus, utilizing available public transportation (any out-of-pocket costs to the pupil or parents are reimbursed by the local education agency), riding a special bus from a pick up point, and portal-to-portal special education transportation via a school bus, taxi, reimbursed parent's driving with a parent's voluntary participation, or other mode as determined by the IEP team.[18]

Certainly school districts may choose to transport these students directly by school bus, but neither federal nor state law requires this. Finally, even if school bus transportation is used for these students, there is no evidence in the record that the state and federal funding provided for transporting children with disabilities is inadequate to cover any pro rata costs that may result from the test claim statutes.

CONCLUSION

By granting the Department of Finance's petition in *State of California Department of Finance v. Commission on State Mandates* (02CS00994), the Sacramento Superior Court found that the *School Bus Safety II* test claim was not a reimbursable state-mandated program to the extent that the underlying school bus transportation services were discretionary. The court left an issue for remand, ordering the Commission "to rehear the *School Bus Safety II* test claim and to issue a decision on the limited issue of whether the federal Individuals with Disabilities Education Act (IDEA) or any other federal law requires school districts to transport any students and, if so, do the *School Bus Safety II* test claim statutes mandate a higher level of service or new program beyond federal requirements for which there are reimbursable state-mandated costs?"[19]

The Commission concludes that although federal law may require transportation of disabled children under certain circumstances, the law does not require school districts to provide a school bus transportation program; therefore, pursuant to the court decision described above, and article XIII B, section 6 of the California Constitution, the *School Bus Safety II* test claim statutes do not impose a new program or higher level of service beyond federal requirements for which there are reimbursable state-mandated costs.

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[17] *California State Plan for Part B of the Individuals with Disabilities Education Act and Section 619 (Preschool) for Fiscal Years 1994 through 1997*, version 4, page 145.

[18] At <http://www.cde.ca.gov/sp/se/sr/trnsprtgdlns.asp> [as of Mar. 8, 2005.]

[19] Peremptory Writ of Mandamus, *State of California Department of Finance v. Commission on State Mandates*, Sacramento County Superior Court Case Number 02CS00994, dated February 3, 2004.