

**COMMISSION ON STATE MANDATES**

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May 9, 2012

Mr. Arthur Palkowitz  
Stutz Artiano Shinoff & Holtz  
2488 Historic Decatur Road, Suite 200  
San Diego, CA 92106

*And Interested Parties and Affected State Agencies (See Mailing List)*

**RE: Final Staff Analysis, Proposed Statement of Decision, and Notice of Hearing**  
*California English Language Development Test II, 03-TC-06*  
Education Code Section 48985, et al.  
Castro Valley Unified School District, Claimant

Dear Mr. Palkowitz:

The final staff analysis and proposed statement of decision for this test claim are enclosed.

**Hearing**

This matter is set for hearing on **Friday, May 25, 2012, at 9:30 a.m.** in Room 447 of the State Capitol, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, or if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

**Special Accommodations**

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Senior Commission Counsel Eric Feller at (916) 323-3562 if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey  
Executive Director

**ITEM 6**  
**TEST CLAIM**  
**FINAL STAFF ANALYSIS**  
**AND PROPOSED STATEMENT OF DECISION**

Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6

Statutes 1977, Chapter 36, Statutes 1978, Chapter 848, Statutes 1980, Chapter 1339, Statutes  
1981, Chapter 219, Statutes 1994, Chapter 922

California Code of Regulations, Title 5, Sections 11300, 11301, 11302, 11303, 11304, 11305,  
11306, 11307, 11308, 11309, 11310, 11316, 11510, 11511, 11511.5, 11512, 11512.5, 11513,  
11513.5, 11514, 11516.5, 11517

Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1998, No. 33 (Aug. 14, 1998) page  
75; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76; Register 2001, No. 40 (Oct. 5, 2001) pages  
77-78.2; Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1;  
Register 2003, No. 16 (April 18, 2003) pages 77-78.2.

*California English Language Development Test II*  
03-TC-06

Castro Valley Unified School District, Claimant

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Attached is the proposed statement of decision for this matter. The executive summary and the proposed statement of decision also function as the final staff analysis, as required by section 1183.07 of the Commission's regulations.

**EXECUTIVE SUMMARY**

**Background**

This test claim addresses statutes and regulations governing the public instruction of limited English proficient ("LEP") pupils in California. LEP pupils are those who do not speak English, or those whose native language is not English and who are not currently able to perform ordinary classroom work in English.

Test Claim Statutes and Regulations

The following statutes and regulations have been pled in this claim:

- Statutes that were adopted as part of the Chacon-Moscone Bilingual-Bicultural Education Act of 1976. This Act provided funding to train bilingual teachers to meet the needs of LEP pupils through bilingual instruction. Bilingual instruction programs are those in which LEP pupils, while learning English, receive instruction in academic subjects such as math, science, and social studies in their primary or home language.<sup>1</sup>

The Act contained a sunset clause that became effective on June 30, 1987. For eleven years following the Act's sunset, the Legislature was unable to gain the necessary consensus for any subsequent legislation regarding bilingual education. However, the

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<sup>1</sup> Education Code sections 52164, 52164.1, 52164.2, 52164.3, 52164.5, and 52164.6.

Legislature authorized continued funding for the general purpose of bilingual education until 1998, when Proposition 227 was adopted by the voters.

- Regulations adopted to implement Proposition 227, which was enacted by the voters in 1998 to generally reject bilingual instruction and, instead, provide for a system of structured English immersion (English-only instruction). These regulations define and clarify the terms adopted in Proposition 227, and implement the process for reviewing parental exception waivers authorized by Proposition 227 to allow a parent to request, or school personnel to recommend an alternative educational program for the pupil.
- English Language Learner regulations adopted by the California Department of Education (CDE) in 2003 and placed with the regulations to implement Proposition 227. These clean-up regulations address the language census and identification of LEP pupils, assessment of LEP pupils using the California English Language Development Test (CELDT), reclassification of the pupil from English learner to proficient in English, monitoring the progress of the pupils, documentation requirements, and a parent advisory committee.<sup>2</sup>
- Regulations adopted to administer the CELDT, which is used to assess the proficiency of LEP pupils upon enrollment, and annually thereafter, until the pupil is reclassified as English proficient.<sup>3</sup>
- Statute and regulations requiring that notices to parents and guardians be provided in English and the primary language of the pupil.<sup>4</sup>

The law regarding the education for LEP pupils has a long history. Many federal and state laws have been enacted and interpreted by the courts to require appropriate action on the part of state and local educational agencies to ensure the equal participation and nondiscrimination in the education of LEP pupils. In addition, federal and state laws have been enacted to provide funding for these services.

#### Federal Law

The 14th Amendment to the United States Constitution declares that no state may deny any person the equal protection of the laws. This amendment protects the privileges of all citizens, provides equal protection under the law, and gives Congress the power to enforce the amendment through legislation.

In 1964, Congress passed Title VI of the Civil Rights Act to prohibit discrimination based on race, color, age, creed, or national origin in any federally funded activity or program. Shortly thereafter, Congress enacted the Elementary and Secondary Education Act of 1965 (ESEA)<sup>5</sup>, as a

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<sup>2</sup> California Code of Regulations, title 5, sections 11300-11316 (regulations implementing Proposition 227 and 2003 clean-up regulations).

<sup>3</sup> California Code of Regulations, title 5, sections 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, and 11517.

<sup>4</sup> Education Code section 48985; California Code of Regulations, title 5, sections 11316 and 11510.

<sup>5</sup> Public Law 89-10.

part of President Lyndon B. Johnson's "War on Poverty." Title I of ESEA provides funding and guidelines for educating "educationally disadvantaged" children. In 1968, the federal Department of Health, Education, and Welfare (HEW), which has authority to adopt regulations prohibiting discrimination in federally assisted school systems, issued a guideline interpreting Title VI that "school systems are responsible for assuring that pupils of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other pupils in the system." In 1970, HEW made the guidelines more specific, requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to pupils who had "language deficiencies."

In 1974, the United States Supreme Court decided *Lau v. Nichols*, a case brought by non-English speaking Chinese pupils challenging the unequal educational opportunities provided by the San Francisco Unified School District under Title VI of the Civil Rights Act.<sup>6</sup> The case presented uncontested facts that more than 2,800 school children of Chinese ancestry attended school in the district and did not speak, understand, read, or write English. The school district had not taken any significant steps to deal with the language deficiency of many of those pupils. The Supreme Court held that pupils of limited English proficiency who are not provided with special programs to help them learn English were being denied their rights under Title VI of the Civil Rights Act. The court further held that the school district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these pupils, and that it is not enough to merely provide these pupils the same facilities, textbooks, teachers, and curriculum. The court did not impose any specific remedy, but agreed that teaching English to the pupils of Chinese ancestry who do not speak the language is one option, or giving instructions to this group of pupils in Chinese is another option.

Shortly after *Lau*, Congress amended ESEA with the Equal Educational Opportunities Act of 1974 (EEOA) to require state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by pupils in the instructional program. Failure to provide the "appropriate action" can result in litigation. The EEOA provides that an individual denied an equal educational opportunity under the Act may institute a civil action in a district court of the United States for such relief as may be appropriate.

Many courts have interpreted the EEOA, and have determined that the EEOA requires that a state's language remediation program and practices:

- Be based on sound educational theory or principles;
- Are reasonably calculated to implement effectively the educational theory adopted by the school; and
- Produce results indicating that the language barriers confronting pupils are actually being overcome.<sup>7</sup>

If a program, after being employed for a period of time sufficient to give the plan a legitimate trial, fails to produce results indicating that the language barriers confronting LEP pupils are actually being overcome, the program may no longer constitute appropriate action under the

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<sup>6</sup> *Lau v. Nichols* (1974) 414 U.S. 563.

<sup>7</sup> *Castaneda v. Pickard* (1981) 648 F.2d 989, 1009-1010.

EEOA. The courts have further determined that identification, testing, evaluating, and assessing LEP pupils on their English language proficiency is required to properly identify these pupils and determine if appropriate action is being provided under the Act.

In 2002, Congress reauthorized ESEA as the No Child Left Behind Act. . Title III of the No Child Left Behind Act is entitled the “English Language Acquisition, Language Enhancement, and Academic Achievement Act” and was enacted to provide increased federal grant funding to state and local educational agencies to help LEP pupils attain English language proficiency and meet the same academic standards as their English-speaking peers in all content areas. In order to receive funding under Title III, state and local educational agencies are held accountable for the progress of LEP and immigrant pupils through annual measurable achievement outcomes, which measures the number of LEP pupils making sufficient progress in English acquisition, attaining English proficiency, and meeting Adequate Yearly Progress. The amount of funding each state receives is determined by a formula derived from the number of LEP and immigrant pupils in that state. Title III also requires educational agencies, as a condition of receipt of funds, to inform the parents and guardians of LEP pupils how they can assist in their child’s progress achieving English proficiency.

In 2009, the United States Supreme Court, in *Horne v. Flores*, held that compliance with the provisions of Title III of No Child Left Behind (NCLB) does not necessarily constitute “appropriate action” required under the EEOA.<sup>8</sup> The court found that the federal government’s approval of a NCLB plan does not entail the substantive review of a state’s program for LEP pupils or a determination that the programming results in equal educational opportunity for LEP pupils as required by the EEOA. Nevertheless, participation and compliance with Title III’s assessment and reporting requirements provides evidence of the state and local educational agencies’ progress and achievement of LEP pupils for purposes of the EEOA.

### **Procedural History**

Claimant Castro Valley Unified School District filed the test claim on September 22, 2003. The Department of Finance filed comments on March 23, 2005. Claimant filed a supplement to the test claim on January 1, 2007. Commission staff requested from CDE the final statement of reasons for regulations adopted in 1998 and 2003 on August 18, 2011, and requested them again on September 28, 2011. CDE submitted the final statement of reasons on September 29, 2011. The Commission issued the draft staff analysis on April 5, 2012. No comments were filed on the draft staff analysis.

### **Position of the Parties**

The claimant contends that all activities required by the plain language of the test claim statutes and regulations constitute reimbursable state-mandated programs.

The Department of Finance (DOF) opposes this test claim on the ground that the activities are mandated by federal law, Proposition 227, and are required as a condition of the voluntary acceptance of federal NCLB funding. Thus, a state-mandated program has not been imposed on school districts.

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<sup>8</sup> *Horne v. Flores* (2009) 557 U.S. 433.

## Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local governments are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local governments to be eligible for reimbursement, one or more similarly situated local governments must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

## Claims

The following chart provides a brief summary of the claims, a description of the statute, regulation or alleged executive order and staff’s recommendation.

| <u>Claim</u>   | <u>Description</u>  | <u>Recommendation</u>   |
|--|---|---|
| Chacon-Moscone Bilingual Education Act (Ed. Code §§52164, 52164.1, 52164.2, 52164.3, 52164.5, and 52164.6)   | Established a bilingual education program for LEP pupils, and required school districts to take a language census of all LEP pupils and report the results to CDE; notify parents or guardians of the results of the assessment; reassess LEP pupils; retain documentation on the assessment of language skills for each pupil; and determine when LEP pupils have developed the language skills necessary to succeed in an English-only classroom and reclassify those pupils. | <i>Denied.</i> The statutes have not been operative and did not constitute a state-mandated program during the period of reimbursement for this claim. Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset on June 30, 1987, and ceased to be operative on that date. |
| Regulations adopted to implement Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300, 11301, 11302, 11303 (renumbered to 11309), 11304 (renumbered to 11310)) | Proposition 227 was adopted by the voters in 1998 to establish an English-immersion program for LEP pupils. The regulations implement the initiative and establish procedures for parental exception waivers.   | <i>Denied.</i> The regulations do not mandate a new program or higher level of service. The regulations impose activities expressly required by Proposition 227 and the federal EEOA, and additional procedural activities that are part and parcel of the ballot measure mandate.                                  |

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|--|--|---|
| <p>2003 English Language Learner Regulations (Cal. Code Regs., tit. 5, §§ 11303, 11304, 11305, 11306, 11307, 11308)</p>                | <p>These regulations require the language census and identification of LEP pupils, initial and annual assessment of LEP pupils using the CELDT, reclassification process to transfer the LEP pupil from English learner to proficient in English, monitoring the progress of the pupils, documentation requirements, and a parental advisory committee to provide recommendations regarding the instruction of LEP pupils.</p>       | <p><b>Denied.</b> The regulations do not mandate a new program or higher level of service. The activities are either expressly required by prior statutes (Ed. Code, § 313, 62002.5), or the federal EEOA. Any additional procedural activities required are part and parcel of the federal mandate.</p>                |
| <p>CELDT regulations (Cal. Code Regs., tit. 5, §§11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, and 11517)</p> | <p>The regulations administer the testing process.</p>   | <p><b>Denied.</b> The regulations do not mandate a new program or higher level of service. The regulations impose the same requirements as prior law in Education Code section 313 and impose activities that are part and parcel of, and necessary to implement, the federal law requirements imposed by the EEOA.</p> |
| <p>Notices in English and primary language of the pupil (Ed. Code, § 48985; Cal. Code Regs., tit. 5, §§ 11316, 11510)</p>              | <p>The statute and regulations require that all notices, reports, statements, or records sent by a school district to a parent or guardian who speaks a primary language other than English is to be written in the primary language in addition to English. This requirement applies only when 15% of the pupils enrolled in a public school speaks a language other than English, as determined by the annual language census.</p> | <p><b>Denied.</b> This requirement does not impose a new program or higher level of service. The same activity was required by former Education Code section 10926.</p>   |

### Staff Analysis

Staff finds that the statutes and regulations pled in this claim do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution and, thus, reimbursement is not required.

A. Statutes Pled Under Chacon Moscone Bilingual-Bicultural Education Act

Under the bilingual education program, school districts are required to take a language census of LEP pupils and report the results to CDE, notify parents or guardians of the assessment results, reassess LEP pupils when there is reasonable doubt regarding the pupil's designation, retain documentation, and determine when an LEP pupil can be reclassified as English proficient.

The activities required by the test claim statutes are not eligible for reimbursement because the statutes have not been operative since 1987 and, thus, did not constitute a mandated program during the period of reimbursement for this claim. Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset and ceased to be operative on June 30, 1987.

B. Regulations that Implement Proposition 227

The voters adopted Proposition 227, which added sections 300 –340 (not including section 313) to the Education Code. Proposition 227 requires school districts to instruct LEP pupils through structured English immersion classes unless a parental exception waiver is granted. When 20 or more pupils have been granted parental exception waivers and are enrolled in a given grade, the school district is required to provide bilingual instruction or allow the pupil to transfer to a public school where bilingual education is provided. The proposition also requires school districts to provide parents and guardians a description of all choices and materials available to enable them to make an informed decision about whether to seek a waiver.

This claimant pleads regulations adopted by CDE that implement the Proposition 227 requirements. To the extent that the regulations require the same activities that are expressly required by the Proposition 227 statutes, they do not mandate a new program or higher level of service on school districts and are not eligible for reimbursement.

The regulations also impose the following additional requirements that are not expressly in the Proposition 227 statutes: (1) providing notices to the parents or guardians; (2) adopting parental waiver exception procedures and guidelines for waivers that go beyond the limited exception provided for pupils with special needs; and (3) providing a written statement of reasons to the parents or guardians in cases where the waiver is denied.

These procedural requirements, however, were adopted to implement Proposition 227 and are part and parcel of the ballot measure mandate of Proposition 227. For purposes of ruling on a request for reimbursement under article XIII B, section 6, challenged state rules or procedures that are intended to implement an applicable ballot measure law – and whose costs are, in context of the ballot measure, de minimis – are treated as part and parcel of the underlying ballot measure mandate and do not impose a reimbursable state-mandated program pursuant to Government Code section 17556(f).<sup>9</sup> Under this “part and parcel” analysis, the courts have denied claims for reimbursement for the following procedural activities required by the state to implement an existing program mandated by federal law, and the courts have instructed the Commission to use the same analysis for ballot measure mandates: the adoption of rules and regulations, notice provisions, the inspection and retention of documents, maintenance of

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<sup>9</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183.



records, and recording orders and the causes thereof in official records.<sup>10</sup> The activities that implement Proposition 227 fall within the same scope as the additional activities denied by the courts under the “part and parcel” analysis.

Finally, the regulations require school districts to provide appropriate services to pupils to recoup any academic deficits that may have occurred in other areas of the core curriculum because of the language barrier of the pupil. This activity is mandated by federal law and not eligible for reimbursement under article XIII B, section 6. The courts have determined that the federal EEOA imposes an obligation on educational agencies to provide LEP pupils with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency’s language remediation program.<sup>11</sup>

Accordingly, staff finds that the regulations adopted to implement Proposition 227 do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

### C. English Language Learner Regulations Adopted by the Department of Education in 2003

These clean-up regulations require the language census and identification of LEP pupils, initial and annual assessment of LEP pupils using the CELDT, reclassification process to transfer the LEP pupil from English learner to proficient in English, monitoring the progress of the pupils after reclassification, documentation requirements, and a parent advisory committee to provide recommendations regarding the instruction of LEP pupils.

As discussed in the analysis, staff finds that these regulations do not impose state-mandated new programs or higher levels of service on school districts because:

1. The language census activities are imposed to implement federal EEOA requirements. Any additional procedural requirements imposed by the regulations to implement existing federal law are part and parcel of the underlying federal requirement and are not reimbursable.
2. The initial and annual assessment of LEP pupils and the reclassification procedures required by the test claim regulations were required by prior law in Education Code section 313, and are not new. Education Code section 313 was pled in prior test claim, *CELDT I* (00-TC-16) and denied by the Commission on the ground that the requirements of the statute were previously mandated by federal law, including the EEOA. The Commission’s decision in *CELDT I* is a final binding decision of the Commission. The documentation requirements are part and parcel of the federal EEOA.
3. The requirement to monitor the progress of pupils after reclassification is a requirement imposed by the federal EEOA.
4. The requirement to establish a parent advisory committee to provide recommendations regarding the instruction of LEP pupils was required by prior

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<sup>10</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 873, footnote 11, and 890.

<sup>11</sup> *Castaneda v. Pickard, supra*, 648 F.2d 989.

law and, thus, the activity is not new. Education Code section 62002.5 (which sunset the Chacon-Moscone Bilingual Education Act), kept the provisions requiring advisory committees and school site councils intact, despite the sunset of the remaining bilingual education statutes. The requirement remained continuously in effect until the test claim regulation became effective in 2003.

Accordingly, staff finds that the 2003 regulations adopted by CDE do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

#### D. CELDT Regulations

In 2001, a prior test claim was filed on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test (CELDT I*, 00-TC-16)) seeking reimbursement for field testing the CELDT, the initial assessment of LEP pupils, the annual assessment of LEP pupils, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program is mandated by federal law under Title VI of the Civil Rights Act and the EEOA. The *CELDT I* test claim, however, did not plead the regulations that were adopted to govern the administration of the test.

CDE adopted the test claim regulations in 2001 to implement Education Code sections 313 and 60810 through 60812 and administer the CELDT. These regulations require school districts to conduct initial and annual assessments of LEP pupils using the test, comply with test security measures, notify parents of the results, maintain test records, provide the test publisher with information regarding each pupil, designate test-site and district coordinators, provide test accommodations for pupils with disabilities, report to CDE the number of pupils to whom the test was administered each year.

Staff finds that the activities required by these regulations do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution, but are part and parcel of, and necessary to implement, the federal law requirements imposed by the EEOA.

In addition, the requirement to provide test accommodations to pupils with disabilities that take the CELDT is mandated by existing federal law under the Individuals with Disabilities Education Act (IDEA). The IDEA requires state and local education agencies to provide services and accommodations for pupils with disabilities to ensure that a free and appropriate public education is provided. These services include special test-taking accommodations as necessary and determined during the pupil's individualized education plan (IEP) process.

Accordingly, staff finds that the regulations that implement the CELDT do not mandate a new program or higher level of service.

#### E. Notice to Parents Provided in English and the Primary Language of the Parent

Staff finds that the requirement to provide notices to parents in their primary language is not new. Former Education Code section 10926, as added in 1976, imposed the same requirement and was continuously in effect until Education Code section 48985 was enacted. Accordingly, staff finds that Education Code section 48985, and the regulations that implement this requirement for Proposition 227 and the CELDT, do not mandate a new program or higher level of service on school districts.

## **Conclusion**

Based on the above analysis, staff finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

### Staff Recommendation

Staff recommends that the Commission adopt the attached proposed statement of decision to deny this test claim.

Minor changes, including those 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 this item modifies the proposed statement of decision, staff recommends that the motion to adopt the proposed statement of decision reflect those changes, which would be made before issuing the final statement of decision. In the alternative, if the changes are significant, staff recommends that the Commission postpone this item to the next Commission hearing.

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BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6

Statutes 1977, Chapter 36, Statutes 1978, Chapter 848, Statutes 1980, Chapter 1339, Statutes 1981, Chapter 219, Statutes 1994, Chapter 922

California Code of Regulations, Title 5, Sections 11300, 11301, 11302, 11303, 11304, 11305, 11306, 11307, 11308, 11309, 11310, 11316, 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, 11517

Register 1998, No. 30 (July 24, 1998) pages 75-76, Register 1998, No. 33 (Aug. 14, 1998) page 75, Register 1999, No. 1 (Jan. 1, 1999) pages 75-76, Register 2001, No. 40 (Oct. 5, 2001) pages 77-78.2, Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1, Register 2003, No. 16 (April 18, 2003) pages 77-78.2

Filed on September 22, 2003 by

Castro Valley Unified School District,  
Claimant

Case No.: 03-TC-06

*California English Language Development Test II*

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

*(Proposed for Adoption: May 25, 2012)*

**STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 25, 2012. [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 to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

## COMMISSION FINDINGS

### Chronology

- 09/22/2003 Claimant, Castro Valley Unified School District, filed the test claim with the Commission
- 03/23/2005 Department of Finance (DOF) filed comments on test claim
- 01/08/2007 Claimant filed a supplement to test claim to clarify the version of regulations pled
- 08/18/2011 Commission staff issued letter to California Department of Education (CDE) requesting the final statement of reasons for the 1998 and 2003 regulations
- 09/28/2011 Commission staff issued second request to CDE for the final statements of reason for the 1998 and 2003 regulations
- 09/29/2011 CDE submitted the final statements of reason for the regulations
- 04/05/2012 Commission staff issued the Draft Staff Analysis.

### I. BACKGROUND

This test claim addresses statutes and regulations governing the public instruction of limited English proficient (LEP) pupils in California. LEP pupils are those who do not speak English or pupils whose native language is not English and who are not currently able to perform ordinary classroom work in English.<sup>12</sup>

The law regarding the education for these pupils has a long history. Many federal and state laws have been enacted and interpreted by the courts to require appropriate action on the part of state and local educational agencies to ensure the equal participation and nondiscrimination in education for LEP pupils. In addition, federal and state laws have been enacted to provide funding for these services. A summary of these laws and the test claim statutes and regulations is provided below.

#### A. Overview of Federal Law

The 14th Amendment to the United States Constitution declares that no state may deny any person the equal protection of the laws. This amendment protects the privileges of all citizens, provides equal protection under the law, and gives Congress the power to enforce the amendment through legislation.

In 1964, Congress passed Title VI of the Civil Rights Act to prohibit discrimination based on race, color, age, creed, or national origin in any federally funded activity or program. Shortly thereafter, Congress enacted the Elementary and Secondary Education Act of 1965 (ESEA),<sup>13</sup> as a part of President Lyndon B. Johnson's "War on Poverty." Title I of ESEA provides funding and guidelines for educating "educationally disadvantaged" children. ESEA has been amended substantially over the years, adding specific education requirements. The federal Bilingual Education Act of 1968, provided funds in the form of competitive grants directly to school districts. These grants were to be used by the districts for: (1) resources for educational

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<sup>12</sup> See Education Code section 306.

<sup>13</sup> Public Law 89-10.

programs, (2) training for teachers and teacher aides, (3) development and dissemination of materials, and (4) parent involvement projects. However, the Bilingual Education Act did not specifically require bilingual education.

In 1968, the federal Department of Health, Education, and Welfare (HEW), which has authority to adopt regulations prohibiting discrimination in federally assisted school systems, issued a guideline interpreting Title VI that “school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system.” In 1970, HEW made the guidelines more specific, requiring school districts that were federally funded “to rectify the language deficiency in order to open” the instruction to pupils who had “language deficiencies.”<sup>14</sup>

In 1974, the United States Supreme Court decided *Lau v. Nichols*, a case brought by non-English speaking Chinese pupils challenging the unequal educational opportunities provided by the San Francisco Unified School District under Title VI of the Civil Rights Act.<sup>15</sup> The case presented uncontested facts that more than 2,800 school children of Chinese ancestry attended school in the district and did not speak, understand, read, or write the English language. For 1,800 of those pupils, the school district had not taken any significant steps to deal with the language deficiency.<sup>16</sup> The Supreme Court held that pupils of limited English proficiency who are not provided with special programs to help them learn English were being denied their rights under Title VI of the Civil Rights Act. The court held that the school district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these pupils, and that it is not enough to merely provide these pupils the same facilities, textbooks, teachers, and curriculum. “[F]or students who do not understand English are effectively foreclosed from any meaningful education.”<sup>17</sup> The court did not impose any specific remedy, but agreed with petitioners that teaching English to the pupils of Chinese ancestry who do not speak the language is one option, or giving instructions to this group of pupils in Chinese is another option.<sup>18</sup> Nevertheless, affirmative steps are required to be taken under Title VI to rectify the language deficiencies.

Shortly after *Lau*, Congress passed the Equal Educational Opportunities Act of 1974 (EEOA) as part of the amendments to the Elementary and Secondary Education Act. The EEOA was enacted pursuant to Congress’ enforcement authority under the 14th Amendment to United States Constitution.<sup>19</sup> The EEOA provides that:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by [¶]...[¶]

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<sup>14</sup> See *Lau v. Nichols* (1974) 414 U.S. 563, 566-567 for this history.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.* at page 569.

<sup>17</sup> *Id.* at pages 566-568.

<sup>18</sup> *Id.* at page 565.

<sup>19</sup> The EEOA is codified in 20 United States Code, section 1703(f); *Gomez v. Illinois State Board of Education* (1987) 811 F.2d 1030, 1037.

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The EEOA defines the term “educational agency” to include both state and local educational agencies.<sup>20</sup> In addition, the Act provides that “an individual denied an equal educational opportunity . . . may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.”<sup>21</sup> The EEOA limits court-ordered remedies to those that “are essential to correct particular denials of equal educational opportunity or equal protection of the laws.”<sup>22</sup>

Many courts have interpreted cases challenging violations of the EEOA, and have determined that by requiring a state “to take appropriate action to overcome language barriers” without specifying particular actions that a state must take, Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.<sup>23</sup> Thus, the appropriateness of a particular school system’s language remediation program challenged under the EEOA is determined by the courts on a case-by-case basis. Nevertheless, the courts have interpreted the EEOA to generally require that the remediation programs and practices:

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<sup>20</sup> 20 United States Code, section 1720(a) and (b) define state and local educational agencies as those defined in 20 United States Code, section 3381. Under section 3381, a state educational agency includes “the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.” A local educational agency is defined in section 3381 to include “a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.”

<sup>21</sup> 20 United States Code, section 1706.

<sup>22</sup> 20 United States Code, section 1712.

<sup>23</sup> *Castaneda v. Pickard*, *supra*, 648 F.2d 989, 1009. In 1974, Congress also passed the Bilingual Education Act to establish a competitive grant program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. However, the court in *Castaneda* found that Congress, in describing the remedial obligation imposed on the states in the EEOA, did not specify that a state must provide a program of “bilingual education” to all limited English speaking students. Rather, Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques to meet their obligations under the EEOA. (*Ibid.*)

- Be based on sound educational theory or principles;
- Are reasonably calculated to implement effectively the educational theory adopted by the school; and
- Produce results indicating that the language barriers confronting pupils are actually being overcome.<sup>24</sup>

If a program, after being employed for a period of time sufficient to give the plan a legitimate trial, fails to produce results indicating that the language barriers confronting pupils are actually being overcome, the program may no longer constitute appropriate action as far as that school is concerned.<sup>25</sup> The cases interpreting the requirements of the EEOA are discussed more fully in the analysis.

Almost thirty years later, in 2002, Congress passed Title III of the No Child Left Behind Act. Title III is entitled the “English Language Acquisition, Language Enhancement, and Academic Achievement Act” and was enacted to provide increased federal grant funding to state and local educational agencies to assist them in helping LEP pupils attain English language proficiency and meet the same academic standards as their English-speaking peers in all content areas.<sup>26</sup> In order to receive funding under Title III, state and local educational agencies are held accountable for the progress of LEP and immigrant pupils through annual measurable achievement outcomes, which measures the number of LEP pupils making sufficient progress in English acquisition, attaining English proficiency, and meeting Adequate Yearly Progress. The amount of funding each state receives is determined by a formula derived from the number of LEP and immigrant pupils in that state.<sup>27</sup> Title III also requires educational agencies, as a condition of receipt of funds, to inform the parents and guardians of LEP pupils how they can assist in their child’s progress achieving English proficiency.

In 2009, the United States Supreme Court, in *Horne v. Flores*, held that compliance with the provisions of Title III of No Child Left Behind does not necessarily constitute “appropriate action” required under the EEOA. The court found that the federal government’s approval of a No Child Left Behind (NCLB) plan does not entail the substantive review of a state’s program for LEP pupils or a determination that the programming results in equal educational opportunity for LEP pupils as required by the EEOA. Moreover, Title III contains a savings clause, which provides that “[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right.”<sup>28</sup> Nevertheless, participation and compliance with Title III’s

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<sup>24</sup> *Id.* at pages 1009-1010.

<sup>25</sup> *Id.* at page 1010.

<sup>26</sup> 20 United States Code, sections 6801-7013; See also, *Horne v. Flores*, *supra*, 557 U.S. 433, where the United States Supreme Court stated that Title III significantly increased funding for English language learner programs.

<sup>27</sup> California Department of Education, “Title III FAQs.”

<sup>28</sup> *Horne v. Flores*, *supra*, 557 U.S. 433; 20 United States Code, section 6847.



assessment and reporting requirements provides evidence of the state and local educational agencies' progress and achievement of LEP pupils for purposes of the EEOA.<sup>29</sup>

## **B. Test Claim Statutes and Regulations**

California has taken several steps to provide programs for LEP pupils. These programs have evolved from providing bilingual instruction while the pupil also learns English, to the current program adopted by the voters in 1998 requiring the use of English-only instruction. The test claim statutes and regulations that implement these programs are described below.

The Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (Ed. Code, § 52160 et seq.; §§ 52164, 52164.1-52164.6 have been pled)<sup>30</sup>

This act provided funding to train bilingual teachers to meet the needs of LEP pupils through bilingual instruction.<sup>31</sup> Bilingual instruction programs are those in which LEP pupils, while learning English, receive instruction in academic subjects such as math, science, and social studies in their “primary” or “home” language.<sup>32</sup> The courts have explained the program as follows:

[The program] set forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP [limited English proficient] students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs was to increase fluency in the English language for LEP students. Secondly, the ‘programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, ...’ (§ 52161.)<sup>33</sup>

The statutes in the Act required school districts to take a language census of LEP pupils each year to determine the number of pupils of limited English proficiency and classify them according to their primary language. The statutes also required reassessment, reporting, and reclassifying the pupils once they become proficient in English.

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<sup>29</sup> *Ibid.*

<sup>30</sup> Originally enacted by Statutes 1976, chapter 978 (not pled in test claim, so staff makes no findings on it) the Act was amended by Statutes 1977, chapter 36 and Statutes 1978, chapter 848.

<sup>31</sup> Pursuant to Education Code section 52168, school districts were authorized to claim funds appropriated for the program for the costs incurred for the employment of bilingual-crosscultural teachers and aids, teaching materials, in-service training, reasonable expenses of parent advisory groups, health and auxiliary services for the pupil, and reasonable district administrative expenses (which included costs incurred for the census of pupils, assessments, and parent consultation).

<sup>32</sup> *Valeria G. v. Wilson* (1998) 12 F.Supp.2d 1007, 1012.

<sup>33</sup> California Research Bureau, “Educating California’s Immigrant Children, An Overview of Bilingual Education,” June 1999, page 16; *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 203-204.

The Act contained a sunset clause that became effective on June 30, 1987.<sup>34</sup> For eleven years following the Act's sunset, the Legislature was unable to gain the necessary consensus for any subsequent legislation regarding bilingual education. However, the Legislature authorized continued funding for the general purpose of bilingual education until 1998, when Proposition 227 was adopted by the voters.<sup>35</sup>

Regulations Implementing Proposition 227 (Cal.Code Regs.,tit.5, § 11300, 11301, 11302, 11303 (renumbered to 11309), 11304 (renumbered to 11310))

On June 2, 1998, the voters of California passed Proposition 227 establishing the English Language Education for Immigrant Children program. The initiative added several statutes to the Education Code that became operative on August 2, 1998<sup>36</sup>, and generally rejected bilingual education programs that were in effect in California public schools. The initiative replaced bilingual education programs with an educational system designed to teach LEP pupils English, and other subjects in English, early in their education.

Proposition 227 was premised on the following findings and declarations:

The People of California find and declare as follows:

- (a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and
- (b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and
- (c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and
- (d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and

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<sup>34</sup> Education Code section 62000.2 (c); Statutes 1983, chapter 1270, provided for the bilingual education program to sunset on June 30, 1986. Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987.

<sup>35</sup> *McLaughlin v. State Board of Education, supra*, 75 Cal.App.4th 196, 204.

<sup>36</sup> Education Code sections 300, 305, 306, 310, 311, 315, 316, 320, 325, 335, and 340.

- (e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.
- (f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible.<sup>37</sup>

Proposition 227 requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year. “Sheltered English immersion” or “structured English immersion” means an English language acquisition process for young children, in which nearly all classroom instruction is in English, but with the curriculum and presentation designed for children who are learning the language.<sup>38</sup> The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique.<sup>39</sup> Individual schools in which 20 pupils of a given grade level receive a waiver are required to offer a class in which children are taught English and other subjects through bilingual or other alternative educational techniques.<sup>40</sup>

English-learner pupils are required to be transferred to English-language mainstream classrooms once they have acquired “a good working knowledge of English.”<sup>41</sup> In addition, the initiative affords parents a right to sue if their child or children are not provided English-only instruction.<sup>42</sup>

Proposition 227 was immediately challenged in federal court as violating the U.S. Constitution and other federal laws. The court rejected the challenges.<sup>43</sup>

On July 9, 1998, the State Board of Education adopted emergency regulations that later became permanent in November 1998 to provide guidance for school districts on the implementation of Proposition 227.<sup>44</sup> The final statement of reasons for the regulations states the following:

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<sup>37</sup> Education Code section 300.

<sup>38</sup> Education Code sections 305, 306 (d).

<sup>39</sup> Education Code sections 310-311; *McLaughlin v. State Board of Education, supra*, 75 Cal.App.4th 196, 217.

<sup>40</sup> Education Code section 310.

<sup>41</sup> Education Code section 305. “English language mainstream classroom” means a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English.” (Ed. Code, § 306 (c).)

<sup>42</sup> Education Code section 320.

<sup>43</sup> *Valeria G. v. Wilson, supra*, 12 F.Supp.2d 1007. Petitioners argued that the initiative violated the Equal Educational Opportunities Act, Title VI of the Civil Rights Act, and the Supremacy and Equal Protection Clauses of the U.S. Constitution.

<sup>44</sup> California Code of Regulations, title 5, subchapter 4, “English Language Learner Education,” sections 11300-11305. In 2003, section 11303 was renumbered to section 11309; section 11304 was renumbered to section 11310 and amended; and section 11305 was renumbered to section 11315. The claimant has not pled former section 11305 or 11315.

Specifically, the proposed regulations clarify “school term,” “informed belief of the school principal and educational staff,” “a good working knowledge of English,” and “a reasonable fluency in English;” provide guidance on the educational services to be provided to English language learners; describe the requirements for informing parents and guardians on the placement of their children, and outline the procedures for receiving and administering funds for community based English tutoring to English language learners.

In addition to the statutes enacted by Proposition 227, the final statement of reasons lists federal law and case law as references for the regulations,<sup>45</sup> and further states under “Disclosures” that the “proposed regulations do not impose a mandate on local agencies or school districts.”<sup>46</sup>

2003 English Language Learner Regulations (Cal.Code Regs., tit.5, § 11303, 11304, 11305, 11306, 11307, 11308)

The claimant has also pled clean-up regulations adopted by the Board of Education in 2003 that moved all previously-adopted regulations from the bilingual education program that sunset in 1987 to subchapter 4, “English Language Learner Education,” where the original Proposition 227 regulations are located. The Board of Education’s final statement of reasons for the 2003 regulations states the intent to provide one coherent system of regulations for English learners.

These regulations address the language census of LEP pupils, assessment of LEP pupils using the California English Development test (CELDT), reclassification of the pupil from English learner to proficient in English, monitoring the progress of the pupils, and documentation requirements.

The final statement of reasons states that “[t]hese regulations do not impose a mandate on local agencies or school districts.”<sup>47</sup>

California English Language Development Test Regulations (Cal.Code Regs, tit. 5, §§ 11510-11517)

From 1997 to 1999, California began developing CELDT.<sup>48</sup> According to CDE, federal law (Title III of the No Child Left Behind Act and case law) and state law (Ed. Code, §§ 313 &

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<sup>45</sup> California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305. Adopted in Register 1998, No. 30 (July 23, 1998). This final statement of reasons, page 2, lists the following references: U.S. Code, Title 20, Section 1703(f); *Lau v. Nichols* (Supreme Court 1974) 414 U.S. 563; *Castaneda v. Pickard* (5<sup>th</sup> Cir. 1981) 648 F.2d 989, 1009-1011; and *Gomez v. Illinois State Board of Education* (7<sup>th</sup> Cir. 1987) 811 F.2d 1030, 1041-1042.

<sup>46</sup> California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305, page 6. Adopted in Register 1998, No. 30 (July 23, 1998).

<sup>47</sup> California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11303-11308, 11316, page 4. Adopted in Register 2003, No. 2 (Jan. 10, 2003).

<sup>48</sup> See Education Code section 60810; Statutes 1997, chapter 936, Statutes 1999, chapter 78.

60810 - 60812), require a statewide English language proficiency test that school districts are required to administer upon enrollment of new LEP pupils and annually to pupils previously identified as LEP who have not been reclassified as fluent in English.<sup>49</sup> The test is used to comply with Proposition 227 to determine the level of English proficiency of the pupil.<sup>50</sup> In addition, funding is appropriated to school districts for CELDT program to identify pupils who are limited English proficient, to determine the level of English language proficiency of LEP pupils, and to assess their progress.<sup>51</sup>

In 2001, a test claim was filed on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test* (00-TC-16)) seeking reimbursement for field testing CELDT, the initial assessment of LEP pupils, the annual assessment of LEP pupils, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program was mandated by federal law through Title VI of the Civil Rights Act and the EEOA, which require states and school districts to conduct English language assessments.

This test claim pleads the regulations that administer CELDT, as added and amended in 2001 and 2003.<sup>52</sup> The regulations govern initial and annual assessments, reporting to parents, reporting test scores, documentation and pupil records, data for analysis of pupil proficiency, the district and test site coordinators' duties, test security, accommodations for pupils with disabilities, alternative assessments for pupils with disabilities, and apportionments to school districts.

Parental Notification (Ed. Code, § 48985; Cal. Code Regs., tit. 5, §§ 11316, 11510): Education Code section 48985 requires that, for any K-12 school in which 15 percent or more pupils enrolled speak a single primary language other than English, "all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district," including those required by the regulations here, are to be written in the primary language of those pupils, in addition to English.<sup>53</sup> Districts determine the number of pupils whose primary language is not English by a language census given through a home language survey.

## **II. POSITION OF THE PARTIES**

### Claimant's Position

Claimant asserts that all of the requirements imposed by the test claim statutes and regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6, and Government Code section 17514.

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<sup>49</sup> California Department of Education, "California English Language Development Test – CalEdFacts" ([www.cde.ca.gov/ta/tg/el/cefceldt.asp](http://www.cde.ca.gov/ta/tg/el/cefceldt.asp)).

<sup>50</sup> Education Code section 313.

<sup>51</sup> Education Code section 60810(a)(4) and (d). Funding is appropriated in the State Budget through Item 6110-113-0001, schedule (3), for the CELDT.

<sup>52</sup> These regulations were also amended in 2005. The 2005 amended regulations have not been pled and, thus, are not addressed in this analysis.

<sup>53</sup> Statutes 1977, chapter 36; Statutes 1981, chapter 219.

Claimant acknowledges state funding of \$100 per pupil that is reclassified to English-fluent status. (Former Ed. Code, § 404 (b).)<sup>54</sup> Claimant states this funding would offset the costs of compliance with the test claim statutes and regulations.<sup>55</sup>

Claimant did not comment on the draft staff analysis.

### State Agency Position

In its March 2005 comments, DOF states that the claim should be denied because of federal requirements, Proposition 227, and the voluntary acceptance of federal NCLB funding by potential claimants. DOF states that the test claim activities are “essential to the ability of the state and school districts to comply with the federal requirements ...”<sup>56</sup>

### **III. DISCUSSION**

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 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.”<sup>57</sup> Thus, the subvention requirement of section 6 is “directed to state mandated increases in the services provided by [local government] ...”<sup>58</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>59</sup>

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<sup>54</sup> Section 404 was repealed by Statutes 2010, chapter 724 (AB1610), effective Oct. 19, 2010. According to the legislative analysis of AB 1610, the repeal provisions: “Combine the English Language Assistance Program (ELAP) funding with Economic Impact Aid (EIA) funding and repeals the ELAP statute. Clarifies that local educational agencies (LEAs) may continue using this funding for English language professional development.” Assembly Floor, Concurrence in Senate Amendments, Analysis of AB 1610 (2009-2010 Reg. Sess.) as amended Oct. 7, 2010, page 1.

<sup>55</sup> Exhibit A.

<sup>56</sup> Exhibit B.

<sup>57</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>58</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>59</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

2. The mandated activity either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>60</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>61</sup>
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>62</sup>

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.<sup>63</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>64</sup> 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.”<sup>65</sup>

**ISSUE: Do the test claim statutes mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?**

**A. Chacon-Moscone Bilingual Education Act (§§ 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6, Stats. 1978, ch. 848, Stats. 1980, ch. 1339)**

The Chacon-Moscone Bilingual Education Act was enacted in 1976 to provide bilingual education to pupils of limited English proficiency and to offer financial support to achieve that purpose.<sup>66</sup> “Bilingual-bicultural education” is defined in the Act as a system of instruction that uses two languages, one of which is English, as a means of instruction. The program consists of daily structured English language development instruction in English (through listening,

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<sup>60</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.)

<sup>61</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>62</sup> *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; Government Code sections 17514 and 17556.

<sup>63</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>64</sup> *County of San Diego, supra*, 15 Cal.4th 68, 109.

<sup>65</sup> *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.

<sup>66</sup> Education Code section 52161.

speaking, reading, and writing), and daily instruction in the primary language of the pupil for the purpose of sustaining achievement in basic subject areas.<sup>67</sup>

### **1. Requirements Imposed by Chacon-Moscone Bilingual Education Act**

Many requirements are imposed by the Act. School districts are required to take an annual language census of LEP pupils within the district and classify them according to their primary language, age, and grade level. The census must be taken by actual count, and not by estimates or samplings, and must include all pupils of limited English proficiency, including migrant and special education pupils. Census results are to be reported to the CDE not later than the 30<sup>th</sup> day of April of each year. The previous language census shall be updated to include new enrollees and to eliminate pupils who are no longer LEP pupils or who no longer attend a school in the district. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year.<sup>68</sup>

The Superintendent of Public Instruction, with the approval of the State Board of Education, is required to prescribe census-taking methods, to include the following:

- A determination of the primary language of each pupil enrolled in the school district.
- An assessment of the language skills of all pupils whose primary language is other than English as pupils enroll in the district and determine whether such pupils are fluent in English or are of limited English proficiency.
- For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment instruments are available.<sup>69</sup>

The parent or guardian of the pupil is to be notified of the results of the assessment. The statute also states as follows:

Any district may elect to follow federal census requirements provided that the language skills described in subdivision (m) of Section 52163 are assessed, and provided that such procedures are consistent with Section 52164, the district shall be exempt from the state census procedures described in subdivisions (a) and (b).<sup>70</sup>

CDE is required to annually review the results of the language census and audit the census if “the information provided ... appears to be inaccurate or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate.”<sup>71</sup>

School districts are required to reassess pupils whose primary language is other than English when a parent or guardian, teacher, or school site administrator claims that there is reasonable

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<sup>67</sup> Education Code section 52163.

<sup>68</sup> Education Code section 52164.

<sup>69</sup> Education Code section 52164.1.

<sup>70</sup> Education Code section 52164.1 (c).

<sup>71</sup> Education Code section 52164.2.



doubt as to the accuracy of the pupil's designation. The school district must notify the parent or guardian of the result of the reassessment.<sup>72</sup>

The school district must retain pertinent information on the assessment of language skills for each pupil whose language is other than English so long as the pupil is enrolled in the district, and must report annually to the CDE on the number of pupils:

- Whose primary language is other than English;
- Who are of limited English proficiency;
- Whose primary language is other than English who are enrolled in classes defined in subdivisions (a) – (f) of Section 52163;
- Who have become bilingual and literate in English and in their primary language, as appropriate; and
- Who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.<sup>73</sup>

Reclassification is the process of reclassifying a pupil from limited-English proficient (or English learner) to proficient in English. School districts are required to establish reclassification criteria if there are pupils of limited English proficiency enrolled. The criteria are used to determine when pupils of limited English proficiency have developed the language skills necessary to succeed in an English-only classroom. The reclassification criteria include:

- Teacher evaluation, including a review of the pupil's curriculum mastery.
- Objective assessment of language proficiency and reading and writing skills.
- Parental opinion and consultation.
- An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.<sup>74</sup>

## **2. The Chacon-Moscone Bilingual Education Act Does Not Constitute a State-Mandated Program During the Period of Reimbursement for This Claim**

The activities required by the test claim statutes, however, are not eligible for reimbursement because the statutes have not been operative during the period of reimbursement for this claim.<sup>75</sup> Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset and ceased to be operative on June 30, 1987.<sup>76</sup>

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<sup>72</sup> Education Code section 52164.3

<sup>73</sup> Education Code section 52164.5.

<sup>74</sup> Education Code section 52164.6.

<sup>75</sup> Pursuant to Government Code section 17557, the eligible period of reimbursement for this claim would begin July 1, 2002.

<sup>76</sup> Statutes 1983, chapter 1270, provided for the bilingual education program to sunset on June 30, 1986. Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987.

The purpose of the sunset legislation was to provide the Legislature with an opportunity to conduct a comprehensive review of the effectiveness of California's bilingual education programs. (Ed. Code, § 62001, Stats.1986, ch. 211.) As part of the sunset review process, Statutes 1983, chapter 1270 required CDE to review the bilingual education program and report on its appropriateness and effectiveness.<sup>77</sup> This 1983 statute included a June 30, 1985 sunset date (former Ed. Code, § 62000), later extended to June 30, 1987,<sup>78</sup> and stated the following legislative intent:

It is the intent of the Legislature, in enacting this act, to maintain and improve educational program quality while providing greater flexibility at the state and local levels, and to reduce paperwork which does not have direct educational benefit.

Although the state's bilingual education program ceased to be operative under the broad terms of these statutes, section 62002 specified that the state funding for the program continued for the general purposes of the program as follows:

If the Legislature does not enact legislation to continue a program listed in this part, the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program. The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative pursuant to this part both with regard to state-to-district and district-to-school disbursements. The funds shall be used for the intended purposes of the program, but all relevant statutes and regulations adopted thereto regarding the use of the funds shall not be operative except as specified in Section 62002.5.<sup>79, 80</sup>

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Education Code section 62000 further provides that the programs sunset “shall cease to be operative on the date specified, unless the Legislature enacts legislation to continue the program.”

<sup>77</sup> Former Education Code section 62006 (Stats. 1983, ch. 1270).

<sup>78</sup> Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987, as did Statutes 1986, chapter 211, the source of current section 62000.2.

<sup>79</sup> See also Bill Honig, California Department of Education, “Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2” August 26, 1987. This advisory also discusses the existing federal requirements under the EEOA for states and local educational agencies to take appropriate action to eliminate language barriers impeding the participation of LEP students in a district's regular instructional program and, thus, some of the activities included in the sunset bilingual education program are still required by federal law. (See pages 16-20.)

<sup>80</sup> Pursuant to section 62002, all relevant statutes and regulations adopted under the bilingual education program were no longer operative after the sunset, “except as specified in Section 62002.5.” In Education Code section 62002.5, the Legislature continued the statutory

School districts that continued to seek state funds for the program could apply for categorical funding pursuant to Education Code section 64000, and CDE was required to audit the use of state funds by the districts to ensure that the funds were expended for eligible pupils according to the purposes for which the legislation was originally established.<sup>81</sup>

In *McLaughlin v. State Board of Education*, the court discussed the history of the Chacon-Moscone Bilingual-Bicultural Education Act, noting that although the Act lapsed by operation of law, bilingual education continued through extended funding until Proposition 227 was passed in 1998. The court further noted that even though the Act lapsed with the sunset of the law, school districts “inexplicably” continued to seek waivers to opt out of the bilingual programs. “Equally inexplicably,” the State Board of Education continued to grant waivers from the “defunct” law until March 1998, when the practice was rescinded.<sup>82</sup>

By the plain language of Education Code sections 62000 et seq., any state mandate imposed by the statutes pled in this test claim that are part of the Chacon-Moscone Bilingual-Bicultural Act ended on June 30, 1987. Thus, the Commission finds that the following test claim statutes do not constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution: Education Code sections 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6, as enacted or amended by Statutes 1978, chapter 848 and Statutes 1980, chapter 1339.

**B. Proposition 227 Regulations (Cal.Code Regs., tit.5, §§ 11300, 11301, 11302, 11303 (renumbered to § 11309), 11304 (renumbered to § 11310))**

**1. Statutes Enacted by the Voters in Proposition 227**

In 1998, the voters adopted Proposition 227 (which added §§ 300 – 340, not including § 313, to the Education Code). The statutes added by the voters require all public school instruction to be conducted in English, and require English-learner pupils to be educated through sheltered English immersion during a temporary transition period not intended to exceed one year. Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English (Ed. Code, § 305).

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requirement for parent advisory committees and school site councils that were in existence as of January 1, 1979, pursuant to the statutes and regulations of the programs that were sunset. The Chacon-Moscone Bilingual Bicultural Act, in Education Code section 52176, required that each school district with more than 50 pupils of limited English proficiency to establish a district-wide advisory committee on bilingual education. Each school site with more than 20 pupils of limited English proficiency was also required to establish a school site committee to advise the principal and staff on bilingual education as specified. Funding is specifically provided for the advisory committees pursuant to Education Code sections 62002 and 52168(b). This test claim does not plead Education Code section 52176, however, and no findings are made on that statute.

<sup>81</sup> Education Code section 62003; *Department of Finance v. Commission on State Mandates* (2004) 30 Cal.4th 727, 746.

<sup>82</sup> *McLaughlin v. State Board of Education*, *supra*, 75 Cal.App.4th 196, 204.

The requirements of Proposition 227 may be waived by the parent under the following circumstances:

- Children who already know English - the child already knows English and possesses good English language skills, as measured by standardized tests of English vocabulary and comprehension, reading, and writing;
- Older children - the child is at least 10 years old and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or
- Children with special needs - the child has already been placed for a period of not less than 30 days during the school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development.

A written description of the special needs must be provided and any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local board of education and ultimately the State Board of Education. The existence of special needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.<sup>83</sup>

Waiving the requirements of Proposition 227 requires prior written informed consent from the child's parents or guardians to be provided annually.<sup>84</sup> For the consent to be "informed consent," the parents or guardians are required to be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. If the waiver is granted, the child may be transferred to classes where he or she is taught in English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law.

Individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer bilingual classes, or allow the pupils with waivers to transfer to a public school in which such a class is offered.<sup>85</sup>

Thus, under Proposition 227, school districts are required to:

1. Instruct LEP pupils in English through sheltered immersion classes during a temporary transition period not normally intended to exceed one year, unless a parent exception waiver is granted;
2. Transfer the pupil to mainstream classrooms once they have acquired a good working knowledge of English;

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<sup>83</sup> Education Code section 311.

<sup>84</sup> Education Code section 310.

<sup>85</sup> Education Code section 310.

3. Provide a full description of the educational materials to be used in the different educational program choices and make all the child’s educational opportunities available to the parents or guardians in order for them to make an informed decision about whether to seek a parental exception waiver;
4. Determine whether a pupil should be granted a parental exception waiver under Education Code section 311.
  - a. If the child is 10 years or older, the school principal and educational staff must determine whether an alternate course of educational study would be better suited to the child’s rapid acquisition of basic English language skills.
  - b. For pupils with special needs, determine whether the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child’s overall educational development. Any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local board of education and ultimately the State Board of Education. Provide a written description of the special needs to the parents or guardians. Provide full information to parents or guardians of their right to refuse to agree to a waiver.
5. Offer bilingual education classes when 20 or more pupils have been granted parental exception waivers and are enrolled in a given grade, or allow the pupil to transfer to a public school where bilingual education is provided.

## **2. Test Claim Regulations Adopted to Implement Proposition 227 Do Not Mandate a New Program or Higher Level of Service**

In 1998, CDE adopted regulations to implement Proposition 227. As more fully described below, the Commission finds that the regulations do not mandate a new program or higher level of service. These regulations were adopted to implement Proposition 227, and many activities are either expressly required by or are necessary to implement the ballot measure initiative. Article XIII B, section 6 requires reimbursement for mandates imposed by the Legislature or any state agency, and not by ballot measure initiatives.<sup>86</sup>

Furthermore, the regulations are intended to comply with federal law requirements imposed the Equal Educational Opportunities Act (EEOA), which prohibits states and local educational agencies from denying equal educational opportunity to an individual on account of his or her race, color, sex, or national origin. Under the Act, “failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs,” is considered a violation of federal law.<sup>87</sup> Requirements imposed by federal law do not result in a reimbursable state-mandated program.<sup>88</sup>

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<sup>86</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1207; Government Code section 17556(f).

<sup>87</sup> 20 United State Code, section 1703(f).

<sup>88</sup> *San Diego Unified School Dist, supra*, 33 Cal.4th 859, 879-880; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1582; Government Code section 17556(c).

- Definitions, Knowledge and Fluency in English, and Duration of Services (Cal Code Regs., tit. 5, §§ 11300, 11301, 11302)

These regulations define some of the terms used in Proposition 227. “School term,” as used in Education Code section 330, is defined in section 11300 to clarify when the initiative became operative. “A good working knowledge of English” pursuant to Education Code section 305, and “reasonable fluency in English” pursuant to Education section 306, are also defined in these regulations to mean that “an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the CDE, or any locally developed assessments.” The requirement to transfer LEP pupils to English mainstream classrooms once they have acquired a good working knowledge of English is expressly provided in Proposition 227 and was previously codified in Education Code section 305, and therefore, is not eligible for reimbursement. The remaining language simply clarifies the circumstances and timing of the transfer and does not mandate a new program or higher level of service.

Sections 11301 and 11302 of the regulations also require school districts to continue to provide additional and appropriate educational services to K-12 English learners for the purposes of overcoming language barriers until the English learners have demonstrated English proficiency and recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of the language barrier. An English learner may be re-enrolled in a structured English immersion program if the pupil has not achieved a reasonable level of English proficiency, unless the parents or guardians of the pupil object to the extended placement. The requirement to continue additional and appropriate education services to English learners until they have demonstrated English proficiency is mandated by Proposition 227. Proposition 227 requires school districts to instruct the pupil in a structured English immersion program until the pupil has acquired a reasonable level of English proficiency. Thus, this requirement does not mandate a new program or higher level of service.

In addition, the requirement to provide appropriate services to recoup any academic deficits that may have occurred in other areas of the core curriculum because of the language barrier is mandated by federal law and not eligible for reimbursement under article XIII B, section 6. In 1974, Congress enacted the Equal Educational Opportunities Act (EEOA, 20 U.S.C. § 1701 et seq.), which recognizes the state’s role in assuring equal opportunity for national origin minority and English-learner pupils. According to the EEOA: “No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶] ... [¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”

In *Castaneda v. Pickard*,<sup>89</sup> the Fifth Circuit Court of Appeal interpreted section 1703(f) of the EEOA when examining English-learner programs of the Raymondville, Texas Independent School District. The court held that the EEOA imposes an obligation on educational agencies to overcome the direct obstacle to learning which the language barrier itself poses, which includes the additional duty to provide LEP pupils with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an

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<sup>89</sup> *Castaneda v. Pickard*, *supra*, 648 F. 2d 989.

agency's language remediation program. In *Castaneda*, which CDE cites as authority for the section 11302 regulation,<sup>90</sup> the court stated the following:

In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development. We understand § 1703(f) to impose on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. If no remedial action is taken to overcome the academic deficits that limited English speaking students may incur during a period of intensive language training, then the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to these students' equal participation in the regular instructional program.<sup>91</sup>

Accordingly, the Commission finds that California Code of Regulations, title 5, sections 11300, 11301, and 11302<sup>92</sup> do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

- Parental Exception Waivers (Former Cal. Code Regs., tit. 5, § 11303, renumbered to § 11309)

Former section 11303 (now codified in § 11309) identifies the process for obtaining a parental exception waiver pursuant to Education Code sections 310 and 311. As bulleted below, that section requires several notices to the parents or guardians, the adoption of parental waiver exception procedures and guidelines that include specific components, a written statement of reasons provided in cases where the waiver is denied, and authority to the parent or guardian to appeal a denied waiver to either the governing body of a school district (if the district has adopted an appeal process) or directly to court. The regulation requires the following activities:

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<sup>90</sup> California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305, page 4. Adopted in Register 1998, No. 30 (July 23, 1998). The Final Statement of Reasons states that section 11302 was adopted to “ensure that LEAs understand the federal requirements for teaching English to English learners” and so they do not “misunderstand the intent of Education Code section 305 and provide no additional services for English learners after one year of structured English language immersion even though the pupil is not English proficient.”

<sup>91</sup> *Castaneda v. Pickard*, *supra*, 648 F.2d 989, 1011.

<sup>92</sup> Register 1998, No. 30 (July 24, 1998) pages 75-76; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76.

1. Inform all parents and guardians of the placement of their children in a structured English immersion program and of the opportunity to apply for a parental exception waiver. The notice shall also include a description of the locally-adopted guidelines for evaluating a parental waiver request.
2. Establish procedures for granting parental waiver exceptions which includes the following components:
  - a. Parents and guardians must be provided with a full written description and, upon request, a spoken description, of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.
  - b. Pursuant to Education Code section 311(c), parents and guardians must be informed that the pupil must be placed for a period of not less than 30 calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.
  - c. Pursuant to Education Code section 311(b) and (c), parents and guardians must be informed in writing of any recommendation for an alternative program made by the school principal and educational staff and must be given notice of their right to refuse to accept the recommendation. The notice shall include a full description of the recommended alternative program and the educational materials to be used for the alternative program, as well as a description of all other programs available to the pupil. If the parent or guardian elects to request the alternative program recommended, the parent or guardian must comply with the requirements of Education Code 310 and all procedures for obtaining a parental exception waiver.
  - d. Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.
3. Schools are required to act upon all parental exception waivers within 20 days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the 30-day placement in an English language classroom. These waivers must be acted upon either no later than 10 calendar days after the expiration of that 30-day English language classroom placement or within 20 instructional days of submission of the parental waiver to the school principal, whichever is later.
4. In cases where a parental exception waiver is denied, the parents and guardians must be informed in writing of the reasons for denial and advised that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education, or to the court.



Proposition 227 expressly imposes some of these requirements. For example, Education Code sections 310 and 311 require that the parent or guardian be provided with a description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child in order for them to make an informed decision about whether to seek a parental exception waiver. In addition, Education Code section 311(c) requires that the recommendation to place a special needs pupil in an alternative course of educational study be made pursuant to locally adopted guidelines. Moreover, parents and guardians have an existing right pursuant to Education Code section 320, which was added by Proposition 227, to challenge the decisions of a school district on these issues in court. These requirements have been mandated by the voters, and are not considered a mandate of the state within the meaning of article XIII B, section 6.<sup>93</sup>

In addition, the option to allow a parent or guardian to appeal a denied waiver to the local governing body of a school district is not required. School districts are not mandated by the state to adopt appeal procedures or conduct appeals.

However, the following regulatory requirements are not expressly required by the statutes adopted by the voters in Proposition 227: providing notices to the parents or guardians; adopting parental waiver exception procedures and guidelines for waivers that go beyond the limited exception provided for pupils with special needs; and providing a written statement of reasons to the parents or guardians in cases where the waiver is denied are not expressly required by Proposition 227. Nevertheless, the Commission finds that these excess procedural requirements are not mandates of the state, but are part and parcel of Proposition 227. Thus, these excess activities are not subject to reimbursement pursuant to article XIII B, section 6.

Government Code section 17556(f) requires the Commission to not find costs mandated by the state when a statute or executive order imposes duties that are necessary to implement a ballot measure approved by the voters in a statewide election. The court in *California School Boards Association v. State of California*, found that duties imposed by a test claim statute or executive order that are not expressly included in a ballot measure are “necessary to implement” the ballot measure pursuant to Government Code section 17556(f), and do not impose costs mandated by the state when the additional requirements imposed by the state are intended to implement the ballot measure mandate, and the costs, when viewed in context of the program adopted by the voters, are de minimis. In such cases, that excess requirements are considered part and parcel of the underlying ballot measure mandate and are not reimbursable.<sup>94</sup>

The court borrowed this analysis from the California Supreme Court’s decision in *San Diego Unified School Dist.* which addressed whether state imposed procedural requirements that exceeded federal due process requirements constituted a federal mandate. The issue in *San Diego Unified School Dist.* was whether procedural due process activities imposed by the test claim statute were reimbursable when a school district sought to expel a pupil. The court recognized that federal due process law requires school districts to comply with federal procedural steps, such as notice and a hearing, to safeguard the rights of a pupil when the pupil is subject to an expulsion from school. The Education Code statute pled in the test claim mandated

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<sup>93</sup> *CSBA, supra*, 171 Cal.App.4th 1183, 1207; Government Code section 17556(f).

<sup>94</sup> *CSBA, supra*, 171 Cal.App.4th at p. 1217.

procedures on school districts to implement federal due process requirements. The test claim statute also required school districts to comply with additional procedures that were not expressly required by federal law; i.e. “primarily various notice, right of inspection, and recording rules.”<sup>95</sup>

The court held that all procedures set forth in the test claim statute, including those that exceed federal law, are considered to have been adopted to implement a federal due process mandate and, thus, the costs were not reimbursable under article XIII B, section 6 of the California Constitution and Government Code section 17556.<sup>96</sup> The court held that for purposes of ruling upon a request for reimbursement, “challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate.”<sup>97</sup>

In reaching this conclusion, the court relied on the holding in *County of Los Angeles*<sup>98</sup> and applied the reasoning in that case as follows:

In this regard, we find the decision in *County of Los Angeles II, supra*, ... to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections – namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that “even in the absence of section 987.9, ... counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and under the Sixth Amendment.” (32 Cal.App.4th at p. 815 ...) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute – requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request – were merely incidental to the federal rights codified by the statute, and their “financial impact” was de minimis. [Citation omitted.] Accordingly, the Court of Appeal concluded, the Penal Code

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<sup>95</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 873, footnote 11, and 890. As stated in footnote 11 of the court’s decision, the excess activities in the *San Diego Unified School Dist.* case included (1) the adoption of rules and regulations, (2) the inclusion of several notices in the notice of expulsion hearing, (3) allowing the pupil or the parent to inspect and obtain copies of documents to be used at the hearing, (4) sending written notice on the rights and obligations of the parents, (5) maintenance of a record of each expulsion, and (6) recording of the expulsion order and the cause thereof in the student’s mandatory interim record.

<sup>96</sup> *Id.* at page 888.

<sup>97</sup> *Id.* at page 890.

<sup>98</sup> *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805.

section, in its entirety – that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds* – constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.

We conclude that the same reasoning applies in the present setting, concerning the District’s request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II*, ..., the initial discretionary decision ... in turn triggers a federal constitutional mandate ... In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *Count of Los Angeles II* concluded, that for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added costs, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.<sup>99</sup>

The court in *CSBA* directed the Commission to apply the holding and analysis in *San Diego Unified* to activities required by the state that are intended to implement ballot measure initiatives.<sup>100</sup> And, as applied here, the excess regulatory requirements to provide notices to parents or guardians, to adopt procedures and guidelines for parental exception waivers, and to provide a written statement of reasons to the parents or guardians in cases where the waiver is denied, are part and parcel of the underlying ballot measure mandate of Proposition 227.

The Final Statement of Reasons for these regulations clearly states the intent of the regulation is to implement Proposition 227. The authority and reference for section 11309 of the regulations are the Proposition 227 code sections added by the voters; Education Code sections 310, and 311. Absent this regulation, school districts would still be required to comply with the Proposition 227 requirements to approve parental exception waivers when appropriate and provide a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child to the parents or guardians in order for them to make an informed decision about whether to seek a parental exception waiver. The excess activities simply establish notice to parents regarding the decisions made by the school district and the guidelines to implement the requirements imposed by the initiative.

There is no evidence that the excess requirements here are different in scope than the excess requirements in *San Diego Unified School District* case, which also included the adoption of

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<sup>99</sup> *Id.* at pages 888-889 (Emphasis in original).

<sup>100</sup> *CSBA*, *supra*, 171 Cal.App.4th at page 1217.

rules and regulations, various notice requirements, the inclusion of several notices in the notice of expulsion hearing, maintaining a record of each expulsion, and recording the expulsion order and the cause thereof in the pupil's mandatory interim record.<sup>101</sup>

Therefore, the Commission finds that the activities required by former section 11303<sup>102</sup> (renumbered 11309) are necessary to implement the ballot measure mandate imposed by Proposition 227 and, thus, does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

- State Board of Education Review of Guidelines for Parental Exception Waivers (Former Cal. Code Regs., tit. 5, § 11304, renumbered to § 11310)

Proposition 227 enacted Education Code 311(c), allows for a parental exception waiver from English-only instruction for pupils with special needs. Under the statute, the principal or other educational staff can make a determination, based on locally developed guidelines, that an alternative course of educational study would be better suited to a child's overall educational development because of the child's special needs. The determination and written description of the special needs is required to be made pursuant to the guidelines, which are subject to review by the local board of education and the State Board of Education. The parents have the right to be informed of the determination and their right to refuse to agree to a waiver.

Former section 11304 of the regulations (now codified in section 11310) requires school district governing boards to submit the guidelines or procedures adopted pursuant to Education Code section 311 regarding parental exception waivers to the State Board of Education upon request for its review. Any parent or guardian who applies for a waiver pursuant to Education Code section 311 may request a review of the local guidelines and procedures by the State Board of Education to determine if the guidelines comply with the law.

The purpose of the regulation is stated in the final statement of reasons adopted by CDE as follows:

Education Code section 311(c) provides that LEAs may establish guidelines for not placing pupils with special needs in English language classrooms. Education Code section 311(c) also indicates that the guidelines may be subject to the review of the State Board of Education. This regulation clarifies for LEAs when they may be required to submit their guidelines to the State Board of Education and the purpose of the review.<sup>103</sup>

Former section 11304 does not impose any new requirements beyond those required by Education Code section 311(c), a statute enacted by the voters through Proposition 227. Thus,

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<sup>101</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th at page 873, footnote 11,

<sup>102</sup> Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1998, No. 33 (Aug. 14, 1998) page 75; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76, Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

<sup>103</sup> California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305, page 5. Adopted in Register 1998, No. 30 (July 23, 1998).

the Commission finds that former section 11304 (renumbered to section 11310)<sup>104</sup> does not impose a state-mandated new program or higher level of service on school districts.

**C. 2003 English Language Learner Regulations (Cal.Code Regs.,tit.5, §§ 11303, 11304, 11305, 11306, 11307, 11308)**

Although grouped with the Proposition 227 regulations, these English Language Learner regulations became operative in 2003, five years after Proposition 227 was adopted, and do not cite to statutes enacted by Proposition 227 for their authority. When CDE adopted the regulations, it stated that the English Language learner regulations were found in sections 4304, 4306, 4311, 4312, and 11300-11305, and that sections 4304, 4306, 4311 and 4312 are the provisions remaining from the Chacon-Moscone bilingual education program that sunset June 30, 1987. Thus, CDE renumbered and added regulations “to provide one coherent system of regulations for English learners.”<sup>105</sup>

As discussed below, the Commission finds that these regulations do not impose state-mandated new programs or higher levels of service on school districts. Federal case law interpreting EEOA and California statutes adopted before the regulations impose some of the same requirements as these regulations. While some procedural requirements in these regulations are not expressly set forth in federal law, they are part and parcel and, thus, necessary to implement the federal requirements of EEOA. All regulatory activities are intended to implement the federal law requirement imposed on state and local educational agencies to take appropriate action to overcome language barriers of LEP pupils that impede their equal participation in the regular instructional program. Challenged state rules or procedures that are intended to implement federal law and, whose costs are considered de-minimis when viewed in the context of the law, are not reimbursable under article XIII B, section 6 of the California Constitution.<sup>106</sup>

Each regulation is discussed below.

- Initial and Annual Assessments of LEP Pupils ( Cal. Code Regs., tit. 5, §§ 11306, 11307(a))

Section 11307(a) of the regulations requires school districts to assess the English language skills of all pupils whose primary language is other than English upon initial enrollment as follows:

- (a) All pupils whose primary language is other than English who have not been previously assessed or are new enrollees to the school district shall have their English language skills assessed within 30 calendar days from the date of initial enrollment.

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<sup>104</sup> Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76, Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

<sup>105</sup> California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11303-11308, 11316, page 1. Adopted in Register 2003, No. 2 (Jan. 10, 2003).

<sup>106</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 608.

Section 11306 then requires school districts that report the presence of English learners to conduct annual assessments of the English language development and academic progress of those pupils.

The Commission finds that the requirement to assess English language learner pupils, both initially and annually, for language development and academic progress does not mandate a new program or higher level of service.

In 1999, before the adoption of these regulations, the Legislature added section 313 to the Education Code to supplement Proposition 227.<sup>107</sup> Education Code section 313 requires school districts that have one or more pupils who are English learners to assess each pupil's English language development to determine the level of proficiency upon initial enrollment of each pupil and annually thereafter. The annual assessments are required to continue until the pupil is re-designated as English proficient. In addition, the statute requires that the assessment primarily use CELDT.

Education Code section 313 was pled in the *CELDT I* test claim (00-TC-16) and denied by the Commission on the ground that the requirements of the statute were previously mandated by federal law. The Commission's decision in *CELDT I* is a final binding decision<sup>108</sup> and is supported by section 4 of the bill that added section 313, which states the following:

It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.<sup>109</sup>

Under federal law, state and local governments are required by EEOA to take appropriate action to overcome language barriers that impede equal participation by its pupils in the regular instructional program. (20 U.S.C. § 1703 (f)). The courts have interpreted EEOA to require proper testing and evaluation to determine the progress of LEP pupils and the program.<sup>110</sup> In *Keyes v. School Dist. No. 1*, the court held a Denver school district violated EEOA, in part because of the district's "...failure to adopt adequate tests to measure the results of what the district is doing. ...The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy"<sup>111</sup>

Accordingly, the Commission finds that the initial and annual assessment of LEP pupils pursuant to sections 11306 and 11307(a)<sup>112</sup> does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.<sup>113</sup>

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<sup>107</sup> Statutes 1999, chapter 678, section 3.

<sup>108</sup> *CSBA, supra*, 171 Cal.App.4th 1183, 1200.

<sup>109</sup> Statutes 1999, chapter 678, section 4.

<sup>110</sup> *Castaneda v. Pickard, supra*, 648 F. 2d 989, 1014.

<sup>111</sup> *Keyes v. School Dist. No. 1* (1983) 576 F. Supp. 1503, 1518.

<sup>112</sup> Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

- Reclassifying Pupils from LEP to Proficient in English (Cal. Code Regs., tit.5, §§ 11303, 11304)

As indicated above, Education Code section 305, which was added by Proposition 227 in 1998, requires pupils to be transferred to English mainstream classes once it is determined that the pupil has acquired a good working knowledge of English.

Section 11303 of the regulations promulgates the process used to reclassify a pupil from English learner to proficient in English and requires the following procedural components to be used in the determination:

- Assessment of language proficiency using the CELDT, as provided in Education Code section 60810.
- Participation of the pupil’s classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.
- Parental involvement through notice to parents or guardians of the reclassification and placement of the pupil, and an opportunity to participate; and by seeking their opinion and consultation during the reclassification process.

Section 11304 requires school districts to monitor the progress of pupils reclassified to ensure correct classification and placement.

The requirements in section 11303 are not new. In 1999, section 313 was added to the Education Code to supplement Proposition 227 and implement federal law. Section 313 directed CDE to establish procedures for the reclassification of a pupil from English learner to proficient in English, and required that the reclassification process consider the same criteria outlined in section 11303 of the regulations. Education Code section 313 states in relevant part the following:

(d) The reclassification procedures developed by the State Department of Education shall utilize multiple criteria in determining whether to reclassify a pupil as proficient in English include, but not limited to, all of the following:

- (1) Assessment of language proficiency using an objective assessment instrument, including, but not limited to, the English language development test pursuant to Section 60810.
- (2) Teacher evaluation, including, but not limited to, a review of the pupil’s curriculum mastery.
- (3) Parental opinion and consultation.
- (4) Comparison of the pupil’s performance in basic skills against an empirically established range of performance in basic skills based upon the performance of English proficient pupils of the same age, that

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<sup>113</sup> In addition, the federal NCLB requires an annual assessment of English proficiency of all students with limited English proficiency in order to obtain federal funding under the Act. (20 U.S.C., § 6311(b)(7).)

demonstrates whether the pupil is sufficiently proficient in English to participate effectively in a curriculum designed for pupils of the same age whose native language is English.

As previously indicated, Education Code section 313 implements the requirements of federal law under the EEOA. The EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by LEP pupils in the regular instructional program. The courts have determined that proper testing and evaluation of an LEP pupil is required to properly comply with the federal act.<sup>114</sup> The courts have also held that other measures, in addition to achievement test scores, should be considered to determine a program's effectiveness in remedying language barriers. The court in *Castaneda* stated the following:

We note also, that even in a case where inquiry into the results of a program is timely, achievement test scores of students should not be considered the only definitive measure of a program's effectiveness in remedying language barriers. Low test scores may reflect many obstacles to learning other than language. We have no doubt that process of delineating the causes of differences in performance among students may well be a complicated one.<sup>115</sup>

Therefore, section 11303 of the title 5 regulations does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.<sup>116</sup>

Moreover, the requirement imposed by section 11304 of the regulations to monitor the progress of a pupil after reclassification to ensure correct classification and placement is required by federal law and does not mandate a new program or higher level of service. The court in *Castaneda* determined that a program may still fail to comply with the EEOA if the program used to overcome language barriers for LEP pupils fails to produce results indicating that the language barriers are "actually being overcome."<sup>117</sup> Thus, there is a continuing duty under federal law to monitor actual results.<sup>118</sup>

Accordingly, the Commission finds that sections 11303 and 11304 of the title 5 regulations<sup>119</sup> do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

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<sup>114</sup> *Castaneda v. Pickard*, *supra*, 648 F. 2d 989, 1014; *Keyes School Dist. No. 1*, *supra*, 576 F.Supp 1503, 1518.

<sup>115</sup> *Castaneda v. Pickard*, *supra*, 648 F.2d at p. 1015, fn. 14.

<sup>116</sup> Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

<sup>117</sup> *Id.* at page 1010.

<sup>118</sup> Title III of NCLB also requires, as a condition of funding, pupil "evaluation" that includes "a description of the progress made by children in meeting challenging State academic content and student achievement standards for each of the 2 years after such children are no longer receiving [English learner] services under this part." (20 U.S.C. § 6841 (a)(4).)

<sup>119</sup> Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.



- Documentation of Multiple Criteria Used in Reclassification (Cal. Code Regs., tit. 5, § 11305)

This regulation requires school districts to maintain documentation regarding the assessment and evaluation of LEP pupils as follows:

School districts shall maintain documentation of multiple criteria information, as specified in Section 11303 (a) and (d), [Assessment of language proficiency using the CELDT, and evaluation of pupil’s performance for academic deficits] and participants and decisions of reclassification in the pupil’s permanent records as specified in Section 11303 (b) and (c)[Participation by teacher and school personnel and parental involvement.]

The Commission finds that section 11305 does not impose a state-mandated activity on school districts, but rather implements the requirements of federal law.

Documenting the assessment and evaluation of a pupil for purposes of reclassification is not expressly mandated by federal law. However, as determined by the California Supreme Court in the *San Diego Unified School Dist.* case, although an activity may not be expressly mandated by federal law, “for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate” and are not reimbursable.<sup>120</sup>

The reference and authority listed for section 11305 of the regulations are the federal EEOA and federal case law interpreting that Act: *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009-1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041-1042. Thus, CDE adopted the regulation to comply with federal law.

Moreover, the excess requirement imposed by section 11305 to maintain documents is the same requirement imposed by the state to comply with federal due process law in *San Diego Unified School Dist.*, where reimbursement was denied.<sup>121</sup> There is no evidence that the costs here to perform the same activity, when considered with the requirements of the EEOA as a whole, are anything more than de minimis. Absent the requirement imposed by section 11305 of the regulations to maintain documentation for the assessment and evaluation of a pupil for purposes of reclassification, school districts would still be required by federal law to assess and evaluate the English language proficiency of a pupil, reclassify the pupil once proficiency is achieved, continue to monitor the pupil to ensure that the pupil remains proficient and can equally participate in the instructional program, and still be subject to potential civil litigation for its determination under the EEOA. Thus, the documentation requirement in section 11305 simply records the actions of compliance with federal law.

Therefore, the Commission finds that section 11305 of the title 5 regulations<sup>122</sup> is necessary to implement a federal mandate, and is therefore not a reimbursable state mandate.

<sup>120</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at page 890.

<sup>121</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at page 873, footnote 11,

<sup>122</sup> Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76; Register 2003, No. 2 (Jan. 10, 2003) pages 75-76.1.

- Language Census Requirements (Cal. Code Regs., tit. 5, § 11307(b) & (c))

Section 11307(b) and (c) require school districts to take a language census of LEP pupils each year and report the results by grade level on a school-by-school basis to CDE by April 30 of each year as follows:

- (b) The census of English learners, required for each school district, shall be taken in a form and manner prescribed by the State Superintendent of Public Instruction in accord with uniform census taking methods.
- (c) The results of the census shall be reported by grade level on a school-by-school basis to CDE not later than April 30 of each year.

According to the 2011 language census instructions issued by CDE, the census is taken and reported for the purpose of collecting background and programmatic data on pupils from non-English-language backgrounds and to collect data on the staff providing services to English learners. The data are collected on the R30-LC form, and is used to produce state and federal reports, and to compute funding for Title III of the No Child Left Behind Act, the Community-based English Tutoring (CBET) program, Economic Impact Aid (EIA) for English learners, and the English Language Acquisition Program (ELAP). The census data are also used to project future English learner enrollments and teachers that provide instructional services to English learners. Data may also serve local needs, such as class load analyses, program design, and to determine school staffing needs.<sup>123</sup> CDE further states that the language census must be submitted because English learners “have federal protections, including the ruling in several federal court cases, such as *Castaneda v. Pickard* & *Gomez v. Illinois State Board of Education*.”<sup>124</sup>

The R30-LC form reports the count of all identified English learners enrolled as of a date certain each year. These pupils are counted and identified based on their initial and annual CELDT scores (which are required to be given pursuant to Education Code section 313 and sections 11306 and 11307(a) of the regulations). In addition, if the reclassification process for annual testers has not been completed by the census date, the pupils continue to be counted as English learners.<sup>125</sup>

The Commission finds that the census requirements imposed by section 11307 do not mandate a new program or higher level of service, but are part and parcel and necessary to implement federal law requirements. Pursuant to the *San Diego Unified* and *County of Los Angeles II* cases, reimbursement is not required when school districts are mandated by federal law to perform a duty. The Legislature or any state agency, to implement the federal law, then passes a law setting forth procedures to comply with the federal law and in the process, requires additional procedural duties that are intended to implement the federal law. Absent the state law, school districts are still required to comply with the underlying federal mandate. Under these circumstances, the excess procedural requirements constitute an implementation of

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<sup>123</sup> California Department of Education, Instructions for the Spring Language Census (Form R30-LC), Reporting Year: 2011, page 1.

<sup>124</sup> *Id.* at p. 23.

<sup>125</sup> *Ibid.*

federal law and are not reimbursable as a state mandated program. “[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate.”<sup>126</sup>

As indicated above, the federal EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by English learner pupils in the regular instructional program. In *Castaneda*, the court determined that “appropriate action” meant, in part, that the programs used for LEP pupils must be reasonably calculated to effectively implement the educational theory adopted by the state and local educational agency as the “appropriate action” under the EEOA, that adequate resources must be provided, and that the action taken produces results indicating that the language barriers are actually being overcome. The court stated the following:

We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court’s inquiry into the appropriateness of the system’s actions. If a school’s program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been “appropriate” when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.<sup>127</sup>

In *Gomez v. Illinois State Board of Education*, the court, using the *Castaneda* decision, clarified that state educational agencies, and not just local school districts, have a legal obligation under the EEOA to ensure that LEP pupils are properly identified and that the needs of these pupils are met.<sup>128</sup>

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<sup>126</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at page 890.

<sup>127</sup> *Castaneda v. Pickard*, *supra*, 648 F.2d 989, 1010; see also, *Horne v. Flores*, *supra*, 557 U.S.433, where the court stated that “any educational program, including the “appropriate action” mandated by the EEOA, requires funding” as a means to the end goal of overcoming the language barriers of English learners.

<sup>128</sup> *Gomez v. Illinois State Board of Education*, *supra*, 811 F.2d 1030; see also, *Idaho Migrant Council v. Board of Education* (1981) 647 F.2d 69.

Under the facts in *Gomez*, the Illinois State Board of Education adopted regulations requiring every school district in Illinois to identify LEP pupils by taking a census. When the census identified 20 or more pupils who speak the same primary language, the local school district was required by the regulation to provide a transitional bilingual education program to those pupils. When the census disclosed less than 20 such pupils, the district was not required to conduct any review or supervision of the existence or adequacy of the services for achieving English proficiency.<sup>129</sup> Petitioners alleged that the regulations did not provide consistent guidelines on the identification process. As a result, the local school districts perceived they had unlimited discretion in selecting the methods of identifying such children and avoided the provision of transitional bilingual education requirements by identifying less than 20 LEP pupils of the same primary language. Thus, the petitioners argued that the state violated the EEOA by failing to promulgate uniform and consistent guidelines for the identification, placement, and training of LEP pupils.<sup>130</sup> While the court did not reach the merits of the arguments raised by petitioners against the State of Illinois, the court held that the EEOA places the obligation on state educational agencies to take appropriate action by setting general and consistent guidelines for local school districts to identify and provide appropriate educational services to LEP pupils and ensure that the implementation of the state’s English proficiency program is effective.<sup>131</sup>

Here, the state’s census requirements imposed by section 11307(b) and (c) complies with these federal requirements. The language census required by the test claim regulation provides information to state and local educational agencies regarding the number of English language learners to project the future needs of these pupils; determines appropriate funding for educating English learners; and shows evidence of whether the English only, structured English immersion program mandated by Proposition 227 is effective. The census activities are imposed to implement federal EEOA requirements and any additional procedural requirements imposed to implement existing federal law are considered part and parcel of the underlying federal requirement.

Accordingly, the Commission finds that the census activities required by section 11307(b) and (c) of the title 5 regulations<sup>132</sup> do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

- Parent Advisory Committees (Cal. Code Regs., tit. 5, § 11308)

Section 11308 requires school districts to set up school advisory and school district advisory committees. School district advisory committees “shall be established in each school district with more than 50 English learners in attendance.” School advisory committees on programs and services for English learners “shall be established in each school with more than 20 English learners in attendance.” School advisory committees consist of parent members elected by the parents or guardians of English learners, and each school advisory committee elects at least one member to the district advisory committee, unless there are more than 30 school advisory

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<sup>129</sup> *Gomez v. Illinois State Board of Education*, *supra*, 811 F.2d 1030, 1033.

<sup>130</sup> *Id.* at pages 1033-1034.

<sup>131</sup> *Id.* at pages 1037, 1042-1043.

<sup>132</sup> Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

committees, in which case the district may use a system of proportional or regional representation.

School district advisory committees are required by section 11308(c) to advise the school district governing board on the following matters:

- Development of a district master plan for education programs and services for English learners;
- Conducting a district wide needs assessment on a school-by-school basis;
- The establishment of district program, goals, and objectives for programs and services for English learners;
- Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements;
- Administration of the annual language census;
- Review and comment on the school district reclassification procedures;
- Review and comment on the written notifications required to be sent to parents and guardians.

In addition, school districts are required by section 11308(d) to provide training materials and training to all school advisory and school district advisory committee members. Funding under the chapter may be used to meet the costs of providing training including the costs associated with the attendance of the members at training sessions.

The Commission finds that section 11308 does not impose a new program or higher level of service.

In 1979, the Legislature added sections 62002 and 62002.5 to the Education Code to sunset programs, including the Chacon-Moscone Bilingual Bicultural Education program. The statutes and regulations that implemented the bilingual education program were deemed inoperative by section 62002, “*except as specified in section 62002.5.*” In section 62002.5, the Legislature continued the requirement that the advisory committees and school site councils, which existed as part of the programs that sunset, continue and maintain the same functions and responsibilities as prescribed by the appropriate law or regulation in effect as of January 1, 1979. Education Code section 62002.5 states in relevant part the following:

Parent advisory committees and school site councils which are in existence pursuant to statutes or regulations as of January 1, 1979, shall continue subsequent to the termination of funding for the programs sunsetted by this chapter. Any school receiving funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunset of these programs as provided in this chapter, shall establish a school site council in conformance with the requirements in Section 52012. The functions and responsibilities of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979.<sup>133</sup>

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<sup>133</sup> Statutes 1979, chapter 282; Statutes 1983, chapter 1270.

Education Code section 52176 was added in 1977 by the Legislature as part of the Chacon-Moscone Bilingual Bicultural Education Act. That statute requires school districts with more than 50 pupils of limited English proficiency, and schoolsites with more than 20 pupils of limited English proficiency, to establish advisory committees.

Former section 4312 of the Title 5 regulations, as last amended in 1999 to implement Education Code sections 62002, 62002.5, and 52176, imposed the same requirements on the advisory committees as currently required in section 11308 of the regulations. Former section 4312 stated the following:

- (a) District advisory committees on programs and services for English learners will be established in each school district with more than 50 English learners in attendance. School advisory committees on education programs and services for English learners will be established in each school with more than 20 English learners in attendance. Both district and school advisory committees shall be established in accordance with Sections 52176 and 62002.5 of the Education Code.
- (b) The parents or guardians of English learners shall elect the parent members of the school advisory committee (or subcommittee, if appropriate). The parents shall be provided the opportunity to vote in the election. Each school advisory committee shall have the opportunity to elect at least one member to the District Advisory Committee, except that districts with more than 30 school advisory committees may use a system of proportional or regional representation.
- (c) District Advisory Committees shall advise the district governing board on at least the following tasks:
  - (1) Development of a district master plan for education programs and services for English learners. The district master plan will take into consideration the school site master plans.
  - (2) Conducting of a districtwide needs assessment on a school-by-school basis.
  - (3) Establishment of district program, goals, and objectives for programs and services for English learners.
  - (4) Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.
  - (5) Administration of the annual language census.
  - (6) Review and comment on the district reclassification procedures established pursuant to Education Code Section 52164.6.
  - (7) Review and comment on the written notification of initial enrollment required in Section 11303(a).
- (d) School districts shall provide all members of district and school advisory committees with appropriate training materials and training which will assist them

in carrying out their responsibilities pursuant to subsection (c). Training provided advisory committee members in accordance with this subsection shall be planned in full consultation with the members, and funds provided under this chapter may be used to meet the costs of providing the training to include the costs associated with the attendance of the members at training sessions.

Pursuant to Education Code section 62002.5, Education Code section 52176 and former section 4312 of the regulations remained continuously in effect despite the sunset of the state's bilingual education statutes until section 11308 became effective in 2003.

Therefore, because the parent advisory committees have been continuously required since 1977, and the sunset statutes provided for their continuance, the Commission finds that the requirements imposed by section 11308 of the title 5 regulations<sup>134</sup> do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

#### **D. California English Development Test Regulations (§§ 11510-11517)**<sup>135</sup>

In 1997, Education Code sections 60810 et seq. required the State Board of Education to approve standards for English language development for pupils whose primary language is other than English. The Superintendent of Public Instruction was also required to develop a test or series of tests to:

- Identify pupils who are limited English proficient.
- Determine the level of English proficiency of pupils who are limited English proficient.
- Assess the progress of limited English proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.

In 1999, Education Code section 313 was enacted to supplement the Proposition 227 initiative on English language instruction. Section 313 requires school districts to assess each pupil's English language development upon initial enrollment and annually thereafter until the pupil is reclassified as English proficient. The statute also states that the assessment shall primarily utilize the test identified in section 60810. Education Code 313 also requires CDE to establish procedures for conducting the assessment for the reclassification of a pupil from English learner to English proficient. The test that was developed is CELDT.

As indicated in the Background, a test claim was filed in 2001 on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test (CELDT I*, 00-TC-16)) seeking reimbursement for field testing CELDT, the initial assessment of LEP pupils, the annual assessment of LEP pupils, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program is mandated by federal law. Title VI of the Civil Rights Act (42 U.S.C. § 2000d), which prohibits discrimination under any program or activity receiving federal financial assistance, and EEOA require states and school districts to conduct English language

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<sup>134</sup> Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

<sup>135</sup> Sections 11516, 11516.6, 11517 and the 2005 amendments to these regulations are not part of the test claim. Staff makes no finding on these regulations.

assessments. The Commission's decision in *CELDT I* (00-TC-16) is a final binding decision and, thus, the parties may not re-litigate in the current claim whether the activities required by Education Code sections 313 and 60810 through 60812 impose a reimbursable state-mandated program.<sup>136</sup> The CELDT I test claim, however, did not plead the regulations that were adopted to govern the administration of the test.

In 2001, CDE adopted regulations to implement Education Code sections 313 and 60810 through 60812.<sup>137</sup> These title 5 regulations impose the following requirements on school districts:

- Assess a pupil whose native language is other than English for English language proficiency with CELDT within 30 calendar days of enrollment in the school district and during the annual assessment window. (Cal Code Regs., tit. 5, § 11511 (a) & (b).)
- Administer CELDT “in accordance with the test publisher’s directions, except as provided by Section 11516.5.” Section 11516.5 governs administering the test to pupils with disabilities. (Cal Code Regs., tit. 5, § 11511 (c).)
- If the school district places an order with the publisher of the test that is excessive, the district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered. (Cal Code Regs., tit. 5, § 11511 (d).)
- Notify parents or guardians of the pupil’s test results on CELDT within 30 calendar days following receipt of results of testing from the test publisher. The notification is required to comply with Education Code section 48985. (Cal Code Regs., tit. 5, § 11511.5.) Education Code section 48985 requires notifications to be in the parent’s primary language.
- Maintain a record of pupils who participated in each administration of CELDT, as specified. (Cal Code Regs., tit. 5, § 11512.)
- Provide the publisher of CELDT with information for each pupil tested, as specified. (Cal Code Regs., tit. 5, § 11512.5.)
- Designate a CEDLT district coordinator, with specified responsibilities. (Cal Code Regs., tit. 5, § 11513.)
- Designate a CELDT test-site coordinator for each test site, including each charter school, with specified responsibilities. (Cal Code Regs., tit. 5, § 11513.5.)
- Comply with test security measures, as specified. (Cal Code Regs., tit. 5, § 11514.)
- Provide accommodations for testing for pupils with disabilities. The accommodations provided are those that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil’s individualized education program plan (IEP). (Cal Code Regs., tit. 5, § 11516.5.)

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<sup>136</sup> *CSBA, supra*, 171 Cal.App.4th 1183, 1201-1202.

<sup>137</sup> These statutes are listed as the authority and reference for the CELDT regulations.



- Report to CDE the unduplicated count of the number of pupils to whom CELDT was administered for annual or initial assessment during the 12 month period prior to June 30 of each year, as specified. (Cal Code Regs., tit. 5, § 11517.) This section was repealed operative June 9, 2005, by Register 2005, No. 23.

The Commission finds that these activities do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution, but are part and parcel of, and necessary to implement, the federal EEOA.<sup>138</sup>

The EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by pupils in the instructional programs offered. As stated by the court in *Castaneda*, proper testing and evaluation is essential under the EEOA to determine the progress of pupils involved in the program and in evaluating the program itself.<sup>139</sup>

The courts have also clarified that the EEOA imposes on state agencies the duty to take appropriate action to ensure that LEP pupils are properly identified, evaluated, and placed, and to establish uniform guidelines for school districts to follow in such areas.<sup>140</sup> In the *Gomez* case, the petitioners alleged that the state violated the EEOA by not providing proper guidelines regarding the identification and testing of pupils as follows:

In addition, because of the absence of proper guidelines, local districts have been found to use as many as 23 different language proficiency tests, 11 standardized English tests, 7 standardized reading tests, and many formal and informal teacher-developed tests. Some of these tests do not accurately measure language proficiency, so that LEP children are not properly identified. This array of tests has also, to the detriment of plaintiffs, resulted in inconsistent results.<sup>141</sup>

The regulations here comply with these principles and do not mandate a new program or higher level of service.

The requirement imposed by the regulations to provide an initial and annual assessment of limited English proficient pupils is not new, but is expressly mandated by Education Code section 313 and, as described above, by federal law under the EEOA.

Moreover, providing test accommodations to pupils with disabilities that take CELDT (Cal Code Regs., tit. 5, § 11516.5.) is mandated by existing federal law under the Individuals with Disabilities Education Act (IDEA). IDEA requires that state and local education agencies ensure that children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services.<sup>142</sup> These services include special test-taking accommodations, as necessary and determined during the pupil's individualized education plan

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<sup>138</sup> An assessment of English proficiency for limited English proficient pupils (e.g., CELDT) is also a condition of receiving federal funds from Title III of NCLB. (20 U.S.C. § 6823(b)(3)(D).)

<sup>139</sup> *Castaneda v. Pickard*, *supra*, 648 F. 2d 989, 1014.

<sup>140</sup> *Gomez v. Illinois State Board of Education*, *supra*, 811 F.2d 1030, 1042.

<sup>141</sup> *Id.* at page 1033.

<sup>142</sup> 20 United States Code section 1400 et seq.

(IEP) process. IDEA further requires that disabled children be “included in general State and district-wide assessment programs, with appropriate accommodations, when necessary.”<sup>143</sup>

The remaining requirements in the regulations are not expressly mandated by the federal EEOA statutes. However, the activities to coordinate with the test publisher, comply with test security measures, notify parents and guardians of the results, maintain records, designate district and school-site coordinators, and provide a report to the state are necessary to implement the federal requirement in the EEOA for the state to establish, and the state and local educational agencies to implement, uniform guidelines for the proper identification and assessment of limited English proficient pupils. “[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate.”<sup>144</sup> The California Supreme Court has determined that these types of activities, which may exceed the express provisions of federal law, are not reimbursable under article XIII B, section 6 of the California Constitution because the activities are considered part and parcel of the underlying federal mandate.<sup>145</sup>

Accordingly, the Commission finds that the CELDT regulations (Cal. Code Regs., tit. 5, §§ 11510-11517)<sup>146</sup> do not impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

**E. Notice to Parents Provided in English and the Primary Language of the Parent (Ed. Code, § 48985; Cal.Code Regs., tit. 5, §§ 11316, 11511.5)**

The claimant has pled Education Code section 48985, as added in 1977 and amended in 1981.<sup>147</sup> The statute requires that all notices, reports, statements, or records sent by a school district to a parent or guardian who speaks a primary language other than English is to be written in the primary language in addition to English. This requirement applies only when 15% of the pupils enrolled in a public school speaks a language other than English, as determined by the annual census. Education Code section 48985, as amended in 1981, stated the following:

When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

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<sup>143</sup> 20 United States Code section 1412(a).

<sup>144</sup> *San Diego School Dist.*, *supra*, 33 Cal.4th at page 890.

<sup>145</sup> *Id.* at page 889.

<sup>146</sup> Register 2001, No. 40 (Oct. 5, 2001) pages 77-78.2; Register 2003, No. 16 (April 18, 2003) pages 77-78.2

<sup>147</sup> Statutes 1977, chapter 36; Statutes 1981, chapter 219.

Education Code section 48985 was amended in 2006 to place the quoted language in subdivision (a), and to add subdivisions (b) through (d). The 2006 statute has not been pled in this test claim and, thus, no analysis is provided for subdivisions (b) through (d).<sup>148</sup>

Regulations under the English Language Learner Education and CELDT regulations have been adopted to comply with Education Code section 48985. Section 11316 of the Title 5 regulations is placed in the English Language Learner Education chapter of the regulations and provides the following:

All notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985.

As described earlier in the analysis, the notices referred to in section 11316 of the regulations include the notice required by section 11309 of the regulations regarding the placement of an LEP pupil in a structured English immersion program and the opportunity for parents or guardians to apply for a parental exception waiver. It also includes the notice required by section 11303 of the regulations regarding the language reclassification process and placement of an LEP pupil.

Similarly, section 11511.5 of the CELDT regulations requires CELDT reports to parents or guardians to comply with Education Code section 48985. Section 11511.5 states the following:

For each pupil assessed using the California English Language Development Test, each school district shall notify parents or guardians of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. Such notification shall comply with the requirements of Education Code Section 48985.

The requirement to provide notices to parents in their primary language, however, is not new. Former Education Code section 10926, as added in 1976, imposed the same requirements as follows:

When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 5761.3 by the first day of April in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language

Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because this act merely affirms for the state that which has been declared existing law or regulation through action of the federal government.<sup>149</sup>

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<sup>148</sup> Statutes 2006, chapter 706.

<sup>149</sup> Statutes 1976, chapter 361.

Accordingly, the Commission finds that Education Code section 48985 and sections 11316,<sup>150</sup> 11511.5<sup>151</sup> of the Title 5 regulations do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

#### **IV. CONCLUSION**

Based on the above analysis, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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<sup>150</sup> Register 2003, No. 2 (Jan. 10, 2003) pages 75-76.1.

<sup>151</sup> Register 2001, No. 40 (Oct. 5, 2001) pages 77-78.2.

## Commission on State Mandates

Original List Date: 9/30/2003  
Last Updated: 5/8/2012  
List Print Date: 05/08/2012  
Claim Number: 03-TC-06  
Issue: California English Language Development Test - 2

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