Hearing Date: May 26, 2005
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ITEM 11

RECONSIDERATION OF PRIOR STATEMENT OF DECISION FINAL STAFF ANALYSIS

Government Code Sections 7570-7588

Statutes 1984, Chapter 1747; Statutes 1985, Chapter 1274 (Assem. Bill No. 3632)

California Code of Regulations,[1] Title 2, Sections 60000-60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28))
CSM 4282

Handicapped and Disabled Students (04-RL-4282-10)

Reconsideration Directed By Statutes 2004, Chapter 493, Section 7
(Sen. Bill No. 1895 ("SB 1895"))

EXECUTIVE SUMMARY

Background

Statutes 2004, chapter 493 (Sen. Bill No. 1895) directs the Commission to reconsider its prior final decision and parameters and guidelines on the *Handicapped and Disabled Students* program. Section 7 of the bill states the following:

> Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs.

Chapter 26.5 of the Government Code was enacted by the Legislature to implement federal law that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services, including psychological and other mental health services, designed to meet the pupil's unique educational needs. The legislation shifted to counties the responsibility and funding of mental health services required by a pupil's individualized education plan (IEP).

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[1] When the test claim was originally filed, the California Code of Regulations was known as the California Administrative Code.

This reconsideration presents the following issues:

- What is the scope of the Commission's jurisdiction directed by SB 1895?
- Does the test claim legislation constitute a state-mandated new program or higher level of service?
- Does the test claim legislation impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

The Commission's Jurisdiction on Reconsideration

To date, the Commission has issued two decisions relating to the test claim legislation[2]: *Handicapped and Disabled Students* (CSM 4282, adopted in 1990 with a reimbursement period beginning July 1, 1986); and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05, adopted in 2000 with a reimbursement period beginning January 1, 1997).

A third, consolidated test claim is pending with the Commission, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), which has been filed by the Counties of Los Angeles and Stanislaus on all of the amendments to the statutes in Chapter 26.5 of the Government Code and to their corresponding regulations from 1986 up to the current date. The test claims in *Handicapped and Disabled Students II* were filed in June 2003 and will have a reimbursement period, if approved by the Commission, beginning July 1, 2001.

In addition, the Counties of Los Angeles and Stanislaus have filed a request to amend the parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282). The request to amend the parameters and guidelines is still pending with the Commission, and if approved, will have a reimbursement period beginning July 1, 2000.

Based on case law and the plain language of SB 1895, staff finds that the Commission has jurisdiction for this item to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282). Staff further finds that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004.

Thus, this reconsideration does *not* address the following filings:

- The claims that are raised in the *Handicapped and Disabled Students II* test claim (02-TC-40 and 02-TC-49);[3]
- The claims still pending with the Commission that are raised in the requests to amend the parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282); or
- *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05).

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[2] Throughout this analysis, "test claim legislation" means Government Code sections 7570 et al., and the California Code of Regulations, title 2, sections 60000 et al.

[3] See Item 13 on the Commission's May 26, 2005 agenda.

Staff intends to issue an analysis on the requests to amend the parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282), for a tentative hearing date of September 2005.

Thereafter, if the Commission adopts this analysis, staff recommends that the parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282), *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), be consolidated so that the reimbursement of all costs incurred by counties pursuant to Chapter 26.5 of the Government Code can be claimed under one set of parameters and guideline and claiming instructions.

The test claim legislation pled in *Handicapped and Disabled Students* (CSM 4282) mandates a new program or higher level of service, and imposes costs mandated by the state

For the reasons described in the analysis, staff finds that the Commission correctly determined that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution. Staff finds, however, that the 1990 Statement of Decision does not fully identify all of the activities mandated by the state or the offsetting revenue that is applicable to this claim. Thus, staff recommends that the activities expressly required by the test claim legislation and the offsetting revenue be identified in the Commission's Statement of Decision on reconsideration. To the extent the Commission approves new activities in this reconsideration that were not included in the original Statement of Decision, the period of reimbursement for the new activities begins July 1, 2004.

Conclusion

Staff concludes that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514 for the *increased costs* in performing the activities listed on pages 51 through 54 of this analysis.

Staff Recommendation

Staff recommends that the Commission adopt this staff analysis on reconsideration and approve the test claim accordingly.

STAFF ANALYSIS

Chronology

07/30/87	Test claim filed by County of Santa Clara (CSM 4282)
01/28/88	Test claim was referred to the Office of Administrative Hearings for hearing and proposed Statement of Decision
04/26/90	Statement of Decision adopted by the Commission
06/25/90	Petition for Writ of Mandate filed by County of Santa Clara; trial court denied the petition and sustained the Commission's decision
08/22/91	Parameters and guidelines adopted by the Commission
01/11/93	Sixth District Court of Appeal affirmed the Commission decision
08/29/96	Amended parameters and guidelines adopted by the Commission
09/13/04	Statutes 2004, chapter 493 (Sen. Bill No. 1895) becomes effective and requires the Commission to reconsider its decision
11/02/04	Notice of reconsideration, briefing and hearing schedule issued by Commission staff
12/03/04	Proposed administrative record for CSM 4282 posted on the Commission's website
12/15/04	County of Stanislaus files comments on the reconsideration
12/15/04	County of Los Angeles files comments on the reconsideration and a request to augment the record on reconsideration
01/20/05	Draft staff analysis issued
02/18/05	County of Los Angeles files comments on draft staff analysis
03/25/95	Department of Mental Health requests extension of time to file comments on the draft staff analysis
03/29/05	Request for extension of time is denied as untimely since comments were due February 20, 2005
05/13/05	Final staff analysis and proposed statement of decision issued

Background

Statutes 2004, chapter 493 (Sen. Bill No. 1895) directs the Commission to reconsider its prior final decision and parameters and guidelines on the *Handicapped and Disabled Students* program. Section 7 of the bill states the following:

> Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs.

Commission Decisions

The Commission adopted the Statement of Decision on the *Handicapped and Disabled Students* program in 1990 (CSM 4282). Generally, the test claim legislation implements federal law that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services designed to meet the pupil's unique educational needs.[4] The mechanism for providing special education services under federal law is the individualized education program, or IEP. An IEP is a written statement developed after an evaluation of the pupil in all areas of suspected disability and may provide for related services including mental health and psychological services.[5]

Before the enactment of the test claim legislation, the state adopted a plan to comply with federal law. The responsibility for supervising special education and related services was delegated to the Superintendent of Public Instruction. Local educational agencies (LEAs) were financially responsible for the provision of mental health services required by a pupil's IEP. [6]

The test claim legislation, which became effective on July 1, 1986, shifted the responsibility and funding of mental health services required by a pupil's IEP to county mental health departments.

The Commission approved the test claim and found that the activities of providing mental health assessments, participation in the IEP process, psychotherapy, and other mental health services were reimbursable under article XIII B, section 6 of the California Constitution. Activities related to assessments and IEP responsibilities were found to be 100% reimbursable. Psychotherapy and other mental health treatment services were found to be 10% reimbursable due to the funding methodology in existence under the Short-Doyle Act for local mental health services.

The parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282) were adopted in August 1991, and amended in 1996, and have a reimbursement period beginning July 1, 1986. The parameters and guidelines authorize reimbursement for the following activities:

A. One Hundred (100) percent of any costs related to IEP Participation, Assessment, and Case Management:

    1. The scope of the mandate is one hundred (100) percent reimbursement, except that for individuals billed to Medi-Cal only, the Federal Financing Participation portion (FFP) for these activities should be deducted from reimbursable activities not subject to the Short-Doyle Act.

    2. For each eligible claimant, the following cost items are one hundred (100) percent reimbursable (Gov. Code, § 7572, subd. (d)(1)):

        a. Whenever an LEA refers an individual suspected of being an "individual with exceptional needs" to the local mental health department, mental health

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[4] See federal Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA).

[5] Title 20 United States Code sections 1400 et seq.

[6] Education Code sections 56000 et seq.

assessment and recommendation by qualified mental health professionals in conformance with assessment procedures set forth in Article 2 (commencing with section 56320) of Chapter 4 of part 30 of Division 4 of the Education Code, and regulations developed by the State Department of Mental Health, in consultation with the State Department of Education, including but not limited to the following mandated services:

i. interview with the child and family,

ii. collateral interviews, as necessary,

iii. review of the records,

iv. observation of the child at school, and

v. psychological testing and/or psychiatric assessment, as necessary.

b. Review and discussion of mental health assessment and recommendation with parent and appropriate IEP team members. (Gov. Code, § 7572, subd. (d)(1).)

c. Attendance by the mental health professional who conducted the assessment at IEP meetings, when requested. (Gov. Code, § 7572, subd. (d)(1).)

d. Review by claimant's mental health professional of any independent assessment(s) submitted by the IEP team. (Gov. Code, § 7572, subd. (d)(2).)

e. When the written mental health assessment report provided by the local mental health program determines that an "individual with special needs" is "seriously emotionally disturbed," and any member of the IEP team recommends residential placement based upon relevant assessment information, inclusion of the claimant's mental health professional on that individual's expanded IEP team.

f. When the IEP prescribes residential placement for an "individual with exceptional needs" who is "seriously emotionally disturbed," claimant's mental health personnel's identification of out-of-home placement, case management, six month review of IEP, and expanded IEP responsibilities. (Gov. Code, § 7572.5.)

g. Required participation in due process hearings, including but not limited to due process hearings.

3. One hundred (100) percent of any administrative costs related to IEP Participation, Assessment, and Case Management, whether direct or indirect.

B. Ten (10) percent of any costs related to mental health treatment services rendered under the Short-Doyle Act:

1. The scope of the mandate is ten (10) percent reimbursement.

2. For each eligible claimant, the following cost items, for the provision of mental health services when required by a child's individualized education program, are ten (10) percent reimbursable (Gov. Code, § 7576):

a. Individual therapy,

b. Collateral therapy and contacts,

c. Group therapy,

d. Day treatment, and

e. Mental health portion of residential treatment in excess of the State Department of Social Services payment for the residential placement.

3. Ten (10) percent of any administrative costs related to mental health treatment services rendered under the Short-Doyle Act, whether direct or indirect.

In 1993, the Sixth District Court of Appeal, in *County of Santa Clara v. Commission on State Mandates*, issued an unpublished decision that upheld the Commission's decision, including the percentage of reimbursements, on the *Handicapped and Disabled Students* program.[7]

In May 2000, the Commission approved a second test claim relating to the test claim legislation, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (CSM 97-TC-05). The test claim on *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) was filed on Government Code section 7576, as amended by Statutes 1996, chapter 654, the corresponding regulations, and on a Department of Mental Health Information Notice Number 86-29. The test claim in *Seriously Emotionally Disturbed Pupils* addressed only the counties' responsibilities for *out-of-state* residential placements for seriously emotionally disturbed pupils, and has a reimbursement period beginning January 1, 1997.

In addition, there are two other matters currently pending with the Commission relating to the test claim legislation. In 2001, the Counties of Los Angeles and Stanislaus filed requests to amend the parameters and guidelines on the original test claim decision, *Handicapped and Disabled Students* (CSM 4282). The counties request that the parameters and guidelines be amended to delete all references to the Short-Doyle cost-sharing mechanism for providing psychotherapy or other mental health services; to add an activity to provide reimbursement for room and board for in-state placement of pupils in residential facilities; and to amend the language regarding the reimbursement of indirect costs. The request to amend the parameters and guidelines was scheduled on the Commission's March 2002 hearing calendar. But at the request of the counties, the item was taken off calendar, and is still pending. If the Commission approves the counties' requests on this matter, the reimbursement period for the new amended portions of the parameters and guidelines would begin on July 1, 2000.[8]

The second matter currently pending with the Commission is a consolidated test claim, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), filed by the Counties of Los Angeles and Stanislaus on all of the amendments to the original test claim legislation from 1986 to the present. The test claims in *Handicapped and Disabled Students II* were filed in

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[7] *County of Santa Clara v. Commission on State Mandates*, Sixth District Court of Appeal Case No. H009520, filed January 11, 1993 (p. 1415.)

[8] California Code of Regulations, title 2, section 1183.2.

June 2003 and, if approved by the Commission, will have a reimbursement period beginning July 1, 2001.

Documented Problems with the Test Claim Legislation

There have been funding and implementation problems with this program, which have been well documented. In 2002, the Legislative Analyst's Office issued a budget analysis that described "significant controversy" regarding the program. The report states in relevant part the following:

> Over the last two years, the State Controller's Office (SCO) has audited county AB 3632 mandate reimbursement claims dating back to 1997 (three years of claims for each audited county). Based on information provided by counties and professional mandate claim preparers, we understand that SCO auditors have found that many counties are claiming reimbursements for 100 percent of the cost of providing mental health treatment services to special education pupils, rather than the 10 percent specified under the terms of this mandate. In addition, some counties are not reporting revenues that auditors indicate should be included as mandate cost "offsets." The magnitude of these auditing concerns is unknown, but could total as much as $100 million statewide for the three-year period.[9]

Before the audits could be completed, Statutes 2002, chapter 1167, section 41 (Assem. Bill No. 2851) was enacted directing the State Controller's Office to not dispute the percentage of reimbursement claimed for mental health services provided by counties prior to and through fiscal years 2000-2001. According to the State Controller's Office, however, audits continue for this program to identify unallowable costs. To date, seventeen audits have been completed, three final reports are in the process, and five audits are in the fieldwork stage.[10]

In addition, the legislative history of SB 1895 refers to a report issued by Stanford Law School in May 2004 on the program that describes the history of the test claim legislation, and addresses the policy and funding issues.[11] According to legislative history, SB 1895 was an attempt to address the issues and recommendations raised in the report.[12]

Accordingly, this reconsideration presents the following issues:

- What is the scope of the Commission's jurisdiction directed by SB 1895?
- Does the test claim legislation constitute a state-mandated new program or higher level of service?

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[9] Report by Legislative Analyst's Office, *2002 Budget Analysis: Health and Social Services, Department of Mental Health (4440)*, dated February 20, 2002. (Exhibit D, p. 2349.) The *Handicapped and Disabled Students* program is often referred to as the "AB 3632" program.

[10] See e-mail from State Controller's Office dated January 19, 2005. (Exhibit D, p. 2429.)

[11] The report is entitled "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004. (Exhibit D, pp. 2355-2428.)

[12] Assembly Committee on Education, analysis of SB 1895 as introduced on March 3, 2004, dated June 23, 2004. (Exhibit D, p. 2431.)

- Does the test claim legislation impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[14] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[15] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[16] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[17]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[18] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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

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

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

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

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

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

legislation.[19] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[20]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[21]

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.[22] 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."[23]

I. What is the scope of the Commission's jurisdiction directed by SB 1895?

Statutes 2004, chapter 493, section 7 (Sen. Bill No. 1895, eff. Sept. 13, 2004), requires the Commission on State Mandates, on or before December 31, 2005, "notwithstanding any other law" to "reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs."

As described in the Background, the Commission has issued two decisions relating to Chapter 26.5 of the Government Code. The first decision, *Handicapped and Disabled Students* (CSM 4282), was adopted on April 26, 1990. The test claim on *Handicapped and Disabled Students* (CSM 4282) was filed on Government Code section 7570 and following, as added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter 1274, and on California Administrative Code, title 2, division 9, sections 60000-60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and re-filed June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

The second decision, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), was adopted on May 25, 2000. The test claim on *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) was filed on Government Code section 7576, as amended by Statutes 1996, chapter 654, the corresponding regulations, and on a Department of Mental Health Information Notice Number 86-29. The test claim in *Seriously Emotionally Disturbed Pupils* addressed only the counties' responsibilities for

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

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

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

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

[23] *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.

out-of-state residential placements for seriously emotionally disturbed pupils. This test claim did not address the mental health services provided by counties to pupils in the state of California.[24]

A third test claim is pending with the Commission, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), and has been filed by the Counties of Los Angeles and Stanislaus on all of the amendments to the statutes in Chapter 26.5 of the Government Code and to their corresponding regulations from 1986 up to the current date. The test claims in *Handicapped and Disabled Students II* were filed in June 2003 and, if approved by the Commission, will have a reimbursement period beginning July 1, 2001.

For purposes of this reconsideration, the Counties of Los Angeles and Stanislaus contend that SB 1895 requires the Commission to reconsider not only the Commission's original decision in *Handicapped and Disabled Students* (CSM 4282), but also on *all* the subsequent amendments to the statutes and regulations up to the current date that were pled in *Handicapped and Disabled II*. In this regard, the County of Stanislaus argues that "to reconsider the prior test claim only, without examining that which has amended the program since its original inception in 1984, overlooks 20 years of subsequent legislation and which has lead to the substantial filings which are before the Commission on State Mandates."[25] The Counties further contend that SB 1895 requires the Commission to reconsider the Commission's decision in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), adopted on May 25, 2000.

Although the Counties' arguments to analyze Chapter 26.5 of the Government Code in its entirety up to the current date for purposes of reimbursement may have surface appeal, neither the law, nor the plain language of SB 1895 supports that position. For the reasons provided below, staff finds that SB 1895 gives the Commission the jurisdiction to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282). The Commission does not have the jurisdiction in this case to reconsider *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), or the jurisdiction to address the statutory and regulatory amendments made to the program since 1985 that have been pled in *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49). Staff further finds, based on the language of SB 1895, that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004.

A. SB 1895 directs the Commission to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282)

It is a well-settled issue of law that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[26]

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[24] The Statement of Decision and parameters and guidelines for *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (CSM 97-TC-05) is at Exhibit F, page 2569.

[25] Comments filed by County of Stanislaus on December 15, 2004 (Exhibit B).

[26] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

Since the Commission was created by the Legislature (Gov. Code, §§ 17500 et seq.), its powers are limited to those authorized by statute. Government Code section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Government Code section 17521 defines the test claim as the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state.

Thus, the Government Code gives the Commission jurisdiction only over those statutes and/or executive orders pled by the claimant in the test claim. The Commission does not have the authority to consider a claim for reimbursement on statutes or executive orders that have not been pled by the claimant.

In addition, if the Commission approves the test claim, the period of reimbursement is calculated based on the date the test claim is filed by the claimant. Government Code section 17557, subdivision (e), states "[a] test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Thus, if a test claim is filed on June 30, 2004, and is approved by the Commission, the reimbursement period would begin in fiscal year 2002-2003. Reimbursement is not based on the effective and operative date of the particular statute or executive order pled in the test claim, unless the effective and operative date falls after the period of reimbursement.

Furthermore, Government Code section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the Statement of Decision is issued.

In the present case, the Commission's jurisdiction is based solely on SB 1895. Absent SB 1895, the Commission would have no jurisdiction to reconsider any of its decisions relating to Chapter 26.5 of the Government Code since the two decisions on those statutes and regulations were adopted and issued well over 30 days ago.

Thus, the Commission must act within the jurisdiction granted by SB 1895, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[27] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of SB 1895.

Under the rules of statutory construction, when the statutory language is plain the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][28]

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[27] *Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[28] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

Neither the court, nor the Commission, may disregard or enlarge the plain provisions of a statute or go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the Commission, like the court, is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[29] To the extent there is any ambiguity in the language used in the statute, the legislative history of the statute may be reviewed to interpret the intent of the Legislature.[30]

SB 1895 states the following:

> Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs.

First, the Commission does not have the jurisdiction to "reconsider" the statutory and regulatory amendments enacted after 1985 to the Handicapped and Disabled program that were pled in *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49) since the Commission has not yet adopted a decision on that claim. Pursuant to Government Code section 17557, subdivision (e), *Handicapped and Disabled Students II* will have a reimbursement period beginning July 1, 2001, if the Commission finds that the statutory and regulatory amendments pled in the claim constitute a reimbursable state-mandated program.

Second, staff finds that the Commission does not have the jurisdiction to reconsider the Commission's decision in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05). The express language enacted by the Legislature in SB 1895 refers to one decision with the use of the singular word "decision." According to the analysis on the bill prepared by the Senate Rules Committee dated August 25, 2004, Senate Bill 1895 "[d]irects the Commission on State Mandates (CSM), on or before December 31, 2005, to reconsider its decision relating to administrative and travel costs for AB 3632 (Brown), Chapter 1747, Statutes of 1984 and its parameters and guidelines for calculating state reimbursement costs."[31] The legislative history cites only to the author and one of the statutes pled in the original *Handicapped and Disabled Students* (CSM 4282) test claim. Although, as argued by the Counties, the statutes pled in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) are included in Chapter 26.5 of the Government Code, there is no indication in the plain language of SB 1895 or in the Senate Rules Committee analysis that the Legislature intended to give the Commission jurisdiction to reconsider *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05). The SEDs test claim was filed on a 1996 statute (Assem. Bill 2726), introduced by another author who is not identified in SB 1895 or in the legislative history.[32]

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[29] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[30] *Estate of Griswald, supra,* 25 Cal.4th at page 911.

[31] Exhibit F, page 2781.

[32] Statutes 1996, chapter 654 was introduced by Assembly Member Woods.

Therefore, staff finds that the Commission has jurisdiction to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282).

Finally, SB 1895 directs the Commission to reconsider its decision relating to "*included services* and administrative and travel costs" associated with services provided pursuant to Chapter 26.5 of the Government Code. The phrase "included services" is broad and does not limit the scope of this reconsideration to any particular service required by the statutes or regulations pled in *Handicapped and Disabled Students*. Therefore, staff finds that SB 1895 requires the Commission to reconsider the entire test claim in *Handicapped and Disabled Students*.

B. The period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004

SB 1895, enacted as a 2004 statute, directs the Commission to reconsider its 1990 Statement of Decision on the *Handicapped and Disabled Students* program. The parameters and guidelines for this program were originally adopted in 1991, with a reimbursement period beginning July 1, 1986. Over the last 14 years, reimbursement claims have been filed with the State Controller's Office for payment on this program, payments have been made by the state, and audits have occurred.

SB 1895, however, does not specify the period of reimbursement for the Commission's decision on reconsideration.[33] The question is whether the Legislature intended to apply the Commission's decision on reconsideration retroactively back to the original reimbursement period of July 1, 1986 (i.e., to reimbursement claims that have already been filed and have been audited and/or paid), or to prospective claims filed in the current and future budget years. If the Commission's decision on reconsideration is applied retroactively, the decision may impose new liability on the state that did not otherwise exist or change the legal consequences of these past events.

For the reasons below, staff finds the Legislature intended that the Commission's decision on reconsideration apply prospectively, to current and future budget years only.

The California Supreme Court has recently upheld its conclusion that there is a strong presumption against retroactive legislation. Statutes generally operate prospectively only. A statute may be applied retroactively only if the statute contains "express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."[34] The court explained its conclusion as follows:

> "Generally, statutes operate prospectively only." [Citation omitted.] "The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly … For that

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[33] In this respect, SB 1895 is different than another recent statute directing the Commission to reconsider a prior final decision. Statutes 2004, chapter 227, directs the Commission to reconsider Board of Control test claims relating to regional housing. Section 109 of the bill states "[a]ny changes by the commission shall be deemed effective July 1, 2004."

[34] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475.

> reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." [Citation omitted.] "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." [Citation omitted.]
>
> This is not to say that a statute may never apply retroactively. "A statute's retroactivity is, *in the first instance, a policy determination for the Legislature* and one to which courts defer absent 'some constitutional objection' to retroactivity." [Citation omitted.] But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." [Citation omitted.] "*A statute may be applied retroactively only if it contains express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application*." [Citation omitted.] (Emphasis added.)[35]

There is nothing in the plain language of SB 1895 or its legislative history to suggest that the Legislature intended to apply the Commission's decision on reconsideration retroactively. Section 10 of SB 1895 states that the act was necessary to implement the Budget Act of 2004 and, thus, supports the conclusion that the statute was intended to apply prospectively to the current and future budget years. Similarly, the legislative history contained in the analysis of the Senate Rules Committee supports the conclusion that the statute applies to current and future budget years only. Page seven of the analysis states that "[t]his bill proposes to provide clarification and accountability *regarding the funds provided in the 2004-05 Budget Act* for mental health services for individuals with special needs." (Emphasis added.)[36]

Moreover, had the Legislature intended to apply the Commission's decision on reconsideration retroactively, it would have included retroactive language in the bill similar to the language in other statutes relating to this program. For example, Statutes 2002, chapter 1167, addressed the funding and reimbursement for the Handicapped and Disabled program. The effective and operative date of the statute was September 30, 2002. However, the plain language in section 38 of the bill contains retroactive language that the terms of the statute applied to reimbursement claims for services delivered beginning in fiscal year 2001-2002. Section 41 of the bill also states that county reimbursement claims already submitted to the Controller for reimbursement for mental health treatment services in fiscal years up to and including fiscal year 2000-2001 were not subject to a dispute by the Controller's Office regarding the percentage of reimbursement claimed by the county.

Based on the case law cited above and the plain language of SB 1895, staff finds that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004. Thus, to the extent there are new activities included in the program that are now reimbursable, reimbursement would begin July 1, 2004.

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[35] *Ibid.*

[36] Exhibit F, page 2781.

II. Does the test claim legislation constitute a state-mandated new program or higher level of service?

In 1993, the Sixth District Court of Appeal, in *County of Santa Clara v. State of California*, issued an unpublished decision in the present case upholding the Commission's decision that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution.[37] Once a court has ruled on a question of law in its review of an agency's action, the agency cannot act inconsistently with the court's order. Instead, absent "unusual circumstances," or an intervening change in the law, the decision of the reviewing court establishes the law of the case and binds the agency and the parties to the action in all further proceedings addressing the particular claim.[38]

Although there have been subsequent amendments to the original test claim legislation that have provided more specificity in the activities performed by counties and that have modified financial responsibilities for the Handicapped and Disabled program, these amendments do not create an "unusual circumstance" or constitute an "intervening change in the law" that would support a finding on reconsideration that the test claim should be denied.[39]

Although staff recommends that the activities identified in the original Statement of Decision and the financial responsibilities for the program be further clarified on reconsideration, the decision in *County of Santa Clara* that the test claim legislation is a reimbursable state-mandated program, is binding on the Commission and the parties for purposes of this reconsideration.

Moreover, other case law interpreting article XIII B, section 6, which is described below, further supports the conclusion that the test claim legislation mandates a new program or higher level of service on counties.

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[37] *County of Santa Clara v. Commission on State Mandates*, Sixth District Court of Appeal Case No. H009520, filed January 11, 1993 (at p. 1422). The court stated the following:

> The intent of section 6 was to preclude the state from shifting to local government the financial responsibility for providing services in light of the restrictions imposed by Proposition 13 on the taxing and spending powers of local government. (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836.) Here it is undisputed that the provision of psychotherapy and other mental health services to special education students resulted in a higher level of service within County's Short-Doyle program.

[38] *George Arakelian Farms, Inc. v. Agricultural Labor Relations Board* (1989) 49 Cal.3d 1279, 1291.

[39] The amendments addressing financial responsibilities for this program are included in this analysis. The amendments enacted after 1985 that modify the activities performed by counties, however, are addressed in the *Handicapped and Disabled Students II* test claim filed by the Counties of Los Angeles and Stanislaus (02-TC-40 and 02-TC-49). (See Item 13.)

A. Case law supports the conclusion that the test claim legislation mandates a new program or higher level of service

The test claim legislation implements federal law that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services designed to meet the pupil's unique educational needs.

In 1988, the California Supreme Court held that education of handicapped children is "clearly" a governmental function providing a service to the public.[40] Thus, the test claim legislation qualifies as a program that is subject to article XIII B, section 6 of the California Constitution.

In 1992, the Third District Court of Appeal, in *Hayes v. Commission on State Mandates*, determined that the federal law at issue in the present case imposes a federal mandate on the states.[41] The *Hayes* case involved test claim legislation requiring school districts to provide special education services to disabled pupils. The school districts in the *Hayes* case alleged that the activities mandated by the state that exceeded federal law were reimbursable under article XIII B, section 6 of the California Constitution.

The court in *Hayes* determined that the state's "alternatives [with respect to federal law] were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event."[42] The court concluded that the state had no "true choice" but to participate in the federal program and, thus, there was a federal mandate on the state.[43]

Although the court concluded that the federal law was a mandate on the states, the court remanded the case to the Commission for further findings to determine if the state's response to the federal mandate constituted a state-mandated new program or higher level of service on the school districts.[44] The court held as follows:

> In our view the determination whether certain costs were imposed upon the local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[45]

The court described its conclusion as follows:

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[40] *Lucia Mar Unified School District, supra*, 44 Cal.3d at page 835.

[41] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.

[42] *Hayes, supra*, 11 Cal.App.4th at page 1591.

[43] *Ibid*.

[44] *Ibid*.

[45] *Id.* at pages 1593-1594.

> The Education of the Handicapped Act [renamed IDEA] is a comprehensive measure designed to provide all handicapped children with basic educational opportunities. While the act includes certain substantive and procedural requirements which must be included in the state's plan for implementation of the act, it leaves primary responsibility for implementation to the state. (20 U.S.C. §§ 1412, 1413.) In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[46]

The federal law relevant to this case is summarized on pages 1582-1594 of the *Hayes* decision, and its requirements that existed at the time the test claim legislation was enacted are described below.

1. Pursuant to the court's ruling in *Hayes*, federal special education law imposes a federal mandate on the state

Before the mid-1970s, a series of landmark court cases established the right to an equal educational opportunity for children with disabilities. The federal courts determined that children with disabilities were entitled to a free public program of education and training appropriate to the child's capacity and that the children and their parents were entitled to a due process hearing when dissatisfied with placement decisions.[47]

In 1973, Congress responded with the Rehabilitation Act of 1973, section 504. Section 504 of the Rehabilitation Act of 1973 imposes an obligation on local school districts to accommodate the needs of children with disabilities. Section 504 provides that "[n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) [now 706(8)] of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." (29 U.S.C. 794.) "Since federal assistance to education is pervasive, ... section 504 was applicable to virtually all public educational programs in this and other states."[48] Section 504 gives school districts "the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free public education for the handicapped child."[49]

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[46] *Id*. at page 1594.

[47] *Id.* at pages 1582-1584.

[48] *Id.* at page 1584.

[49] *Id.* at pages 1584-1585.

In 1974, Congress became dissatisfied with the progress under earlier efforts to stimulate the states to accommodate the educational needs of children with disabilities. Thus, in 1975, Congress enacted the Education for All Handicapped Children Act. In 1990, the Education for All Handicapped Act was renamed the Individuals with Disabilities Education Act (IDEA).[50]

Since 1975, the IDEA has guaranteed to disabled children the right to receive a free appropriate public education that emphasizes special education and related services designed to meet the child's individual needs. The IDEA further guarantees that the rights of disabled children and their parents are protected.[51] States are eligible for "substantial federal financial assistance" under the IDEA when the state agrees to adhere to the substantive and procedural terms of the act and submits a plan specifying how it will comply with federal requirements.[52] At the time the test claim legislation was enacted, the requirements of the IDEA applied to each state and each political subdivision of the state "involved in the education of handicapped children."[53]

Special education is defined under the IDEA as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.[54] To be eligible for services under the IDEA, a child must be between the ages of three and twenty-one and have a qualifying disability.[55] If it is suspected that a pupil has a qualifying disability, the Individual Education Program, or IEP, process begins. The IEP is a written statement for a handicapped child that is developed and implemented in accordance with federal IEP regulations.[56] Pursuant to federal regulations on the IEP process, the child must be evaluated in all areas of suspected handicaps by a multidisciplinary team. Parents also have the right to obtain an independent assessment of the child by a qualified professional. Local educational agencies are required to consider the independent assessment as part of their educational planning for the child.[57]

If it is determined that the child is handicapped within the meaning of IDEA, an IEP meeting must take place. Participants at the IEP meeting include a representative of the local educational agency, the child's teacher, one or both of the parents, the child if appropriate, other individuals

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[50] Public Law 101-476 (Oct. 30, 1990), 104 Stat.1143.

[51] 20 United States Code section 1400(c).

[52] *Hayes, supra*, 11 Cal.App.4th at page 1588; 20 United States Code sections 1411, 1412.

[53] Title 34 Code of Federal Regulations, sections 300.2 and 300.11. These regulations defined "public agency" to mean "all political subdivisions of the State *that are involved in the education of handicapped children*."

[54] Former Title 20 United States Code section 1401(a)(16). The definition can now be found in Title 20 United States Code section 1401(25).

[55] Title 20 United States Code section 1412.

[56] Title 20 United States Code section 1401; Title 34 Code of Federal Regulations section 300.340 et seq.

[57] Former Title 34 Code of Federal Regulations section 300.503. The requirement is now at Title 34 Code of Federal Regulation section 300.502.

at the discretion of the parent or agency, and evaluation personnel for children evaluated for the first time.[58] The local educational agency must take steps to insure that one or both of the parents are present at each meeting or are afforded the opportunity to participate, including giving the parents adequate and timely notice of the meeting, scheduling the meeting at a mutually convenient time, using other methods to insure parent participation if neither parent can attend, and taking whatever steps are necessary to insure that the parent understands the proceedings.[59] The IEP document must include the following information:

- a statement of the child's present levels of educational performance;
- a statement of annual goals, including short term instructional objectives;
- a statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;
- the projected dates for initiation of services and the anticipated duration of the services; and
- appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.[60]

Each public agency must provide special education and related services to a handicapped child in accordance with the IEP.[61] In addition, each public agency must have an IEP in effect at the beginning of each school year for every handicapped child who is receiving special education from that agency. The IEP must be in effect before special education and related services are provided, and special education and related services set out in a child's IEP must be provided as soon as possible after the IEP is finalized.[62] Each public agency shall initiate and conduct IEP meetings to periodically review each child's IEP and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.[63]

A child that is assessed during the IEP process as "seriously emotionally disturbed" has a qualifying disability under the IDEA.[64] "Seriously emotionally disturbed" children are children who have an inability to learn which cannot be explained by intellectual, sensory, or health

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[58] Title 34 Code of Federal Regulations section 300.344.

[59] Title 34 Code of Federal Regulations section 300.345.

[60] Former Title 34 Code of Federal Regulations section 300.346. The IEP requirements are now found in Title 34 Code of Federal Regulations section 300.347.

[61] Former Title 34 Code of Federal Regulations section 300.349. The requirement is now found in Title 34 Code of Federal Regulations section 300.343.

[62] Title 34 Code of Federal Regulations section 300.342.

[63] Title 34 Code of Federal Regulations section 300.343.

[64] Former Title 20 United States Code section 1401(a)(1). The phrase "serious emotionally disturbed" has been changed to "serious emotional disturbance." (See, 20 U.S.C. § 1401(3)(A)(i).)

factors; who are unable to build or maintain satisfactory interpersonal relationships with peers and teachers; who exhibit inappropriate types of behavior or feelings under normal circumstances; who have a general pervasive mood of unhappiness or depression; and/or who have a tendency to develop physical symptoms or fears associated with personal or school problems. One or more of these characteristics must be exhibited over a long period of time and to a marked degree, and must adversely affect educational performance in order for a child to be classified as "seriously emotionally disturbed." Schizophrenic children are included in the "seriously emotionally disturbed" category. Children who are socially maladjusted are not included unless they are otherwise determined to be emotionally disturbed.[65]

Related services designed to assist the handicapped child to benefit from special education are defined to include "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."[66] Federal regulations define "psychological services" to include the following:

- administering psychological and educational tests, and other assessment procedures;
- interpreting assessment results;
- obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;
- consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and
- planning and managing a program of psychological services, including psychological counseling for children and parents.[67]

The comments to section 300.13 of the federal regulations further state that "[t]he list of related services is not exhaustive and may include other developmental, corrective, or supportive services . . . if they are required to assist a handicapped child to benefit from special education."

Furthermore, if placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents or child.[68]

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[65] Former Title 34 Code of Federal Regulations section 300.5, subdivision (b)(8). "Serious emotional disturbance" is now defined in Title 34 Code of Federal Regulations section 300.7(c)(3).

[66] Title 20 United States Code section 1401; former Title 34 Code of Federal Regulations section 300.13 (the definition of "related services" can now be found in 34 C.F.R. § 300.24.)

[67] *Ibid.*

The IDEA also requires states and local educational agencies to establish and maintain due process procedures to assure that handicapped children and their parents are guaranteed procedural safeguards. The procedures must include an opportunity for the parents to examine all relevant records and to obtain an independent educational evaluation; procedures to protect the rights of children who do not have parents or guardians to assert their rights, including procedures for appointment of a surrogate for the parents; prior written notice to the parents whenever the educational agency proposes to initiate, change, or refuse to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child; procedures designed to assure that the required notice fully informs the parents in the parents' native language of all the procedures available; and an opportunity to present complaints. There must also be impartial due process hearing procedures that include the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children; the right to present evidence; the right to confront, cross-examine, and compel the attendance of witnesses; the right to a written or electronic verbatim record of the hearing; the right to written findings of fact and decisions; the right to appeal the determination of the due process hearing officer; and the right to bring a civil action in court. The court in its discretion may award attorney's fees and costs in certain circumstances.[69]

Finally, the state is ultimately responsible for insuring the requirements of the IDEA. For example, the state educational agency is responsible for assuring that all education and related services required for a handicapped child will be under the general supervision of persons responsible for educational programs for handicapped children in the state educational agency and shall meet the education standards of the state educational agency.[70] The state educational agency is responsible for insuring that each public agency develops and implements an IEP for each handicapped child.[71] Furthermore, the state educational agency must provide services directly if no other agency provides them.[72] The comments to section 300.600 of the federal regulations describe the purpose of making the states ultimately responsible for providing special education and related services:

> The requirement in § 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children with each State. With respect to State educational agency responsibility, the Senate Report on Pub. L. 94-142 includes the following statements:

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[68] Title 20 United States Code section 1412; Title 34 Code of Federal Regulations section 300.302.

[69] Title 20 United States Code 1415.

[70] Former Title 20 United States Code section 1412(6). The requirement is now in Title 20 United States Code section 1412(a)(11).

[71] Title 34 Code of Federal Regulations section 300.341.

[72] Former Title 34 Code of Federal Regulation section 300.600. The requirement is now in Title 34 Code of Federal Regulations section 300.142.

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency . . . .
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Sen. Rep. 94-168, p. 24 (1975)).[73]

There have been several amendments to the IDEA since the test claim legislation was originally enacted in 1984. Congress' 1997 amendment to the IDEA is relevant for purposes of this action. In 1997, Congress amended the IDEA to "strengthen the requirements on ensuring provisions of services by non-educational agencies …" (Sen. Rep. 105-17, dated May 9, 1997.) The amendment clarified that the state or local educational agency responsible for developing a child's IEP could look to non-educational agencies to pay for or provide those services the educational agencies are otherwise responsible for. The amendment further clarified that if a non-educational agency failed to provide or pay for the special education and related services, the state or local educational agency responsible for developing the IEP remain ultimately responsible for ensuring that children receive all the services described in their IEPs in a timely fashion and the state or local educational agency shall provide or pay for the services.[74] Federal law does not require states to use non-educational agencies to pay for or provide services. A states' decision regarding how to implement of the IDEA is still within the discretion of the state.

2. The state "freely chose" to mandate a new program or higher level of service on counties to implement the federal law

The court in *Hayes* held that if the state freely chose to impose the costs upon the local agency as a means of implementing a federally mandated program, regardless of whether the costs were imposed on the state by the federal government, then the costs are the result of a reimbursable state mandate pursuant to article XIII B, section 6.[75]

As more fully described below, staff finds that the state, with the enactment of the test claim legislation, freely chose to mandate a new program or higher level of service on counties.

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[73] Exhibit D, page 2273.

[74] Title 20 United States Code sections 1412 (a)(12)(A), (B), and (C), and 1401 (8); Title 34 Code of Federal Regulations section 300.142. (See also Exhibit D, Letters from the Department of Education dated July 28, 1998 and August 2, 2004, to all SELPAs, COEs, and LEAs on the requirements of 34 C.F.R. 300.142 (pp. 2439-2444); and *Tri-County Special Education Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 578 (p. 2195.))

[75] *Hayes, supra*, 11 Cal.App.4th at pages 1593-1594.

The federal IDEA includes certain substantive and procedural requirements that must be included in the state's plan for implementation. But, as outlined above, federal law leaves the primary responsibility for implementation to the state.

Before the enactment of the test claim legislation, the state enacted comprehensive legislation (Ed. Code, §§ 56000 et seq.) to comply with federal law that required local educational agencies to provide special education services, including mental health and residential care services, to special education students.[76] Education Code section 56000 required that students receive public education and related services through the Master Plan for Special Education. Under the master plan, special education local plan areas (SELPAs), which consist of school districts and county offices of education, were responsible for developing and implementing a plan consistent with federal law to provide an appropriate education for individuals with special needs.[77] Each district, SELPA, or county office of education was required to establish IEP teams to develop, review, and revise education programs for each student with special needs.[78] The IEP team may determine that mental health or residential treatment services were required to support the student's special education needs.[79] The following mental health services were identified in statute: counseling and guidance; psychological services, other than assessment and development of the IEP; parent counseling and training; health and nursing services; and social worker services.[80] In such cases, the school districts and county offices of education were solely responsible for providing special education services, including mental health and residential care services, for special education students under the state's statutory scheme.[81] The state Superintendent of Public Instruction was, and still is, responsible for supervising education and related services for handicapped children pursuant to the IDEA.[82]

In 1984 and 1985, the Legislature enacted the test claim legislation, which added Chapter 26.5 to the Government Code to shift the responsibility and funding of mental health services required by a pupil's IEP to county mental health departments. Generally, the test claim legislation requires counties to:

- renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement;

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[76] Statutes 1980, chapter 1218.

[77] Education Code sections 56140 and 56200.

[78] Education Code sections 56340 and 56341.

[79] Education Code sections 56363 and 56365.

[80] Education Code section 56363.

[81] Education Code section 56363; see also, Report by the Office of the Auditor General, dated April 1987, entitled "A Review of the Costs of Providing Noneducational Services to Special Education Students." (Exhibit D, p. 2445). The report states that in fiscal year 1985-86, the year immediately before the effective date of the test claim legislation, local education agencies provided psychotherapy and other mental health services to 941 students and residential services to 225 students. (p. 2456.)

[82] Education Code section 56135 and Government Code section 7570.

- perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team;
- participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary;
- act as the lead case manager, as specified in statute and regulations, if the IEP calls for residential placement of a seriously emotionally disturbed pupil;
- issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils;
- provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP; and
- participate in due process hearings relating to issues involving mental health assessments or services.

The purpose of the test claim legislation was recently described in the report prepared by Stanford Law School as follows:

> With the passage of AB 3632, California's approach to mental health services was restructured with the intent to address the increasing number of emotionally disabled students who were in need of mental health services. Instead of relying on LEAs to acquire qualified staff to handle the needs of these students, the state sought to have CMH [county mental health] agencies – who were already in the business of providing mental health services to emotionally disturbed youth and adults – assume the responsibility for providing needed mental health services to children who qualified for special education. Moreover, it was believed at the time that such mental health services would be most cost-efficiently provided by CMH agencies.[83]

Federal law does not require the state to impose any requirements relating to special education and related services on counties. At the time the test claim legislation was enacted, the requirements under federal law were imposed only on states and local educational agencies.[84] Today, federal law authorizes, but does not require, states to shift some of the special education requirements to non-educational agencies, such as county mental health departments.[85] But, if a county does not provide the service, federal law requires the state educational agency to be ultimately responsible for providing the services directly.[86] Thus, the decision to shift the mental

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[83] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 12. (Exhibit D, p. 2374.)

[84] Title 34 Code of Federal Regulations section 300.2.

[85] Title 20 United States Code section 1412(a)(12).

[86] Title 20 United States Code sections 1412(a)(12)(A), (B), and (C), and 1401(8); Title 34 Code of Federal Regulations section 300.142.

health services for special education pupils from schools to counties was a policy decision of the state.

Moreover, the mental health services required by the test claim legislation for special education pupils were new to counties. At the time the test claim legislation was enacted, the counties had the existing responsibility under the Short-Doyle Act to provide mental health services to eligible children and adults. (Welf. & Inst. Code, §§ 5600 et seq.) But as outlined in a 1997 report prepared by the Department of Mental Health and the Department of Education, the requirements of the test claim legislation are different than the requirements under the Short-Doyle program. For example, mental health services under the Short-Doyle program for children are provided until the age of 18, are provided year round, and the clients must pay the costs of the services based on the ability to pay. Under the special education requirements, mental health services may be provided until the pupil is 22 years of age, are generally provided during the school year, and must be provided at no cost to the parent. Furthermore, the definition of "serious emotional disturbance" as a disability requiring special education and related services focuses on the pupil's functioning in school, a standard that is different than the standard provided under the Short-Doyle program.[87] Thus, with the enactment of the test claim legislation, counties are now required to perform mental health activities under two separate and distinct provisions of law: the Government Code (the test claim legislation) and the Welfare and Institutions Code.

Since article XIII B, section 6 "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of restrictions on the taxing and spending power of the local entities,"[88] staff finds that the shift of mental health services for special education pupils to counties constitutes a new program or higher level of service.

Accordingly, staff finds that the Commission's conclusion adopted in the 1990 Statement of Decision, that the test claim legislation mandates a new program or higher level of service, was correctly decided. The new activities mandated by the state are described below.

B. Activities expressly required by the test claim legislation that constitute a state-mandated new program or higher level of service on counties

The findings and conclusion in the Commission's 1990 Statement of Decision generally identify the following state-mandated activities: assessment, participation on the expanded IEP team, case management services for seriously emotionally disturbed pupils, and providing psychotherapy and other mental health services required by the pupil's IEP. The 1990 Statement of Decision states:

> The Commission concludes that, to the extent that the provisions of Government Code section 7572 and section 60040, Title 2, Code of California Regulations, require county participation in the mental health assessment for "individuals with exceptional needs," such legislation and regulations impose a new program or higher level of service upon a county.

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[87] "Mental Health Services for Special Education Pupils, A Report to the State Department of Mental Health and the California Department of Education," dated March 1997 (Exhibit D, p. 2475). The construction of statutes by the officials charged with its administration is entitled to great weight. (*Whitcomb, supra*, 24 Cal.2d at pp. 756-757.)

[88] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 876.

> Moreover, the Commission concludes that any related participation on the expanded IEP team and case management services for "individuals with exceptional needs" who are designated as "seriously emotionally disturbed," pursuant to subdivisions (a), (b), and (c) of Government Code section 7572.5 and their implementing regulations, impose a new program or higher level of service upon a county. …
>
> The Commission concludes that the provisions of Welfare and Institutions Code section 5651, subdivision (g), result in a higher level of service within the county Short-Doyle program because the mental health services, pursuant to Government Code sections 7571 and 7576 and their implementing regulations, must be included in the county Short-Doyle annual plan. In addition, such services include psychotherapy and other mental health services provided to "individuals with exceptional needs," including those designated as "seriously emotionally disturbed," and required in such individual's IEP. …

As described below, staff finds that the 1990 Statement of Decision does not fully identify all of the activities mandated by the test claim legislation. Thus, staff recommends that all of the activities expressly required by the test claim legislation be identified in the Commission's Statement of Decision on reconsideration.

1. Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal Code Regs., tit. 2, §§ 60030, 60100)[89]

Government Code section 7571 requires the Secretary of Health and Welfare to designate a single agency in each county to coordinate the service responsibilities described in Government Code section 7572. To implement this requirement, section 60030 of the joint regulations adopted by the Department of Mental Health and the Department of Education (Cal. Code Regs., tit. 2, §§ 60000 et seq.) require the local mental health director to appoint a liaison person for the local mental health program to ensure that an interagency agreement is developed before July 1, 1986, with the county superintendent of schools.[90] The requirement to develop the initial

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[89] The regulations pled in the original test claim were enacted by the Departments of Mental Health and Education as emergency regulations (Cal. Code Regs., tit. 2, §§ 60000 through 60610, filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)). These regulations were repealed and were superceded by new regulations, effective July 1, 1998. The 1998 regulations are the subject of Item 13, the pending test claim, *Handicapped and Disabled Students II* (02-TC-40, 02-TC-49). Most of the activities required by the original regulations remain the law. However, as indicated in this analysis, several activities have been deleted in the 1998 regulations. Since the reimbursement period of this reconsideration begins July 1, 2004, those activities deleted by the 1998 regulations no longer constitute a state-mandated new program or higher level of service for purposes of the original test claim. The analysis of activities that have been modified by the 1998 regulations is provided in the staff analysis for *Handicapped and Disabled Students II* (02-TC-40, 02-TC-49).

[90] The local mental health program is the county community mental health program established in accordance with the Short-Doyle Act (Welf. & Inst. Code, §§ 5600 et seq.) or the county welfare

interagency agreement before July 1, 1986 is not reimbursable because the original reimbursement period for this claim began on or after July 1, 1986, and the reimbursement period for purposes of this reconsideration is July 1, 2004.

But the regulations require that the interagency agreement be renewed every three years, and revised if necessary. The interagency agreement "shall include, but not be limited to, a delineation of the process and procedure for" the following:

- Interagency referrals of pupils, which minimize time line delays. This may include written parental consent on the receiving agency's forms.
- Timely exchange of pupil information in accordance with applicable procedures ensuring confidentiality.
- Participation of mental health professionals, including those contracted to provide services, at IEP team meetings pursuant to Government Code sections 7572 and 7576.
- Developing or amending the mental health related service goals and objectives, and the frequency and duration of such services indicated on the pupil's IEP.
- Transportation of individuals with exceptional needs to and from the mental health service site when such service is not provided at the school.
- Provision by the school of an assigned, appropriate space for delivery of mental health services or a combination of education and mental health services to be provided at the school.
- Continuation of mental health services during periods of school vacation when required by the IEP.
- Identification of existing public and state-certified nonpublic educational programs, treatment modalities, and location of appropriate residential placements which may be used for placement by the expanded IEP program team.
- Out-of-home placement of seriously emotionally disturbed pupils in accordance with the educational and treatment goals on the IEP.[91]

In addition, section 60100, subdivision (a), of the regulations requires the local mental health program and the special education local plan area liaison person to define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

Accordingly, staff finds that Government Code section 7571, and sections 60030 and 60100 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Renew the interagency agreement every three years, and revise if necessary.

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agency when designated pursuant to Government Code section 7572.5. (Cal. Code of Regs., tit. 2, § 60020, subd. (d)).

[91] California Code of Regulations, title 2, section 60030, subdivision (b).

- Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

2. Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team (Gov. Code, § 7572, Cal. Code Regs., tit. 2, § 60040)

Government Code section 7572, subdivision (a), provides that "a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service before any action is taken with respect to the provision of related services or designated instruction and services to a child, including, but not limited to, services in the area of, … psychotherapy, and other mental health assessments." Government Code section 7572, subdivision (c), states that psychotherapy and other mental health assessments shall be conducted by qualified mental health professionals as specified in regulations developed by the Department of Mental Health and the Department of Education.

Section 60040 of the regulations governs the referral to and the initial assessment by the county. Section 60040, subdivision (a), states that a local education agency may refer a pupil suspected of needing mental health services to the county mental health program when a review of the assessment data documents that the behavioral characteristics of the pupil adversely affect the pupil's educational performance. The pupil's educational performance is measured by standardized achievement tests, teacher observations, work samples, and grade reports reflecting classroom functioning, or other measures determined to be appropriate by the IEP team; the behavioral characteristics of the pupil cannot be defined solely as a behavior disorder or a temporary adjustment problem, or cannot be resolved with short-term counseling; the age of onset was from 30 months to 21 years and has been observed for at least six months; the behavioral characteristics of the pupil are present in several settings, including the school, the community, and the home; and the adverse behavioral characteristics of the pupil are severe, as indicated by their rate of occurrence and intensity.

Section 60040, subdivision (c), states that when a local education agency refers a pupil to the county, the local education agency shall obtain written parental consent to forward educational information to the county and to allow the county mental health professional to observe the pupil during school. The educational information includes a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, and a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.

Section 60040, subdivision (d), states that "[t]he local mental health program shall be responsible for reviewing the educational information [identified in the paragraph above], observing *if necessary*, the pupil in the school environment, and determining if mental health assessments are needed." (Emphasis added.) Subdivision (d)(1) provides that "*[i]f mental health assessments are deemed necessary by a mental health professional*, a mental health assessment plan shall be developed and the parent's written consent obtained …" (Emphasis added.) This regulation includes language that implies that the observation of the pupil and the preparation of the mental health assessment plan are activities within the discretion of the county. Staff finds, however, that these activities are mandated by the state when necessary to provide the pupil with a free and appropriate education under federal law. Under the rules of statutory construction,

section 60040, subdivision (d), must be interpreted in the context of the entire statutory scheme so that the statutory scheme may be harmonized and have effect.[92] In addition, it is presumed that the administrative agency, like the Departments of Mental Health and Education, did not adopt a regulation that alters the terms of a legislative enactment.[93] Federal law, through the IDEA, requires the state to *identify*, locate, and evaluate *all* children with disabilities, including children attending private schools, who are in need of special education and related services.[94] The state is also required by federal law to conduct a full and individual initial evaluation to determine whether a child is a child with a qualifying disability and the educational needs of the child.[95] Government Code section 7572, subdivision (a), is consistent with federal law and requires that a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service. In cases where the pupil is suspected of needing mental health services, the state has delegated to the counties the activity of determining the need for service. Accordingly, staff finds that the following activities, identified in section 60040, subdivision (d) and (d)(1), are new activities mandated by the state:

- Review the following educational information of a pupil referred to the county by a local education agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
- If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
- If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.

The county is then required by section 60040, subdivision (d)(2), to complete the assessment within the time required by Education Code section 56344 (except as expressly provided, the IEP shall be developed within a total time not to exceed 50 days from the date of receipt of the parent's written consent for assessment.) If a mental health assessment cannot be completed within the time limits, the county mental health program shall notify the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.

Section 60040, subdivision (e), requires the county to provide to the IEP team a written assessment report in accordance with Education Code section 56327. Education Code section 56327 requires that the report include the following information:

- Whether the pupil may need special education and related services.

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[92] *Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781-782.

[93] *Wallace v. State Personnel Board* (1959) 168 Cal.App.2d 543, 547.

[94] 20 United States Code section 1412, subdivision (a)(3).

[95] 20 United States Code section 1414, subdivision (a).

- The basis for making the determination.
- The relevant behavior noted during the observation of the pupil in the appropriate setting.
- The relationship of that behavior to the pupil's academic and social functioning.
- The educationally relevant health and development, and medical findings, if any.
- For pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services.
- A determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate.
- The need for specialized services, materials, equipment for pupils with low incidence disabilities.

After the assessment by the county is completed, Government Code section 7572, subdivision (d)(1), requires that the recommendation of the person who conducted the assessment be reviewed and discussed with the parent and the appropriate members of the IEP team before the IEP team meeting. When the proposed recommendation has been discussed with the parent and there is disagreement on the recommendation pertaining to the related service, the parent shall be notified in writing and may require the person from the county who conducted the assessment to attend the IEP team meeting. Government Code section 7572, subdivision (d)(1), states that "the person who conducted the assessment shall attend the individualized education program team meeting if requested."

Government Code section 7572, subdivision (e), requires the local education agency to invite the county to meet with the IEP team to determine the need for the related service and to participate in developing the IEP. Staff finds, however, that the county's attendance at the IEP meeting at the request of the local education agency is not mandated by the state for the following reasons. Government Code section 7572, subdivision (e), states that *if* the county representative cannot meet with the IEP team, then the representative is required to provide the local education agency written information concerning the need for the service. Staff finds that the assessment report required by section 60040, subdivision (e), of the regulations satisfies the written information requirement of Government Code section 7572, subdivision (e), and that Government Code section 7572, subdivision (e), does not impose any further requirement on the county to prepare additional written reports. The conclusion that the county is not required by the state to attend the IEP team meeting at the request of the local education agency is further supported by the sentence added to subdivision (e) by Statutes 1985, chapter 1274. That sentence provides the following: "If the responsible public agency representative will not be available to participate in the individualized education program meeting, the local educational agency shall ensure that a qualified substitute is available to explain and interpret the evaluation pursuant to subdivision (d) of Section 56341 of the Education Code.[96] There is no requirement in the law that the qualified substitute has to be a county representative.

[96] Education Code section 56341, subdivision (e), stated the following when the test claim legislation was enacted (as amended by Stats. 1982, ch. 1201): "If a team is developing, reviewing, or revising the individualized education program of an individual with exceptional

In addition, Government Code section 7572, subdivision (e), imposes a requirement on the county to provide a copy of the written information to the parent or any adult for whom no guardian or conservator has been appointed.

Finally, Government Code section 7572, subdivision (d)(2), provides that if a parent obtains an independent assessment regarding psychotherapy or other mental health services, and the independent assessment is submitted to the IEP team, the county is required to review the independent assessment. The county's recommendation shall be reviewed and discussed with the parent and with the IEP team before the meeting of the IEP team. The county shall attend the IEP team meeting if requested.

Accordingly, staff finds that Government Code section 7572 and section 60040 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Review the following educational information of a pupil referred to the county by a local education agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
- If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
- If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.
- Assess the pupil within the time required by Education Code section 56344.[97]
- If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.

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needs who has been assessed for the purpose of that individualized education program, the district, special education local plan area, or county office, shall ensure that a person is present at the meeting who has conducted an assessment of the pupil or who is knowledgeable about the assessment procedures used to assess the pupil and is familiar with the results of the assessment. The person shall be qualified to interpret the results if the results or recommendations, based on the assessment, are significant to the development of the pupil's individualized education program and subsequent placement."

[97] The existing parameters and guidelines allow reimbursement for mental health assessments and include within that activity the interview with the child and the family, and collateral interviews, as necessary. These activities are not expressly required by the test claim legislation. However, when reconsidering the parameters and guidelines for this program, the Commission has the jurisdiction to consider "a description of the most reasonable methods of complying with the mandate." (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(1)(A)(4).)

- Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.
- Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
- In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
- Review independent assessments of a pupil obtained by the parent.
- Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
- In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

3. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary (Gov. Code, § 7572.5, subds. (a) and (b); Cal. Code Regs., tit. 2, § 60100)

Government Code section 7572.5, subdivision (a), and section 60100, subdivision (b), of the regulations provide that when an assessment determines that a child is seriously emotionally disturbed as defined in section 300.5 of the Code of Federal Regulations, and any member of the IEP team recommends residential placement based on relevant assessment information, the IEP team shall be expanded to include a representative of the county. Government Code section 7572.5, subdivision (b), requires the expanded IEP team to review the assessment and determine whether (1) the child's needs can reasonably be met through any combination of nonresidential services, preventing the need for out-of-home care; (2) residential care is necessary for the child to benefit from educational services; and (3) residential services are available, which address the needs identified in the assessment and which will ameliorate the conditions leading to the seriously emotionally disturbed designation. Section 60100, subdivision (d), similarly states that the expanded IEP team shall consider all possible alternatives to out-of-home placement.

Section 60100, subdivision (c), states that if the county determines that additional mental health assessments are needed, the county is required to assess or re-assess the pupil in accordance with section 60040.

Section 60100, subdivision (e), states that when residential placement is the final decision of the expanded IEP team, the team shall develop a written statement documenting the pupil's educational and mental health treatment needs that support the recommendation for the placement.

Section 60100, subdivision (f), requires the expanded IEP team to identify one or more appropriate, least restrictive and least costly residential placement alternatives, as specified in the regulation.

Finally, section 60100, subdivision (g), requires the county representative on the expanded IEP team to notify the Local Mental Health Director or designee of the team's decision within one working day of the IEP team meeting. However, effective July 1, 1998, section 60100 of the regulations was amended and this activity is no longer required. Since the reimbursement period for this reconsideration begins July 1, 2004, staff finds that the activity of notifying the local mental health director of the decision is not a state-mandated new program or higher level of service.

Accordingly, staff finds that Government Code section 7572.5, subdivisions (a) and (b), and section 60100 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.
- Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.

4. Act as the lead case manager, as specified in statute and regulations, if the IEP calls for residential placement of a seriously emotionally disturbed pupil (Gov. Code, §§ 7572.5, subd. (c)(1), 7579; Cal. Code Regs., tit. 2, § 60110)

Government Code section 7572.5, subdivision (c)(1), provides that if the review of the expanded IEP team calls for residential placement of the seriously emotionally disturbed pupil, the county shall act as the lead case manager. That statute further states that "the mental health department shall retain financial responsibility for provision of case management services."

Section 60110, subdivision (a), requires the Local Mental Health Director or the designee to designate a lead case manager to finalize the pupil placement plan with the approval of the parent and the IEP team within 15 days from the decision to place the pupil in a residential facility. Subdivision (c) defines case management duties to include the following activities:

- Convening parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.
- Verifying with the educational administrator or designee the approval of the local governing board of the district, special education service region, or county office pursuant to Education Code section 56342.[98]

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[98] Education Code section 56342 states in relevant part the following:

> Prior to recommending a new placement in a nonpublic, nonsectarian school, the individualized education program team shall submit the proposed recommendation to the local governing board of the district and special education local plan area for review and recommendation regarding the cost of placement.
>
> The local governing board shall complete its review and make its recommendations, if any, at the next regular meeting of the board. A parent or representative shall have the right to appear before the board and submit written

- Completing the local mental health program payment authorization in order to initiate out of home care payments.
- Coordinating the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
- Coordinating the completion of the residential placement as soon as possible.
- Developing the plan for and assisting the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
- Facilitating the enrollment of the pupil in the residential facility.
- Conducting quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
- Notifying the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.
- Coordinating the six-month expanded IEP team meeting with the local education agency administrator or designee.

As of July 1, 1998, however, the activity of verifying with the educational administrator or designee the approval of the local governing board pursuant to Education Code section 56342 is no longer required by section 60100 of the regulations. In addition, the activity of coordinating the six-month expanded IEP team meeting with the local education agency administrator or designee was repealed as of July 1, 1998. Since the reimbursement period for this reconsideration begins July 1, 2004, staff finds that these two activities are not a state-mandated new program or higher level of service.

Moreover, on April 30, 1986, the Department of Mental Health issued DMH Letter No. 86-12 to all local mental health directors, program chiefs, and administrators, and to county administrative officers regarding the implementation of the test claim legislation. (p. 1513.) On page 1521 of the record, the Department lists the case management duties for seriously emotionally disturbed pupils placed in a residential facility and includes "coordinating the pupil's transportation needs" as a case management duty of the county. This letter issued by the Department of Mental Health was not identified or pled as an executive order in the original test claim, and the activity of "coordinating the pupil's transportation needs" is not expressly required by the test claim statutes or regulations. Moreover, section 60110 was amended on July 1, 1998, to include as a case management activity "coordinating the transportation of the pupil to the facility if needed." Section 60110, as amended on July 1, 1998, is the subject of a pending test claim, *Handicapped and Disabled II* (02-TC-40 and 02-TC-49). Therefore, staff finds that "coordinating the pupil's

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and oral evidence regarding the need for nonpublic school placement for his or her child. Any recommendations of the board shall be considered at an individualized education program team meeting, to be held within five days of the board's review.

transportation needs" is not mandated by the test claim legislation before the Commission in this reconsideration.

Finally, Government Code section 7579, subdivision (a), requires courts, regional centers for the developmentally disabled, or other non-educational public agencies that engage in referring children to, or placing children in, residential facilities, to notify the administrator of the special education local plan area (SELPA) in which the residential facility is located before the pupil is placed in an out-of-home residential facility. The intent of the legislation, as stated in subdivision (c), is to "encourage communication between the courts and other public agencies that engage in referring children to, or placing children in, residential facilities, and representatives of local educational agencies." Government Code section 7579, subdivision (a), however does not apply to county mental health departments. The duty imposed by section 7579 to notify the SELPA before the pupil is placed in a residential facility is a duty imposed on a placing agency, like a court or a regional center for the developmentally disabled. This test claim was filed on behalf of county mental health departments.[99] Thus, staff finds that Government Code section 7579 does not impose a state-mandated new program or higher level of service on county mental health departments.

Accordingly, staff finds that Government Code sections 7572.5, subdivision (c)(1), and section 60110 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Designate a lead case manager when the expanded IEP team recommends out-of-home residential placement for a seriously emotionally disturbed pupil. The lead case manager shall perform the following activities:
    1. Convene parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.
    2. Complete the local mental health program payment authorization in order to initiate out of home care payments.
    3. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
    4. Coordinate the completion of the residential placement as soon as possible.
    5. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
    6. Facilitate the enrollment of the pupil in the residential facility.
    7. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.

[99] Test claim (CSM 4282) filed by County of Santa Clara, page 13.

8. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.

5. Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

Government Code section 7581 requires the county to be financially responsible for the residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility. Section 7581 states the following:

> The residential and noneducational costs of a child placed in a medical or residential facility by a public agency, other than a local education agency, or independently placed in a facility by the parent of the child, shall not be the responsibility of the state or local education agency, but shall be the responsibility of the placing agency or parent [if the parent places the child].

Consistent with Government Code section 7581, section 60200, subdivision (e), of the regulations requires the county welfare department to issue the payments to providers of out-of-home facilities in accordance with Welfare and Institutions Code section 18351, upon receipt of authorization documents from the State Department of Mental Health or a designated county mental health agency. The authorization documents are required to include information sufficient to demonstrate that the child meets all eligibility criteria established in the regulations for this program. (Welf. & Inst. Code, § 18351.) The Department of Social Services is required to determine the rates to be paid to the residential providers in accordance with Welfare and Institutions Code section 18350. (Cal. Code Regs., tit. 2, § 60200, subd. (d).)

Thus, the test claim regulations require that payments to providers of 24-hour out-of-home care be made in accordance with Welfare and Institutions Code sections 18350 and 18351. Welfare and Institutions Code sections 18350 and following govern the payments to 24-hour out-of-home care providers for seriously emotionally disturbed pupils, and were added by the 1985 test claim statute. Welfare and Institutions Code sections 18350 and following were not pled in the original *Handicapped and Disabled Students* test claim. However, since Welfare and Institutions Code sections 18350 and 18351 were identified in the regulations that were pled in the test claim, and sections 18350 and 18351 define the scope of the activity and the costs at issue in this case, staff finds that the Commission may properly consider sections 18350 and 18351 on reconsideration of this claim.

Welfare and Institutions Code section 18351, subdivision (a), requires the county welfare department located in the same county as the county mental health agency designated to provide case management services to issue payments to residential care providers upon receipt of authorization documents from the State Department of Mental Health or a designated county mental health agency. Subdivision (a) further states that "[a]uthorization documents shall be submitted directly to the county welfare department clerical unit responsible for issuance of warrants and shall include information sufficient to demonstrate that the child meets all eligibility criteria established in regulations by the State Department of Mental Health, developed in consultation with the State Department of Education."

Welfare and Institutions Code section 18350, subdivision (c), states that "[p]ayments shall be based on rates established in accordance with Sections 11461, 11462, and 11463 and shall be based on providers' actual allowable costs." At the time the test claim legislation was enacted, Welfare and Institutions Code section 11462, subdivision (b), defined "allowable costs" as follows:

> As used in this section, "allowable costs" means: (A) the reasonable cost of, and the cost of providing food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation; (B) reasonable cost of administration and operation necessary to provide the items described in paragraph (A); and (C) reasonable activities performed by social workers employed by group home providers which are not otherwise allowable as daily supervision or as the costs of administration.

Welfare and Institutions Code section 11462 was repealed and replaced in 1989, before the Commission adopted the 1990 Statement of Decision in this case.[100] A similar definition of allowable costs for care and supervision of the pupil in the residential facility remains the law, however, and can now be found in Welfare and Institutions Code section 11460, subdivision (b).[101] Since Government Code section 7581 requires counties to be responsible for the residential and *non-educational* costs of the pupil only, staff finds that the cost for school supplies are not required to be paid to residential care providers by the counties.

In addition, effective July 1, 1998, the regulations were amended to provide a definition of "care and supervision." The definition does not include issuing payments for the reasonable cost of administration and operation, and the reasonable activities performed by social workers employed by group home providers, which are not otherwise allowable as daily supervision or as the costs of administration.[102] Therefore, since the reimbursement period for this reconsideration begins July 1, 2004, staff finds that the activity of issuing payments for the reasonable cost of administration and operation, and the reasonable activities performed by social workers employed by group home providers which are not otherwise allowable as daily supervision or as the costs of administration, do not constitute a state-mandated new program or higher level of service.

Thus, staff finds that the requirement to issue payments to providers of 24-hour out-of-home facilities for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation, constitutes a state-mandated new program or higher level of service.

Welfare and Institutions Code section 18351, subdivision (b), further requires the county welfare department to submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

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[100] Statutes 1989, chapter 1294.

[101] Welfare and Institutions Code section 11460 was added by Statutes 1989, chapter 1294.

[102] See California Code of Regulations, title 2, section 60025, subdivision (a), (eff. July 1, 1998).

Accordingly, staff finds that Government Code section 7581 and section 60200, subdivision (e), of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation.
- Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

6. Provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60020, subd. (a), 60200, subds. (a) and (b))

Government Code section 7576 requires the State Department of Mental Health, or any designated community mental health service (i.e., the county), to provide psychotherapy or other mental health services when required by a pupil' s IEP. Psychotherapy or other mental health services may be provided directly or by contracting with another public agency, qualified individual, or a state-certified nonpublic, nonsectarian school or agency.

Section 60020, subdivision (a), defines "psychotherapy and other mental health services" as "those services defined in Sections 542 to 543, inclusive, of Title 9 of the California Administrative Code [Department of Mental Health regulations], and provided by a local mental health program directly or by contract." Section 542 of the Department of Mental Health regulations governs the definition of "day services": services that are designed to provide alternatives to 24-hour care and supplement other modes of treatment and residential services. Day services include day care intensive services, day care habilitative services, vocational services and socialization services. These services are defined in section 542 of the regulations as follows:

- Day care intensive services are "services designed and staffed to provide a multidisciplinary treatment program of less than 24 hours per day as an alternative to hospitalization for patients who need active psychiatric treatment for acute mental, emotional, or behavioral disorders and who are expected, after receiving these services, to be referred to a lower level of treatment, or maintain the ability to live independently or in a supervised residential facility."
- Day care habilitative services are "services designed and staffed to provide counseling and rehabilitation to maintain or restore personal independence at the best possible functional level for the patient with chronic psychiatric impairments who may live independently, semi-independently, or in a supervised residential facility which does not provide this service."[103]

[103] In comments to the draft staff analysis, the County of Los Angeles asserts that "rehabilitation" should be specifically defined to include the activities identified in section 1810.243 of the regulations adopted by the Department of Mental Health under the Medi-Cal Specialty Mental Health Services Consolidation program. (Cal. Code Regs., tit. 9, § 1810.243.) These activities

- Vocational services are "services designed to encourage and facilitate individual motivation and focus upon realistic and obtainable vocational goals. To the extent possible, the intent is to maximize individual client involvement in skill seeking and skill enhancement, with the ultimate goal of meaningful productive work."
- Socialization services are "services designed to provide life-enrichment and social skill development for individuals who would otherwise remain withdrawn and isolated. Activities should be gauged for multiple age groups, be culturally relevant, and focus upon normalization."

Section 543 of the Department of Mental Health regulations defines "outpatient services," which are defined as "services designed to provide short-term or sustained therapeutic intervention for individuals experiencing acute or ongoing psychiatric distress." Outpatient services include the following:

- Collateral services, which are "sessions with significant persons in the life of the patient, necessary to serve the mental health needs of the patient."
- Assessment, which is defined as "services designed to provide formal documented evaluation or analysis of the cause or nature of the patient's mental, emotional, or behavioral disorder. Assessment services are limited to an intake examination, mental health evaluation, physical examination, and laboratory testing necessary for the evaluation and treatment of the patient's mental health needs."
- Individual therapy, which is defined as "services designed to provide a goal directed therapeutic intervention with the patient which focuses on the mental health needs of the patient."
- Group therapy, which are "services designed to provide a goal directed, face-to-face therapeutic intervention with the patient and one or more other patients who are treated at the same time, and which focuses on the mental health needs of the patient."
- Medication, which is defined to include "the prescribing, administration, or dispensing of medications necessary to maintain individual psychiatric stability during the treatment process. This service shall include the evaluation of side effects and results of medication."
- Crisis intervention, which means "immediate therapeutic response which must include a face-to-face contact with a patient exhibiting acute psychiatric symptoms to alleviate problems which, if untreated, present an imminent threat to the patient or others."

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include "assistance in improving, maintaining, or restoring a beneficiary's or group of beneficiaries' functional skills, daily living skills, social and leisure skills, grooming and personal hygiene skills, meal preparation skills, and support resources and/or medication education."

Staff disagrees with the County's request. The plain language of test claim regulations (Cal. Code Regs., tit. 2, §§ 60000 et seq.) does not require or mandate counties to perform the activities defined by section 1810.243 of the Department's title 9 regulations. In addition, the test claim regulations do not reference section 1810.243 of the Department's title 9 regulations for any definition relevant to the program at issue in this case.

The County of Los Angeles, in comments to the draft staff analysis, argues that all of the activities listed above should be identified as reimbursable state-mandated activities.[104] However, as of July 1, 1998, the activities of providing vocational services, socialization services, and crisis intervention to pupils are no longer required by section 60020 of the regulations. The final statement of reasons for the 1998 adoption of section 60020 of the regulations by the Departments of Mental Health and Education provides the following reason for the deletion of these activities:

> The provision of vocational services is assigned to the State Department of Rehabilitation by Government Code section 7577.
>
> Crisis service provision is delegated to be "from other public programs or private providers, as appropriate" by these proposed regulations in Section 60040(e) because crisis services are a medical as opposed to educational service. They are, therefore, excluded under both the Tatro and Clovis decisions. These precedents apply because "medical" specialists must deliver the services. A mental health crisis team involves specialized professionals. Because of the cost of these professional services, providing these services would be a financial burden that neither the schools nor the local mental health services are intended to address in this program.
>
> The hospital costs of crisis service provision are explicitly excluded from this program in the Clovis decision for the same reasons.
>
> Additionally, the IEP process is one that responds slowly due to the problems inherent in convening the team. It is, therefore, a poor avenue for the provision of crisis services. While the need for crisis services can be a predictable requirement over time, the particular medical requirements of the service are better delivered through the usual local mechanisms established specifically for this purpose.[105]

Since the reimbursement period for this reconsideration begins July 1, 2004, staff finds that the activities of providing vocational services, socialization services, and crisis intervention to pupils do not constitute a state-mandated new program or higher level of service.

In addition, the County of Los Angeles specifically requests reimbursement for "medication monitoring." The phrase "medication monitoring" was not included in the original test claim legislation. "Medication monitoring" was added to the regulations for this program in 1998 (Cal. Code Regs., tit. 2, § 60020.) "Medication monitoring" is part of the new, and current, definition of "mental health services" that was adopted by the Departments of Mental Health and Education in 1998. The current definition of "mental health services" and "medication monitoring" is the subject of the pending test claim, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), and will not be specifically analyzed here. But, as of 1998, "dispensing of medications necessary to maintain individual psychiatric stability during the treatment process" was deleted from the definition of "mental health services." Since the reimbursement period for this reconsideration begins July 1, 2004, staff finds that the activity of "dispensing of medications

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[104] Exhibit C.

[105] Final Statement of Reasons, pages 55-56. (Exhibit F, pp. 2648-2649.)

necessary to maintain individual psychiatric stability during the treatment process" does not constitute a state-mandated new program or higher level of service.

Finally, section 60200, subdivisions (a) and (b), of the regulations clarifies that counties are financially responsible for providing the mental health services identified in the IEP of a seriously emotionally disturbed pupil placed in an out-of-home residential facility located within the State of California. Mental health services provided to a seriously emotionally disturbed pupil shall be provided either directly or by contract.

Accordingly, staff finds that Government Code section 7576, and sections 60020 and 60200 of the regulations constitute a state-mandated new program or higher level of service for the following activity:

- Providing psychotherapy or other mental health services identified in a pupil's IEP, as defined in sections 542 and 543 of the Department of Mental Health regulations. However, the activities of providing vocational services, socialization services, and crisis intervention to pupils, and dispensing medications necessary to maintain individual psychiatric stability during the treatment process, do *not* constitute a state-mandated new program or higher level of service.

7. Participate in due process hearings relating to issues involving mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550)

Government Code section 7586, subdivision (a), addresses the due process procedures when disputes regarding special education and related services arise. That section requires all state departments and their designated local agencies to be governed by the procedural safeguards required by federal law. The designated local agency is the county mental health program established in accordance with the Short-Doyle Act.[106]

Government Code section 7586, subdivision (a), states the following:

> All state departments, and their designated local agencies, shall be governed by the procedural safeguards required in Section 1415 of Title 20 of the United States Code. A due process hearing arising over a related service or designated instruction and service shall be filed with the Superintendent of Public Instruction. Resolution of all issues shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter.[107]

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[106] Government Code section 7571; California Code of Regulations, title 2, section 60020, subdivision (d).

[107] Section 60550 of the regulations contains similar language and provides that "[d]ue process hearing procedures apply to the resolution of disagreements between parents and a public agency regarding the proposal or refusal of a public agency to initiate or change the identification, assessment, educational placement, or the provision of special education and related services to the pupil."

The due process hearing procedures identified in Education Code section 56501 allow the parent and the public education agency to initiate the due process hearing procedures when there is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; there is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; or when the parent refuses to consent to an assessment of the child. The due process hearing rights include the right to a mediation conference pursuant to Education Code section 56500.3 at any point during the hearing process; the right to examine pupil records; and the right to a fair and impartial administrative hearing at the state level, before a person knowledgeable in the laws governing special education and administrative hearings, under contract with the department, pursuant to Education Code section 56505.

Education Code section 56505, subdivision (e), further affords the parties the right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of children and youth with disabilities; the right to present evidence, written arguments, and oral arguments; the right to confront, cross-examine, and compel the attendance of witnesses; the right to written findings of fact and decision; the right to be informed by the other parties to the hearing of the issues in dispute; and the right to receive a copy of all documents and a list of witnesses from the opposing party.

Staff finds that the county's participation in the due process hearings relating to issues involving mental health assessments or services constitutes a state-mandated new program or higher level of service. Although federal law mandates the due process hearing procedures (20 U.S.C. § 1415), it is state law, rather than federal law, that requires counties to participate in due process hearings involving mental health assessment or service issues.

This finding is consistent with the Supreme Court's decision in the recent case of *San Diego Unified School District v. Commission on State Mandates*.[108] In the *San Diego Unified School District* case, the Supreme Court held that all due process hearing costs with respect to a mandatory expulsion of a student (those designed to satisfy the minimum requirements of federal due process, and those due process requirements enacted by the state that may have exceeded federal law) were reimbursable pursuant to article XIII B, section 6 since it was state law that required school districts to incur the hearing costs.[109]

Accordingly, staff finds that Government Code section 7586 and section 60550 of the regulations constitute a state-mandated new program or higher level of service for the following activity:

- Participation in due process hearings relating to issues involving mental health assessments or services.

III. Does the test claim legislation impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

In order for the activities listed above to impose a reimbursable, state-mandated program under article XIII B, section 6 of the California Constitution, two additional elements must be satisfied.

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[108] *San Diego Unified School District, supra,* 33 Cal.4th 859.

[109] *Id.* at pages 881-882.

First, the activities must impose costs mandated by the state pursuant to Government Code section 17514.[110] Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service.

Government Code section 17556 states that the Commission shall not find costs mandated by the state, as defined in section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

> (a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.
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> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
>
> (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

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[110] See also, *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835

Except for Government Code section 17556, subdivision (e), staff finds that the exceptions listed in section 17556 are not relevant to this claim, and do not apply here. Since the Legislature has appropriated funds for this program in the 2004 Budget Bill, however, Government Code section 17556, subdivision (e), is relevant and is analyzed below.

A. Government Code section 17556, subdivision (e), does not apply to deny this claim

Government Code section 17556, subdivision (e), states the Commission shall not find costs mandated by the state if the Commission finds that:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, *or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate*. (Emphasis added.)

The Budget Acts of 2003 and 2004 contain appropriations " considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." The Budget Act of 2003 appropriated $69 million from the federal special education fund to counties to be used exclusively to support mental health services identified in a pupil's IEP and provided during the 2003-04 fiscal year by county mental health agencies pursuant to the test claim legislation. (Stats. 2003, ch. 157, item 6110-161-0890, provision 17.) The bill further states in relevant part that the funding shall be considered offsetting revenue pursuant to Government Code section 17556, subdivision (e):

> This funding shall be considered offsetting revenues within the meaning of subdivision (e) of section 17556 of the Government Code for any reimbursable mandated cost claim for provision of these mental health services provided in 2003-04.

The Budget Act of 2004 similarly appropriated $69 million to counties from the federal special education fund to be used exclusively to support mental health services provided during the 2004-05 fiscal year pursuant to the test claim legislation. (Stats. 2004, ch. 208, item 6110-161-0890, provision 10.) The appropriation was made as follows:

> Pursuant to legislation enacted in the 2003-04 Regular Session, of the funds appropriated in Schedule (4) of this item, $69,000,000 shall be used exclusively to support mental health services provided during the 2004-05 fiscal year by county mental health agencies pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of the Government Code and that are included within an individualized education program pursuant to the Federal Individuals with Disabilities Education Act (IDEA).

The Budget Act of 2004 does not expressly identify the $69 million as "offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." But the statute does contain language that the appropriation was made "Pursuant to legislation enacted in the 2003-04 Regular Session." As indicated above, it is the 2003-04 Budget Bill that contains the language

regarding the Legislature's intent that the $69 million is considered offsetting revenue within the meaning of Government Code section 17556, subdivision (e).[111]

In order for Government Code section 17556, subdivision (e), to apply to deny this claim for fiscal year 2004-05, the plain language of the statute requires that two elements be satisfied. First, the statute must include additional revenue that was specifically intended to fund the costs of the state mandate. Second, the appropriation must be in an amount sufficient to fund the cost of the state mandate.

Staff finds that the Legislature intended to fund the costs of this state-mandated program for fiscal year 2004-05 based on the language used by the Legislature that the funds "shall be considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." Under the rules of statutory construction, it is presumed that the Legislature is aware of existing laws and that it enacts new laws in light of the existing law.[112] In this case, the Legislature specifically referred to Government Code section 17556, subdivision (e), when appropriating the $69 million. Thus, it must be presumed that the Legislature was aware of the plain language of Government Code section 17556, subdivision (e), and that its application results in a denial of a test claim.

But, based on public records, the second element under Government Code section 17556, subdivision (e), requiring that the appropriation must be *in an amount sufficient* to fund the cost of the state mandate, has not been satisfied. According to the State Controller's Deficiency Report issued on May 2, 2005, the amounts appropriated for this program in fiscal years 2003-04 and 2004-05 are not sufficient to pay the claims received by the State Controller's Office. Unpaid claims for fiscal year 2003-04 total $66,915,606. The unpaid claims for fiscal year 2004-05 total $68,958,263.[113]

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[111] Proposals from the Department of Mental Health, State Controller's Office, and the Department of Finance for the allocation of the $69 million to counties are attached in Exhibit D, pp. 2545-2551.

[112] *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.

[113] The State Controller's Deficiency Report is prepared pursuant to Government Code section 17567. (See Exhibit F, pp. 2581-2590.) Government Code section 17567 requires that in the event the amount appropriated for reimbursement of a state-mandated program is not sufficient to pay all of the claims approved by the Controller, the Controller shall prorate claims in proportion to the dollar amount of approved claims timely filed and on hand at the time of proration. The Controller shall then issue a report of the action to the Department of Finance, the Chairperson of the Joint Legislative Budget Committee, and the Chairperson of the respective committee in each house of the Legislature that considers appropriations. The Deficiency Report is, thus, an official record of a state agency and is properly subject to judicial notice by the court. (*Munoz v. State* (1995) 33 Cal.App.4th 1767, 1773, fn. 2; *Chas L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 85-87.)

The Deficiency Report lists the total unpaid claims for this program as follows:

1999 and prior Local Government Claims Bills	$ 8,646
2001-02	124,940,258
2002-03	124,871,698

This finding is further supported by the 2004 report published by Stanford Law School, which indicates that "$69 million represented only approximately half of the total funding necessary to maintain AB 3632 services."[114]

Accordingly, staff finds that Government Code section 17556, subdivision (e), does not apply to deny this claim for fiscal year 2004-05. Eligible claimants are, however, required to identify the funds received from the $69 million appropriation as an offset to be deducted from the costs claimed.[115]

Based on the program costs identified by the State Controller's Office, staff further finds that counties do incur increased costs mandated by the state pursuant to Government Code section 17514 for this program. However, as more fully discussed below, the state has established cost-sharing mechanisms for some of the mandated activities that affect the total costs incurred by a county.

B. Increased costs mandated by the state for providing psychotherapy or other mental health treatment services, and for the residential and non-educational costs of a pupil placed in an out-of-home residential facility

In the Commission's 1990 Statement of Decision, the Commission concluded that the costs incurred for providing psychotherapy or other mental health treatment services were subject to the Short-Doyle Act. Under the Short-Doyle Act, the state paid 90 percent of the total costs of mental health treatment services and the counties paid the remaining 10 percent. Thus, the Commission concluded that counties incurred increased costs mandated by the state in an amount that equaled 10 percent of the total psychotherapy or other mental health treatment costs. The Commission further concluded that conducting assessments, participation on an expanded IEP team, and case management services for seriously emotionally disturbed pupils placed in residential facilities were not subject to the Short-Doyle Act and, thus, were 100 percent reimbursable. The Statement of Decision contains no findings regarding the activity of issuing and paying providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils.

Since the Statement of Decision was issued, the law with respect to the funding of psychotherapy or other mental health treatment services has changed. In addition, staff finds that the original Statement of Decision does not reflect the cost sharing ratio established by the Legislature in Welfare and Institutions Code section 18355 with respect to the residential care of seriously emotionally disturbed pupils. These issues are addressed below.

1. <u>The costs for providing psychotherapy or other mental health treatment services</u>

The test claim legislation (Stats. 1985, ch. 1274) amended Welfare and Institutions Code section 5651 to require that the annual Short-Doyle plan for each county include a description of

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2003-04	66,915,606
2004-05	68,958,263

[114] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20. (Exhibit D, p. 2382.)

[115] Government Code section 17514; California Code of Regulations, title 2, section 1183.1.

the services required by Government Code sections 7571 and 7576 (psychotherapy or other mental health treatment services), including the cost of the services. Section 60200 of the regulations required the county to be financially responsible for the provision of mental health treatment services and that reimbursement to the provider of the services shall be based on a negotiated net amount or rate approved by the Director of Mental Health as provided in Welfare and Institutions Code section 5705.2, or the provider's reasonable actual cost. Welfare and Institutions Code section 5705.2 imposed a cost-sharing ratio for mental health treatment services between the state and the counties, with the state paying 90 percent and the counties paying 10 percent of the total costs.

In 1993, the Sixth District Court of Appeal in the *County of Santa Clara* case upheld the Commission's finding that psychotherapy or other mental health treatment services were to be funded as part of the Short-Doyle Act and, thus, only 10 percent of the total costs for treatment were reimbursable under article XIII B, section 6. The court interpreted the test claim legislation as follows:

> County entered into an NNA [negotiated net amount] contract with the state in lieu of the Short-Doyle plan and budget. (Welf. & Inst. Code, § 5705.2.) The NNA contract covers mental health services in the contracting county. The amount of money the state provides is the same whether the county signs a NNA contract or adopts a Short-Doyle plan…. By adding subdivision (g) to Welfare and Institutions Code section 5651, the legislature designated that the mental health services provided pursuant to Government Code section 7570 et seq. were to be funded as part of the Short-Doyle program. County's NNA contract was consistent with this intent. Accordingly, the fact that County entered into an NNA contract rather than a Short-Doyle plan and budget is not relevant.[116]

Based on these findings, the court concluded that only 10 percent of the costs were "costs mandated by the state" and, thus, reimbursable under article XIII B, section 6. The court held as follows:

> By placing these services within Short-Doyle, however, the legislature limited the extent of its mandate for these services to the funds provided through the Short-Doyle program. A Short-Doyle agreement or NNA contract sets the maximum obligation incurred by a county for providing the services listed in the agreement or contract. "Counties may elect to appropriate more than their 10 per cent share, but in no event can they be required to do so." (*County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 450.) Since the services were subject to the Short-Doyle formula under which the state provided 90 per cent of the funds and the county 10 per cent, that 10 per cent was reimbursable under section 6, article XIII B of the California Constitution. (Emphasis in original.)[117]

There have been "intervening changes in the law" with respect to the costs for psychotherapy or other mental health treatment services, however. Thus, the decision in the *County of Santa Clara* case with respect to the inclusion of mental health treatment services for special education pupils

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[116] Pages 1420-1421.

[117] Pages 1422-1423.

in the Short-Doyle plan no longer applies and is not binding on the Commission for purposes of this reconsideration.[118]

In 1991, the Legislature enacted realignment legislation that repealed the Short-Doyle Act and replaced the sections with the Bronzan-McCorquodale Act. (Stats. 1991, ch. 89, §§ 63 and 173.) The realignment legislation became effective on June 30, 1991. The parties have disputed whether the Bronzan-McCorquodale Act keeps the cost-sharing ratio, with the state paying 90 percent and the counties paying 10 percent, for the cost of psychotherapy or other mental health treatment services for special education pupils.[119]

Staff finds, however, that the Commission does not need to resolve that dispute for purposes of this reconsideration. Section 38 of Statutes 2002, chapter 1167 (Assem. Bill 2781) prohibits the funding provisions of the Bronzan-McCorquodale Act from affecting the responsibility of the state to fund psychotherapy and other mental health treatment services for handicapped and disabled pupils and requires the state to provide reimbursement to counties for those services for all allowable costs incurred. Section 38 also states the following:

> *For reimbursement claims for services delivered in the 2001-02 fiscal year and thereafter*, counties are *not* required to provide any share of those costs or to fund the cost of any part of these services with money received from the Local Revenue Fund [i.e. realignment funds]. (Emphasis added.)

In addition, SB 1895 (Stats. 2004, ch. 493, § 6) provides that realignment funds used by counties for this program "are eligible for reimbursement from the state *for all allowable costs* to fund assessments, psychotherapy, and other mental health services . . . ," and that the finding by the Legislature is "declaratory of existing law." (Emphasis added.)

Therefore, beginning July 1, 2001, the 90 percent-10 percent cost-sharing ratio for the costs incurred for psychotherapy and other mental health treatment services no longer applies. Since the period of reimbursement for purposes of this reconsideration begins July 1, 2004, and section 38 of Statutes 2002,chapter 1167 is still in effect, all of the county costs for psychotherapy or other mental health treatment services are reimbursable, less any applicable offsets that are identified below.

2. <u>The residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility</u>

Government Code section 7581 requires the county to be financially responsible for the residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility. As described above, the residential and non-educational costs include the costs for food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation.

Welfare and Institutions Code section 18355 describes a cost-sharing formula for the payment of these costs. That section states in relevant part the following:

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[118] *George Arakelian Farms, Inc., supra,* 49 Cal.3d 1279, 1291.

[119] The dispute was initially raised in the request to amend the parameters and guidelines for this program filed by the Counties of Los Angeles and Stanislaus.

> Notwithstanding any other provision of law, 24-hour out-of-home care for seriously emotionally disturbed children who are placed in accordance with Section 7572.5 of the Government Code shall be funded from a separate appropriation in the budget of the State Department of Social Services in order to fund both 24-hour out-of-home care payment and local administrative costs. Reimbursement for 24-hour out-of-home payment costs shall be from that appropriation, *subject to the same sharing ratio as prescribed in subdivision (c) of Section 15200,* and available funds… (Emphasis added.)

Since 1991, Welfare and Institutions Code section 15200, subdivision (c)(1), has provided that for counties that meet the performance standards or outcome measures in Welfare and Institutions Code section 11215, the state shall appropriate 40 percent of the sum necessary for the adequate care of each child. Thus, for those counties meeting the performance measures, their increased cost mandated by the state would equal 60 percent of the total cost of care for each special education child placed in an out-of-home residential facility, less any applicable offset.

When a county does not meet the performance standards or outcome measures in Welfare and Institutions Code section 11215, state funding for the program decreases and the counties are liable for the decreased cost.[120] Staff finds that a county's cost incurred for the decrease in the state's share of the costs as a result of the county's failure to meet the performance standards, are not costs mandated by the state and are not reimbursable. Counties are mandated by the state to meet the performance standards for residential facilities.[121]

Therefore, staff finds that counties incur increased costs mandated by the state in an amount that equals 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

C. Identification of offsets

Reimbursement under article XIII B, section 6 and Government Code section 17514 is required only for the increased costs mandated by the state. As determined by the California Supreme Court, the intent behind section 6 was to prevent the state from forcing new programs on local governments that require an increased expenditure by local government of their limited tax revenues.[122]

The 1990 Statement of Decision does not identify any offsetting revenues. The parameters and guidelines for this program lists the following reimbursements that must be deducted from the costs claimed:

- Any direct payments (categorical funding) received from the State which are specifically allocated to this program; and

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[120] Welfare and Institutions Code sections 15200, subdivision (c)(2), and 11215, subdivision (b)(5).

[121] *Ibid.*

[122] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of San Diego, supra*, 15 Cal.4th at page 81.

- Any other reimbursements for this mandate (excluding Short-Doyle funding, private insurance payments, and Medi-Cal payments), which is received from any source, e.g. federal, state, etc.

Staff agrees with the identification of any direct payments or categorical funds appropriated by the Legislature specifically for this program as an offset to be deducted from the costs claimed. In the past, categorical funding has been provided by the state for this program in the amount of $12.3 million.[123] The categorical funding was eliminated, however, in the Budget Acts of 2002 through 2004.

If, however, funds are appropriated in the Budget Act for this program, such as the $69 million appropriation in the 2004-05 Budget Act, such funds are required to be identified as an offset.

Staff disagrees with the language in the existing parameters and guidelines that excludes private insurance payments as offsetting revenue. Federal law authorizes public agencies to access private insurance proceeds for services provided under the IDEA if the parent consents.[124] Thus, to the extent counties obtain private insurance proceeds with the consent of a parent for purposes of this program, such proceeds must be identified as an offset and deducted from the costs claimed. This finding is consistent with the California Supreme Court's decision in *County of Fresno v. State of California*. In the *County of Fresno* case, the court clarified that article XIII B, section 6 requires reimbursement by the state only for those expenses that are recoverable from tax revenues. Reimbursable costs under article XIII B, section 6, do not include reimbursement received from other non-tax sources.[125]

Staff further disagrees with the language in the existing parameters and guidelines that excludes Medi-Cal payments as offsetting revenue. Federal law authorizes public agencies, with certain limitations, to use public insurance benefits, such as Medi-Cal, to provide or pay for services required under the IDEA.[126] Federal law limits this authority as follows:

> (2) With regard to services required to provide FAPE [free appropriate public education] to an eligible child under this part, the public agency-
>
> (i) May not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the Act;
>
> (ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parent would be required to pay;
>
> (iii) May not use a child's benefits under a public insurance program if that use would

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[123] Budget Acts of 1994-2001, Item 4440-131-0001.

[124] 34 Code of Federal Regulations section 300.142, subdivision (f).

[125] *County of Fresno, supra,* 53 Cal.3d at page 487.

[126] 34 Code of Federal Regulations section 300.142, subdivision (e).

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discrimination of insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.[127]

According to the 2004 report published by Stanford Law School, 51.8 percent of the students receiving services under the test claim legislation are Medi-Cal eligible.[128] Thus, staff finds to the extent counties obtain proceeds under the Medi-Cal program from either the state or federal government for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed.

In addition, Government Code section 7576.5 describes offsetting revenue to counties transferred from local educational agencies for this program as follows:

> If funds are appropriated to local educational agencies to support the costs of providing services pursuant to this chapter, the local educational agencies shall transfer those funds to the community mental health services that provide services pursuant to this chapter in order to reduce the local costs of providing these services. These funds shall be used exclusively for programs operated under this chapter and are offsetting revenues in any reimbursable mandate claim relating to special education programs and services.

Government Code section 7576.5 was added by the Legislature in 2003 (Stats. 2003, ch. 227) and became operative and effective on August 11, 2003. Thus, staff finds money received by counties pursuant to Government Code section 7576.5 shall be identified as an offset and deducted from the costs claimed.

Finally, the existing parameters and guidelines do not require eligible claimants to offset any Short-Doyle funding, and specifically excludes such funding as an offset. As indicated above, the Short-Doyle Act was repealed and replaced with the realignment legislation of the Bronzan-McCorquodale Act. Based on the plain language of SB 1895 (Stats. 2004, ch. 493, § 6), realignment funds used by a county for this mandated program are not required to be deducted from the costs claimed. Section 6 of SB 1895 adds, as part of the Bronzan-McCorquodale Act, section 5701.6 to the Welfare and Institutions Code. Section 5701.6 states in

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[127] 34 Code of Federal Regulations section 300.142, subdivision (e)(2)

[128] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20. (Exhibit D, p. 2382.)

relevant part the following:

> Counties may utilize money received from the Local Revenue Fund [realignment] …to fund the costs of any part of those services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code. *If money from the Local Revenue Fund is used by counties for those services, counties are eligible for reimbursement from the state for all allowable costs* to fund assessments, psychotherapy, and other mental health services allowable pursuant to Section 300.24 of Title 34 of the Code of Federal Regulations [IDEA] and required by Chapter 26.5 … of the Government Code. (Emphasis added.)

Thus, staff finds that realignment funds used by a county for this mandated program are not required to be identified as an offset and deducted from the costs claimed.

Accordingly, staff finds that the following revenue and/or proceeds must be identified as offsets and be deducted from the costs claimed:

- Funds received by a county pursuant to Government Code section 7576.5.
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes funds received by a county pursuant to the $69 million appropriation to counties for purposes of this mandated program in the Budget Act of 2004 ((Stats. 2004, ch. 208, item 6110-161-0890, provision 10).
- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay a portion of the county services provided to a pupil under this mandated program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source.[129]

CONCLUSION

Staff concludes that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514 for the *increased costs* in performing the following activities:

1. Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal. Code Regs., tit. 2, §§ 60030, 60100)
   - Renew the interagency agreement every three years, and revise if necessary.

[129] *County of Fresno, supra*, 53 Cal.3d at page 487; California Code of Regulations, title 2, section 1183.1, subdivision (a)(8).

- Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

2. Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team (Gov. Code, § 7572, Cal. Code Regs., tit. 2, § 60040)

   - Review the following educational information of a pupil referred to the county by a local educational agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
   - If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
   - If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.
   - Assess the pupil within the time required by Education Code section 56344.
   - If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.
   - Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.
   - Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
   - In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
   - Review independent assessments of a pupil obtained by the parent.
   - Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
   - In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

3. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary (Gov. Code, § 7572.5, subds. (a) and (b); Cal. Code Regs., tit. 2, § 60100)

   - Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.
   - Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.

4. Act as the lead case manager if the IEP calls for residential placement of a seriously emotionally disturbed pupil (Gov. Code, § 7572.5, subd. (c)(1); Cal. Code Regs., tit. 2, § 60110)

   - Designate a lead case manager when the expanded IEP team recommends out-of-home residential placement for a seriously emotionally disturbed pupil. The lead case manager shall perform the following activities:

     1. Convene parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.
     2. Complete the local mental health program payment authorization in order to initiate out of home care payments.
     3. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
     4. Coordinate the completion of the residential placement as soon as possible.
     5. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
     6. Facilitate the enrollment of the pupil in the residential facility.
     7. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
     8. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.

5. Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

   - Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to reimbursed for 60 percent of the total residential and non-

educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

- Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

6. Provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60020, subd. (a), 60200, subds. (a) and (b))

   - Provide psychotherapy or other mental health services identified in a pupil's IEP, as defined in sections 542 and 543 of the Department of Mental Health regulations. However, the activities of providing vocational services, socialization services, and crisis intervention to pupils, and dispensing medications necessary to maintain individual psychiatric stability during the treatment process, do *not* constitute a state-mandated new program or higher level of service.

7. Participate in due process hearings relating to mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550)

Staff further concludes that the following revenue and/or proceeds must be identified as offsets and be deducted from the costs claimed:

- Funds received by a county pursuant to Government Code section 7576.5
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes funds received by a county pursuant to the $69 million appropriation to counties for purposes of this mandated program in the Budget Act of 2004 ((Stats. 2004, ch. 208, item 6110-161-0890, provision 10).
- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay a portion of the county services provided to a pupil under this mandated program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source

The period of reimbursement for this decision begins July 1, 2004.

Finally, any statutes and/or regulations that were pled in *Handicapped and Disabled Students* (CSM 4282) that are not identified above do not constitute a reimbursable state-mandated program.

Staff Recommendation

Staff recommends that the Commission adopt this staff analysis on reconsideration and approve the test claim accordingly.