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BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

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Claim of:	)	<b>No. CSM-4476</b>
	)	Education Code Section 48209.1
San Diego Unified	)	Education Code Section 48209.9
School District,	)	Chapter 1262, Statutes of 1994
	)	
Claimant	)	Education Code Section 48209.7
	)	Chapter 915, Statutes of 1993
	)	
	)	
	)	<i>Choice Transfer Appeals</i>
	)	

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**PROPOSED STATEMENT OF DECISION**

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This claim was heard by the Commission on State Mandates (Commission) on March 28, 1996, in Sacramento, California, during a regularly scheduled hearing.<sup>1</sup>

Mr. Keith Petersen appeared on behalf of the San Diego Unified School District, Dr. Carol Berg appeared on behalf of the Education Mandated Cost Network, and Mr. James M. Apps and Mr. Scott Hannan appeared on behalf of the Department of Finance. Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the Commission finds:

**ISSUE**

Do the provisions of Education Code sections 48209.1 and 48209.9, as amended by Chapter 1262, Statutes of 1994, and section 48209.7, as amended by Chapter 915, Statutes of 1993, impose a new program or higher level of service in an existing program upon school districts within the meaning of section 6 of article XIII B of the California Constitution?

**BACKGROUND AND FINDINGS OF FACT**

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<sup>1</sup> This test claim also had been heard, and continued, on October 26, 1995, and January 25, 1996.

1                   The test claim was filed with the Commission on April 3, 1995, by the San Diego  
2 Unified School District.

3                   The elements for filing a test claim, as specified in section 1183 of Title 2 of the  
4 California Code of Regulations, were satisfied.

5 Education Code section 48209.1, as amended by Chapter 1262/94, states the following:

- 6           (a) The governing board of any school district may accept interdistrict transfers. No school  
7 district that receives an application for attendance under this article is required to admit pupils  
8 to its schools. If, however, the governing board elects to accept transfers as authorized under  
9 this article, it shall, by resolution, elect to accept transfer pupils, determine and adopt the  
10 number of transfers it is willing to accept under this article, and ensure that pupils admitted  
11 under the policy are selected through a random, unbiased process that prohibits an evaluation  
12 of whether or not the pupil should be enrolled based upon his or her academic or athletic  
13 performance. Any pupil accepted for transfer shall be deemed to have fulfilled the  
14 requirements of Section 48204.
- 15           (b) Either the pupil's school district of residence, upon notification of the pupil's acceptance to  
16 the school district of choice pursuant to subdivision (c) of Section 48209.9, or the school  
17 district of choice may prohibit the transfer of a pupil under this article or limit the number of  
18 pupils so transferred if the governing board of the district determines that the transfer would  
19 negatively impact any of the following:
- 20                   (1) The court-ordered desegregation plan of the district.
  - 21                   (2) The voluntary desegregation plan of the district that meets the criteria of Section  
22                   42249.
  - 23                   (3) The racial and ethnic balance of the district.
- 24           (c) The school district of residence shall not adopt policies that in any way block or discourage  
25 pupils from applying for transfer to another district. (Additions or changes are indicated by  
26 underline.)

27 Education Code section 48209.7, as added by Chapter 160/93 and amended by Chapter 915/93,  
28 states the following:

- 29           (a) A school district of residence with average daily attendance greater than 50,000 may limit the  
30 number of pupils transferring out each year under this article to 1 percent of its current year  
31 estimated average daily attendance.
- 32           (b) A school district of residence with average daily attendance less than 50,000 may limit the  
33 number of pupils transferring out under this article to 3 percent of its current year estimated  
34 average daily attendance and may limit the maximum number of pupils transferring out under  
35 this article for the duration of the program authorized by this article to 10 percent of  
36 the average daily attendance for that period.<sup>2</sup> (Additions or changes are indicated by  
37 underline.)

38 Education Code section 48209.9, as amended by Chapter 1262/94, states the following:

- 39           (a) Commencing January 1, 1994, any application for transfer under this article shall be  
40 submitted by the pupil's parent or guardian to the school district of choice that has elected to  
41 accept transfer pupils pursuant to Section 48209.1 prior to January 1 of the school year

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<sup>2</sup> Article 1.5 was added by Stats.1993, c.160 (A.B.19), section 1, becomes inoperative July 1, 2000 and is repealed Jan. 1, 2001, under the provisions of section 48209.16.

1 preceding the school year for which the pupil is to be transferred. This application deadline  
2 may be waived upon agreement of the pupil's school district of residence and the school  
district of choice. No applications shall be submitted after January 1, 1999.

- 3 (b) The application shall be submitted on a form provided for this purpose by the State  
4 Department of Education and may request enrollment of the pupil in a specific school or  
5 program of the district.
- 6 (c) Not later than 90 days after the receipt by a school district of an application for transfer, the  
7 governing board of the district shall notify the parent or guardian in writing whether the  
8 application has been provisionally accepted or rejected or of the pupil's position on any  
9 waiting list. Final acceptance or rejection shall be made by May 15 preceding the school year  
10 for which the pupil is to be transferred. In the event of an acceptance, that notice shall be  
11 provided also to the school district of residence. If the application is rejected, the district  
governing board shall set forth in the written notification to the parent or guardian the  
12 specific reason or reasons for that determination, and shall ensure that the determination, and  
13 the specific reason or reasons therefor, are accurately recorded in the minutes of the board  
meeting in which the determination was made.
- 14 (d) The parent or guardian of a pupil who is prohibited from transferring pursuant to either  
15 subdivision (b) of Section 48209.1 or Section 48209.7 may appeal the decision to the county  
16 board of education.
- 17 (e) Final acceptance of the transfer is applicable for one school year and will be renewed  
18 automatically each year unless the school district of choice through the adoption of a  
19 resolution withdraws from participation in the program and no longer will accept any transfer  
20 pupils from other districts. However, if a school district of choice withdraws from  
21 participation in the program, high school pupils admitted under this article may continue until  
22 they graduate from high school. (Additions or changes are indicated by underline.)

18 The Commission on State Mandates determined on April 28, 1995, that when a  
19 school district elects to become a school district of choice (the receiving district in the choice  
20 transfer process) under Education Code section 48209.1 of Chapter 160/93, such election is a  
21 voluntary, permissive act and, accordingly, not a reimbursable state mandated program.<sup>3</sup>

22 For the school district of residence (the sending district in the choice transfer  
23 process), the Commission also determined in CSM-4451 that a limited state mandated activity  
24 exists in section 48209.1, subdivision (b). That subdivision states that the "... school district of  
25 residence ... may prohibit the transfer of a pupil under this article..." and the permissive "may"  
26 thus seemingly avoids any subsequent reimbursable state mandated duties specified in section  
27 48209.1. Nevertheless, the Commission determined that a district of residence, only when  
28 subject to a court-ordered desegregation plan, must confirm that the proposed transfer does not  
negatively impact such plan. This activity constitutes a reimbursable state mandated program.

1                   However, because this activity has already been recognized for reimbursement in  
2 a separate test claim, the Commission determined that no reimbursable state mandated program  
3 exists in section 48209.1 for the purposes of this test claim.<sup>4</sup> The Commission found that the  
4 changes which have been made to section 48209.1 since its previous decision on this section  
5 serve to provide technical clarifications in subdivisions (a) and (b). In the new subdivision (c),  
6 however, the Legislature made clear a policy that school districts of residence are not to adopt  
7 policies which block or discourage pupils from applying for transfer to another district. None of  
8 these changes subsequent to the Chapter 160/93 amendment would appear to negate the  
9 Commission's decision on CSM-4451. Finally, despite claimant's contention that the Chapter  
10 1262/94 amendment to section 48209.9 impacts the CSM-4451 Commission determination on  
11 section 48209.1, the Commission disagreed and determined that section 48209.1 contains no  
12 reimbursable state mandated program.

13                   Regarding Education Code section 48209.7, the Commission's Statement of  
14 Decision (CSM-4451) also addressed this section and stated that no reimbursable state mandated  
15 program exists regarding school districts of residence. Section 48209.7 provides a mathematical  
16 limitation that a school district of residence may use in the event that it decides to prohibit a  
17 pupil from leaving its district to attend a school district of choice. Similarly, in this  
18 test claim, CSM-4476, the Commission again determined that the use of the word "may" makes  
19 district limitations under section 48209.7 permissive. The Commission noted that no substantive  
20 changes have been made to section 48209.7 which would negate its April 28, 1995 determination  
21 on this section. Although claimant contends that the Chapter 1262/94 amendment to section  
22 48209.9 impacts the CSM-4451 Commission determination on  
23 section 48209.7, the Commission disagreed and determined that section 48209.7 contains no  
24 reimbursable state mandated program.

25                   Regarding Education Code section 48209.9, Chapter 1262/94, added subdivision  
26 (d) to this section, which provides, "[t]he parent or guardian of a pupil who is prohibited from  
27 transferring pursuant to either subdivision (b) of Section 48209.1 or Section 48209.7 may appeal  
28 the decision to the county board of education."

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<sup>3</sup> See Statement of Decision, CSM-4451, School District of Choice, adopted on April 28, 1995.

<sup>4</sup> See Statement of Decision, CSM-4451, School District of Choice, adopted on April 28, 1995.

1           Because the parent/guardian has a new statutory right to appeal a transfer that was  
2 prohibited under these two sections, the county board of education has no option but to respond  
3 to that appeal (regardless of whether or not the denial was discretionary on the part of the school  
4 district).

5           No prior requirements regarding this matter existed in law. The Commission  
6 therefore determined that the parent/guardian's authority to appeal a denied transfer imposes a  
7 reimbursable state mandated program upon county boards of education.

8           Further, although not explicitly required, the county board must first establish an  
9 appropriate process for these appeal hearings. Claimant states the appeals process could be  
10 modeled after the complex process provided for in sections 46601 and 46602.

11           Although recognizing the need for a process, the Commission disagreed with  
12 claimant's suggestion of using sections 44601 and 44602 as a model for the parameters and  
13 guidelines. The Commission noted that the Legislature, in enacting subdivision (d), did not spell  
14 out elaborate procedures similar to those contained in sections 46601 and 46602; further, the  
15 Legislature could have simply incorporated by reference the provisions of sections 46601 and  
16 46602, but did not. The Commission also observed that new subdivision (c) to section 48209.1  
17 was added along with subdivision (d) to section 48209.9. (See Chapter 1262/94.) Subdivision  
18 (c) states that, "[t]he school district of residence shall not adopt policies that in any way block or  
19 discourage pupils from applying for transfer to another district." The Commission found that  
20 subdivision (c) expressly warns school districts of residence to not purposefully discourage the  
21 utilization of the school district of choice vehicle and, therefore, school districts will indeed heed  
22 and follow such directive.

23           The Commission found that simple, non-complex appeals procedures were  
24 contemplated by the Legislature in light of the admonition set forth in subdivision (c), rather than  
25 the elaborate procedures such as those contained in sections 46601 and 46602. Therefore, the  
26 Commission determined that simple, non-complex appeals procedures fall within the scope of  
27 the statutory provisions and, accordingly, should be employed in the parameters and guidelines.  
28 Moreover, the Commission found that a simple process is appropriate in view of the limited state  
mandated activity associated with the appeals process upon school districts of residence as  
described below.

1 Claimant asserted that school districts of residence are required to participate in  
2 and respond to the county board's appeal process. Although this section implicitly requires  
3 district of residence participation, such activity is not considered reimbursable if it results from a  
4 discretionary denial on the part of the district. Section 48209.1 states that the district of  
5 residence, "may prohibit the transfer of a pupil under this article". Likewise, section 48209.7  
6 states in both subdivisions (a) and (b) that the district of residence "may limit...". The inclusion  
7 of the word "may" in both of these sections makes transfer denials permissive. Accordingly, the  
8 Commission determined that any required statutory activity (such as participation in the appeal  
9 process by any school district) resulting from a section 48209.1 or 48209.7 denial is *not*  
10 reimbursable as a *state mandated activity* because of the discretion initially exercised in the  
11 decision to deny. (See *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783;  
12 *County of Contra Costa v. State of California* (1986) 177 Cal. App.3d 62, 79.)

13 The one exception, as noted in the Commission's Statement of Decision for  
14 CSM-4451, would be a district of residence subject to a court-ordered desegregation plan which  
15 must confirm that the proposed transfer does not negatively impact that plan. At its  
16 April 28, 1995 hearing, the Commission determined that this confirmation activity imposes a  
17 reimbursable state mandated program upon a district of residence.

18 Correspondingly, the Commission determined that the district of residence's  
19 participation in and response to a county board of education's appeal process, under subdivision  
20 (d) of section 48209.9, resulting only from a denied transfer based on the negative impact upon  
21 that district's court-ordered desegregation plan, constitutes a reimbursable state mandated  
22 activity.

23 Finally, the Commission found that none of the previous Commission  
24 determinations as addressed in the claimant's August 15, 1995 rebuttal are comparable to this  
25 claim. Independently of these previous determinations, the Commission determined that the  
26 permissive "may" in sections 48209.1 and 48209.7 clearly does not impose a new program or  
higher level of service upon school districts (as previously determined in CSM-4451).

27 Further, even with the addition of section 48209.9, which allows for denied  
28 transfer appeals due to section 48209.1 or 48209.7, the Commission determined that no language  
in any of these three sections explicitly or implicitly requires the monitoring of racial or ethnic  
balances or limits as claimant alleged. The Commission reviewed claimant's assertion that

1 school districts would be acting arbitrarily to either approve or deny the transfer without  
2 considering its impact on the ethnic balance of the district, since according to claimant, school  
3 districts have a pre-existing constitutional duty to equalize the demographics of its schools. The  
4 case cited by claimant, *Long Beach Unified School District v. State of California*, (1990) 225  
5 Cal.App.3d 155, and other cases reviewed by the Commission did not support claimant's  
6 assertion that Education Code section 48209.1, subdivision (b)(3), required school districts to  
7 check "the racial and ethnic balance of the district" before approving or denying a choice  
8 transfer. (See *Crawford v. Board of Education* (1976) 17 Cal.3d 280.) Accordingly, the  
9 Commission rejected claimant's contention that school districts have a pre-existing  
10 constitutional duty to equalize the demographics of its schools or to maintain a certain racial and  
11 ethnic balance.

12 Finally, the Commission acknowledged the closing testimony from the  
13 Department of Finance which noted that the Legislature's use of the terms "may" and "shall" in  
14 closely related sections was significant because of the Legislature's awareness of their use of the  
15 two terms and that if the Legislature had wanted to make a statute mandatory, this was clearly  
16 within their purview. (Transcript, Commission Hearing, March 28, 1996, pp. 71-72.)

17  
18 **APPLICABLE LAW RELEVANT TO THE DETERMINATION**  
19 **OF A REIMBURSABLE STATE MANDATED PROGRAM**

20 The applicable law relevant to this determination of a reimbursable state  
21 mandated program is Government Code section 17500 and following, and section 6 of  
22 Article XIII B of the California Constitution, and related case law.  
23  
24

25 **CONCLUSION**

26 Based on the foregoing, the Commission approves the test claim in part. The  
27 Commission finds that the parent/guardian's authority to appeal a denied transfer contained in  
28 section 48209.9, subdivision (d), imposes a reimbursable state mandated program upon county  
boards of education. Because the parent/guardian has a new statutory right to appeal a transfer  
that was prohibited under section 48209.1 or section 48209.7, the county board of education has

1 no option but to respond to that appeal (regardless of whether or not the denial was discretionary  
2 on the part of the school district). Further, although not explicitly required, the county board  
3 must first establish an appropriate, non-complex process for these appeal hearings, which shall  
4 be addressed in the parameters and guidelines. No requirements regarding this matter existed in  
5 law prior to January 1, 1975.

6 The Commission concludes that the district of residence's participation in and  
7 response to a county board of education's appeal process, under subdivision (d) of section  
8 48209.9, resulting solely from a denied transfer based on the negative impact upon that district's  
9 court-ordered desegregation plan, constitutes a reimbursable state mandated activity.

10 Further, the foregoing conclusions pertaining to the requirements contained in  
11 Education Code sections 48209.1, 48209.7 and 48209.9 are subject to the following conditions:

12 The determination of a reimbursable state mandated program does not mean that  
13 all increased costs claimed will be reimbursed. Reimbursement, if any, is subject  
14 to Commission approval of parameters and guidelines for reimbursement of the  
15 mandated program; approval of a statewide cost estimate; a specific legislative  
16 appropriation for such purpose; a timely-filed claim for reimbursement; and  
17 subsequent review of the claim by the State Controller's Office.

18 Finally, the Commission concludes that no reimbursable state mandated programs  
19 exist in section 48209.1, section 48209.7, or in the remainder of section 48209.9 for the purposes  
20 of this test claim.

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