

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Government Code Section 7576, as amended
by Statutes of 1996, Chapter 654;

California Code of Regulations, Title 2,
Division 9, Chapter 1, Sections 60000-60610;
and

California Department of Mental Health
Information Notice Number 86-29

Filed on December 22, 1997

By the County of Los Angeles, Claimant.

No. 97-TC-05

*Seriously Emotionally Disturbed (SED) Pupils:
Out-of-State Mental Health Services*

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

(Adopted on May 25, 2000)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on May 26, 2000.

Paula Higashi, Executive Director

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STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim on April 27, 2000 during a regularly scheduled hearing. Leonard Kaye, Paul McIver, Gurubanda Khalsa, and Robert Ulrich appeared for the County of Los Angeles and Daniel Stone appeared for the Department of Finance.

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

The Commission, by a vote of 7-0, approved this test claim.

BACKGROUND AND FINDINGS

This test claim alleges reimbursable costs mandated by the state regarding the monitoring and paying for out-of-state residential placements for seriously emotionally disturbed (SED) pupils as detailed in Government Code section 7576, California Code of Regulations sections 60000-60610, and the California Department of Mental Health Information Notice Number 86-29.

Prior law provided that any community mental health agency shall be responsible for the provision of psychotherapy or other mental health services, as defined by regulation, when required in an individual's IEP. Specifically, Government Code section 7576 as amended by Statutes of 1985, Chapter 1247 provided:

“Notwithstanding any other provision of law, the State Department of Mental Health, or any community mental health service designated by the State Department of Mental Health, shall be responsible for the provision of

psychotherapy or other mental health services, as defined by regulation by the State Department of Mental Health, developed in consultation with the State Department of Education, when required in the child’s [IEP]. This service shall be provided directly or by contracting with another public agency, qualified individual, or a state-certified nonpublic, nonsectarian school or agency.”

Regulations in effect immediately before the enactment of the test claim legislation prohibited county mental health agencies from providing psychotherapy and other mental health services in those cases where out-of-state residential placement was required. Section 60200 provided:

“(b) The local [county] mental health program shall be responsible for:

“(1) Provision of mental health services as recommended by a local mental health program representative and included in an [IEP]. Services shall be provided directly or by contract. . . . *The services must be provided within the State of California.*” (Emphasis added.)

In contrast, LEAs were required to provide mental health services for students placed outside of California under subdivision (c) of section 60200, which provided:

“(c) [LEAs] shall be responsible for:

“(3) *Mental health services when an individual with exceptional needs is placed in a nonpublic school outside of the State of California.*” (Emphasis added.)

Thus, the law in effect immediately before the enactment of the test claim legislation did not require county mental health agencies to pay or monitor the mental health component of out-of-state residential placements for SED pupils.¹

The Test Claim Legislation

The Legislature, in section 1 of Statutes of 1996, Chapter 654, expresses its intent that:

“The *fiscal and program* responsibilities of community mental health services shall be the same *regardless of the location of placement*. . . . [LEAs] and community mental health services *shall make out-of-state placements* . . . only if other options have been considered and are determined inappropriate. . . .”² (Emphasis added.)

Before the enactment of Chapter 654, counties were only required to provide mental health services to SED pupils placed in out-of-home (in-state) residential facilities. However, section 1 now requires counties to have fiscal and programmatic responsibility for SED pupils *regardless of placement* – i.e., regardless of whether SED pupils are placed out-of-home (in-state) or out-of-state.

Chapter 654 also added subdivision (g) to Government Code section 7576, which provides:

“Referrals shall be made to the community mental health service in the county in which the pupil lives. If the pupil has been placed into residential care from

¹ Title 2, California Code of Regulations, section 60200, subdivision (c)(3).

² Statutes of 1996, Chapter 654.

another county, the community mental health service receiving the referral shall forward the referral immediately to the community mental health service of the county of origin, which *shall have fiscal and programmatic responsibility for providing or arranging for provision of necessary services. . . .*” (Emphasis added.)

California Code of Regulations, sections 60100 and 60200, amended in response to section 7576, further define counties’ “fiscal and programmatic responsibilities” for SED pupils placed in out-of-state residential care. Specifically, section 60100 entitled “LEA Identification and Placement of a Seriously Emotionally Disturbed Pupil” reflects the Legislature’s intent behind the test claim statute by providing that residential placements for a SED pupil may be made out-of-state only when no in-state facility can meet the pupil’s needs. Section 60200 entitled “Financial Responsibilities” details county mental health and LEA financial responsibilities regarding the residential placements of SED pupils.

In particular, amended section 60200 removes the requirement that LEAs be responsible for the out-of-state residential placement of SED pupils. Subdivision (c) of section 60200 *now* provides that the county mental health agency of origin shall be “responsible for the provision of assessments and mental health services included in an IEP in accordance with [section 60100].” Thus, as amended, section 60200 replaces the LEA with the *county of origin* as the entity responsible for paying the mental health component of *out-of-state* residential placement for SED pupils.

Therefore, the Commission found that under the test claim legislation and implementing regulations, county mental health agencies now have the fiscal and programmatic responsibility for the mental health component of a SED pupil’s IEP whenever such pupils are referred to a community mental health agency by an IEP team.

Issue 1: Does the Test Claim Legislation Impose a New Program or Higher Level of Service Within an Existing Program Upon County Offices of Education Within the Meaning of Section 6, Article XIII B of the California Constitution by Requiring County Mental Health Agencies to Pay for Out-of-State Residential Placement for Seriously Emotionally Disturbed Pupils?

In order for a statute or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the language: (1) must direct or obligate an activity or task upon local governmental entities; and (2) the required activity or task must be new, thus constituting a “new program,” or it must create an increased or “higher level of service” over the former required level of service. The court has defined a “new program” or “higher level of service” as a program that carries out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect

immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.³

The test claim legislation involves the paying and monitoring of the mental health component of out-of-state residential placement for SED pupils. These placements are deemed necessary by an IEP team to ensure that the pupil receives a free appropriate public education. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Moreover, the test claim legislation imposes unique requirements upon county mental health agencies that do not apply generally to all residents and entities of the state. Therefore, the Commission found that paying and monitoring of the mental health component of out-of-state residential placements for SED pupils constitutes a “program” within the meaning of section 6, article XIII B of the California Constitution.⁴

Does A Shift of Costs and Activities Between Local Governmental Entities Create a New Program or Higher Level of Service?

The Commission found that immediately before the enactment of the test claim legislation, LEAs were responsible for paying and monitoring the mental health component of out-of-state residential placements for SED pupils. The test claim legislation shifted these responsibilities to county mental health agencies. The Government Code considers both LEAs and county mental health agencies local agencies for purposes of mandates law. Thus, the question arises whether a shift of program responsibilities from one local agency to another constitutes a state mandate. This question was recently addressed in *City of San Jose v. State of California*.^{5,6}

In *City of San Jose*, the issue was whether Government Code section 29550, which gave counties the discretion to charge cities and other local agencies for the costs of booking persons arrested by a city or other local agency into county jails, constituted a state mandate. The City of San Jose (City) contended that because the statute allowed counties to charge cities and other local agencies for booking fees, the statute imposed a new program under article XIII B, section 6. Thus, the City maintained that the *Lucia Mar*⁷ decision governed the claim.

³ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

⁴ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

⁵ *City of San Jose, supra* (1996) 45 Cal.App.4th 1802.

⁶ The Commission noted that the *Handicapped and Disabled Students Test Claim*, which also involved a shift of funding and activities from one local agency to another, was decided six years before the *City of San Jose* decision. Therefore, the analysis the Commission relied on in deciding the *Handicapped and Disabled Students Test Claim* is inapplicable to the present test claim.

⁷ *Lucia Mar, supra* (1988) 44 Cal.3d 830, involved Education Code section 59300, enacted in 1981. That section required local school districts to contribute part of the cost of educating district students at state schools for the severely handicapped while the state continued to administer the program. Prior to 1979, the school districts had been required by statute to contribute to the education of students in their districts who attended state schools. However, those statutes were repealed following the passage of Proposition 13 in 1978. In 1979, the state assumed full responsibility for funding the schools. At the time section 59300 was enacted in 1981, the state had full financial responsibility for operating state schools.

The California Supreme Court found that the primary financial and administrative responsibility for state handicapped schools rested with the state at the time the test claim statute was enacted. The court stated that “[t]he intent of [section 6] would plainly be violated if the state could, while retaining administrative control of programs it

The *City of San Jose* court disagreed with the City’s contention. The court held that the shift in funding was not from the state to the local agency, but from the county to the city and, thus, *Lucia Mar* was inapposite. The court stated:

“The flaw in the City’s reliance on *Lucia Mar* is that in our case the shift in funding is not from the state to the local entity but from the county to the city. In *Lucia Mar*, prior to the enactment of the statute in question, *the program was funded and operated entirely by the state. Here, however, at the time section 29550 was enacted, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county.*”⁸ (Emphasis added.)

The *City of San Jose* court concluded that:

“Nothing in article XIII B prohibits the shifting of costs between local governmental entities.”⁹ (Emphasis added.)

The requirement to provide for and monitor the mental health component of a SED pupil in an out-of-state residential placement was not shifted to county mental health agencies by LEAs – LEAs have no such power. Rather, the shift in activities was performed by the state. *City of San Jose* applies if it can be shown that *LEAs* initiated the shift of costs to counties. However, this is not the case. Although a shift between local agencies occurred, the state required the shift. Moreover, the shift entailed both *costs and activities*.

As explained above, the legislation at issue in *City of San Jose* permitted counties to charge cities and other local agencies for the costs of booking persons arrested by a city or other local agency into county jails. The counties, in turn, enacted ordinances that required cities and other local agencies to pay booking fees. Under these facts, the county not the state, imposed costs upon cities and other local agencies. While the state enabled counties with the authority to charge booking fees to cities or other local agencies, the state did not require the imposition of such fees.

The same cannot be said for the test claim legislation. Before the enactment of the test claim legislation, LEAs were required to provide for the mental health component of a SED pupil in an out-of-state residential placement. Under the test claim legislation, the state shifted those responsibilities from LEAs to county mental health agencies. This scenario is different from the one in *City of San Jose*, in which the court recounted: “in our case the shift in *funding* is not from the State to the local entity but from county to city.”¹⁰ (Emphasis added.)

Based on the foregoing, the Commission found that *City of San Jose* does not apply to the present test claim. The shift in responsibilities regarding the mental health component of SED pupils in out-of-state residential placements represents a shift performed by the state. In addition, there is a shift of *costs and activities*.

has supported with state tax money, simply shift the cost of the programs to local government. . . .” (Emphasis added.) Thus, the court found that, under the circumstances of the case, the transfer of financial responsibility from the state to local school districts imposed a new program under section 6.

⁸ *City of San Jose, supra* (1996) 45 Cal.App.4th 1802, 1812.

⁹ *Id.* at 1815.

¹⁰ *City of San Jose, supra* (1996) 45 Cal.App.4th 1802, 1812.

Issue 2: Does the Requirement That Counties Pay and Monitor the Mental Health Component of Out-of-State Residential Placements for SED Pupils Represent Costs Mandated by the State?

The Commission noted that the issue of whether federal special education law requires counties to pay and monitor the mental health component of out-of-state residential placements for SED pupils must be addressed to determine whether there are costs mandated by the state.

Overview of Federal Special Education Law – The Individuals with Disabilities Education Act (IDEA)

The Commission noted that the Education for All Handicapped Children Act (Act) of 1975 is the backbone of the federal statutory provisions governing special education.¹¹ The express purpose of the Act is to assist state and local educational efforts to assure equal protection of the law and that children with disabilities have available special education and related services designed to meet their unique needs.

The Act requires: “that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.”¹² The Act defines FAPE as “special education” and “related services” that: (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the state educational agency; (3) include an appropriate preschool, elementary, or secondary school education in the state involved; and (4) are provided in conformity with the individualized education program (IEP) required under federal law.

The Commission further noted that every disabled child must have an IEP. The IEP is a written statement developed in a meeting between the school, the teacher, and the parents. It includes the child’s current performance, the annual goals and short-term instructional objectives, specific educational services that must be provided, and the objective criteria and evaluation procedures to determine whether the objectives are being achieved. Special education services include both *special education*, defined as specially designed instruction to meet the unique needs of a child with disabilities, and *related services*, defined as such developmental, corrective, and other supportive services as may be required to assist a child with disabilities to benefit from special education. The federal definition of a “child with a disability” includes children with serious emotional disturbances.

Are Counties Responsible for Paying and Monitoring the Mental Health Component of Out-of-State Residential Placements for SED Pupils Under Federal Law?

As discussed in the previous section, federal law requires that every child receive a FAPE. The Commission found that SED pupils are no exception to this requirement.¹³ The test claim legislation requires counties to be responsible for the mental health component of out-of-state

¹¹ In 1990, Congress changed the title of the Act to the “Individuals with Disabilities Education Act.”

¹² *Ibid.*

¹³ The claimant agrees: “As previously noted, of the 1,000 pupils who receive residential care, only a few, about 100, are placed out-of-state. But the rights of the few are no less than the rights of the many. [SED] pupils placed in out-of-state residential program [sic] are also entitled to a [FAPE].” See claimant’s Test Claim filing dated December 22, 1997 at page 3.

residential placements for SED pupils. A SED pupil’s IEP team, which includes a county mental health representative, directs such placements.¹⁴ The purpose of a SED pupil’s IEP is to ensure they receive a FAPE in the least restrictive environment. In those cases where out-of-state residential placements are required, it is because an IEP team has determined that no school site, school district, or out-of-home (in-state) residential placement is adequate to provide the necessary special education services to meet the federal FAPE requirement.¹⁵

The Commission found that when an IEP team recommends an out-of-state residential placement for a SED pupil, the requirement to provide such placement is a federal, not state requirement. Such placements are made to ensure pupils receive a FAPE, not in response to any state program. However, the fact that federal law requires the state to provide a FAPE to all disabled children begs the question: Does federal law require county mental health agencies to pay and monitor the mental health component of out-of-state residential placements for SED pupils?

The Commission found that federal law does not require counties to provide out-of-state placements. The Commission recognized that federal law defines “local educational agency” as:

“A public board of education or other public authority legally constituted within a State for either *administrative control or direction of*, or *to perform a service function for*, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. . . . The term includes –

“(i) an educational service agency . . . ; and

“(ii) any other public institution or agency having administrative control and direction of a public elementary or secondary school.”¹⁶

The Commission found that, as the above definition demonstrates, federal law does not consider counties to be “local educational agencies.”¹⁷ Counties are not legally constituted in the state for “either *administrative control or direction of*, or *to perform a service function for*, public elementary or secondary schools.” Under the test claim legislation counties are only providing services *on an individual basis*.

Furthermore, the Commission found that counties are not recognized by the state as an administrative agency having control and direction of a public elementary or secondary school. It is LEAs that continue to control a SED pupil’s IEP. LEAs determine when a county mental

¹⁴ Education Code section 56345 requires school districts or county offices of education to provide the services that are recommended in the student’s IEP.

¹⁵ The Commission noted that title 2, California Code of Regulations, section 60100 provides that when an IEP team member recommends residential placement, the IEP team is expanded to include a county mental health representative. Before determining that residential placement is required, the expanded IEP team must consider other, less restrictive alternatives – such as a full-time behavioral aide in the classroom and/or parent training. The IEP team must document the alternatives considered and why they were rejected. Section 60100 goes on to provide that: “Residential placements for a [SED pupil] may be made out of California only when no-instate facility can meet the pupil’s needs.”

¹⁶ Title 20, United States Code, section 1401, subdivision (15).

¹⁷ The definition of “local educational agency” is identical in the federal regulations. See 34 Code of Federal Regulations, section 300.18.

health agency representative must join a pupil’s IEP team. The county acts in a responsive manner to the determinations of the LEA, not in a proactive manner. Therefore, the Commission concluded that counties do not have administrative control and direction of public elementary or secondary schools, let alone SED pupils.

Moreover, the Commission recognized that federal law defines public agency to include:

“[State Educational Agencies], LEAs, [educational service agencies (ESA)], public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and *any other political subdivisions of the State that are responsible for providing education to children with disabilities.*”¹⁸
(Emphasis added.)

The Commission found that the federal definition of “public agency” does not include counties for purposes of this test claim. Since counties are not included in the federal definition of LEAs, the question remains whether counties are “responsible for providing education to children with disabilities.” To answer this question it is necessary to review the state’s requirements under the test claim legislation. Here, under the test claim legislation, counties are not responsible for providing education to children with disabilities. Rather, the test claim legislation limits counties’ responsibilities to paying for and monitoring the mental health component of out-of-state residential placements of SED pupils. Under the test claim legislation, LEAs continue to be responsible for the educational aspects of a SED pupil’s IEP. This is evidenced by regulation section 60110, subdivision (b)(2), which provides that: “The LEA shall be responsible for providing or arranging for the special education and non-mental health related services needed by the pupil.” Moreover, there is no reference to counties in federal special education law that would support a finding that counties, under the program outlined in the test claim legislation, are required to pay for and monitor out-of-state residential placements of SED pupils. Therefore, the Commission concluded that federal law does not require counties to pay for and monitor the mental health component of out-of-state residential placements for SED pupils.

CONCLUSION

Based on the foregoing, the Commission concluded that the test claim legislation, regulations, and information notice impose new programs or higher levels of service within an existing program upon counties within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514 for the following activities:

- Payment of out-of-state residential placements for SED pupils. (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60100, 60110.)
- Case management of out-of-state residential placements for SED pupils. Case management includes supervision of mental health treatment and monitoring of psychotropic medications. (Gov. Code, § 7576; Cal. Code Regs., tit. 2, § 60110.)
- Travel to conduct quarterly face-to-face contacts at the residential facility to monitor level of care, supervision, and the provision of mental health services as required in the pupil’s IEP. (Cal. Code Regs., tit. 2, § 60110.)

¹⁸ 34 Code of Federal Regulations, section 300.22.

- Program management, which includes parent notifications as required, payment facilitation, and all other activities necessary to ensure a county's out-of-state residential placement program meets the requirements of Government Code section 7576 and Title 2, California Code of Regulations, sections 60000-60610. (Gov. Code, § 7576; Cal. Code of Regs., tit. 2, §§ 60100, 60110.)