

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Section 51223.1, as added by  
Statutes of 1997, Chapter 640

Filed on October 27, 1998

By Sweetwater Union High School District and  
Bakersfield City Elementary School District,  
Claimants.

No. 98-TC-08

*Physical Education Reports*

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 September 28, 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 September 29, 2000.

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Paula Higashi, Executive Director

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*(Adopted on September 28, 2000)*

**STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim on August 24, 2000 during a regularly scheduled hearing. Lawrence L. Hendee appeared for co-claimant Sweetwater Union High School District and Wayne Stapley appeared for co-claimant Bakersfield City Elementary School District. Dr. Carol Berg of Education Mandated Cost Network, and Jim Cunningham of San Diego Unified School District, appeared as witnesses for the claimants. Jeff Bell and Barbara Taylor 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 to 0, approved this test claim.

**BACKGROUND AND FINDINGS OF FACT**

School districts are required to provide a minimum number of physical education instruction hours to pupils. The subject test claim legislation adds a new reporting and compliance requirement to determine whether districts are actually providing their students with the statutory minimum hours of physical education. Specifically, school districts selected by the Superintendent of Public Instruction (SPI), must now include in their periodic Coordinated Compliance Review<sup>1</sup> (CCR) reporting to the California Department of Education (CDE), reports on their compliance with Education Code section 51222, subdivision (a) and section 51223, which specify how many hours of scheduled physical education are required for each pupil.

**Issue:**

Does Education Code section 51223.1 impose a reimbursable state mandate upon school districts within the meaning of section 6, article XIII B of the California Constitution<sup>2</sup> and

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<sup>1</sup> The Coordinated Compliance Review, as administered by the California Department of Education, School and District Accountability Division, evaluates multiple educational programs at the local level. The CCR is conducted on a four-year cycle by district.

Government Code section 17514,<sup>3</sup> by requiring selected school districts to report on compliance with physical education requirements?

In order for a statute, regulation or an executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory, regulatory, or executive order language must direct or obligate an activity or task upon local governmental entities. 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 without applying 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 made between the test claim legislation and the requirements in effect immediately before the enactment of the test claim legislation. Finally, the new activity or increased level of service must be state mandated.<sup>4</sup>

The Commission found that the test claim legislation requires selected school districts to prepare and submit reports to the State regarding the school district’s compliance with physical education instruction provisions. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public.<sup>5</sup> Moreover, the test claim legislation, by requiring selected school districts to prepare and submit reports to the State regarding the school district’s compliance with physical education instruction provisions, imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Thus, the Commission found the reporting requirements on physical education instruction by school districts constitutes a “program” within the meaning of section 6, article XIII B of the California Constitution.<sup>6</sup>

However, the Commission continued its inquiry to determine if the activities are new or impose a higher level of service and if so, if there are costs mandated by the state.

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<sup>2</sup> Section 6, article XIII B of the California Constitution provides: “Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

(a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.”

<sup>3</sup> Government Code section 17514 provides: “Costs mandated by the state means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

<sup>4</sup> *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.

<sup>5</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172 states “although numerous private schools exist, education in our society is considered to be a peculiarly governmental function ... administered by local agencies to provide service to the public.”

<sup>6</sup> *Id.*

The claimant contended that the test claim legislation and regulations impose a new program or higher level of service upon school districts requiring selected districts to prepare and provide reports to the CDE on their compliance with minimum physical education instruction hours.

The Commission noted that under prior law school districts were required to provide a minimum number of physical education hours. However, school districts were not required to submit reports to the CDE on the provision of physical education. The test claim legislation, added Education Code section 51223.1, providing for reports on school district compliance with physical education in elementary schools, specifically, the minimum number of physical education hours required under Education Code section 51222, subdivision (a) and section 51223.<sup>7</sup>

The Commission found that the test claim legislation requires that school districts, chosen by the SPI, shall include in their Coordinated Compliance Review a report regarding adherence with the statutory minimum class hours for physical education.<sup>8</sup> The test claim legislation provides that a sample of at least ten percent of school districts shall be selected<sup>9</sup> and school districts receiving a noncompliance notification from the CDE shall issue a corrective plan to the CDE within one year of such notification.<sup>10</sup> High schools are explicitly excluded from the test claim legislation.<sup>11</sup>

The Commission noted that the test claim legislation, namely Education Code section 51223.1, subdivision (b), provides that, in the event the school district is selected by the SPI, the district:

“*shall* report to the Superintendent of Public Instruction in the Coordinated Compliance Review as to the extent of its compliance with subdivision (a) of Section 51222 and Section 51223 during that school year.” [Emphasis added.]

In addition, section 51223.1, subdivision (d), provides that any:

“school district that fails to comply with existing statutory requirements *shall* issue a corrective plan to the State Department of Education within one year of receiving a noncompliance notification from the department.” [Emphasis added.]

The Commission also noted that Education Code section 75 provides, that for purposes of interpreting the Education Code, “shall” is mandatory and “may” is permissive. Accordingly, the Commission concluded, based upon the plain language of the test claim legislation, the new obligation of selected school districts to report on their compliance with physical education requirements is mandatory rather than permissive, thereby imposing a reimbursable state mandate.

It was DOF’s position that school districts, in response to the Gender Equity Review portion of the existing CCR, are already required “to develop enough compliance documentation (such as

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<sup>7</sup> Education Code section 51223 provides that students in an elementary school maintaining any of grades one through eight shall have at least 200 minutes of physical education for every ten school days, not including regular recesses and lunch periods. Section 51222, subdivision (a) refers to the temporary or permanent exemption from physical education requirements for injured, ill, or half time students, as allowed under Education Code section 51241.

<sup>8</sup> Education Code section 51223.1, subdivision (b) (1).

<sup>9</sup> Education Code section 51223.1, subdivision (b) (2).

<sup>10</sup> Education Code section 51223.1, subdivision (d)

<sup>11</sup> Education Code section 51223.1, subdivision (e).

lesson plans with the scheduled minutes indicated). . .” Thus, DOF concluded that there should be no costs associated with compliance with the test claim legislation. DOF did not initially provide any documentation to support its assertion that school districts, under the Gender Equity Review portion of the CCR, are already required to provide documentation that would satisfy the requirements of the test claim legislation.

At the hearing, DOF submitted two pages from the Coordinated Compliance Review Training Guide for 2001-2002. These pages describe the elements of the Gender Equity portion of the CCR. The document describes a compliance test for demonstrating that “all students in elementary schools (grades 1-8) participate in physical education programs for a total of not less than 200 minutes within each 10 school days” and requires the review of “lesson plans for each teacher, which document the total minutes and exclude recess and lunch period.”

In response to DOF’s testimony, claimants explained that the compliance test under the Gender Equity portion of the CCR training guide first appeared in the 1999-2000 CCR training guide in compliance with Education Code section 51223.1. Claimants explained that these provisions were designed by the Department of Education to implement the test claim legislation.<sup>12</sup> Specifically, claimant’s representatives cited to page 167 of the 1999-2000 training guide which described the physical education instruction compliance test as “new,” and in response to Education Code section 51223.1.

The Commission found that prior to the test claim legislation there was never a specific requirement for school districts, selected by the SPI, to include in their periodic CCR, specific reports of compliance with Education Code section 51222, subdivision (a) and section 51223. Accordingly, the Commission concluded that the new obligations imposed under the test claim legislation, requiring selected school districts to report on their compliance with physical education requirements, constitutes a reimbursable state mandate.

DOF further argued that additional reporting requirements on physical education instruction, adopted in Education Code section 51223.1, are not a reimbursable mandate since the SPI has not yet implemented the provisions. Claimants, in rebuttal, state that under the test claim process, a claimant need not prove actual costs but only must show that it may incur costs. Government Code section 17555 provides that a:

“test claim may be based upon *estimated costs* that a local agency or school district *may incur* as a result of the statute or executive order and may be filed at any time after the statute is enacted...” [Emphasis added.]

While section 51223.1 does not require additional reporting prior to selection and notification by the SPI, there is no evidence that the law will not be implemented, thereby causing selected school districts to incur additional costs related to report preparation. Accordingly, the Commission concluded that the test claim legislation imposes a reimbursable state mandate for activities necessary to comply with reporting on compliance with physical education requirements, but only for those school districts, excluding high schools, specifically selected by the Superintendent of Public Instruction.

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<sup>12</sup> Pertinent pages of the August 24, 2000 hearing transcript are attached as Exhibit A.

## **CONCLUSION**

The Commission concluded that Education Code section 51223.1 imposes a reimbursable state mandated program within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514 by requiring selected school districts to engage in physical education compliance reporting requirements.

Accordingly, the Commission approved this test claim for the actual costs incurred by any school districts specifically selected by the SPI for:

- Preparing and submitting reports to the SPI on the extent of the school district's compliance with the minimum minutes of physical education instruction required by law;
- Training school district staff on the requirements of Education Code section 51223.1; and
- Developing and implementing training, audit, and record keeping procedures for record keeping, reporting and plan of correction activities necessary to comply with the implementation of Education Code section 51223.1, to the extent that these are not already standard school district record keeping procedures.

Although the Commission approved the test claim at this time, the actual reimbursement period for any of the above activities, including training and developing additional record keeping procedures, should begin no earlier than the date that the school district receives documentation from the CDE that their district is specifically selected to participate in physical education compliance reporting.