

MINUTES

COMMISSION ON STATE MANDATES

Department of Finance
915 L Street, Redwood Room
Sacramento, California
May 29, 2009

Present: Member Tom Sheehy, Chairperson
Representative of the Director of the Department of Finance
Member Richard Chivaro, Vice Chairperson
Representative of the State Controller
Member Francisco Lujano
Representative of the State Treasurer
Member Anne Houston Schmidt
Representative of the Director of the Office of Planning and Research
Member Sarah Olsen
Public Member
Member Paul Glaab
City Council Member

Absent: Member J. Steven Worthley
County Supervisor

CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 10:30 a.m. Executive Director Paula Higashi called the roll, and noted that Member Worthley was absent.

APPROVAL OF MINUTES

Item 1 March 27, 2009

The March 27, 2009 hearing minutes were adopted by a vote of 6-0.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS ON TEST CLAIM AND STATEMENT OF DECISION,
PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5,
ARTICLE 7 (GOV. CODE, § 17551) (action)

DISMISSAL OF WITHDRAWN TEST CLAIM

Item 7* *Ferry Assets, 07-TC-07*
Government Code Sections 66540 through 66540.69
Streets and Highway Code Sections 30913 and 30914
Statutes 2007, Chapter 734 (SB 976)
City of Vallejo, Claimant

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PARAMETERS AND GUIDELINES

- Item 8* *Local Government Employment Relations*, 01-TC-30
Government Code Sections 3502.5 and 3508.5
Statutes 2000, Chapter 901 (SB 739)
California Code of Regulations, Title 8, Sections 32132, 32135, 32140, 32149, 32150, 32160, 32168, 32170, 32175, 32176, 32180, 32190, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, 60070, Register 2001, Number 49
County of Sacramento and City of Sacramento, Claimants

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES

- Item 10* *National Norm-Referenced Achievement Test*, 08-PGA-01 (05-PGA-03, 04-RL-9723-01, 97-TC-23)
Education Code Sections 60607, subdivision (a), 60609, 60615, 60630, 60640, and 60641, Statutes 1997, Chapter 828 (SB 376)
California Code of Regulations, Title 5, Sections 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864, 865, 867, and 868
Department of Finance, Requestor

PROPOSED STATEWIDE COST ESTIMATE

- Item 11* *Local Recreation Areas: Background Screenings*, 01-TC-11
Public Resources Code Section 5164, Subdivisions (b) (1) and (2);
Statutes 2001, Chapter 777 (AB 351)
City of Los Angeles, Claimant

Member Lujano made a motion to adopt items 7, 8, 10 and 11 on the consent calendar. With a second by Member Glaab, the consent calendar was adopted by a vote of 6-0.

Executive Director stated that Items 5, 6 and 9 have been postponed at the request of claimant representatives.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

- Item 2 Staff Report (if necessary)

There were no appeals to consider.

HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551 and 17559) (action)

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing.

TEST CLAIMS

- Item 3 *Student Records*, 02-TC-34
Education Code Sections 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, 49078, 76220, 76223, 76225, 76234, 76244, 76245, 76246
Statutes 1975, Chapter 816 (S.B. 182); Statutes 1976, Chapter 1010 (A.B. 3100); Statutes 1976, Chapter 1297 (S.B. 1493); Statutes 1980, Chapter 1347 (A.B. 2168); Statutes 1983, Chapter 498 (S.B. 813); Statute 1989, Chapter 593 (S.B. 1546); Statutes 1993, Chapter 561 (A.B. 1539); Statutes 1995, Chapter 758 (A.B. 446); Statutes 1996, Chapter 879 (A.B. 1721); Statutes 1998, Chapter 311 (S.B. 933); Statutes 1998, Chapter 846 (S.B. 1468); Statutes 2000, Chapter 67 (A.B. 2453)
Riverside Unified School District and Palomar Community College Districts, Claimants

Kenny Louie, Commission Counsel presented this item. Mr. Louie stated that this test claim addresses issues of pupil and student record management by school districts and community-college districts, such as the establishment, maintenance, and destruction of records; transfer of pupil and student records; release of information to peace officers; release of information in compliance with a court order or subpoena; and notice to others concerning a student's disciplinary records.

Staff received comments on the draft staff analysis only from the claimant, Riverside Unified School District, which were addressed in the final staff analysis.

Staff finds that some of the test claim statutes are not reimbursable state-mandated programs because they are federal mandates and/or court mandates or not new programs or higher levels of service. However, staff finds that some of the test claim statutes impose reimbursable state-mandated activities on school districts for providing access to or transferring pupil records to foster families, new districts, or peace officers.

Staff also finds that the test claim imposes a reimbursable state-mandated activity on community college districts relating to informing alleged victims of sexual assault or physical abuse about any disciplinary action taken by a community college concerning the sexual assault or physical abuse.

Staff recommends one modification to the staff analysis. The fee authority in Education Code section 76223 for furnishing copies of records for community college students does not apply to the reimbursable state-mandated activity on community college districts to inform a victim of sexual assault or physical abuse of the results of any disciplinary action against another student.

Staff recommends that references to the fee authority in the staff analysis, pages 3, 57, and 58, and the proposed Statement of Decision, pages 5, 57, 58, be deleted. With this modification, staff recommends that the Commission adopt the staff analysis to partially approve the test claim for the activities listed on pages 57 and 58.

Parties were represented as follows: Art Palkowitz representing Riverside Unified School District and Susan Geanacou representing the Department of Finance.

Art Palkowitz stated that, in the staff analysis, Commission staff recommended that certain records activities be reimbursed. Those records pertain to individualized education plans under the jurisdiction of foster-family agencies. The records also deal with probation type of requests, other types of foster care, and with certain things that relate to specific peace officers.

Mr. Palkowitz agreed with the staff on the analysis and urged the Commission to affirm that recommendation.

Mr. Palkowitz explained that the group of records that the Commission staff is recommending not be approved as reimbursable activities refers to transfer of a pupil's permanent record or a copy of the permanent record to the K-12 school district or private school where the pupil intends to enroll, upon the request of the K-12 school district or private school where a pupil intends to transfer. A student is making a change and the new school is requesting the records from the old school. This happens quite often.

The analysis by the Commission staff refers to an Education Code section from 1959, 50 years ago. That code section, very similar to these activities, refers to a "*cumulative record*." The language in the current statute refers to a "*permanent record*." There is an analysis of "*cumulative*" and "*permanent*" record. Staff concludes that the cumulative record was already requested by a previous statute; so this is not really a new statute, or a new program and, therefore, should not be reimbursed.

Mr. Palkowitz asked if a cumulative record is the same as a permanent record, then why did the Legislature pass this bill. He noted that the older section was eventually repealed. Mr. Palkowitz stated that the intent of the Legislature was that permanent records should be reimbursed under this statute. The Legislature has defined a permanent record different than a cumulative record and, therefore, should be reimbursable.

Mr. Louie stated that the cumulative record was not the same as the permanent record; rather, the permanent record is inclusive of the cumulative record. So technically, it was a decrease in terms of what is being referred to in the prior code section.

Member Glaab asked if electronic records are acceptable in this instance.

Mr. Palkowitz responded that these statutes are from 1998, so we may not have been thinking in that line back then as we would today. It seems that if they are going to accept a copy, then an electronic version should be acceptable.

Susan Geanacou for the Department of Finance commented about the final staff analysis on two specific code sections.

The first is Education Code section 49069.3 regarding a school district's response to a foster-family agency request for access to student records under their jurisdiction. Finance acknowledged that the Commission staff considered the plain-language issue on pages 42 and 43 of the final staff analysis. Nonetheless, Finance disagreed with the analysis in that regard. Finance asserted that staff is, and should not be, reading into the plain language of Education Code section 49069.3, a school district requirement that isn't there to provide the records in response to the foster-family agency request. Accordingly, Finance asked that this activity be denied reimbursement.

The second comment is regarding community college districts and Education Code section 76234, on page 53 of the final staff analysis. It involves the activity of informing the alleged victim of sexual assault or physical abuse within three days of the results of any disciplinary action by the community college and the results of any appeal.

Finance asserted that this activity is already being reimbursed under another community college mandate called *Sexual-Assault Response Procedure* (99-TC-12). In that mandate, the Commission found that it was reimbursable for each community college district to adopt and to implement written procedures or protocol for several pieces of information, one of which is procedures for ongoing case management. It specifically includes keeping the victim informed of the status of disciplinary proceedings in connection with the assault and the results of any other disciplinary action or appeal.

And to the extent that the same activity is being recommended for reimbursement here, Finance argued that community college districts should not be reimbursed twice for the same or very similar activity.

Chairperson Sheehy asked Ms. Geanacou if Finance had previously shared the analysis that these activities are already being covered under another reimbursable mandate with the Commission and staff.

Ms. Geanacou stated that Finance submitted a "very late" (either yesterday or this morning) filing of the analysis and didn't believe members or staff had time to process the analysis.

Chairperson Sheehy noted that Finance did not give the Commission and staff sufficient time to analyze the late filing.

Mr. Louie responded that in the activity approved in that prior test claim, there were discussions in the parameters and guidelines phase. The approved activity was for a one-time activity of adopting policies and distributing those policies to the districts, and not actually informing the victim. In this test claim, the activity is informing the victim. So it is a different activity.

On a motion by Member Chivaro to adopt the staff recommendation, and a second by Member Glaab, the staff recommendation to partially approve the test claim was adopted by a vote of 6-0.

Item 4 Proposed Statement of Decision: *Student Records*, 02-TC-34
[See Item 3]

Mr. Louie also presented this item. He stated that the sole issue before the Commission was whether the proposed Statement of Decision, as modified, accurately reflected the Commission's decision to partially approve the *Student Records* test claim. Staff recommended that the Commission adopt the proposed Statement of Decision including minor changes reflecting the witnesses' hearing testimony and vote count.

Member Olsen asked if the Statement of Decision will reflect the earlier comments.

Ms. Shelton, Chief Legal Counsel, stated that the recommendation would be to adopt the proposed Statement of Decision as modified.

Member Chivaro made a motion to adopt the proposed Statement of Decision. With a second by Member Lujano, the Statement of Decision was adopted by a vote of 6-0.

STAFF REPORTS

Item 13 Report on 2009 Legislation

Ms. Patton reported that the number of mandate bills is dwindling. There is AB 349 by Member Silva. This would provide that if any mandated program is suspended for three concurrent years,

the Department of Finance would be required to submit language in the Governor's proposed budget to repeal the suspended mandates. It passed through the Assembly by a vote of 77-0, and is pending committee assignment in the Senate. So it went through the Legislature and the Assembly with no "no" votes.

Chairperson Sheehy asked who sponsored the bill.

Ms. Patton replied that it is sponsored by the author. It is not an administration bill.

Member Olsen asked what it meant to have three *concurrent* years as opposed to *consecutive* years.

Ms. Higashi replied that it should be *consecutive*.

Chairperson Sheehy asked if the Commission staff has a position on that bill.

Ms. Patton replied no. Ms. Higashi stated that Commission staff does not take a position on a bill if it does not impact our workload. This bill would impact Finance's workload.

Ms. Patton continued that the next bill is AB 548 by Member Krekorian. This bill would require the audits the State Controller completes on mandate reimbursement claims to be done within three years from the time the claim was filed rather than three years from the time reimbursement for the claim was made by the state. The author's office reported, by e-mail this morning, that they amended the bill yesterday to say the audits be completed within four years rather than three. Ms. Patton stated she had not seen that language yet. But with that amendment, it did pass out of Assembly Appropriations yesterday, so it's on the floor.

The final bill is AB 661. This bill would implement the settlement agreement between the Department of Finance and the schools on the BIPS program. That bill, due to its high cost, was held in suspense yesterday in Appropriations. The author's office reports this morning they do not think it is going to move.

Item 14 Chief Legal Counsel's Report (info)

Ms. Shelton reported that the court set a December 11th hearing date on BIPs. If the situation of the settlement agreement is not taken care of and an appropriation is not made, that date is set for hearing. So we will be possibly attending a hearing date on the merits of that claim at that point.

Chairperson Sheehy asked Ms. Shelton to explain why there is legislation (AB 661) and a court case.

Ms. Shelton explained that there was a settlement agreement that required agreement from a majority of the school districts. Ninety-five percent of the school districts in the state agreed to sign a waiver of the right to file reimbursement claims with the State Controller's Office. The agreement also would have a court enjoin the Commission from adopting parameters and guidelines and a statewide cost estimate because we had not reached that stage yet. The Commission had only adopted a Statement of Decision approving the claim. The third prong of the agreement was legislation (AB 661) providing an appropriation based on the Department of Finance and the school districts' settlement agreement. The parties went to court in March to try to get the judge to sign off on this agreement; however, the court would not sign off until an appropriation had actually been made. The judge, with the agreement of the parties, pushed the hearing date to December 11 for a trial on the merits if the appropriation is not made.

Chairperson Sheehy asked how, if this bill stopped in the Legislature, it will impact the process.

Ms. Shelton explained that would be up to the Department of Finance and the school districts to try to renegotiate another agreement, or just have a hearing on the merits. It would go through the litigation process. The court is maintaining jurisdiction.

Ms. Shelton continued with a list of cases of interest. The first one was dealing with Grossmont Union High School District on a Handicapped and Disabled Students program. The Commission is not a party to that case. The school districts sued the Department of Education directly to try to get reimbursement for their costs of performing that program.

The Supreme Court denied the petition for review. The ruling in this case was that the school districts did not exhaust their administrative remedies by filing a test claim with the Commission. So it is possible we could receive a test claim from school districts on that case.

The second case of interest is a lawsuit by school districts against the State Controller's Office. It is now on appeal. The Commission is not a party to that action. It is a challenge to reductions the State Controller made on reimbursement claims on the ground that the school districts did not have contemporaneous source documents.

The trial court ruled that to the extent that the Commission's parameters and guidelines require contemporaneous source documents, it would be valid for the Controller to reduce on that ground. But to the extent the parameters and guidelines did not include that language, there was a ruling in favor of the school districts. Both parties have appealed.

Ms. Shelton stated that the Commission has a request on file from the State Controller's Office to go back and amend every set of parameters and guidelines to include that language. We have not yet set that for hearing. A lot of the issues the request raises are issues involved in this lawsuit.

Mr. Palkowitz asked to clarify what the Commission's process is going to be when the appeal is over.

Ms. Higashi stated that the request to amend the parameters and guidelines is just for the mandates that do not currently have the updated language. Ms. Shelton explained that the language is already included in all parameters and guidelines adopted since 2004. Ms. Higashi stated that there are different variations of the boilerplate language and the Controller's request brings that language up to what has been currently adopted.

Mr. Palkowitz asked that if there were parameters and guidelines being approved now, would they have the new language.

Ms. Higashi responded with a yes. Staff has been reviewing it and trying to determine if we can proceed on any of the proposed amendments. We have not heard specifically from any of the parties that they wish for us to postpone it. We had planned to have a prehearing conference to discuss the pros and cons of going forward immediately or holding it until the litigation is completed. But there are also related incorrect reduction claims on all of these cases pending before the Commission; the ones that are subject to the litigation and others that are not in the litigation.

Ms. Shelton introduced, Lauren Manning. Ms. Manning is the Commission's new law clerk who, as a second-year student from McGeorge School of Law, is interning for credit this summer.

Item 15 Executive Director's Report (info)

Ms. Higashi reported that the pending caseload is at 58. She noted that this is the first time that the caseload has been below 60 in many years.

Ms. Higashi stated that this summer or during conference committee, Assembly Budget Subcommittee Number 4 may consider giving the Commission jurisdiction over some form of reconsideration procedure. This decision has been precipitated by the recent ruling in the CSBA case, which basically said that the Legislature cannot direct the Commission to reconsider prior decisions. With that decision, there is serious interest in making sure that the Commission has jurisdiction to change prior Statements of Decision when there is a material change in facts or law that occurs after that decision.

In response to the request for Commission comment, Ms. Higashi reported that she testified before the Assembly Budget Subcommittee. The background material distributed to the subcommittee was included in the agenda item. At the end of the hearing, the subcommittee requested that the parties provide proposals and ideas.

In response to the subcommittee's request, staff developed a proposal based on how we read the CSBA ruling. Instead of calling it "*reconsideration*," the staff draft is a procedure which allows the Commission to amend a test claim decision, much like the courts consider in terms of amendment of an injunction. It is not drafted as a Commission proposal but, as an example of a workable alternative. There are, however, a number of variables in this proposal that obviously are subject to negotiation and discussion.

Ms. Higashi reported that the parties have been notified of this process that is underway and were encouraged to think about this issue and develop a proposal. CSBA and League of Cities and CSAC sent a letter to the committee consultants and committee members requesting that they be involved in this process. Staff hopes that if this process does pick up again, we will have a full discussion and cover all of the issues. The following issues were identified by Ms. Higashi:

- Authority to File a Request for Amendment of a Statement of Decision. We are recommending that it be the parties to the test claim proceeding. There is interest in the Capitol for legislators to have the right to request amendment of the Statement of Decision.
- Effective Date of Amendment. The staff draft suggests that it be the next fiscal year; the fiscal year after the decision is changed, if it is changed. It also would give the Commission the authority to amend the parameters and guidelines, prepare a new statewide cost estimate and do whatever needs to be done to update what we know about the mandate.
- Statute of Limitations. For the first year of operation, a request could be filed on any prior decision based on a subsequent change that occurred after that decision was rendered. After that one year period, there would be, for all the decisions that are issued by the Commission, a provision that says that one year after a change occurs there is a window in which a proposal can be filed to request an amendment of that decision.

Chairperson Sheehy asked if the Assembly Sub 4 has taken any action specifically on this issue.

Ms. Higashi responded that the committee chair directed the participants to form a working group to develop a proposal and bring it back to the subcommittee.

Chairperson Sheehy asked what problem they are trying to solve with this budget trailer bill language.

Ms. Higashi responded if a change in case law would change the outcome of an old decision if it were to be decided today, they would like to see that decision reconsidered.

In the past, only those cases that the Legislative Analyst's Office identified as potential denied mandates were the subject of reconsideration. The Commission was directed to reconsider those cases based on current law in the hope that the state would reduce its liability. We have decisions that are from the Board of Control and the Commission, before much of our case law was issued. We also have changes to the definition of "costs mandated by the state" that have occurred since those prior decisions were issued.

Chairperson Sheehy commented that he is a little uncomfortable in hearing that they are trying to do this as a trailer bill. This is a complicated subject that needs a lot of review and public input.

Staff's draft proposal, described as a starting point, has been circulated to LAO, Budget Subcommittee, and Finance staff and will be sent out to other interested parties. The draft was also made available on the Commission's website through this agenda item.

Member Glaab stated that he understands what they are trying to do by bringing everything into compliance with current law. However, it seems that it is going to open up a Pandora's Box and the Commission's workload could explode. Mr. Glaab concurred with Chairperson Sheehy in that this needs and calls for a vote in a full public hearing, weighing everything.

Chairperson Sheehy directed his comments to Carla Castañeda from the Department of Finance. He asked her, as Finance's mandates principal, to follow this issue closely and report up through her chain of command what is going on to ensure that this is not something that is done in a vacuum.

Mr. Allan Burdick, staff to the California State Association of Counties and League of California Cities Advisory Committee on State Mandates, commented on the importance of full participation in open and fair discussions on these very complicated, legal issues. On behalf of the League and CSAC, Mr. Burdick thanked the Commission for their interest in this and encouraged participation in a fair and open deliberation of this and not a budget-trailer-bill fix.

Ms. Higashi continued that CSBA wants to comment and participate as well, especially in light of the litigation that, after having completed that case, there is certainly a concern that whatever process is developed, it meets their concerns as well.

Chairperson Sheehy commented that it was not clear to him how the budget process was going to play out in June, as far as amendments to the adopted State budget. He asked whether or not the Senate has taken any action on this item, and is this an item that has actually been queued up for review and discussion by the current ten-member conference committee that is taking place on the State budget?

Ms. Higashi directed the questions to Carla Castañeda, Department of Finance. Ms. Castañeda stated that both houses closed without any reconsideration or adoption of any of this language so it has not come up yet. Finance has not yet seen anything on the conference agenda. However, with the Assembly chairing them, it may come up because the issue was before the Assembly.

Ms. Higashi asked for two members to work as a subcommittee to share ideas, drafts or comments.

Chairperson Sheehy suggested Member Glaab because of his local government and state government executive background and Member Olsen because of her expertise in the state budget process. Both members agreed to form the subcommittee. Chairperson Sheehy and Member Schmidt both offered support and help in their areas of expertise, as well.

Ms. Higashi reviewed the tentative agenda for the next meeting on July 31, 2009 and reminded members that the September meeting is set for September 25, 2009.

PUBLIC COMMENT

There was no public comment.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526 (action)

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, [Behavioral Intervention Plans]
2. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. State of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller*, Third District Court of Appeal, Case No. C055700; [AB 138; Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]
3. *Department of Finance v. Commission on State Mandates*, Third District Court of Appeal, Case No. C056833, [Peace Officer Procedural Bill of Rights]
4. *California School Boards Association, Education Legal Alliance, and Sweetwater Union High School Dist. v. State of California, Commission on State Mandates, and John Chiang, in his capacity as State Controller*, Sacramento County Superior Court, Case No. 07CS01399, [School Accountability Report Cards, SARC]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

Hearing no further comments, Chairperson Sheehy adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

At 11:42 a.m., Chairperson Sheehy reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice

and agenda, and pursuant to Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

Hearing no further business, Chairperson Sheehy adjourned the meeting at 11:42 a.m.

A handwritten signature in cursive script that reads "Paula Higashi".

PAULA HIGASHI
Executive Director