


Office of the City Attorney

Lead Sampling in Schools Permit Amendment No. 2017PA-SCHOOLS

17-TC-03

Commission on State Mandates
March 22, 2019



 Office of the City Attorney

City of San Diego

- Charter City
- Municipal Water Agency since July 21, 1901
- Provide water to 1.3 million residents
- Permit from State Water Resources Control Board

Proposed Decision

- Draws the Commission into new territory
- Service provided by government is not a “governmental function”
- Requiring free services is not a state mandate.
- Moots the pending appeal in *Paradise Irrigation District*

SB 334

- Required school drinking water to meet USEPA standards for lead
- Bill said it imposed a state-mandated local program
- Vetoed by Gov. Brown over state mandate concerns
- Gov. Brown directed SWRCB to implement lead testing through local water agencies

Permit Amendment 2017PA-SCHOOLS

- Perform lead testing at request of any K-12 school
- Water system is responsible for costs of:
 - Laboratory fees for all lead samples
 - Reporting results to State and schools
 - All water system staff time
- Effective Jan. 18, 2017 (received by City Jan. 23, 2017)

State Press Releases

“State Superintendent of Public Instruction Tom Torlakson announced that public schools can receive free testing for lead in drinking water under a new state program.”

- California Dept. of Education News Release

State Press Releases

“K-12 schools in the state can receive free testing for lead under a new initiative announced today by the State Water Resources Control Board.”

- SWRCB Media Release

Lead Testing by City

- 255 requests in the first year
- At one point, more than the rest of the State combined
- Lead over 15 ppb found at 4 schools
- Schools removed source of lead
- No issues with City water

Mandate of Free Services

- Prop. 218 prohibits using ratepayer funds to subsidize services to other ratepayers.
- City had fee authority under Prop. 26 to charge for lead testing
- Permit Amendment took away the City's fee authority
- Only way to comply with both Prop. 218 and the Permit Amendment is to use tax revenue from the General Fund

State Mandated Programs

- "Programs that carry out the governmental function of providing services to the public." (program-specific)
- "Laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (provider-specific)

County of Los Angeles v. State of California, (1987) 43 Cal. 3d 46

Services to the Public

- Proposed Decision: School lead testing most closely resembles *County of Los Angeles II* (elevator safety regulations)
- Everyone had to upgrade their own elevators
- Everyone is not testing their own fixtures for lead
- City is testing schools for lead, at their request
- Employee benefits cases are not analogous

Water Service is a Governmental Function

- Proposed Decision: Water service is a proprietary function
- Derived from old court opinions on sovereign immunity and torts
- 5,314 of 6,970 water systems are privately owned

Water Service is a Governmental Function

- 81% of residents receive potable water from public agencies
- Propriety vs. governmental distinction abolished by the Torts Claim Act.

Water Service is a Governmental Function

- US Supreme Court: “We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions.”
- Issued in the context of taxes
- Specifically recognized private companies also provide water service
- Limited the proprietary function rule to torts

- *Brush v. Commissioner of Internal Revenue*, (1937) 300 U.S. 352

Water Service is a Governmental Function

- California Supreme Court: “pueblo rights, and hence the rights of its successor, the City of San Diego, to whatever of the waters of the San Diego river were from time to time required for the needs of the pueblo and of the city and of the inhabitants of each, were rights which were essentially ‘governmental’ in character . . . and that the term ‘proprietary’ . . . has no application”

- *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105

Water Service is a Governmental Function

- Private companies perform governmental functions:
- Operating prisons
 - *Richardson v. McKnight*, (1997) 521 U.S. 399; *Pennsylvania Dept. of Corrections v. Yeskey*, (1998) 524 U.S. 206
- Trash collection
 - *Davis v. City of Santa Ana*, (1952) 108 Cal. App. 2d 669; *Glass v. City of Fresno*, (1936) 17 Cal. App. 2d 555.
- Water service is a governmental function, even though there are private water companies

School Lead Testing is a Governmental Function

- Do not need to be a water supplier to perform lead testing on school property
- Building inspection on private property is a governmental function
- Protecting health of children and students is a governmental function

- *Denman v. City of Pasadena*, (1929) 101 Cal. App. 769

- *Kellar v. City of Los Angeles*, (1919) 179 Cal. 605; *Davie v. Board of Regents*, (1957) 66 Cal. App. 693

Purpose of State Mandates Law

- “the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believes should be extended to the public.”
- Should not be able to avoid a reimbursable state mandate by transferring obligation from one local agency to another

- *County of Los Angeles v. State of California*, (1987) 43 Cal. 3d 46

Questions?

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 27, 2019, I served the:

- **Decision adopted March 22, 2019**
- **Claimant's PowerPoint Presentation Presented at the Commission Hearing on March 22, 2019 filed March 21, 2019**

Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System
No. 3710020, effective January 18, 2017
City of San Diego, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 27, 2019 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/25/19

Claim Number: 17-TC-03

Matter: Lead Sampling in Schools: Public Water System No. 3710020

Claimant: City of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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