

**ITEM 2
PROPOSED MINUTES**

COMMISSION ON STATE MANDATES

State Capitol, Room 126
Sacramento, California
December 2, 2003

Present: Chairperson James Tilton
 Representative of the Director of the Department of Finance
 Member William Sherwood
 Representative of the State Treasurer
 Member Walter Barnes
 Representative of the State Controller
 Member John Lazar
 City Council Member

Vacant: Representative of the Director of the Office of Planning and Research
 Local Elected Official
 Public Member

CALL TO ORDER AND ROLL CALL

Vice Chairperson Sherwood called the meeting to order at 1:31 p.m.

ELECTION OF CHAIRPERSON

Item 1 Staff Report

Paula Higashi, Executive Director, noted that the annual election of officers was usually held in January, but since the office of Chairperson was vacant, the Commission's regulations required that one be elected for the remainder of the 2003 term. Member Sherwood nominated Ms. Donna Arduin, the Director of the Department of Finance, as Chairperson. With a second by Member Barnes, Ms. Arduin was unanimously elected.

APPROVAL OF MINUTES

Item 2 December 2, 2003

Member Sherwood noted that Mr. Van Houten represented the State Treasurer's Office at the last hearing. Member Sherwood stated that he met with Mr. Van Houten, who indicated that the minutes were acceptable. Therefore, upon motion by Member Sherwood and second by Member Lazar, the minutes were adopted. Chairperson Tilton abstained.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)

PROPOSED STATEMENT OF DECISION – TEST CLAIMS

- Item 8 *Dismissal of Standardized Account Code Structure, 97-TC-17, 02-TC-14*
Brentwood Union School District, Claimant
Education Code Section 41010
Statutes 1993, Chapter 237 (SB 94); Statutes 1995, Chapter 525 (AB 438);
Statutes 1997, Chapter 299 (AB 1578)
California School Accounting Manual, Part II
California Department of Education Letters Dated October 21, 1994;
December 22, 1995; November 1996; March 24, 1997 (Draft Version); and
September 8, 1997
California State Board of Education Agenda and Full Board Minutes for
April 11, 1997 Meeting

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

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

- Item 10 *Sexual Assault Response Procedures, 99-TC-12*
Los Angeles Community College District, Claimant
Education Code Sections 67385, 67390 and 67391.
Statutes 1987, Resolution Chapter 105 (SB 339); Statutes 1990, Chapter
423 (AB 3098); Statutes 1991, Chapter 1068 (AB 365); and Statutes 1995,
Chapter 758 (AB 446)

- Item 11 *Absentee Ballots: Tabulation by Precinct (formerly known as Absentee
Ballots II), 00-TC-08*
County of Orange, Claimant
Elections Code Sections 15111, 15321 and 21000
Statutes 1999, Chapter 697 (AB 1530)

- Item 12 Proposed Consolidation of *Charter Schools I*, CSM-4437
Los Angeles County Office of Education and
San Diego Unified School District, Claimants
Education Code Section 47605, Subdivision (b), and former
Subdivisions (j)(1), (j)(2), and (j)(3); and 47607, Subdivisions (a) and (b)
Statutes 1992, Chapter 781 (SB 1448)
and
Proposed Parameters and Guidelines *Charter Schools II*, 99-TC-03
Education Code Sections 47605, Subdivisions (j)(1) and (k)(3),
47605.5, 47607, and 47614
Statutes 1998, Chapters 34 and 673 (AB 544 and AB 2417)

- Item 13 Proposed Consolidation of *AIDS Prevention Instruction I*, 99-TC-07
Sweetwater Union High School District, Claimant
Education Code Sections 51201.5 and 51229.8
Statutes 1991, Chapter 818 (AB 11)
and
Proposed Parameters and Guidelines for *AIDS Prevention Instruction II*,
00-TC-01
Education Code Sections 51201.5, 51229.8, 51554 and 51553,
Subdivision (b)(1)(A)
Statutes 1998, Chapter 403 (SB 1110)

Member Sherwood moved for adoption of the consent calendar, which consisted of items 8, 10, 11, 12, and 13. With a second by Member Lazar, the consent calendar was unanimously adopted.

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)

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

- Item 3 Staff Report

Ms. Higashi reported that no appeals were filed.

TEST CLAIMS

- Item 4 *Integrated Waste Management*, 00-TC-07
Santa Monica and Lake Tahoe Community College Districts, Co-Claimants
Public Resources Code Sections 40148, 40196.3, 42920-42928
Public Contract Code Sections 12167, 12167.1
Statutes 1992, Chapter 1116 (AB 3521)
Statutes 1999, Chapter 764 (AB 75)
Manuals of the California Integrated Waste Management Board
- Item 5 *School Accountability Report Cards II and III*, 00-TC-09, 00-TC-13, and 02-TC-32, Empire Union School District, Sweetwater Union High School District, and Bakersfield City School District, Claimants
Education Code Sections 33126, 33126.1, 41409
Statutes 1997, Chapter 912 (AB 572); Statutes 2000, Chapter 996 (SB 1632)
Statutes 2001, Chapters 159 (SB 662) and 734 (AB 804); and Statutes 2002, Chapter 1168 (AB 1818)

PROPOSED STATEMENTS OF DECISION – TEST CLAIM

- Item 6 *Integrated Waste Management*
See Item 4 Above
- Item 7 *School Accountability Report Cards II*
See Item 5 Above

Items 4, 5, 6, and 7 were postponed.

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

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

- Item 9 *Administrative License Suspension*, 98-TC-16
City of Newport Beach, Claimant
Vehicle Code Sections 13202.3, 13353, 13353.1, 13353.2, 14100, 23136, 23137, 23138, 23139, 23140, 23157, 23158.2, 23158.5
As Added or Amended by Statutes 1989, Chapter 1460 (SB 1623)
Statutes 1990, Chapter 431 (SB 1150); Statutes 1992, Chapter 1281 (AB 3580); Statutes 1993, Chapters 899(SB 689) and 1244 (SB 126); Statutes 1994, Chapter 938 (SB 1295), and Statutes 1997, Chapter 5 (AB 74)

Cathy Cruz, Program Analyst, presented this item. She noted that the Commission partially approved the *Administrative License Suspension* test claim on August 29, 2002. The test claim legislation became effective on July 1, 1990, and generally authorizes a peace officer, on behalf of the Department of Motor Vehicles, to immediately seize a valid California driver's license in the possession of a person arrested or detained for driving under the influence of alcohol, to immediately serve an order of suspension or revocation, and to issue a temporary driver's license to the driver.

Ms. Cruz stated that before the Commission was a revised parameters and guidelines proposal issued on November 26, 2003. This version included indirect costs language, allowed for reimbursement of postage and envelopes, and added additional citations for clarifying purposes. She also indicated that this version included the Bureau of State Audits' recommended language as set forth in the audit report on the *Peace Officer Procedural Bill of Rights and Animal Adoption* programs. If adopted, the language found under section X. would be included in all future parameters and guidelines.

The following outstanding issues were outlined:

1. whether the claimant's proposed administrative activities for developing and updating policies and procedures, and training, were reimbursable; and
2. the proposed uniform time allowances.

Staff recommended that the Commission adopt staff's proposed parameters and guidelines.

Parties were represented as follows: Glen Everroad and Juliana Gmur, on behalf of the City of Newport Beach; Allan Burdick, representing the City of Newport Beach and the California State Association of Counties; Patrice Rogers, Barbara Hiyama Zweig, and Mark Slaughter, with the Department of Motor Vehicles; Captain Chris Jenkins and Sergeant L.D. Maples, with the California Highway Patrol; and Susan Geanacou and Elliott Mandell, with the Department of Finance.

Mr. Burdick requested a continuance of the item in order to allow time for a pre-hearing conference to resolve particular issues. He noted that this request was made previously, but was denied by the Executive Director. He also pointed out that the lead counsel on this matter was unable to attend the hearing because of an emergency.

Ms. Gmur noted that this matter was originally scheduled for the September hearing and that an errata sheet was to be issued to address some problems prior to that hearing. However, because

of an emergency, the matter was continued to this December meeting. She indicated that as of November 5, 2003, no errata sheet had been issued. Therefore, the claimant responded to the proposed parameters and guidelines and requested a pre-hearing. A response to the request was not received until November 26, when a new proposal was also issued. Ms. Gmur stated that there were still issues with the revised staff proposal.

Mr. Burdick mentioned that there was a number of issues to be discussed and staff informed the claimant only two days ago that the request was denied.

Chairperson Tilton requested reaction from Paul Starkey, Chief Legal Counsel, or Ms. Higashi. Ms. Higashi first asked staff to respond to the issue of the filing that was received.

Ms. Cruz explained that the final staff analysis for the September hearing was issued on September 4. The claimant filed a request to postpone the hearing on the matter, which the Executive Director granted on September 23. She indicated that between September 23 and November 11, the date the December hearing analysis was released, there had been no written communication. A written request by the claimant to postpone the hearing was received on November 14, which is considered a late filing for the December agenda.

Ms. Higashi added that the document was labeled "Comments on Commission Staff's Proposed Parameters and Guidelines and Staff Analysis," and was received after the binders had been sent to the members. She noted that the last sentence of the seven-page document requested a pre-hearing conference with Commission staff; however, it was overlooked because staff reviewed the document as comments to staff's proposal. When the claimant called this to her attention, staff had already revised the parameters and guidelines proposal to address some of the concerns and it was too late to convene a pre-hearing because the Commission's regulations require a ten-day notice. She maintained that a pre-hearing conference had already been conducted for this matter, and thus, another one was not warranted. Ms. Higashi further noted that other than the claimant's November 14th filing, no other comments had been received.

Member Lazar asked if staff and the parties were prepared to discuss the proposed parameters and guidelines if the request for continuance was denied. Ms. Higashi responded that staff and the witnesses present were prepared. However, Mr. Burdick argued that most of the witnesses present represented the state, but this was a law enforcement issue. He stated that unfortunately, the claimant was not able to bring its experts in law enforcement to this hearing, and thus, the claimant's representatives could not accurately say whether or not the proposed unit times were reasonable. Further, he submitted that the revised proposal was very different and there were substantial differences that should be worked out in a pre-hearing.

Mr. Everroad agreed that there were issues raised in staff's latest proposal that could be worked through given an opportunity to discuss them at a pre-hearing. Ms. Cruz pointed out that staff's revised proposal did not contain substantive changes other than the addition of the indirect costs language requested by the claimant. Mr. Everroad explained that unfortunately the lead counsel was unavailable, but she also agreed there were issues that could be resolved.

Ms. Higashi confirmed Chairperson Tilton's observation that the issues before the Commission were the same as those before it in September. Ms. Higashi maintained that there were no new issues.

Mr. Everroad acknowledged that some of the changes were made at the claimant's request; however, he maintained that because their lead counsel was unavailable, they had not had the

opportunity or the time to review the revisions.

Member Barnes requested clarification as to the reason for postponing the item in September. Clarification was provided. He stated that regardless of where the request to make changes came from, the current proposal did contain fairly substantive changes from what was before the Commission in September.

Ms. Cruz clarified that the outstanding issues remained the same. Camille Shelton, Senior Commission Counsel, added that specifically, the main change was to allow for envelopes and other material fees outside of the unit time. The other changes were strictly for clarification purposes and were non-substantive.

Member Barnes maintained that the revised proposal included substantive changes from the last proposal. He was concerned that granting the request to postpone the matter may only reopen issues that staff had already decided on.

Member Sherwood commented that the changes that staff made encompassed what the claimants requested. The areas of concern were the uniform allowance and the administrative costs. He noted that although there was a difference of opinion, all sides had already justified their points of view and another pre-hearing would not be beneficial. Considering next month's agenda and the existing workload, he suggested that the Commission move forward and make a decision.

Chairperson Tilton asked the claimant if there was disagreement that the changes were what they requested. Mr. Everroad reiterated that the lead counsel had not analyzed the changes, but it was indicated that there were significant differences that needed to be resolved.

Member Barnes indicated that staff's proposal did not incorporate all of the claimant's recommendations, but the changes that were made were specifically requested. He stated that he agreed with those changes but he did not see a basis for changing staff's recommendation relative to the other issues. Also considering the Commission's workload, he agreed that the Commission should proceed and make a decision.

Noting that there were no new issues before the Commission, Chairperson Tilton asked the claimant to present its case.

Mr. Burdick argued that there was no basis for the proposed unit times. He noted that the last pre-hearing focused on the time spent on activities associated with adults only. At that time the locals agreed on a unit time but it was indicated that there was no evidence to support the proposal. Thus, a time study of approximately 30 different cities and counties was conducted. The local law enforcement agencies were instructed to record the amount of time involved in performing the activities. The completed study, which showed that a greater amount of time was necessary than the prior proposal, was submitted to the Commission.

Also, Mr. Burdick emphasized that local law enforcement agencies, particularly the counties' deputy sheriffs, needed additional time to perform the activities because they were administrative and not related to criminal activities. Whereas these activities were a high priority for the California Highway Patrol, he argued that deputy sheriffs were criminal specialists and not normally involved in administrative per se processes. Mr. Burdick stated that the staff determined this study to be irrelevant and instead based its proposal on the time study done by the California Highway Patrol, which he believed was an unscientific telephonic survey rather than a documented field study. He stated that they also had issues with the time related to the activities for juveniles and other issues were still being researched.

Captain Jenkins stated that the Highway Patrol's survey was conducted in 1999 in eight field divisions. He submitted that the forms were not difficult and regardless of whether a highway patrol officer or a deputy sheriff was filling them out, there should not be a significant variance in the time it takes to complete them. He maintained that 15 minutes was an appropriate unit time to complete the forms.

Member Sherwood requested clarification about the method used in the Highway Patrol's survey. Ms. Rogers explained that the study was conducted in a manner that was representative statewide. She clarified that the study resulted in a range of 9 to 21 minutes across the state, an average time of about 14 minutes. The 15-minute figure resulted from the meeting among the parties in August.

Ms. Gmur asserted that staff rejected that stipulation as not being supported by evidence. Therefore, the City of Newport Beach proceeded with their time study.

Ms. Rogers pointed out that the claimant's time study was invalid because the responses were not representative of the state. Mr. Slaughter added that the survey had duplicative activities and the cover letter suggested that more money could be obtained by completing the survey. Ms. Rogers argued that the survey tool was very biased. These concerns were pointed out at the August meeting, which resulted in the claimant agreeing to the unit time of 15 minutes.

Ms. Gmur stated that since Commission staff did not accept this stipulation, evidence had to be brought forward. She duly noted the Department of Motor Vehicles objections to the claimant's study, but argued that the Highway Patrol's study was not available for them to review. Other than a declaration, she maintained that there was no other evidence to document the results and tools used.

Ms. Cruz addressed three points raised by the claimant and claimant representatives. As to the alleged stipulation, she noted that there was no agreement among the parties, and thus, no stipulation. Specifically, she pointed out that the California Highway Patrol and Department of Motor Vehicles supported 15 minutes for all administrative per se activities in letters dated July 23 and April 30, respectively. Conversely, the claimant, in a letter dated April 30, supported 15 minutes to complete the forms and an additional 15 minutes to administer the alcohol-screening test to minors. On the record, there was no agreement.

Regarding the proposed uniform time allowance, Ms. Cruz maintained that the basis for staff's recommendation was the Highway Patrol's study, but it was also consistent with the claimant's proposal dated May 1, 2003. In fact, while the claimant proposed 15 minutes to complete the forms and an additional 15 minutes to administer the alcohol-screening test, staff proposed 15 minutes and 16 minutes, respectively. Further, Ms. Cruz noted that staff did not accept the claimant's time study because of the objections raised by the Department of Motor Vehicles.

Ms. Hiyama-Zweig commented that staff's unit time proposal for administering the alcohol-screening test relied on a Department of Health Services regulation that requires a 15-minute observation period. However, she cited *Coniglio v. DMV*, arguing that the requirement was inapplicable to screening tests used when detecting the presence of alcohol rather than the concentration of alcohol. Thus, she asserted that the 15-minute observation period should not be used in determining the appropriate unit time to administer the test.

Chairperson Tilton asked for a technical clarification. Ms. Hiyama-Zweig clarified that there was no distinction made in the parameters and guidelines between minors and adults.

Ms. Shelton responded that in developing parameters and guidelines, the reimbursable activities must either be required by statute, which are identified in the Statement of Decision, or be reasonably necessary to comply with the mandated program. In this case, staff included the 15-minute observation period as reasonably necessary to comply with the program based on the California Highway Patrol's comments. Those comments indicated that it was the department's policy to encourage the 15-minute observation period for the preliminary alcohol-screening test based upon the standards for evidential breath testing contained in the Department of Health Services regulations.

Ms. Hiyama-Zweig believed that there was a misunderstanding.

Sergeant Maples explained that the Department of Health Services regulation found under title 17 was for evidentiary breath testing after arrest, not for the preliminary alcohol-screening device, which was a field sobriety test. He clarified that it was the Highway Patrol's departmental policy to recommend the 15-minute observation period for administration of the testing device in case the evidential test could not be taken to court. He explained that in case law, by training, and by policy, the 15 minutes begins the moment a driver is stopped. He noted, however, that at this moment, an officer is conducting a criminal investigation rather than enforcing an administrative law.

Chairperson Tilton asked a question about the process. Sergeant Maples provided clarification.

Mr. Slaughter commented that the title 17 regulation was not applicable to the preliminary alcohol-screening device. Therefore, agencies that chose to use the benchmark did so at their own discretion because it was not a requirement.

Ms. Shelton clarified that Vehicle Code section 23136 requires the officer to administer a preliminary alcohol-screening test to those minors that are detained. She maintained that this was a civil detention, not criminal. Therefore, while it was clear that this observation period was not required by law for an arrest, she stated that the issue was whether the Commission finds that it is reasonably necessary to have a 15-minute observation period to comply with Vehicle Code section 23136.

Captain Jenkins indicated that officers are not initially enforcing section 23136 when making a traffic stop. Rather they are investigating a case of driving under the influence, which is a criminal investigation.

Ms. Shelton stated that the difficulty with this claim was that what was reimbursable was not known until after the fact.

Ms. Hiyama-Zweig argued that there was a big distinction between measuring the presence of alcohol versus the alcohol concentration in a screening test on a minor. She stated that Vehicle Code section 23137 states that the preliminary alcohol-screening test is used to measure the presence of alcohol, which is supported by the *Coniglio* decision.

Chairperson Tilton observed that the 15-minute period did not appear to be additional time spent because of the mandate.

Ms. Hiyama-Zweig noted that not all officers had a preliminary alcohol-screening device.

Member Sherwood asked staff to clarify its rationale for including the 15-minute period in its recommendation. Ms. Shelton responded that staff relied on the California Highway Patrol's statement that it was their policy to encourage the use of the 15-minute observation period. In

response to Member Sherwood's inquiry, she stated that she would not change her recommendation based on the written record.

Chairperson Tilton requested clarification about staff's recommendation, which was provided by Ms. Shelton.

Mr. Burdick argued that deputy sheriffs mainly dealt with law enforcement rather than traffic enforcement issues. Thus, they did not have as much expertise as patrol officers in administering the tests. He also stated that he was still unclear as to the method used to conduct the Highway Patrol's study, whether it was done telephonically or if there was written documentation other than the declaration.

Ms. Rogers explained that the information was not telephonically transmitted, but written into the record in the response to the test claim in 1999.

Mr. Mandell stated that the Department of Finance did not agree that the second unit time for minors should be included.

After some discussion about the Department of Finance's concern, Ms. Shelton explained that the Commission already found in its Statement of Decision that the activities for minors that are detained under Vehicle Code sections 23136 and 23137 were by law civil in nature pursuant to Vehicle Code section 23138, consistent with the statute, and consistent with case law.

Mr. Mandell maintained that when a stop is initially made, it is not to enforce a civil action, and hence, the clock for reimbursement of that civil action should not begin.

Mr. Burdick provided a distinction between county deputy sheriffs and city police.

Ms. Rogers stated that since 1990, the California Highway Patrol had consistently conducted about 47 percent of the administrative per se actions. In most recent years, the California Highway Patrol conducted about 43 percent. The remainder was conducted by local entities.

Captain Jenkins reiterated that the forms were not difficult and that level of expertise was not relevant.

On a different issue, Ms. Rogers commented that local entities received federal grant money that should be offset against the claims. Ms. Shelton clarified that section VII. of the parameters and guidelines specifically addressed offsetting savings and reimbursements. Member Barnes stated that the issue of offsets could also be made clear in the claiming instructions.

Regarding the issue of training, Ms. Gmur asserted that its exclusion was an error. She stated that while the Department of Motor Vehicles provided training programs and videos free of charge, there were costs for the officers' time to participate in the training and costs to obtain substitute coverage while the officer was in training.

Mr. Everroad acknowledged that the Department of Motor Vehicles actively provides training on the *Administrative Per Se* program to local law enforcement. However, he argued that since 1997, there had been ten changes to the four forms, and with each revision, training was provided to all officers. The claimant submitted that costs related to training were incurred in complying with the mandated program.

Ms. Shelton pointed out that this program was initially enacted in 1990, which was before the reimbursement period. Within the reimbursement period, one 12-minute video was issued but most of its content was not related to the reimbursable activities. She explained that staff's

recommendation to deny the training component was based on the fact that the training courses encompassed topics that were not reimbursable.

Mr. Everroad contended that staff's position understated the training that was provided and that training included completion of the forms. Ms. Shelton noted that within the reimbursement period, the English forms were revised two times and the Spanish forms three times. The majority of the changes were cosmetic in nature and were not substantive. Mr. Everroad asserted that some of the changes required changes to the officers' activities, and thus, training was provided.

Pointing to evidence in the record, Ms. Shelton noted that within the reimbursement period, the claimant only issued one training bulletin. It was issued in March 2000 and dealt with the arrest report. Further, she maintained that evidence in the record suggests that training topics have not been limited to the reimbursable activities and have occurred at the request of the local agency. She indicated that the issue was whether training on the reimbursable activities was reasonably necessary to comply with the program.

Mr. Burdick stated that the parties should negotiate what was reasonable for training. Member Barnes disagreed.

Mr. Everroad stated that at one point training had been included, but then was recently stricken. He reiterated that locals do incur training costs that should be reimbursable. Member Barnes clarified that training was included initially in the claimant's proposed parameters and guidelines.

Ms. Rogers noted that the basic training would have been completed at the officer's academy.

Regarding Mr. Everroad's comment that training was included, Ms. Shelton indicated that staff requested further comments regarding training to gather more information. However, staff never recommended training as a reimbursable activity.

Mr. Burdick expressed his belief that the issue of training was never discussed at a pre-hearing conference.

Ms. Shelton responded that the rationale for requesting additional information was to make the record full so that the members, when making their decision, had full information on what training was actually provided. She maintained that based on the comments provided, staff continues to recommend that training is not reasonably necessary to comply with this program.

Ms. Gmur pointed out that a potentially large mathematical error may occur in the calculation of the unit time because the minutes had not been converted to hours. Staff stated that the unit times could be converted to the percentage of the hour.

Mr. Burdick brought to the Commission's attention the issue over officer hearing fees and witness fees. The local governments believed these costs were reimbursable but they were still waiting for a legal opinion from the Attorney General's Office.

Ms. Shelton stated that the Commission's Statement of Decision already denied reimbursement for the time spent by officers when they were subpoenaed for an administrative hearing. She maintained that the Commission no longer had jurisdiction over the issue, even to reconsider, since the Statement of Decision was adopted in 2002 and more than 30 days had elapsed.

[At this time, a short break was taken.]

Chairperson Tilton raised the issue about the 15-minute observation period for minors, noting that it appeared to be a maximum time because it gave no credit for any time used during the normal stop for arrest procedures.

Member Sherwood commented that the activity of requesting to administer the preliminary alcohol-screening test was included in the Statement of Decision but the 15-minute observation period was not a requirement. Ms. Shelton affirmed.

Chairperson Tilton was concerned about there being an overlap of time with the civil and criminal procedures. Ms. Shelton clarified that there would not be an overlap because the statute was civil and requires an officer to determine the presence of alcohol in the blood by conducting a preliminary alcohol-screening test. She explained that based on the comments submitted by the California Highway Patrol, which indicated a policy to use a 15-minute observation period, staff felt that it would be reasonable for local agencies to do the same.

Ms. Rogers commented that the majority of zero tolerance cases resulted in drivers ultimately being arrested. Ms. Shelton added that in the Statement of Decision, it was noted that 83.7 percent of minors that are stopped are ultimately arrested. Thus, the recommended 15-minute observation period only applies to 16 percent of minors that are stopped.

Sergeant Maples believed that unless otherwise determined, an officer's expectation is that when making a stop, a criminal rather than civil statute was being enforced.

Ms. Shelton explained that Vehicle Code section 23152 requires officers to stop a driver if there is probable cause that driving under the influence is involved, and to admonish the driver and administer a test. At this point, it would be considered a criminal investigation. However, in this case, she reiterated that the administration of the preliminary alcohol-screening test for minors was part of a civil detention statute. If the driver were ultimately arrested, then the administration of the preliminary alcohol-screening test would not be reimbursable.

Mr. Mandell stated that 15 minutes was a cap and the time should instead be a little less.

Ms. Rogers submitted that an officer does not stop the criminal investigation of driving under the influence at the time the screening test reading was determined.

Ms. Shelton maintained that an officer's expectation was not relevant because officers do not do their jobs thinking about what activities would be reimbursable. She stated that officers perform criminal investigations in every case, but after the fact, someone from the administrative office goes back to determine the amount of time it took to perform a particular reimbursable activity. Also, she noted the reason for the higher time recommendation for minors that are detained under section 23136 is that the Commission found two additional activities to be reimbursable for this group.

Chairperson Tilton asked for clarification regarding workload, which was provided by Ms. Shelton.

Member Sherwood made a motion, which was seconded by Member Barnes, to adopt the staff recommendation with the amendment to convert the unit times to the percentage of an hour. Member Lazar asked how many votes were necessary for majority approval. Ms. Higashi responded, and Mr. Starkey confirmed, that three votes were necessary. The motion carried unanimously.

Item 14 Proposed Amendment of *Criminal Background Checks I*, 97-TC-16
Napa County Office of Education, Requestor
Education Code Sections 45125, 45125.1, 44332.6, 44830.1, 45122.1
Statutes of 1997, Chapters 588 (AB 1610) and 589 (AB 1612), and Statutes
1998, Chapter 840 (AB 2102)

Shirley Opie, Assistant Executive Director, presented this item. She noted that in 1997, the Legislature enacted the Michelle Montoya School Safety Act, which requires school districts to obtain criminal background checks on specified types of district and contract employees. The act also prohibits districts from employing or retaining temporary, substitute, or probationary employees who have been convicted of a serious or violent felony.

Ms. Opie indicated that the Commission adopted its Statement of Decision on March 25, 1999, and the parameters and guidelines on October 28, 1999. The Legislature subsequently amended the *Criminal Background Checks* program and the Michelle Montoya School Safety Act in 1998 and 1999. Thus, in February 2003, the Commission adopted its Statement of Decision for the *Criminal Background Checks II* test claim.

Staff recommended that the Commission adopt the proposed amendment to the *Criminal Background Checks* Parameters and Guidelines, which reflects the change in law associated with the school districts' fee authority for processing criminal background checks for non-certificated applicants, as determined by the Commission in its decision in *Criminal Background Checks II*. Ms. Opie noted that the MCS Education Services was in disagreement with the application of the fee authority.

Parties were represented as follows: David Scribner, representing the Napa County Office of Education; and Matt Aguilera, with the Department of Finance.

Mr. Scribner expressed disagreement with staff's proposal to strike the eight activities found under subdivision A for non-certificated employees. While he agreed that the fee authority outlined in Education Code section 45125, subdivision (f)(1), can be applied to three of the activities, he argued that the remaining five, listed as activities three through seven, should be reimbursed on an ongoing basis since the total fee cannot be determined until the entire process was completed.

Eric Feller, Commission Counsel, stated that staff's position was based on two things: 1) the test claim statute, which removed the \$2 fee cap and states that the fee shall not exceed the actual costs incurred by the agency; and 2) the Commission's finding in the Statement of Decision that the fee authority includes processing applications for non-certificated applicants. Staff believed that the fee authority was broad enough to include all eight activities, and Mr. Scribner's objections regarding the difficulty of the fee determination was not relevant because the fee authority provision of Government Code section 17556 was broad enough to cover the fee determination.

Regarding Mr. Scribner's issue of not knowing the total fee ahead of time, Chairperson Tilton noted that nothing prevented a school district from first estimating costs by looking at workload, setting a fee accordingly, and then later reassessing the fee based on actual data.

Mr. Scribner stated that estimates could be made, but pointed out that the Education Code only allowed actual costs to be charged. He asserted that allowing school districts to claim actual costs for the five downstream activities as they occurred and applying the fee authority only to

the three activities of taking fingerprints, filling out the card, and submitting it the Department of Justice would ensure that only actual costs are charged to the applicant each time a card was submitted.

Member Barnes stated his belief that the removal of the cap on the fees was intended to provide schools the authority to charge and cover the costs of the activities. Mr. Feller noted that the plain language of the statute would indicate that. Thus, because of the statute's intent, Member Barnes indicated that he was not sure how the Commission could provide relief to the districts within the context of the parameters and guidelines.

Mr. Scribner argued that the intent could also be that the cap was removed because it was found that the cost to obtain the fingerprints and complete the card was more than the cap, to which Member Barnes agreed. From this point of view, Mr. Scribner maintained that the fee authority was only meant to address three of the eight activities.

Ms. Opie reiterated staff's position that the fee was intended to cover the actual cost, which includes all eight of the activities under subdivision A, and that the total fee not exceed the actual cost of providing the service.

Following a discussion about actual costs from an accounting perspective, Member Barnes stated that the Controller's Office could only deal with the concept of the legislation, which was that the fees should cover the costs. Member Sherwood agreed, noting that the Commission would not be in a position to have the state reimburse something that was set-up in statute to be covered by fees. Member Barnes added that the law would be absurd on its face to have the cap on the fee lifted with the idea of covering the full costs and yet have a process that prevented recovery of full costs. Member Barnes also stated that there should be a way to deal with this issue, but it could not be dealt with within the context of the parameters and guidelines.

Mr. Aguilera concurred with the staff analysis.

Member Barnes made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried unanimously.

Item 15 *Criminal Background Checks II*, 00-TC-05
Napa County Office of Education, Claimant
Education Code Sections 44830.1, 44830.2, 45122.1 45125,
45125.01,45125.1 and 45125.2; Statutes 1998, Chapters 594 (AB 1392) and
840 (AB 2102); Statutes 1999, Chapter 78 (AJR 19);
California Code of Regulations, Title 11, Sections 700-708

Shirley Opie, Assistant Executive Director, presented this item. She stated that the Commission adopted its Statement of Decision on February 27, 2003. Consistent with the Statement of Decision, staff proposed the following reimbursable activities:

- certain communications with the Department of Justice, including entering into contracts with the Department of Justice in order to receive notification of subsequent arrests;
- storing criminal history records and reports of subsequent arrests received from the Department of Justice in a locked file separate from other files;
- destroying information received from the Department of Justice upon a hiring determination;

- requesting that the Department of Justice forward copies of non-certificated employees' fingerprint cards to the Federal Bureau of Investigation;
- maintaining a list indicating the current number of employees who have not completed the requirements;
- requesting subsequent arrest service from the Department of Justice; and
- determining whether contractors will have limited contact with pupils, and if so, installing a physical barrier at construction work sites or developing contract language that requires the contractor to continually supervise and monitor these employees.

Staff recommended that the Commission adopt staff's proposed parameters and guidelines.

Parties were represented as follows: David Scribner, representing the Napa County Office of Education; and Matt Aguilera, with the Department of Finance.

Mr. Scribner and Mr. Aguilera concurred with the staff recommendation.

Member Lazar made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried unanimously.

STAFF REPORT

- Item 16 Bureau of State Audits Report, *State Mandates: The High Level of Questionable Costs Claimed Highlights the Need for Structural Reforms of the Process*, 2003-106.

Nancy Patton, Staff Services Manager, presented this item. She noted that on October 15, 2003, the Bureau of State Audits released its audit report on the *Peace Officers Procedural Bill of Rights* and *Animal Adoption* programs. The Commission was required to report within 60 days, six months, and one year of the report's release. The proposed 60-day report was before the Commission, and Ms. Patton outlined the included work plan that detailed the tasks that Commission staff had completed or will complete to implement the following recommendations:

1. For the Legislature to direct the Commission to amend the *Animal Adoption* Parameters and Guidelines in order to correct the formula for determining the reimbursable portion of requiring additional shelter space.

Staff met with the Joint Legislative Audit Committee. AB 533, which directs the Commission to amend the parameters and guidelines, has been introduced. Once enacted, Commission staff will develop the revised parameters and guidelines language and schedule the proposed revision for hearing.

2. For the Commission to notify parties in the parameters and guidelines that the Statement of Decision is legally binding and provides the legal and factual basis for the parameters and guidelines. It should also be noted that such legal and factual findings are found in the administrative record of the test claim.

This language was included in the *Administrative License Suspension* Parameters and Guidelines that was just adopted by the Commission. This language will be included in all future parameters and guidelines.

3. For the Commission to work with the State Controller, other state agencies, and interested parties to revise the process to allow the Controller sufficient time to perform field reviews and identify any inappropriate claiming, as well as to suggest changes to parameters and guidelines.

The Joint Legislative Audit Committee reported that language would be included in AB 533 to provide the Controller clear statutory authority to conduct field reviews of reimbursable claims after they are submitted and before they are paid. In addition, staff is meeting with the Controller's Office and will schedule additional meetings with the Department of Finance and interested parties. Staff is also drafting a legislative proposal to act as a placeholder for any statutory changes needed to implement this recommendation.

4. For the Commission staff to more carefully analyze the claims data used to develop statewide cost estimates and to report to the Legislature the incomplete nature of the initial claims data.

Commission staff will implement this recommendation when it develops future statewide cost estimates beginning in January.

5. For the Commission to continue to assess its caseload and to work with the Department of Finance and the Legislature to obtain sufficient staffing to deal with its caseload backlog.

Commission staff submitted a budget change proposal to the Department of Finance requesting temporary additional resources.

Staff recommended that the Commission approve the proposed work plan. Once approved, it will be transmitted to the Bureau of State Audits.

Chairperson Tilton commented that the work plan should be modified if the Commission does not receive the full resources requested in the budget change proposal.

Member Lazar made a motion to adopt the proposed work plan. With a second by Member Sherwood, the motion carried unanimously.

PROPOSED AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS,
TITLE 2, DIVISION 2, CHAPTER 2.5.

- Item 17 Adoption of Proposed Amendments to Sections 1181.1, 1183.01, 1183.3, and Proposed New Section 1189.11.

Shirley Opie, Assistant Executive Director, presented this item. She noted that the rulemaking package incorporated the current methodology for developing statewide cost estimates into the Commission's regulations. It also included changes to the conflict of interest code that would require designated filers to complete ethics training as required by changes in the law that became effective at the beginning of this calendar year.

Ms. Opie stated that the proposed regulations were issued for public comment and no written comments or request for hearing were received. She noted that the governor signed Executive Order S2-03, regarding regulations, on November 17, 2003. Mr. Starkey has reviewed the order, and by its terms, it does not apply to this rulemaking because the Commission is exempt from the

Administrative Procedure Act. Also, these regulations have no impact on business. Staff recommended that the Commission adopt the proposed rulemaking package.

Member Sherwood made a motion to adopt the rulemaking. With a second by Member Barnes, the motion carried unanimously.

STAFF REPORTS

Item 18 Chief Legal Counsel's Report
Recent Decisions, Litigation Calendar

Mr. Starkey reported the following:

- *New Filings.* There were additional filings in the superior court related to the *Graduation Requirements* program. A case was filed involving the Castro Valley and San Jose Unified School Districts.
- *Recent Decisions.* The Palos Verdes Peninsula Unified School District case, in which the superior court upheld the Commission's decision, appears to be concluded as no appeals have been made.
- *New Decision.* Notice of a decision regarding the Property Tax Administration case was received. The appellate court decided in favor of the Commission.

Item 19 Executive Director's Report
Budget, Workload, Legislation, Next Hearing

At this time, a short presentation was made in honor of Ms. Shirley Opie, who is retiring. She was presented with a resolution and watch by Chairperson Tilton. The Commission members wished her well in retirement and thanked and acknowledged her for her years of dedicated service to the state.

Ms. Opie thanked the Commission and her staff, and introduced her family.

Ms. Higashi noted the following:

- *Workload.* The Commission currently has 133 test claims pending.
- *Budget.* The Budget Act of 2003 reduced the Commission's budget. The proposed budget for 2004-2005 is pending. A transition report on the Commission's activities to date was filed with the new administration.
- *Legislation.* The Local Taxpayers and Public Safety Protection Act, an initiative, is pending. The proposal was filed by the League of Cities, the California State Association of Counties, and the Special Districts Association. The initiative specifically amends article XIII B, section 6 of the Constitution and is under review.
- *Future Hearing Agendas.* The January 29, 2004 hearing agenda is expected to be very long. Scheduled to be heard are four test claims, one set of parameters and guidelines, and one statewide cost estimate.

Member Barnes commented that this would be the longest agenda he had seen since joining the Commission. Thus, he encouraged staff and the claimants to do what was necessary to keep these items on the agenda.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.

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. *County of San Diego v. Commission on State Mandates, et al.*, Case Number D039471, in the Appellate Court of the State of California, Fourth Appellate District, Division 1. CSM Case No. 01-L-16 [*San Diego MIA*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 02CS00994, in the Superior Court of the State of California, County of Sacramento. CSM Case No. 02-L-01 [*School Bus Safety II*]
3. *San Diego Unified School District v. Commission on State Mandates, et al.*, Case Number S109125, in the Supreme Court of the State of California. CSM Case No. 02-L-02 [*Pupil Expulsions*]
4. *County of San Bernardino v. Commission on State Mandates of the State of California, et al.*, Case Number B163801, in the Appellate Court of the State of California, Second Appellate District. CSM Case No. 02-L-04 [*Property Tax Administration*]
5. *San Diego Unified School District and San Juan Unified School District v. Commission on State Mandates, et al.*, Case Number C044162, in the Appellate Court of the State of California, Third Appellate District. CSM Case No. 02-L-05 [*Physical Performance Tests*]
6. *Palos Verdes Peninsula Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS00897, in the Superior Court of the State of California, County of Sacramento. CSM Case No. 02-L-06 [*Eastview Optional Attendance Area*]
7. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 03CS01069 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-01 [*Animal Adoption*]
8. *Department of Finance v. Commission on State Mandates, et al.*, Case Number 03CS01432 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]

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).)

PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a), and 17526.

Discussion and action, if appropriate, on report from the Personnel Sub-Committee.

Hearing no further comments, Chairperson Tilton 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

Chairperson Tilton 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 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 Tilton adjourned the meeting at 4:56 p.m.

PAULA HIGASHI
Executive Director