

Item 1

Proposed Minutes

COMMISSION ON STATE MANDATES

Location of Meeting: Room 447
State Capitol, Sacramento, California
May 25, 2012

Present: Member Pedro Reyes, Chairperson
Representative of the Director of the Department of Finance
Member Francisco Lujano, Vice Chairperson
Representative of the State Treasurer
Member Richard Chivaro
Representative of the State Controller
Member Ken Alex
Director of the Office of Planning and Research
Member Sarah Olsen
Public Member
Member Carmen Ramirez
City Council Member
Member Don Saylor
County Supervisor

This item was rescheduled from July 27, 2012 to September 28, 2012. Except to reflect the date change, no other revisions were made to this document.

NOTE: The transcript for this hearing is attached. These minutes are designed to be read in conjunction with the transcript.

CALL TO ORDER AND ROLL CALL

Chairperson Reyes called the meeting to order at 9:30 a.m. He introduced and welcomed Oxnard City Council Member Carmen Ramirez as a new Commission Member. Chairperson Reyes also welcomed new Commission Executive Director Heather Halsey.

Executive Director Heather Halsey called the roll.

APPROVAL OF MINUTES

Item 1 March 23, 2012

Member Olsen made a motion to adopt the minutes. With a second by Member Chivaro, the March 23, 2012 hearing minutes were adopted by a vote of 5-0, with member Ramirez and Chairperson Reyes abstaining.

CONSENT CALENDAR

HEARINGS AND DECISIONS ON TEST CLAIMS, PARAMETERS AND GUIDELINES, AND INCORRECT REDUCTION CLAIMS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (GOV. CODE, § 17551, 17557, and 17559) (action)

PARAMETERS AND GUIDELINES AND PARAMETERS AND GUIDELINES
AMENDMENTS

- Item 7* *Developer Fees, 02-TC-42*
Government Code Sections 65970, 65971, 65972, 65973, 65974, 65974.5, 65975, 65976, 65977, 65978, 65979, 65980, 65981
Statutes 1977, Chapter 955; Statutes 1979, Chapter 282; Statutes 1980, Chapter 1354; Statutes 1981, Chapter 201; Statutes 1982, Chapter 923; Statutes 1983, Chapter 1254; Statutes 1984, Chapter 1062; Statutes 1985, Chapter 1498; Statutes 1986, Chapters 136 and 887; Statutes 1994, Chapter 1228
Clovis Unified School District, Claimant
- Item 8* *Local Agency Formation Commissions, 11-PGA-07 (02-TC-23)*
Government Code Section, 56425(i)(1) (formerly Subdivision (h)(1))
Statutes 2000, Chapter 761
Department of Finance, Requestor
- Item 9* *In-Home Supportive Services II, 11-PGA-08*
Welfare and Institutions Code Sections 12301.3, 12301.4 and 12302.25
Statutes 1999, Chapter 90 and Statutes 2000, Chapter 445
Department of Finance, Requestor

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

A. STATEWIDE COST ESTIMATE

- Item 10* *Mandate Reimbursement Process II, 05-TC-05*
Government Code Section 17553(b)(1)(C) through (G) and (b)(2)
California Code of Regulations, Title 2, Sections 1183, Subdivision (d) (Register 2005, No. 36, Effective September 6, 2005)
Statutes 2004, Chapter 890 (AB 2856)
City of Newport Beach, Claimant

Member Chivaro made a motion to adopt the consent calendar. With a second by Member Lujano, the consent calendar was adopted by a vote of 7-0.

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

- Item 2 Staff Report (if necessary)

There were no appeals to consider.

HEARINGS AND DECISIONS ON TEST CLAIMS, PARAMETERS AND GUIDELINES, AND INCORRECT REDUCTION CLAIMS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (GOV. CODE, § 17551, 17557, and 17559) (action)

Executive Director Heather Halsey swore in parties and witnesses participating in the hearing.

A. TEST CLAIMS

- Item 3 *Juvenile Offender Treatment Program Court Proceedings*, 04-TC-02
Welfare and Institutions Code Sections 779, 1731.8, 1719, and 1720
Statutes 2003, Chapter 4
County of Los Angeles, Claimant

This test claim addresses the duties of public defenders in the juvenile justice system as a result of a test claim statute that realigned the duties of the former Youthful Offender Parole Board (YOPB) and the California Youth Authority (CYA).

Senior Commission Counsel Eric Feller presented this item and recommended that the Commission adopt the proposed final staff analysis and statement of decision denying the test claim because the amendments to the statute either clarify existing law or transfer duties imposed on YOPB to CYA and therefore do not impose new requirements on counties.

Parties were represented as follows: Leonard Kaye, representing Los Angeles County; Lori A. Harris, Los Angeles County Deputy Public Defender ; and Susan Geanacou and Carla Shelton representing the Department of Finance.

Following discussion among the Commission members, staff, and parties, Member Chivaro made a motion to adopt the staff recommendation. With a second by Member Alex, the staff recommendation to adopt the statement of decision denying the test claim was adopted by a vote of 7-0.

- Item 4 *Public Contracts (K-14)*, 02-TC-35
Public Contract Code Sections 2000, 2001, 3300, 6610, 7104, 7107, 7109, 9203, 10299, 12109, 20100, 20101, 20102, 20103.5, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, 20104.50, 20107, 20110, 20111, 20111.5, 20116, 20650, 20651, 20651.5, 20657, 20659, and 22300
Business and Professions Code Section 7028.15
Statutes 1976, Chapter 921; Statutes 1977, Chapter 36; Statutes 1977, Chapter 631; Statutes 1980, Chapter 1255; Statutes 1981, Chapter 194; Statutes 1981, Chapter 470; Statutes 1982; Chapter 251; Statutes 1982, Chapter 465; Statutes 1982, Chapter 513; Statutes 1983, Chapter 256; Statutes 1984, Chapter 173; Statutes 1984, Chapter 728; Statutes 1984, Chapter 758; Statutes 1985, Chapter 1073; Statutes 1986, Chapter 886; Statutes 1986, Chapter 1060; Statutes 1987, Chapter 102; Statutes 1988, Chapter 538; Statutes 1988, Chapter 1408; Statutes 1989, Chapter 330; Statutes 1989, Chapter 863; Statutes 1989, Chapter 1163; Statutes 1990, Chapter 321; Statutes 1990, Chapter 694; Statutes 1990, Chapter 808; Statutes 1990, Chapter 1414; Statutes 1991, Chapter 785; Statutes 1991, Chapter 933; Statutes 1992, Chapter 294; Statutes 1992, Chapter 799; Statutes 1992, Chapter 1042; Statutes 1993, Chapter 1032; Statutes 1993, Chapter 1195; Statutes 1994, Chapter 726; Statutes 1995, Chapter 504; Statutes 1995, Chapter 897; Statutes 1997, Chapter 390; Statutes 1997, Chapter 722; Statutes 1998, Chapter 657; Statutes 1998, Chapter 857; Statutes 1999, Chapter 972; Statutes 2000, Chapter 126; Statutes 2000, Chapter 127; Statutes 2000, Chapter 159; Statutes 2000, Chapter 292; Statutes 2000, Chapter 776; and Statutes 2002, Chapter 455

California Code of Regulations, Title 5, Sections 59500, 59504, 59505, 59506, and 59509

Register 94, number 6

Clovis Unified School District and Santa Monica Community College District, Co-Claimants

This test claim addresses public contract requirements imposed on school districts and community college districts when contracting for goods, services, and public works projects.

Commission Counsel Kenny Louie presented this item and recommended that the Commission adopt the staff analysis and the proposed statement of decision to partially approve the test claim for public contract activities required when a district repairs and maintains school property, but deny the activities that are triggered by the discretionary decision to purchase good and services and undertake public works projects.

Parties were represented as follows: Art Palkowitz, Stutz Artiano Shinoff & Holtz, representing the claimants; and Susan Geanacou and Chris Ferguson representing the Department of Finance.

Following discussion among the Commission members, staff, and parties, Member Olsen made a motion to adopt the staff recommendation. With a second by Member Lujano, the staff recommendation to adopt the staff analysis and the proposed statement of decision partially approving the test claim was adopted by a vote of 6-1, with Member Saylor voting no because, while he supported the staff recommendation pertaining to partial approval for public contract activities related to repair and maintenance, he disagreed with the part denying public contract activities related to new construction.

Item 5 *Local Agency Ethics (AB 1234), 07-TC-04*

Government Code Sections 25008, 36514.5, 53232, 53232.1, 53232.2, 53232.3, 53232.4, 53234, 53235, 53235.1, and 53235.2; Harbors and Navigation Code Sections 6060 and 7047; Health and Safety Code Sections 2030, 2851, 4733, 4733.5, 6489, 9031, 13857, 13866, and 32103; Military and Veterans Code Section 1197; Public Resources Code Sections 5536, 5536.5, 5784.15, and 9303; Public Utilities Code Sections 11908, 11908.1, 11908.2, 16002, and 22407; and Water Code Sections 20201, 21166, 30507, 30507.1, 34741, 40355, 50605, 55305, 56031, 60143, 70078, 71255, 74208, and 20201.5 as added or amended by Statutes 2005, Chapter 700

City of Newport Beach and Union Sanitary District, Co-Claimants

This test claim addresses policymaking, reporting, recordkeeping, ethics training and notice requirements imposed on local agencies if they provide any type of compensation, salary, or stipend to a member of a legislative body, or provide reimbursement for actual and necessary expenses incurred by a member of a legislative body in the performance of official duties.

Chief Legal Counsel Camille Shelton presented this item and recommended that the Commission adopt the staff analysis and proposed statement of decision to partially approve the test claim for general-law counties and those eligible special districts subject to the tax-and-spend provisions of articles XIII A and XIII B that are required by their enabling acts to provide reimbursement to the members of legislative bodies, to adopt a written policy relating to the reimbursement of expenses, provide expense report forms, provide information on ethics training courses, and to maintain training records.

Parties were represented as follows: David O'Hara, representing Union Sanitary District; Juliana Gmur, representing the City of Newport Beach; and Donna Ferebee and Randall Ward, representing the Department of Finance.

Following discussion among the Commission members, staff, and parties, Member Chivaro made a motion to adopt the staff recommendation. With a second by Member Lujano, the staff recommendation to adopt the staff analysis and proposed statement of decision partially approving the test claim was adopted by a vote of 7-0.

- Item 6 *California English Language Development Test II*, 03-TC-06
Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5, and 52164.6
Statutes 1977, Chapter 36; Statutes 1978, Chapter 848; Statutes 1980, Chapter 1339; Statutes 1981, Chapter 219; Statutes 1994, Chapter 922
California Code of Regulations, Title 5, Sections 11300, 11301, 11302, 11303, 11304, 11305, 11306, 11307, 11308, 11309, 11310, 11316, 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, 11517
Register 98, No. 30 (July 24, 1998) pages 75-76, Register 98, No. 33 (Aug. 14, 1998) page 75, Register 99, No. 1 (Jan. 1, 1999) pages 75-76, Register 01, No. 40 (Oct. 5, 2001) pages 77-78.2, Register 03, No. 2 (Jan. 8, 2003) pages 75-76.1
Register 03, No. 16 (April 18, 2003) pages 77-78.2
Castro Valley Unified School District, Claimant

This test claim addresses statutes and regulations governing the public instruction of limited English proficient (LEP) pupils in California. LEP pupils are those who do not speak English or pupils whose native language is not English and who are not currently able to perform ordinary classroom work in English.

Mr. Feller presented this item and recommended that the Commission adopt the test claim and statement of decision to deny the test claim because the bilingual education statute ceased to be operative in 1987, and the remaining activities are either required by, or are part and parcel of, federal law and Proposition 227.

Parties were represented as follows: Art Palkowitz, Stutz Artiano Shinoff & Holtz, representing the Castro Valley Unified School District; and Donna Ferebee, representing the Department of Finance.

Following discussion among the Commission members, staff, and parties, Member Olsen made a motion to adopt the staff recommendation. With a second by Member Saylor, the staff recommendation to adopt the test claim and statement of decision to deny the test claim was adopted by a vote of 7-0.

HEARINGS ON COUNTY APPLICATIONS FOR FINDINGS OF SIGNIFICANT FINANCIAL DISTRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 17000.6 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 6.5 (info/action)

- Item 11 Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commission, or to a Hearing Officer
Note: This item will only be taken up if an application is filed.

No applications were filed.

STAFF REPORTS

Item 12 Legislative Update

Assistant Executive Director Nancy Patton presented this item.

Item 13 Chief Legal Counsel: Recent Decisions, Litigation Calendar

Chief Legal Counsel Camille Shelton presented this item.

Item 14 Executive Director's Report

Executive Director Heather Halsey presented this item.

PUBLIC COMMENT

Mr. Allan Burdick congratulated the Commission on the outstanding selection of Ms. Heather Halsey as the Executive Director. He also addressed the Commission's backlog reduction plan and Commission staffing concerns.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (action).

A. PENDING LITIGATION

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(e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates*, Sacramento County Superior Court Case No. 34-2010-80000529 [Graduation Requirements, Parameters and Guidelines Amendments, Nov. 2008]
2. *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Board, San Diego Region v. Commission on State Mandates and County of San Diego, et al.* (petition and cross-petition), Third District Court of Appeal, Case No. C070357 (Sacramento County Superior Court Case No. 34-2010-80000604) [*Discharge of Stormwater Runoff, Order No. R9-207-000, 07-TC-09 California Regional Water Control Board, San Diego Region Order No. R9-2007-001, NPDES No. CAS0108758, Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g,F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c) iv-vii & x-xv, and L*]
3. *California School Board Association (CSBA) v. State of California et al.*, Alameda County Superior Court Case No. RG11554698 [2010-2011 Budget Trailer Bills, Mandates Process for K-12 Schools, Redetermination Process]
4. *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al* (petition and cross-petition). Second District Court of Appeal, Case No. B237153 (Los Angeles County Superior Court, Case No. BS130730) [*Municipal Storm Water and Urban Runoff Discharges, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, Los Angeles Regional Quality Control*

B. PERSONNEL

To confer on personnel matters pursuant to Government Code section 11126(a)(1):

Hearing no further comments, Chairperson Reyes adjourned into closed executive session pursuant to Government Code section 11126(e) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation published in the notice and agenda; to confer and receive advice from legal counsel regarding potential litigation, and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

REPORT FROM CLOSED EXECUTIVE SESSION

At 12:03 p.m., Chairperson Reyes reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126(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 public notice and agenda, and potential litigation, and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

ADJOURNMENT

Hearing no further business, Chairperson Reyes adjourned the meeting at 12:03 p.m.

Heather Halsey
Executive Director

PUBLIC HEARING
COMMISSION ON STATE MANDATES



TIME: 9:30 a.m.
DATE: Friday, May 25, 2012
PLACE: State Capitol, Room 447
Sacramento, California



REPORTER'S TRANSCRIPT OF PROCEEDINGS



Reported by:
Daniel P. Feldhaus
California Certified Shorthand Reporter #6949
Registered Diplomate Reporter, Certified Realtime Reporter

Daniel P. Feldhaus, C.S.R., Inc.
Certified Shorthand Reporters
8414 Yermo Way, Sacramento, California 95828
Telephone 916.682.9482 Fax 916.688.0723
FeldhausDepo@aol.com

A P P E A R A N C E S

COMMISSIONERS PRESENT

PEDRO REYES
(*Commission Chair*)
Representative for ANA MATOSANTOS, Director
State Department of Finance

KEN ALEX
Director
Office of Planning & Research

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

FRANCISCO LUJANO
Representative for BILL LOCKYER
State Treasurer

SARAH OLSEN
Public Member

M. CARMEN RAMIREZ
Oxnard City Council Member

DON SAYLOR
Yolo County Supervisor
Local Agency Member



COMMISSION STAFF PRESENT

HEATHER HALSEY
Executive Director
(Items 2, 11, and 14)

NANCY PATTON
Assistant Executive Director
(*Item 12*)

CAMILLE SHELTON
Chief Legal Counsel
(*Items 5 and 13*)

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF

continued

ERIC FELLER
Senior Staff Counsel
(Items 3 and 6)

KENNY LOUIE
Staff Counsel
(Item 4)



PUBLIC TESTIMONY

Appearing Re Item 3:

For County of Los Angeles:

LEONARD KAYE
County of Los Angeles
Department of Auditor-Controller
500 West Temple Street, Suite 603
Los Angeles, California 90012

LORI A. HARRIS
County of Los Angeles
Law Offices of the Public Defender
312 So. Hill Street, 3rd Floor
Los Angeles, California 90013

For Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, California 95814

CARLA SHELTON
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 4:

For Clovis Unified School District:

ARTHUR PALKOWITZ
Stutz, Artiano, Shinoff & Holtz
2488 Historic Decatur Road, Suite 200
San Diego, California 92106

For Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, California 95814

CHRIS FERGUSON
Education Systems Unit
Department of Finance
915 L Street, 7th Floor
Sacramento, California 95814

Appearing Re Item 5:

For City of Newport Beach:

JULIANA F. GMUR
Manager, Financial Services
MAXIMUS
625 Coolidge Drive, Suite 100
Folsom, California 95630

For Union Sanitary District:

DAVID M. O'HARA
Attorney at Law
39300 Civic Center Drive, Suite 110
Fremont, California 94538

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 5:

For Department of Finance:

DONNA FEREBEE
Staff Counsel III
Department of Finance
915 L Street
Sacramento, California 95814

RANDALL WARD
Budget Analyst
Department of Finance
915 L Street
Sacramento, California 95814

For California State Association of Counties SB-90
Service:

ALLAN BURDICK
MGT of America, Inc.
2001 P Street, Suite 200
Sacramento, California 95811

Appearing Re Item 6:

For Castro Valley Unified School District:

ARTHUR PALKOWITZ
Stutz, Artiano, Shinoff & Holtz
2488 Historic Decatur Road, Suite 200
San Diego, California 92106

For Department of Finance:

DONNA FEREBEE
Staff Counsel III
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Public Comment

ALLAN BURDICK
MGT of America, Inc.
2001 P Street, Suite 200
Sacramento, California 95811



ERRATA SHEET

<u>Page</u>	<u>Line</u>	<u>Correction</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

I N D E X

<u>Proceedings</u>	<u>Page</u>
I. Call to Order and Roll Call	11, 12
II. Approval of Minutes	
Item 1 March 23, 2012	13
III. Proposed Consent Calendar	
Items 7, 8, 9, and 10	14
IV. Appeal of Executive Director Decisions Pursuant to California Code of Regulations Title 2, Section 1181(c)	
Item 2 Appeal of Executive Director's Decision (<i>none</i>)	15
V. Hearings and Decisions on Test Claims and Statements of Decision, Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7	
A. Test Claims and Statements of Decision	
Item 3 <i>Juvenile Offender Treatment Program Court Proceedings, 04-TC-02 County of Los Angeles</i>	15
Item 4 <i>Public Contracts (K-14), 02-TC-35 Clovis Unified School District and Santa Monica Community College District</i>	44
Item 5 <i>Local Agency Ethics (AB 1234) 07-TC-04 City of Newport Beach and Union Sanitary District</i>	79

I N D E X

Proceedings

Page

VI. Hearings and Decisions on Test Claims and Statements of Decision, Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7

A. Test Claims and Statements of Decision

Item 6 *California English Language Development Test II*
03-TC-06
Castro Valley Unified School District 104

B. Parameters and Guidelines and Statements of Decision

Item 7* *Developer Fees,*
02-TC-42
Clovis Unified School District . 14

Item 8* *Local Agency Formation Commissions,*
11-PGA-07 (02-TC-23)
Department of Finance 14

Item 9* *In-Home Supportive Services II,*
11-PGA-08
Department of Finance 14

VI. Informational Hearing on Parameters and Guidelines Amendments Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8

A. Statewide Cost Estimate

Item 10* *Mandate Reimbursement Process II,* 05-TC-05
City of Newport 14

I N D E X

<u>Proceedings</u>	<u>Page</u>
VII. Hearings on County Applications for Findings of Significant Financial Distress Pursuant to Welfare and Institutions Code Section 17000.6 and California Code of Regulations, Title 2, Article 6.5	
Item 11 Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commissions or to a Hearing Officer (<i>None</i>)	110
VIII. Reports	
Item 12 Legislative Update	110
Item 13 Chief Legal Counsel: Recent Decisions, Litigation Calendar.	111
Item 14 Executive Director: Budget, Workload, Workplan Update, and Next Meetings/Hearings	112
IX. Public Comment	116
X. Closed Executive Session	124
XI. Report from Closed Executive Session	124
Adjournment	124
Reporter's Certificate	125



Commission on State Mandates – May 25, 2012

1 BE IT REMEMBERED that on Friday, May 25, 2012,
2 commencing at the hour of 9:31 a.m., thereof, at the
3 State Capitol, Room 447, Sacramento, California, before
4 me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the
5 following proceedings were held:



7 CHAIR REYES: The hour of 9:30 having arrived,
8 we will begin the May 25th Commission on State Mandates
9 meeting. The meeting will come to order.

10 It is good to be back. I think I've been gone
11 for the last two meetings, so good to see everybody.

12 Please join me in welcoming the new Commission
13 member, Carmen Ramirez. Carmen is currently the City
14 Councilmember for the City of Oxnard.

15 Welcome, Carmen. This is your first meeting.

16 MEMBER RAMIREZ: Thank you very much. I
17 appreciate the confidence.

18 CHAIR REYES: Excellent.

19 And also, this was going to be my first meeting
20 with Don Saylor. I know he was here last time.

21 But please join me in welcoming the new
22 Executive Director, Heather Halsey.

23 Welcome, Heather, in your new role. You were
24 with the Commission before.

25 MS. HALSEY: Thank you.

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: And before we get into the roll
2 call, I would like to personally thank the Selection
3 Committee for all the extra work that was involved in
4 going through this process and finding an executive
5 officer. Thank you very much. It's much appreciated.

6 You'll all get a 20 percent raise on what the
7 Commission pays for that extra effort. And although
8 you --

9 MEMBER OLSEN: In the next life, right?

10 CHAIR REYES: There you go.

11 Well, I was debating whether 25 or 50, so...

12 But anyhow, so given the economic
13 circumstances, I will go with 20 percent.

14 May we have the roll call, please?

15 MS. HALSEY: Mr. Alex?

16 MEMBER ALEX: Here.

17 MS. HALSEY: Mr. Chivaro?

18 MEMBER CHIVARO: Here.

19 MS. HALSEY: Mr. Lujano?

20 MEMBER LUJANO: Here.

21 MS. HALSEY: Ms. Olsen?

22 MEMBER OLSEN: Here.

23 MS. HALSEY: Ms. Ramirez?

24 MEMBER RAMIREZ: Here.

25 MS. HALSEY: Mr. Saylor?

Commission on State Mandates – May 25, 2012

1 (No response.)

2 MS. HALSEY: Mr. Reyes?

3 CHAIR REYES: Present.

4 Thank you.

5 Are there any objections or corrections to the
6 March 23rd minutes?

7 MEMBER RAMIREZ: I will be abstaining.

8 CHAIR REYES: Okay.

9 MEMBER OLSEN: I'll move the minutes.

10 CHAIR REYES: It's been moved.

11 Seconded?

12 MEMBER CHIVARO: Second.

13 CHAIR REYES: Moved and seconded.

14 (Commissioner Saylor entered the hearing room.)

15 CHAIR REYES: And the record will show that
16 Commissioner Saylor has joined us.

17 Good morning. Welcome.

18 We'll give him a couple seconds to settle in.

19 Sir, good to see you.

20 Okay, so the minutes have been moved and
21 seconded.

22 All those in favor, say "aye."

23 (A chorus of "ayes" was heard.)

24 CHAIR REYES: Opposed?

25 (No response)

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: And we'll have two abstentions:
2 Myself and Ms. Ramirez.

3 Are we okay with that, in terms of the vote?

4 MS. HALSEY: Yes.

5 CHAIR REYES: Thank you.

6 The next item?

7 MS. HALSEY: The next item is the Proposed
8 Consent Calendar, which consists of Items 7, 8, 9, and
9 10.

10 CHAIR REYES: Is there any objection to taking
11 up the consent items?

12 Does anybody want to pull any of the items?

13 *(No response)*

14 CHAIR REYES: Seeing none, can we take roll
15 call on -- or is there a motion on the Consent Calendar?

16 MEMBER CHIVARO: I move approval.

17 MEMBER LUJANO: I second.

18 CHAIR REYES: It's been moved and seconded.

19 Any other comments?

20 *(No response)*

21 CHAIR REYES: All those in favor, say "aye."

22 *(A chorus of "ayes" was heard.)*

23 CHAIR REYES: Opposed?

24 *(No response)*

25 CHAIR REYES: The "ayes" have it.

Commission on State Mandates – May 25, 2012

1 Thank you.

2 Ms. Halsey?

3 MS. HALSEY: Item 2 is reserved for appeals of
4 the Executive Director's decision.

5 There are no appeals to consider under Item 2.

6 CHAIR REYES: Thank you.

7 MS. HALSEY: So let's go ahead and move to the
8 Article 7 portion of the hearing.

9 Will the parties and witnesses for Items 3, 4,
10 5, and 6 please rise?

11 *(The parties and witnesses were sworn.)*

12 MS. HALSEY: Senior Staff Counsel Eric Feller
13 will present Item 3, a test claim on *Juvenile Offender*
14 *Treatment Program Court Proceedings*.

15 CHAIR REYES: Thank you.

16 MR. FELLER: Good morning.

17 CHAIR REYES: Good morning.

18 MR. FELLER: This test claim alleges activities
19 of public defenders in the juvenile justice system as a
20 result of a test-claim statute that realigned the duties
21 of the former Youthful Offender Parole Board and the
22 former California Youth Authority.

23 Staff recommends that the Commission adopt the
24 proposed final staff analysis and statement of decision
25 to deny the test claim for the reasons stated in the

1 analysis.

2 Would the parties and witnesses please state
3 your names for the record?

4 MR. KAYE: Leonard Kaye, Los Angeles County.

5 MS. HARRIS: Lori A. Harris, deputy public
6 defender from Los Angeles County.

7 MS. GEANACOU: Susan Geanacou, Department of
8 Finance.

9 CARLA SHELTON: Carla Shelton, Department of
10 Finance.

11 CHAIR REYES: Okay, you've all seen the
12 analysis.

13 Mr. Kaye?

14 MR. KAYE: All? Okay.

15 CHAIR REYES: Or you may want to -- I think you
16 presented --

17 MR. KAYE: It's traditional that staff present.

18 CHAIR REYES: Go ahead, staff, present.

19 MR. FELLER: Well, I did.

20 MR. KAYE: Oh, you just did? Okay.

21 CHAIR REYES: He did.

22 MR. KAYE: Okay. We also feel that the record
23 is complete on our side as well. However, what we wish
24 to do this morning is briefly highlight some key points
25 and introduce a few brief exhibits into the record which

1 support our contentions.

2 Lori Harris has prepared Exhibits A through D.
3 We promise that they're brief.

4 CHAIR REYES: Has staff had a chance to look at
5 those exhibits?

6 MR. KAYE: We're going to distribute them now,
7 according to staff's recommendation.

8 CHAIR REYES: Okay.

9 MR. KAYE: So why don't you give that to
10 Camille Shelton?

11 And this has to do with Lori's portion of the
12 presentation. So she will give you an opportunity to
13 respond.

14 And as I say, these brief exhibits illustrate
15 some of the points we'll be making. There is no heavy
16 legal analysis that's required.

17 So let me know when I can begin with my
18 portion, which should be just momentarily.

19 CHAIR REYES: Hold on. Before we move any
20 further here, I have two copies, Camille. I have two
21 copies.

22 I'm looking at this Exhibit 1 is November 6th;
23 another one is November 6th of 2002; September 24, 2007;
24 November 21st of 2008.

25 And I'm not quite sure why they would not have

1 been -- the other one is at the bottom of the page, in
2 Exhibit D. I'm looking at December 2003.

3 MR. KAYE: Commissioner Reyes, we apologize for
4 any delay that we may have had. These recently came to
5 our attention.

6 CHAIR REYES: Finance did not get a copy of
7 this, Camille.

8 CAMILLE SHELTON: I'm sorry?

9 CHAIR REYES: Did Finance get a copy of this?

10 CAMILLE SHELTON: I'm sorry. You did not?
11 Okay.

12 CHAIR REYES: So are we complete with A, B, C,
13 and D exhibits?

14 MR. KAYE: Yes, that is correct.

15 We debated whether to give you these exhibits
16 during Lori's portion; but we felt it very important to
17 do it in the beginning. And we'll be getting to those --
18 a brief discussion of those exhibits in a little bit.

19 First of all, let us say that we are very
20 pleased to have the Commission's time to consider our
21 case. We feel that apart from issues of equity, as a
22 matter of law, this program is SB 90-reimbursable.

23 We find that staff -- and we have a great deal
24 of respect for staff's prowess in this area, they've done
25 a very comprehensive and thorough analysis -- but we

1 respectfully feel that it's basically wrong.

2 And what are the reasons for this?

3 Mainly, staff seems to be basing the
4 recommendation on analysis, which finds that SB 459
5 mandated that public defenders provide the same services
6 to wards, as were required under prior law. And then
7 they indicate that they have the same right, the public
8 defender has the same right to receive copies of reviews
9 on their behalf, under prior and current law. It sort of
10 ends right there.

11 For the County, the relevant issue is: Were
12 County Public Defenders mandated to implement new
13 services designed to protect their clients' rights to new
14 treatments specified in SB 459?

15 And just based upon a statutory analysis, there
16 are a host of new services that are now required for the
17 first time: individual treatment plans, individual
18 education plans -- all these services and many, many
19 other types of new services. And this will be
20 illustrated by some of the exhibits that we'll be going
21 into in a little bit.

22 And these are not found under prior law. This
23 required our public defender, which, because of
24 due-process requirements, was mandated to provide these
25 new services, and to enforce the law.

1 The public defender, as you know, is charged
2 with not necessarily representing all defendants, but
3 those that can't afford these services. And,
4 unfortunately, many of them are indigent, so they have
5 no other alternative.

6 The court has no other mechanism to enforce the
7 law. It's an adversarial proceeding. No one doubts that
8 the prosecuting attorney in this case is, by statute, the
9 district attorney. The district attorney is the sound of
10 one hand clapping. I mean, you have to have a public
11 defender and a district attorney; otherwise, the court is
12 befuddled as to how to proceed. So there is no doubt
13 that this is a mandated program and it's a new program.

14 And then when you look at what was the
15 legislative intent, and you look at the tremendous number
16 of analyses, newspaper reports, and most importantly, the
17 Inspector General's report, that treatment planning,
18 psychiatric services, and so forth, was nonexistent prior
19 to SB 459. There just wasn't anything.

20 So the question arises, again: Why claim that
21 it's the same? And staff respectfully suggests that the
22 same type of services as were provided under current,
23 prior law, are the same as those provided now; and they
24 provide a list of 20 or so factors to consider, such as
25 the sophistication or the maturity level of the

1 individual.

2 And this is completely different from an
3 individual education plan which, as you know, under
4 federal requirements, is required to be implemented.
5 So we have further analyses that we have submitted. We
6 stand on the record on that. We feel fairly confident
7 that this will be upheld.

8 But the real proof of the pudding, so to speak,
9 is the fact that we have five or six declarations, with
10 people with personal knowledge of this matter, that have
11 actually done this work, that have actually worked with
12 psychiatric social workers which we've had to hire, and
13 so forth, and provide these new services.

14 And in that regard, I introduce Lori Harris to
15 give some pertinent examples that are tied into her
16 exhibits.

17 MS. HARRIS: Good morning. I'm Lori Harris.
18 I am a Deputy Public Defender from Los Angeles County.
19 And in 2007, I was assigned to join what's called the
20 "DJJ unit." DJJ is the new name for what was formerly
21 known as the California Youth Authority.

22 Our unit was formed in 2004 in response to
23 SB 459. And historically, I think it's important for the
24 Commission to know why SB 459 came about.

25 Generally, it was in response to taxpayer

1 litigation and other civil litigation in relation to the
2 care and treatment of the children that were housed
3 within the California Youth Authority. Children were
4 being -- there were some DUFs, there was some harm done
5 to the children, and there were kids that were not
6 benefiting from the services that were being provided
7 from the Youth Authority.

8 Now, the documents that you have before you,
9 there is Exhibits A through D. You will note that these
10 are true and correct copies of documents that could be
11 found in court files within Los Angeles County related to
12 the clients that the documents refer to.

13 For my clients' privacy, their names have
14 been omitted. The only thing that I have added to these
15 documents is highlighted in yellow, where it says "Before
16 SB 459" and the words "Exhibits A through D."

17 Now, prior to SB 459, it resulted in a
18 change -- SB 459 resulted in a change to what my
19 obligation as counsel would be to a child who was
20 committed to the Youth Authority.

21 So once a judge committed a child to the Youth
22 Authority prior to SB 459, our office would monitor to
23 make sure that the child got proper credits and actually
24 got moved off. And then their case was basically put on
25 a file and we were done with it.

1 And we never really heard about that child
2 again until it was time for them to be considered for
3 parole. And then at that time, DJJ would send out a
4 letter saying that in 30 days' time you can expect that
5 this child will be considered for parole. And there was
6 no communication between our agency or, really, the court
7 prior to SB 459.

8 Then after SB 459 -- so we have this letter
9 here. And it is referred to as "Exhibit A."

10 The name of the child has been removed from the
11 document, but it will indicate to you that the Youth
12 Authority has reviewed the documents that were sent by
13 the court and has decided to accept that child. And
14 that's what you would normally receive. And then the
15 County would have a responsibility for transferring that
16 child to the Youth Authority within 90 days in order for
17 there to be action on the acceptance.

18 After SB 459, in Exhibit B, that document
19 indicates that, as required by SB 459, the Division of
20 Juvenile Justice has, in fact, done an individualized
21 change plan. And the individualized change plan is an
22 analysis of the care and treatment that would be required
23 for the care and rehabilitation of that minor.

24 Now, if you look at Exhibit --

25 CHAIR REYES: Hold on a second, though.

1 The individualized plan is required, but was
2 the child not entitled to that plan prior to SB 459 as a
3 matter of course?

4 I mean, you talk about kids being hurt in the
5 Youth Authority. And technically, while not required by
6 law, there are certain rights that those kids had.

7 MS. HARRIS: Okay, if I could refer you to
8 Exhibit D, Exhibit D is a document that I retrieved from
9 the Department of Youth Authority Institutional Camps
10 Manual. The only thing that I added to that document, is
11 the highlighted portion that says "After SB 459" and the
12 words "Exhibit D."

13 You will note that therein, they list the
14 things that they are now required to do as a result of
15 the change in statute.

16 And the language at the side that -- there's a
17 line that runs vertically down the page; and in the
18 middle of that line, it says "New." That line was
19 created and printed by the Youth Authority at the time of
20 the preparation of that document.

21 And while it may be true that -- the Inspector
22 General's report, I believe that you have, indicates that
23 there was substantial substandard services that were
24 provided to the young people that were in the facility;
25 and that is why the Legislature took it upon themselves

1 to do this analysis to decide what kinds of care and
2 treatment should happen and what authority does the court
3 have in order to act upon it.

4 So the *Owens* court said that the court can't
5 just substitute its judgment and move in and say, "Okay,
6 this child is not doing well within Youth Authority, and
7 I'm going to move them out," or "This child is ready to
8 parole and I'm going to move them out."

9 The *Owens* court wrote quite clear that the
10 court does not have that authority.

11 SB 459 was designed to respond to that, and to
12 give the court the authority to do that. But the court
13 is a neutral and detached entity. They have no mechanism
14 for getting to a child and removing them, or getting to a
15 child and taking an action upon their case to determine
16 what it is that they need.

17 And because of SB 459, our office formed, in
18 response to this must, this mandate, to contact and
19 monitor and evaluate the services that were provided to
20 our clients. Because each kid is different, they're
21 there for different reasons, and they present with
22 different problems.

23 MEMBER ALEX: Excuse me, can I --

24 MS. HARRIS: And these children have due-
25 process rights to counsel.

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: Mr. Alex?

2 MS. HARRIS: Yes?

3 MEMBER ALEX: Let me ask you this way: If the
4 court determined that, as a constitutional matter, that
5 an individual should have been provided a right to
6 counsel and had previously not been, would that be a
7 mandated state obligation or would that have been simply
8 that the service had not been provided previously and was
9 a violation of the law?

10 MS. HARRIS: I'm not certain what you're asking
11 me.

12 I think what you're asking me is: If a kid has
13 a right to have an attorney, does the state have to
14 provide it?

15 MEMBER ALEX: Well, let's say that the
16 procedure before was, as a matter of course, no attorney
17 was provided; and then a court decides that either as a
18 statute or a constitutional provision, in fact, there is
19 an obligation to provide an attorney.

20 Does that create a state-mandated requirement
21 for which there is compensation?

22 MS. HARRIS: As long as you're going to have
23 the district attorney continuing to represent the people
24 of the state of California, then I believe that it does.

25 It doesn't make any sense for you to say that

1 you have a right to have counsel if a child is indigent.
2 Clearly, it has no meaning. Due process doesn't mean
3 anything if, in fact, you're not going to put something
4 behind it.

5 CHAIR REYES: Ms. Shelton?

6 CAMILLE SHELTON: Just to add a couple of
7 things on that very point.

8 A mandate exists only if a state statute or a
9 state executive order requires the public defender's
10 office to do something.

11 What has been discussed here are underlying
12 constitutional due-process requirements to allow the
13 child to have the right to counsel, which have existed
14 always.

15 If a court now is going to say that the public
16 defender needs to step in, that is a mandate by the
17 court, or required under constitutional law, and by a
18 long line of cases. That is not a state-mandated
19 program.

20 MR. KAYE: May I respond?

21 I think Camille is right, generally.

22 But in this particular case, we would rely upon
23 cases such as the *San Diego Unified School District* case,
24 33 Cal.App.4th 859, which said that if the state creates
25 a mandate, then the courts have a -- which requires due

1 process, that even the federal due-process procedures
2 and requirements are now state-mandated and state-
3 reimbursable.

4 So there is a fine point that has to be put on
5 all of this. The issue is basically: Is this a new
6 state mandate?

7 And we would point out on a purely
8 plain-reading statutory basis, you won't find the
9 requirements to have the individual education plan, you
10 won't find the requirements to have individual treatment
11 plans, progress reports in statute before SB 459. They
12 may have been occasionally, or now and then, required in
13 specific cases; but the statutory requirement started
14 with 459.

15 Thank you.

16 CHAIR REYES: Ms. Shelton?

17 CAMILLE SHELTON: The *San Diego Unified School*
18 *District* case is completely distinguishable from this
19 case.

20 In that case, those statutes dealt with the
21 expulsion and suspension procedures for students in K-12
22 education. And they, on the plain language of those
23 statutes, explicitly provided excess due-process
24 requirements in order to expel or suspend a student.

25 Here, on these statutes that are pled, there is

1 nothing requiring local government to do anything. These
2 statutes were transferring duties from the Youthful
3 Offender Parole Board to the CYA. So nothing on the face
4 of these statutes requires local government to do
5 anything.

6 Some of the information -- if you turn to
7 page 31 of the analysis, there was a lot of prior
8 regulations that were imposed on the Youthful Offender
9 Parole Board. And under prior law, it did have to have
10 an initial case conference conducted of the ward. They
11 had to provide complete medical diagnostic services upon
12 commitment to the CYA. And there were initial case
13 conferences and annual reviews, all of which the ward had
14 the right to request counsel.

15 So really, the statute is transferring just
16 those duties. And certainly, they probably -- the
17 communication and the services may have gotten better
18 with CYA, when it transferred to CYA; but, again, those
19 deputies imposed on the public defender's office under
20 due process are not mandated by the state.

21 MR. KAYE: This is Leonard Kaye.

22 In response to Camille's thing, I refer you to
23 Bates page 116. This is an excerpt at the bottom of the
24 page from the California performance review in 2002,
25 which, as many of you know, at the time was a very, very

1 comprehensive review conducted by experts out of the
2 state executive office that appointed various panels of
3 experts. And they did a very thorough analysis of this
4 matter.

5 And the title -- the headline for this thing --
6 and I'll just read a sentence or so, it's found on Bates
7 page 116: "Judges and probation officers have no
8 role in decisions to continue incarceration."

9 And it says, "The California Youth Authority
10 has not been mandated to involve local courts, judges,
11 and probation officers in the treatment and incarceration
12 of youthful offenders. And one superior court judge
13 noted recently in correspondence to Senator Gloria
14 Romero, that local juvenile justice systems are not
15 afforded the opportunity to oversee or be involved in
16 decisions affecting wards committed to the California
17 Youth Authority."

18 And it goes on and on and on. But the basic
19 point is, there was no mandate before SB 459; now, there
20 is.

21 CHAIR REYES: Ms. Shelton?

22 CAMILLE SHELTON: The information that Mr. Kaye
23 is referring to, is the statutory change to section 1720.
24 And there, it did require the CYA to provide reports to
25 the court and to the parole officer. That's a mandate on

1 CYA. It is not a mandate by the plain language on local
2 government.

3 MS. HARRIS: However, it's my understanding
4 that once this court gets this information, there is no
5 mechanism for the court to take any action to do
6 anything. And the monitoring that happens by the public
7 defender's DJJ unit allows them to have some meaning
8 behind these empty reports that they might receive.

9 So my role as a DJJ lawyer changes a bit
10 because when I'm in the trial court, I'm clearly simply
11 advocating for the child that is before the court and
12 representing their interests.

13 Once I move into the role as DJJ unit attorney,
14 then I am a liaison between the court and the youth and
15 the Youth Authority, to let the court know exactly what
16 is going on within the institution with the
17 individualized child.

18 So I'm the eyes and ears of the court. And
19 they may receive a report like you have in Exhibit C,
20 which is a progress report. So Exhibit B is the initial
21 report that they receive from CYA. Exhibit C is a
22 progress report. And I'm in a position to give meaning
23 to these words that are put on a page, to let the court
24 know what exactly is happening with the ward.

25 And just to give you an example of the type of

1 work that we do in the CYA unit or the DJJ unit, is I
2 attend hearings with the client, to make sure that
3 they're getting appropriate services that would be within
4 CYA. I monitor their medical treatment. I monitor that
5 they are getting appropriate mental health treatment.

6 We have had clients who, after getting to CYA,
7 it became apparent that they were mentally disabled,
8 developmentally disabled, and that they were being
9 required to interact with materials that were presented
10 to them at a higher level than they could handle of the
11 curriculum. So we work with them to have adjustments
12 made to the curriculum, so that they could be successful.

13 CHAIR REYES: Mr. Saylor, and then Mr. Feller.

14 MEMBER SAYLOR: I'm interested in what you've
15 described as your duties. And I'm reading through the
16 packet, and see the various elements included in the
17 individualized change plan.

18 Frankly, I'm compelled by the points that
19 Ms. Shelton has made about the absence of a change in
20 responsibility for public defenders as a result of
21 SB 459.

22 MS. HARRIS: Well, we --

23 MEMBER SAYLOR: Excuse me, if I may complete...

24 MS. HARRIS: I'm sorry.

25 MEMBER SAYLOR: And so my interest is in

1 understanding specifically what changed in the
2 responsibilities as you've identified them for public
3 defenders in working with these cases.

4 My reason for asking the question is that the
5 items that you've shown in Exhibit D were, I believe,
6 unchanged for many years prior to SB 459, as requirements
7 as a part of the interaction between the Youth Authority
8 and the YOPB with wards incarcerated in the Youth
9 Authority. So I'm not sure what your case is for what
10 exactly changed for your responsibilities with this
11 measure.

12 MS. HARRIS: I'm sorry for the confusion.

13 What I wanted to make sure that was clearly
14 understood is, these documents are in addition to other
15 documents that were provided to the Commission early on
16 in the process.

17 And the other document --

18 MEMBER SAYLOR: What specifically changed as a
19 result of the bill for your responsibilities? Because I
20 don't see it.

21 MS. HARRIS: Okay. All right, well, prior to
22 SB 459, as I said before, we normally closed out our
23 cases, because we treated the clients as if they went to
24 state custody. And now that they -- and they were then a
25 state responsibility. After that SB 459, I continued to

1 monitor the conditions of confinement. I advocated for
2 the clients to make sure they were receiving appropriate
3 treatment, training, education, and mental health
4 services.

5 I assured that they were getting the
6 appropriate mental health treatment. And as I said, I
7 gave you an example of a child who was in a sex-offender
8 program which has a very complicated curriculum. We made
9 adjustments to make sure that the curriculum was brought
10 to a level that the developmentally disabled child could
11 understand. We monitored their educational services that
12 they received, to make sure that they're getting
13 appropriate services.

14 We've had clients who were severely mentally
15 ill, such that it was beyond what CYA could handle. And
16 we brought them back on 779 motions to have their
17 services changed.

18 Prior to SB 459, that information would not
19 have come to light. We would not have been aware of the
20 condition of that severely disabled client, had it not
21 been for SB 459.

22 We continue to monitor clients to make sure
23 that they were on track for parole. And that meant in
24 addition to doing the programs that they were ordered to
25 do, that if -- making sure that the programs were made

1 available to them. Because many times, the young people,
2 without an advocate, would languish in DJJ, waiting on a
3 waiting list to get substance-abuse programming. And
4 they couldn't get in it because the program was full, and
5 so we advocated to make sure they got what they needed.

6 And prior to SB 459, we wouldn't have known
7 about it, wouldn't have been able to do it, wouldn't have
8 been able to act on it.

9 CHAIR REYES: Who wants to go first:
10 Mr. Feller or Ms. Shelton? I'll leave it up to you two.

11 MR. FELLER: I just wanted to emphasize, the
12 mandate question is a question of law. And for us, in
13 this analysis, the main question was the power of the
14 court to change, modify, or set aside an order of
15 commitment.

16 And in looking at the legislative history that
17 referred to that in that amendment to section 779 as a
18 clarification and in comparing it to the *Owen* case, which
19 held that the court has that power where CYA has failed
20 to comply with the law or has abused its discretion in
21 dealing with the ward in its custody, we didn't see on
22 the face of these statutes any new programs or higher
23 levels of service.

24 I just wanted to emphasize that.

25 CHAIR REYES: Ms. Shelton?

Commission on State Mandates – May 25, 2012

1 CAMILLE SHELTON: Let me just kind of put this
2 whole thing in perspective, maybe.

3 I think a lot of what counsel is arguing, is
4 that there has been better communication because of this
5 statute. And I think that was the intent, right, to
6 switch some of the duties from the Youthful Offender
7 Parole Board to CYA because there were problems.

8 And a lot of times, under old law, they had to
9 do annual reviews. All of those services were supposed
10 to be provided by the board; but they didn't have to turn
11 over their reports to the court or to the parole officer.
12 So I would imagine there probably was miscommunication or
13 noncommunication between, you know, what was going on
14 with the child and, you know, what the court may be
15 potentially overseeing in their role of maintaining
16 jurisdiction over that child.

17 So I'm sure communication has gotten better.
18 But a mandates analysis is not a but-for test. You know,
19 it's not "But for the statute, we've incurred costs."

20 You've got to have a statute or a regulation
21 that directly requires you to perform a new activity.
22 And that has not shown that here. None of these statutes
23 impose anything on the local government.

24 MR. KAYE: Okay, could I respond?

25 CHAIR REYES: Yes.

1 MR. KAYE: We understand Camille's point. And
2 as usual, she is very, very accurate.

3 However, we feel that in this case, to use her
4 term, is distinguishable, because there have been other
5 cases in the history of SB 90 that necessarily implied
6 mandates have been found to be reimbursable.

7 And I give you this hypothetical: We all know
8 that the legislative intent for this was to vastly
9 improve whether you call it communication, whatever, the
10 treatment that is provided to these kids. So they
11 weren't getting individual treatment plans, it wasn't in
12 statute, there was no IEPs in statute. All these new
13 services and so forth were to be provided.

14 So my hypothetical is: What was a judge to do
15 when he got a copy of this report?

16 He could either do one of two things, let's
17 suppose: He could either throw it in the trash can and
18 ignore it, or he could take action.

19 Now, we say that it's a necessarily implied
20 mandate because we presume that the judge would take
21 action. And once the action the judge would take, he
22 would have no alternative but to give it to the public
23 defender. He can't give it to the prosecuting attorney,
24 the district attorney who has no role in this type of
25 discovery effort. It's a motion filed by the public

1 defender.

2 So we feel that it is, in effect, a necessarily
3 implied mandate; and reimbursement should be found in
4 this particular case because it has involved a huge
5 amount of work on the part of the public defender to
6 handle the avalanche of cases and treatment requirements
7 that are flooding our juvenile courts.

8 CHAIR REYES: Okay, so we have staff's
9 recommendation. We have clearly disagreement.

10 I'm not seeing Finance grabbing the microphone.
11 So I think they're happy with staff's -- Commissioner
12 Ramirez?

13 MEMBER RAMIREZ: May I ask a question?

14 CHAIR REYES: Yes.

15 MEMBER RAMIREZ: I'm really interested in what
16 you just said, Mr. Kaye, on "necessarily implied"
17 mandate.

18 I'd like to have Camille respond to that.

19 CAMILLE SHELTON: Since I've been here -- I
20 don't know about 15 years -- there have been occasions
21 where there are statutes that do impose activities on
22 local government by the plain language. But you don't
23 really know what it means, what the language means. And
24 so through statutory interpretation, you have to kind of
25 understand what that activity requires. And in some of

1 those cases, you would certainly imply something.

2 As an example, there was a statute for a report
3 given from one school district to the other school
4 district; but the plain language said that the second
5 school district --

6 MEMBER OLSEN: Receive.

7 CAMILLE SHELTON: -- receive -- yes, received
8 the report -- yes, received the report; but there was no
9 requirement for the other -- the first school district to
10 provide it. And so, obviously, there needs to be a
11 requirement to provide it in order for the second school
12 district to receive it.

13 We've only done that when the statute on its
14 plain language does impose an activity on local
15 government.

16 Again, these statutes don't impose any
17 activities on local government.

18 MEMBER OLSEN: Well, if I might on that one, on
19 that case, I believe --

20 CHAIR REYES: Ms. Olsen, do you want to turn on
21 your microphone?

22 MEMBER OLSEN: I'm sorry.

23 I believe the finding of the Commission on that
24 case was that the providing district, it wasn't a
25 mandate, but that it could be taken care of in the

1 P's and G's.

2 CAMILLE SHELTON: Correct. And, you know, that
3 is where the Commission has discretion to include
4 activities that are reasonably necessary to comply with a
5 mandate. But you have to find a mandate first. As a
6 question of law, like Mr. Feller was saying, you have to
7 find a mandate in the language of the statute first.

8 MS. HARRIS: May I be heard?

9 Due process requires that people have
10 representation at every stage of any important
11 proceeding, okay.

12 Now, my understanding of SB 459 imposed on
13 counsel an obligation to the post-dispositional child.
14 Prior to SB 459, we didn't have such an obligation. A
15 post-dispositional child was -- their case was shelved
16 and we were done with it.

17 In order for the court to take any kind of
18 action to have any kind of meaning for these simple
19 reports that are coming across their desk, there needs to
20 be active interaction and monitoring to know exactly what
21 it means, what's available, what can be done, whether the
22 child is materially benefitting or not, or if it requires
23 some change in action.

24 CHAIR REYES: Commissioner Saylor?

25 MEMBER SAYLOR: It just strikes me generally,

1 that prior to SB 459, there were activist judges who
2 obtained the information that would be now provided to
3 everyone as a result of the language in SB 459. Those
4 judges then would need to take whatever action was at
5 their discretion to unfold their commitment or their
6 disposition. So that prior to the legislation, there
7 already were mechanisms in place for judges and public
8 defenders, presumably, and others to look into these
9 matters.

10 This simply -- this measure simply allows -- or
11 it simply requires the State to perform something that
12 it didn't perform before, and was a reorganization of
13 responsibilities at the state level.

14 I'm failing to see a new requirement or
15 mandated activity, though I appreciate that the tools
16 that are now available to local judges and public
17 defenders and communities to look into the cases more
18 thoroughly after the kid has been sent to another
19 location is a value to society. I don't see it as new
20 mandated state activity.

21 MR. KAYE: And on that, Commissioner -- on
22 that, we respectfully disagree.

23 I think if you'll look at the statutory
24 requirements after SB 459, you'll find a whole host, a
25 paragraph filled with specific requirements. And these

1 are specific mandated requirements, as I said, that are
2 heading their way towards the juvenile courts; and the
3 judge has two choices: He can either trash-can them or
4 he can implement them. And we presume that he would want
5 to implement them.

6 Now, the big difference, before SB 459 --
7 you're absolutely right, the judge from Santa Clara
8 County and a number of others were very active. But this
9 was on an ad hoc, idiosyncratic basis, and they would
10 have their pet treatment programs or this or that, or
11 legislators, and they would go to them and get results.
12 But that is definitely not a state-mandated situation.
13 That is a situation where judges took the initiative at
14 their discretion and solved the problem. And we applaud
15 that.

16 But this clearly is a uniform and reliable
17 implementation of a new treatment standard. And I don't
18 see any way around that.

19 CHAIR REYES: Ms. Olsen?

20 MEMBER OLSEN: I guess I'm struck by the idea
21 that maybe this is the difference between a state mandate
22 and a professional compulsion. That because information
23 has improved and because the system at the state level
24 has become more transparent, that you, as legal
25 professionals, feel more compelled to provide services.

1 But that is not necessarily the same thing as a
2 state-mandated program.

3 And I think we're all sympathetic to the costs
4 you may be incurring because you are needing to do this
5 for your clients. But, again, as with Mr. Saylor, I'm
6 not seeing where the state mandate is.

7 MR. KAYE: Okay. And to that, we simply reply,
8 it's a due-process requirement that if a child is
9 entitled to a service and is not being provided that
10 service, then they have a due-process right and a new
11 remedy to get the new service. That's where our
12 difference is.

13 CHAIR REYES: Are there any further questions
14 from board members?

15 *(No response)*

16 CHAIR REYES: Anybody else from the public that
17 would like to speak on this subject?

18 *(No response)*

19 CHAIR REYES: Finance?

20 CARLA SHELTON: We would just like to support
21 the staff recommendation to deny the test claim.

22 CHAIR REYES: Thank you.

23 Is there a motion?

24 MEMBER CHIVARO: I'll move adoption of the
25 staff recommendation.

Commission on State Mandates – May 25, 2012

1 MEMBER ALEX: Second.

2 CHAIR REYES: It's been moved and seconded.

3 Any additional comments?

4 *(No response)*

5 CHAIR REYES: All in favor, say "aye."

6 *(A chorus of "ayes" was heard.)*

7 CHAIR REYES: Opposed?

8 *(No response)*

9 CHAIR REYES: Abstentions?

10 *(No response)*

11 CHAIR REYES: The "ayes" have it.

12 Thank you.

13 MR. KAYE: Thank you.

14 MS. HARRIS: Thank you.

15 MS. HALSEY: Moving on to Item 4, Commission
16 Counsel Kenny Louie will present Item 4, a test claim on
17 *Public Contracts* for school districts and community
18 college districts.

19 MR. LOUIE: This test claim addresses
20 allegations of public contract requirements imposed on
21 school districts and community college districts when
22 contracting for goods, services, and public works
23 projects.

24 Staff recommends that the Commission deny some
25 of the alleged public contracting activities on the basis

1 that the activities are triggered by the discretionary
2 decision to purchase goods and services and undertake
3 public works projects. This finding is consistent with
4 prior Commission decisions.

5 The claimants continue to disagree with the
6 staff's recommendation of a denial on this basis.

7 Finance disagrees with the recommended partial
8 approval contending that sufficient funding has been
9 provided for the test-claim activities through various
10 state grant programs and local fee authority for school
11 districts.

12 However, none of the grant programs cited to
13 appropriate monies specifically intended to fund the
14 specific activities approved in this test claim.

15 In addition, the fee authority cited to does
16 not cover all of the activities -- or cannot be used for
17 all of the activities that have been approved in this
18 claim.

19 Staff recommends that the Commission adopt the
20 staff analysis and the proposed statement of decision to
21 partially approve the test claim.

22 Will the parties and witnesses state their
23 names for the record, please?

24 MR. PALKOWITZ: Good morning. Arthur Palkowitz
25 on behalf of the claimant.

Commission on State Mandates – May 25, 2012

1 MS. GEANACOU: Susan Geanacou, Department of
2 Finance.

3 MR. FERGUSON: Chris Ferguson, Department of
4 Finance.

5 CHAIR REYES: Thank you.

6 It's been presented.

7 MR. PALKOWITZ: Yes, thank you.

8 CHAIR REYES: At this point, we have that
9 neither party agrees with the staff's analysis; is that
10 correct?

11 So you disagree with what's been approved, and
12 you disagree with what's been denied?

13 MR. FERGUSON: I would say we don't necessarily
14 disagree 100 percent. We believe it should be much more
15 narrowly confined.

16 CHAIR REYES: Okay, all right, go ahead.

17 MR. PALKOWITZ: Thank you, sir.

18 This test claim relates to activities that are
19 involved when you're doing construction. The activities
20 are listed as approximately 13 activities that involve
21 the bidding process, selecting the vendor, dealing with
22 minorities when it comes to who should be selected.

23 Staff has, out of the 13 activities, has
24 approved four and partially approved one and denied
25 approximately four activities. And I would like to

1 address those four activities that were denied.

2 For the most part, the activities that were
3 approved relate to repair and maintenance type of work
4 that staff has concluded is required by statute. Repair
5 and maintenance, we're referring to usually
6 school-related facilities. And staff said that based on
7 statutes requiring that schools maintain and repair
8 facilities, that those activities are then triggered by
9 a statute that's reimbursable.

10 The denial of the activities, staff is
11 concluding, do not relate to repair and maintenance; and,
12 therefore, there is a belief that those activities are
13 discretionary and are not required by the statute and is
14 the basis for the denial.

15 Staff, in their thorough analysis, goes to
16 great lengths on several pages. And I'd like to just
17 highlight some of that.

18 Staff -- and so what we're really dealing with
19 as an issue is, the need to build schools and other
20 school-related facilities, and is that a requirement
21 under the law.

22 Staff comments that the courts have
23 consistently held publication as a matter of statewide
24 concern, not local concern, which is the basis of the
25 reimbursable state mandate process.

1 It goes on -- and they cite authority in the
2 *Butte versus California* case. It also talks about that
3 it is legislative policy that the state strengthen and
4 be responsible for the control of school districts.

5 It is the State that holds title to the school
6 districts. So we have evidence here -- ample evidence to
7 show that this is a statewide, not a local concern.

8 And the authority that the staff is relying
9 upon to say, "No, it's really a local decision and
10 therefore, since it's a local decision, it is not a
11 statewide mandate that should be approved for
12 reimbursement" -- and they're relying on a *Santa Barbara*
13 *School District* case that occurred fifty years ago. And
14 in that case, the school district was faced with a
15 decision to condemn schools based on the amount of repair
16 greatly exceeded a value that they felt the school was
17 worth; and there was other facilities able to absorb the
18 children.

19 Based on that decision by the local, which was
20 a local decision on what to do with a school, is the
21 basis that they're using to show that since this is a
22 local decision on whether you have or have not schools,
23 it is then not a statewide decision.

24 Now, in that case, what I think is clearly easy
25 to distinguish, is that the Court said, as long as there

1 are -- let me get the correct language here.

2 MS. HALSEY: Could you point us to the page
3 that you're --

4 MR. PALKOWITZ: Of course. I'm sorry. It's
5 page 25 of the staff analysis.

6 And I apologize, I've lost my place here.

7 And in the first paragraph, near the end of the
8 paragraph, it said that, "The court held that absent
9 proof that there were no school facilities to absorb the
10 students, the school district, 'in the reasonable
11 exercise of its discretion,' could lawfully take this
12 action."

13 And I think this is the paramount part of the
14 discussion. What happened is, a school district made a
15 decision that they could lawfully take an action to close
16 down a school; and on the other flip side, they could
17 make a lawful decision to open a school. But when it
18 does that, in this case, there has to be proof that there
19 can be a facility to absorb it.

20 And that argument, contrary, is used when you
21 want to build a school; and that there is no way to
22 absorb the children, so now, the decision is, you must
23 build a school.

24 That is not meant to be a discretionary
25 decision by a local that should bar it from being

1 reimbursed for the construction costs.

2 I think the previous page comments on how the
3 staff recommends -- or states, rather -- that there is a
4 statewide obligation to build schools, a statewide
5 obligation to provide free public education.

6 Either can be viewed as this being a legal
7 compulsion or a practical compulsion to have schools
8 throughout the state; and that decision is not a
9 discretionary decision that a local has and, therefore,
10 should not preclude it from being reimbursed for
11 activities.

12 CHAIR REYES: Let me ask you a question,
13 though: Has there been case law now that, in fact,
14 requires the State to build schools for local districts?
15 Or is it a permissive program under the State Allocation
16 Board Office of Public School Construction?

17 MR. PALKOWITZ: Has there been case law?

18 CHAIR REYES: Yes, is there case law that says,
19 "The state shall provide school facilities for kids"?

20 I'll agree that we have compulsory education,
21 kids under 16 must attend school. But is there a case
22 law or in statute that says, "And the state shall provide
23 for those school facilities"?

24 MR. PALKOWITZ: Well, there is no statute that
25 says you provide for teachers.

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: That's not the question.

2 The question is -- because you say that the
3 State requires that you provide the school facilities.

4 MR. PALKOWITZ: Right.

5 CHAIR REYES: And so what is the citation for
6 that?

7 You're talking to the chair of the State
8 Allocation Board, by the way, in all fairness.

9 MR. PALKOWITZ: Thank you for that disclosure.

10 I think we have to not leave our common sense
11 outside the room here. That if we have to provide a --

12 CHAIR REYES: I vehemently disagree with you on
13 that statement you are about to make because there is no
14 case law, there is nothing, there is no statute, there's
15 no case law.

16 Now, yes, you can argue the common-sense
17 approach, and the common-sense approach, too, is that
18 school districts are responsible for the facilities for
19 the kids and they must provide adequate facilities as
20 well. But that's a different issue of the mandate.

21 I just don't understand that there would be a
22 case law. At this point, I have not been able to find
23 one.

24 Okay, I'm sorry, proceed.

25 MR. PALKOWITZ: That has -- I believe I've made

1 my comments that I wanted to make on that issue.

2 CHAIR REYES: Okay.

3 MR. FERGUSON: In response to the staff's
4 analysis, we believe that there should be a more narrowly
5 tailored view of the mandate.

6 Specifically, Education Code 17070.75, which
7 outlines the requirements of the School Facilities
8 Program and participation in it, clearly states that any
9 applicant shall maintain and keep in good repair those
10 facilities.

11 As such, any of those facilities should not
12 apply to this particular mandated claim for additional
13 contracting requirements, because as a condition of
14 participating in the School Facilities Program, they have
15 agreed to maintain those facilities. So it's a condition
16 of building; therefore, we don't see that as subject to
17 the partial mandate claim that's here, because they're
18 required to do that.

19 In addition, we also see that staff's analysis
20 references Education Code section 17002, which has the
21 definition for "good repair."

22 We would note that the definition for "good
23 repair" is further defined in the Emergency Repair
24 Program under section 17592 point -- I believe it's 75?

25 MS. GEANACOU: .70.

1 MR. FERGUSON: -- .70, which clearly identifies
2 what are the emergency repairs and maintenance that are
3 needed.

4 And if we look at that, it clearly identifies
5 that all of those activities under section 17002
6 constitute emergency repairs.

7 So we would disagree that those would apply to
8 this mandate claim.

9 To the extent that there are additional
10 activities required when contracting for maintenance and
11 repair, we would then state that the deferred maintenance
12 program, which provides approximately \$250 million
13 annually on a matching basis to school district funds,
14 would cover any costs borne from the additional
15 contracting requirements of the Public Contracting Code.

16 I think the staff's analysis states that while
17 the program doesn't explicitly authorize the use of those
18 funds for contracting, that that means it would be
19 precluded from using that money for contracting.

20 However, we disagree; and we've been in contact with
21 staff from the Office of Public School Construction
22 who clearly have told us that school districts do, in
23 fact, use that funding to pay for some of the
24 contracting-related activities of their maintenance and
25 repair.

1 MR. LOUIE: I'd just like to clarify that last
2 statement. That was in the draft staff analysis. We've
3 amended that in the final staff analysis to find that
4 those funds could be used but are not required to be used
5 for those purposes.

6 Additionally, the funding under SFFR, it's a
7 voluntary program. There is no in evidence in the
8 record -- in this particular record -- that any of the
9 school districts have -- clearly, they probably have.
10 But in this record, there is no evidence that school
11 districts have applied for that funding, nor is there
12 any specific requirement in that funding to use those
13 funds for these specific activities.

14 MR. FERGUSON: Sure. And we agree with that to
15 the extent there is no specific funding requirement to
16 it. But we would argue that those funds should be used
17 to offset any costs to the extent that they are used by
18 districts for that purpose.

19 MR. LOUIE: And I believe that we've allowed
20 for that within the findings of the staff analysis.

21 MR. PALKOWITZ: If I may respond?

22 CHAIR REYES: Hold on. Ms. Shelton has a
23 point.

24 Go ahead.

25 CAMILLE SHELTON: I was trying to understand

1 Finance's argument just a little bit more.

2 I think it is your argument that you're trying
3 to except from the mandate those districts that
4 participate in those grant programs, so that they would
5 not be eligible to claim reimbursement if they
6 participate in the School Facilities Program and the
7 Deferred Maintenance Program?

8 MR. FERGUSON: Correct, correct, those should
9 be excepted.

10 CAMILLE SHELTON: Okay, that's an interesting
11 argument. I have never heard it that way before.

12 The problem with that is that that is a grant
13 program, and they voluntarily entered that program.

14 The statutes that Mr. Louie was talking about
15 for repair and maintenance are statutes and requirements
16 imposed on all school districts, regardless of whether
17 they are participating in the School Facilities Program
18 or the Deferred Maintenance Program.

19 So they -- all school districts -- regardless,
20 are required to repair and maintain facilities.

21 CHAIR REYES: Mr. Ferguson, is it your position
22 that the State grant program meets 100 percent of the
23 needs for the maintenance and repair to the statewide
24 school district -- the school districts and throughout
25 the state?

1 MR. FERGUSON: No, that's not my position.
2 My position is that as a condition of accepting those
3 grant funds, they've agreed to do the activity, and that
4 includes the maintenance and repair of those facilities
5 to keep them in good repair. So any of the facilities
6 built under that program necessarily require that. And
7 that was a discretionary choice of the school districts
8 to participate in the School Facilities Program.
9 Therefore, it is a discretionary downstream activity
10 requirement.

11 CHAIR REYES: But if they did not participate
12 in the State's program and they built it out of their
13 own...?

14 MR. FERGUSON: That is where we would agree
15 with the staff.

16 CAMILLE SHELTON: So what their argument is
17 doing, they're making it a mandate issue, and our
18 analysis is making it a cost issue.

19 I still strongly believe that it's not a
20 mandate issue because by law, those two statutes -- or
21 that one statute that requires repair and maintenance
22 is imposed on everybody, regardless of their decision.

23 CHAIR REYES: Everybody. Regardless of who
24 paid for the funding and whether or not they
25 participated.

Commission on State Mandates – May 25, 2012

1 CAMILLE SHELTON: Right.

2 CHAIR REYES: Yes?

3 MS. GEANACOU: May I ask -- I think it's maybe
4 a rhetorical or an actual question.

5 Susan Geanacou from Finance.

6 I was just looking at the order in which the
7 statutes were adopted. The General Repair and
8 Maintenance statute, 17- --

9 MR. FERGUSON: -565.

10 MS. GEANACOU: -565, I think is what is cited,
11 was a 1996 enacted statute.

12 And I think it was two years later that the
13 School Facilities Program, a piece of which is 17070.75,
14 said if schools elect to take that grant money, optional
15 money, to build their schools, with it comes the
16 attendant requirement on them to repair and maintain
17 their schools, which is a two-year later, arguably more
18 specific statute, so that they were aware of the prior
19 requirement; but then came along the assumption of
20 responsibility to, if they take the money, take on the
21 cost and responsibility of repairing and maintaining.

22 CAMILLE SHELTON: Do you have anything on that?
23 I believe the repair and maintenance statute, although it
24 may have been renumbered, I think that's been in law for
25 a long time.

1 We have other test claims that we have had a
2 triggering point for repair and maintenance. And without
3 having the Ed. Code with me -- do you have that?

4 MR. FERGUSON: That's correct, I don't have the
5 Ed. Code in front of me.

6 CAMILLE SHELTON: Okay.

7 MR. FERGUSON: But that's correct. So what
8 we're arguing here is that any of those
9 contracting-related activities specific to School
10 Facilities Program-built facilities should be excluded
11 from the mandate claim because, as a condition of
12 participating in that program, you have agreed to
13 maintain and repair those facilities. Therefore, you
14 should be excluded.

15 CAMILLE SHELTON: But their -- whatever their
16 decision is, they are still required by state law,
17 regardless of those local decisions that they made, to
18 repair and maintain under 170- -- I didn't write it
19 down -- 17065, or whatever that statute.

20 MR. FERGUSON: Yes, 17565.

21 So we're agreeing with you in those regards.

22 CAMILLE SHELTON: Right.

23 MR. FERGUSON: But we're saying it should be
24 more narrowly tailored to exclude any facilities that
25 were constructed under the School Facilities Program.

1 CHAIR REYES: So your position is if a school
2 facility -- if a school district participated in the
3 School Facilities Program in accepting that
4 participation, whether 50 percent or for hardship, a
5 higher percentage, the agreement was made by that school
6 district that they will assume all maintenance and
7 responsibilities downstream --

8 MR. FERGUSON: Correct.

9 CHAIR REYES: -- indefinitely?

10 MR. FERGUSON: That is correct.

11 In fact, within that, there is the routine
12 restricted maintenance account, which requires school
13 districts to set aside a portion of their general fund
14 monies for the purpose of maintaining those facilities,
15 built under the School Facilities Program.

16 CHAIR REYES: So under that scenario then, the
17 Emergency Repair Grant Program, does that mean that the
18 school facilities -- because the school districts that
19 participate in the school construction program can't tap
20 those? Because you sort of -- if I'm a school, and I tap
21 the School Construction grant bond program, then I assume
22 all responsibility for downstream of construction -- I
23 mean, for repairs, then the state grants for repairs, am
24 I then kicked out of that?

25 MR. FERGUSON: No, you would not. But that is,

1 again, a discretionary choice of the State to settle the
2 *Williams* lawsuit and provide additional assistance to
3 school districts for those types of repairs. But it does
4 not mean that that is a mandate of the state; that is
5 simply assistance of the state to school districts.

6 CAMILLE SHELTON: The argument is not working
7 with case law with me. I mean, with case law, it says
8 you have to look at your triggering point. And if your
9 triggering point in law requires you to do something,
10 then downstream from that, new state-imposed requirements
11 are eligible for reimbursement. So that's what the staff
12 recommendation is.

13 Now, also the staff recommendation does point
14 out all of the grant programs and the funding that you've
15 identified. And to the extent that they receive that
16 money and they apply it to the contracting activities,
17 then those would be offsetting revenue and have to be
18 reduced in their reimbursement claim.

19 But I don't see an argument that would allow
20 the Commission to exclude those districts that
21 participate in those grant programs. Mandates doesn't
22 work like that.

23 MS. GEANACOU: Susan Geanacou from Finance.

24 Then what would the Commission staff then think
25 of the requirement of participating in the School

1 Facilities Program to repair and maintain?

2 CAMILLE SHELTON: Well, those -- I understand,
3 you're trying to say there is an overlap in statutes, and
4 that is hard for me to conceptualize. I understand what
5 you're saying.

6 Those test claims have been filed and have been
7 denied by the Commission. So that was claimed in those
8 test claims that "once we participated in those funding
9 programs, we were required to comply with all these
10 activities." But independent of those programs, there's
11 a separate requirement in law to repair and maintain.
12 And those statutes haven't changed. They can't be
13 ignored.

14 MR. FERGUSON: We're not disagreeing with what
15 you're saying, necessarily. What we're saying is that
16 further downstream, any district that elected to
17 participate in the program necessarily waived their right
18 to claim that mandate funding because they agreed to, as
19 a condition of participating in that program, to repair
20 and maintain the facility.

21 CAMILLE SHELTON: Well, I guess from the State
22 Allocation Board, when money -- when a school district
23 comes before the board, they apply for specific projects,
24 right?

25 CHAIR REYES: They apply for construction,

1 modernization.

2 Let's think of this as new construction.

3 So what I'm hearing Mr. Ferguson say is if I'm
4 a school district, and I come up to the OPSC, and I seek
5 a grant for participation by the State in new
6 construction, and the project is -- I'm just going to say
7 \$10 million for lack of a better number, the locals put
8 five, the state puts five.

9 In accepting the five from the State, the
10 locals, therefore, assume all responsibility for
11 maintaining and repairing that facility.

12 So under your argument, Mr. Ferguson, is that
13 if years later, when there's a need to repair and this
14 statute kicks in, and says, "It needs repair, therefore,
15 you need to pay it," then by virtue of the fact that they
16 participate in the OPSC program, they're not entitled to
17 that mandate, but they're required to repair because they
18 now have met a substandard -- whether they recognize it
19 on their own or not, it is below standard and they need
20 to take care of it?

21 MR. FERGUSON: That would be correct.

22 CHAIR REYES: Okay. Commissioner Olsen, then
23 Commissioner Saylor.

24 MEMBER OLSEN: So it seems to me that that's
25 not an issue of whether there's a mandate. That's an

1 issue for the P's & G's.

2 That's a claiming issue; isn't it?

3 CAMILLE SHELTON: Well, we have it as --

4 It's what? I'm sorry.

5 MEMBER OLSEN: It's a claiming issue?

6 CAMILLE SHELTON: Well, and that's how we've
7 written the analysis. I still think of it as a claiming
8 issue and an offset issue.

9 CHAIR REYES: I kind of agree with you there
10 because the broad law would be -- schools -- you're all
11 required to pay, to take care of the maintenance and
12 repairs; and then if you happen to participate through
13 this program, you're exempted from doing that, then
14 you're exempted.

15 But overall, all schools -- and then it's in
16 the P's & G's that you didn't differentiate who would and
17 who would not.

18 MS. GEANACOU: I don't think the analysis is
19 written that way, though, that it would --

20 CAMILLE SHELTON: Well, maybe I'm missing
21 something. The analysis, as written, were those grant
22 funding programs are identified as offsetting revenue.
23 So to the --

24 CHAIR REYES: But you're talking about the
25 offsetting -- for the emergency repair for the

1 offsetting. Not necessarily if you originally were built
2 through OPSC.

3 MEMBER LUJANO: I'd like to note that we have
4 specifically excluded new construction in this claim.

5 MS. HALSEY: Yes. Can I clarify? Because I
6 think I'm understanding what everybody is saying and kind
7 of going this way, because I did the *School Facilities*
8 *Funding Requirement* test claim.

9 But I think what Finance is arguing is, if you
10 build a new school and you're using school-facility
11 program financing, then you have entered into a
12 commitment for eternity to then repair and maintain that
13 at your own expense. And, therefore, you cannot be
14 eligible for reimbursement under a state mandate to
15 repair and maintain.

16 That's the argument, right?

17 MR. FERGUSON: That's correct.

18 MS. HALSEY: And then in our analysis, we find
19 a duty to repair and maintain is reimbursable. However,
20 there is also a state facility program for modernization
21 that can be used for major repairs and maintenance.
22 That's a separate issue.

23 CHAIR REYES: Right.

24 MS. HALSEY: That is a program you can apply
25 for. And in our analysis, we say you can use that as

1 offsetting for the mandate, so...

2 CHAIR REYES: But you don't make the
3 distinction whether or not the school was originally
4 built for the OPSC?

5 MS. HALSEY: Right, we don't.

6 And also, just something to think about, if
7 that's where the Commissioners are thinking of going:
8 You can't say a school district isn't eligible because it
9 would be a facility-by0facility.

10 CHAIR REYES: Right.

11 CAMILLE SHELTON: Exactly.

12 MS. HALSEY: Whether or not they were built
13 with the school -- and I don't know if there's even a way
14 to track that.

15 CHAIR REYES: Right. It gets back to the --
16 Commissioner Olsen?

17 MEMBER OLSEN: Take care of it in the
18 P's & G's.

19 MS. HALSEY: Well, no, but I mean, as a claim,
20 it could be -- I don't know how you would even do it in
21 claiming, because I don't know how you track whether a
22 school has been built with School Facilities Program
23 funds, particularly schools that are really old,
24 50 years -- I don't know how long these records are kept.
25 Or I don't know what that would mean for claiming. We

Commission on State Mandates – May 25, 2012

1 don't have anyone here from the State Controller's office
2 that could speak to that.

3 CHAIR REYES: Well, let's have Mr. Ferguson
4 answer that question, then we will go back to
5 Commissioner Saylor.

6 MR. FERGUSON: I know under the late 90's,
7 under the lease purchase program, which was the prior
8 iteration of the School Facilities Program, we do have
9 data of schools constructed under those programs. We
10 know school-site by school-site what was constructed at
11 those schools.

12 CHAIR REYES: Okay.

13 MS. GEANACOU: I want to add, I don't think
14 Finance is arguing that whole school districts be
15 excluded because they may or may not have ever used the
16 school facility funding to build one or more of their
17 schools.

18 I think we just want to see in the analysis
19 an acknowledgment that for districts that did do --

20 CHAIR REYES: "If the project..." Call it a
21 "project."

22 MS. GEANACOU: Project-specific, yes.

23 CHAIR REYES: Project-specific?

24 Commissioner Saylor?

25 MEMBER SAYLOR: So on the issue -- there are

1 two issues, as I'm hearing: One is new construction and
2 one is repair and maintenance.

3 It strikes me for repair and maintenance, that
4 the staff analysis is on target.

5 Here is the circumstance that I see: If we've
6 required somebody to do something in return for a grant
7 and then we change the cost and procedures involved with
8 that requirement, then that seems to me to be a mandate.
9 Because we've required -- in fact, it's an even stronger
10 one because we're requiring them to do something, and now
11 we're adding an additional requirement downstream that
12 they had no eyes open to understand that they were going
13 to be facing at a later time.

14 We could just as easily require that as a part
15 of any repair and maintenance, they lower the light
16 switches from four feet to three feet. And that's a new
17 cost, but we could say that's simply a matter of repair
18 and maintenance to meet current standards.

19 So I think for the repair and maintenance
20 portion, I certainly agree with the Commission staff that
21 these procedural contractual, procedural requirements are
22 a new mandate and we ought to figure out how to
23 appropriately set the claim process.

24 For new construction, it strikes me then that
25 our witness here said something about common sense. And

1 it strikes me that school districts don't have
2 unfettered, unlimited discretion in the area of whether
3 or not they construct schools. And, frankly, the State
4 Allocation Board is not paying for the full cost of
5 school construction, and hasn't and can't.

6 So what we have is a set of -- a framework,
7 I think, of statutes from the federal and state
8 governments, the "free and appropriate public education
9 in the least restrictive environment..." and all of that --
10 structure that people have to live within, health and
11 safety requirements, where, what patterns of growth are.
12 It strikes me that there are limits to what we would
13 think of as discretion.

14 This statute establishes a requirement. The
15 requirement is that certain contractual procedures have
16 to fall in place. That's a mandate. To me, that's a
17 mandate.

18 And I don't care -- we can say that they don't
19 have to build schools; but practically speaking, that's
20 not accurate.

21 This is a requirement for people, when they are
22 taking an action, they must fulfill this new requirement.
23 That sounds like a mandate to me, under law and under
24 practical common sense.

25 CAMILLE SHELTON: Can I just clarify that the

Commission on State Mandates – May 25, 2012

1 recommendation here on the -- the activities are
2 triggered only for repair and maintenance of existing
3 facilities. So we're not even talking about new
4 construction.

5 MEMBER SAYLOR: Well, I am.

6 CAMILLE SHELTON: Oh, you are? I'm sorry.

7 MEMBER SAYLOR: I am definitely talking about
8 new construction because I believe that is a part of the
9 statute that sets up the contractual requirements.

10 CAMILLE SHELTON: Okay.

11 MEMBER SAYLOR: And while the Commission staff
12 recommendation is not to identify these requirements for
13 new construction as a mandate, I disagree with that
14 because in practical terms, I don't -- I'm not compelled
15 that whether or not school districts have the discretion
16 is the relevant point. It seems to me that there is a
17 new requirement placed on them when they take a certain
18 action. And that requirement is a mandate.

19 So I believe that that's a mandate that we
20 should be identifying for reimbursement.

21 MR. PALKOWITZ: If I may follow up --

22 CHAIR REYES: Yes.

23 MR. PALKOWITZ: -- to your previous question as
24 far as the legal authority.

25 And I'm not aware of one, but there is a

1 California Supreme Court case that follows, and that line
2 of thinking is that it could be legal or practical
3 compulsion. And that is really what I believe is correct
4 as far as the practical compulsion, that there really,
5 really is no discretionary decision on a board making a
6 decision and moving forward for a new school facility.

7 When a board goes through that analysis, they
8 have exhausted every alternative which is required under
9 CEQA and other requirements. It's not that school
10 districts are building new facilities because they have
11 extra money or there is no need for it. I mean, there is
12 an exhaustive process that's done.

13 CHAIR REYES: I'm just thinking of Elk Grove,
14 who built the school and -- I'm sorry.

15 MR. PALKOWITZ: Well, you know, there are
16 800 school districts out there, and you could find an
17 exception, but...

18 CHAIR REYES: That's what the smile was about.
19 I apologize.

20 MR. PALKOWITZ: Yes, that's okay. I'm not
21 offended.

22 And I agree with the other comments that
23 really the other school facilities funding is really a
24 parameters and guidelines issue, so...

25 Thank you.

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: Mr. Louie?

2 MR. LOUIE: I would just note, as in prior
3 Commission decisions, there is a slew of other options,
4 as pointed out I believe in SFFR and even CEQA, that
5 there's a slew of other options that districts can take.
6 And there have been instances based off of policy reasons
7 why they've -- why districts have decided to build a new
8 building rather than take the other options.

9 Here, there's no evidence in the record to
10 suggest one way or the other that school districts, all
11 the time, need to build these districts -- or need to
12 build these schools. We can't find, just on our own,
13 just based off of gut assumption, that this occurs. We
14 can't make our mandates finding based off of that.

15 MEMBER SAYLOR: I think it's a mandate if you
16 have a requirement for certain procedures.

17 Now, the school districts can choose to do a
18 number of different things. They can choose to have
19 overcrowded schools forever. But the point is, if
20 they're ever going to have a contract to build something,
21 they have to follow this requirement that's now set out.
22 That's a mandate.

23 There's argument in the staff analysis about
24 use of developer fees. Well, that's shifting -- that's a
25 tax. If we actually say that we're going to have school

1 districts tax developers, that is a back door to avoiding
2 a state responsibility.

3 And there are limits, frankly, to how much
4 developer impact fees can be raised. So I think it's a
5 specious argument that somehow the district can avoid
6 this cost simply by overcrowding their schools or by
7 operating substandard schools. I don't find that
8 compelling at all.

9 MS. GEANACOU: Could I make one comment for
10 Finance, please?

11 CHAIR REYES: Sure.

12 MS. GEANACOU: Susan Geanacou.

13 Regarding the Education Code 17070.75 in the
14 School Facilities Program, which imposes on the districts
15 the obligation to maintain and repair if they accept the
16 School Facilities Program money, Mr. Saylor -- if I
17 understood your comments correctly, you were concerned
18 that the Legislature here, in the non-emergency repair
19 contracted out area, has added new requirements on the
20 districts that may not have been specified or are not
21 contained in that statute that they agreed to upon
22 accepting the money. So nothing precludes the state from
23 adding on additional requirements.

24 And so you think that's a mandate?

25 I want to make sure I understood what you were

1 saying.

2 MEMBER SAYLOR: As I understand the measure,
3 the issue before us, is that as a requirement for
4 contract procedures for specific elements of the
5 contracting process. So that's a specific mandate.
6 Whether we're -- every time that a school district
7 chooses to take an action, whether it's for new
8 construction or for repair and maintenance, they must
9 follow this new mandate.

10 Now, I think we can set up some process for
11 what kinds of fees -- or what kinds of P's & G's,
12 parameters and guidelines may go into effect for
13 claiming; but I really hope that this Commission does not
14 dismiss this as not a requirement.

15 It is a requirement. We're saying, "For the
16 repair and maintenance, you're going to have to do this,"
17 And we can say, "We're not going to pay you because you
18 agreed to do this forever."

19 Well, frankly, that doesn't seem right because
20 they didn't have any idea that they were going to be
21 facing this new set of requirements. That's a cost.

22 There is a statewide interest. The Legislature
23 has identified clearly a statewide interest in
24 establishing these standard contract procedures.

25 Great. It's appropriate. There is nothing

Commission on State Mandates – May 25, 2012

1 wrong with it. But it is requiring local governments to
2 do something they didn't have to do before.

3 That is a mandate. That's a state mandate for
4 every time they choose to -- or have to do either a new
5 construction or rehab. There has got to be a recognition
6 that that's a mandate; and we should figure out how we're
7 going to pay for it or not. But it is a requirement that
8 we're imposing on local government.

9 CHAIR REYES: Well, the Commission has to
10 decide whether or not it's a mandate.

11 MEMBER SAYLOR: Okay, well, that's my vote.

12 CHAIR REYES: Go ahead, Susan, you had a
13 question, or you wanted a clarification?

14 MS. GEANACOU: Well, I wanted to make sure I
15 understand what he was saying.

16 I think my concern on behalf of Finance is that
17 when the districts assume that obligation, I think it's
18 with the awareness that the Legislature can subsequently
19 amend or alter what the duty of repair and maintaining
20 involves.

21 And I'd be eager to hear what the Commission
22 staff has on that line of thinking.

23 CAMILLE SHELTON: Okay, there is case law from
24 the California Supreme Court.

25 If these public contract duties were placed in

1 the School Facilities Program statutes, or the Deferred
2 Maintenance statutes, or the Emergency -- whatever --
3 fund statutes, then the courts have said that that
4 initial decision to participate in that program is a
5 discretionary program of the school district, and the
6 Legislature can subsequently impose requirements.

7 And, yes, they're required to do those things; but those
8 are not state-mandated programs.

9 So you have to look at the underlying decision.
10 If the underlying decision is discretionary, then any
11 downstream requirement imposed by the Legislature is not
12 mandated by the statute, okay.

13 So here, we have a -- it's kind of not the same
14 because these test-claim statutes were not placed in
15 these voluntary programs. They were not intended to be
16 included in the voluntary programs. They're outside of
17 that. They're imposed on every school district. And so
18 that's the distinction.

19 Mandates law is very difficult, the Supreme
20 Court has determined, because you are looking at it in
21 the abstract. You don't have, usually, a lot of facts to
22 show you what is really going on.

23 So what the court has said is, you have to
24 perform that legal analysis, just like I explained.

25 If you want to get to a practical compulsion situation,

1 though, the claimant has the burden to bring in
2 substantial evidence in the record.

3 We don't have any evidence filed here. I don't
4 have any evidence from a school district saying they have
5 exhausted all their alternatives and have felt compelled
6 to build new construction and then, therefore, they've
7 got to comply with all these downstream requirements.
8 If they had that, then that would be something we would
9 have to absolutely consider.

10 CHAIR REYES: Your point?

11 MR. PALKOWITZ: I'm not aware of there being a
12 court that has ruled the State School Facilities is not a
13 mandate.

14 CAMILLE SHELTON: The courts haven't, no.
15 The Commission has made that ruling.

16 The case law I'm talking about is *San Diego*
17 *Unified School District, Kern High School District*, and
18 the *Department of Finance versus Commission on State*
19 *Mandates POBR* case.

20 MR. PALKOWITZ: I just want to clarify that
21 there is no court that has made a ruling on school
22 facilities or deferred maintenance programs.

23 CHAIR REYES: Mr. Alex?

24 MEMBER ALEX: So, I don't want to get into a
25 debate over this, but I do want to make the point that as

Commission on State Mandates – May 25, 2012

1 director of the Office of Planning and Research, we see,
2 on a fairly regular basis, school districts that are
3 building schools in areas that, from a state perspective,
4 we may not think is appropriate.

5 And so I don't think that that creates -- that
6 building a new construction is necessarily a state
7 mandate. And I concur that there is no evidence in the
8 record that would support it on this particular record.

9 MEMBER SAYLOR: No, the contractual procedures
10 are the mandate.

11 MEMBER ALEX: That was his second step.

12 CHAIR REYES: Commissioner Saylor, do you have
13 your mike on?

14 Okay, anybody else?

15 *(No response)*

16 CHAIR REYES: Any other questions?

17 *(No response)*

18 CHAIR REYES: Okay, there are several
19 recommendations from staff. There are some denied, some
20 approved, and then there's some partially approved.

21 We can take all in bulk and see where the votes
22 go, or we can go one by one and see where the votes go.
23 And what it would take is a motion from somebody to get
24 the ball rolling.

25 CHAIR REYES: Commissioner Olsen?

Commission on State Mandates – May 25, 2012

1 MEMBER OLSEN: Well, I'll move staff
2 recommendation, and we'll see what happens with that.

3 MEMBER LUJANO: I'll second.

4 MEMBER OLSEN: And then we can go back, if we
5 need to.

6 CHAIR REYES: Okay, staff's recommendation has
7 been moved and seconded.

8 Commissioner Ramos?

9 MEMBER RAMIREZ: Aye.

10 CHAIR REYES: Okay, let's do --

11 MS. HALSEY: Call the roll?

12 CHAIR REYES: Call the roll.

13 MS. HALSEY: Mr. Alex?

14 MEMBER ALEX: Aye.

15 MS. HALSEY: Mr. Chivaro?

16 MEMBER CHIVARO: Aye.

17 MS. HALSEY: Mr. Lujano?

18 MEMBER LUJANO: Aye.

19 MS. HALSEY: Ms. Olsen?

20 MEMBER OLSEN: Aye.

21 MS. HALSEY: Ms. Ramirez?

22 MEMBER RAMIREZ: Aye.

23 MS. HALSEY: Mr. Saylor?

24 MEMBER SAYLOR: No.

25 MS. HALSEY: Mr. Reyes?

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: Aye.

2 MEMBER SAYLOR: If I could make a brief
3 comment?

4 CHAIR REYES: Yes.

5 MEMBER SAYLOR: I'll make it very briefly, and
6 I won't do this often.

7 But I would support the staff recommendation
8 pertaining to repair and maintenance, obviously; but I
9 disagree with the other part. And so that was the reason
10 for my vote in this case.

11 CHAIR REYES: Thank you, sir.

12 Let's take a five-minute recess, if we can,
13 very quickly. And be back here by 11:00, please.

14 *(Recess from 10:53 a.m. to 11:01 a.m.)*

15 CHAIR REYES: Okay, we're back.

16 MS. HALSEY: Item 5, Chief Counsel Camille
17 Shelton will present Item 5, a test claim on *Local Agency*
18 *Ethics*, AB 1234.

19 CAMILLE SHELTON: This test claim addresses the
20 required policy-making, reporting, record-keeping, and
21 ethics training and notice requirements imposed on local
22 agencies if they provide any type of compensation,
23 salary, or stipend to a member of a legislative body, or
24 provide reimbursement for actual and necessary expenses
25 incurred by a member of a legislative body in the

1 performance of official duties.

2 Staff finds that some of the code sections pled
3 impose a reimbursable state-mandated program only on
4 general-law counties and those eligible special districts
5 subject to the tax-and-spend provisions of articles XIII
6 A and XIII B that are required by their enabling acts to
7 provide reimbursement to the members of legislative
8 bodies.

9 Claimant City of Newport Beach did not file any
10 comments on the draft staff analysis, and Finance did
11 file comments concurring. However, the co-claimant Union
12 Sanitary District argues that it is an eligible claimant
13 because it operates primarily on proceeds of taxes, is
14 subject to the tax-and-spend limitations of the
15 California Constitution, and, under Prop. 218, the sewer
16 service charges that it imposes are considered special
17 taxes.

18 However, staff finds that the evidence in the
19 record does not support the co-claimant's assertions that
20 its charges have been determined to be proceeds of taxes;
21 and staff finds that the co-claimant is not subject to
22 the tax-and-spend restrictions of the California
23 Constitution and, thus, not eligible to claim
24 reimbursement under this program.

25 Staff recommends that the Commission adopt the

Commission on State Mandates – May 25, 2012

1 staff analysis and proposed statement of decision to
2 partially approve the test claim.

3 Will the parties and witnesses please state
4 your names for the record?

5 MR. O'HARA: David O'Hara, attorney for Union
6 Sanitary District.

7 MS. GMUR: Juliana Gmur on behalf of the City
8 of Newport Beach.

9 MS. FEREBEE: Donna Ferebee, Department of
10 Finance.

11 MR. WARD: Randall Ward, Department of Finance.

12 CHAIR REYES: Okay, thank you.

13 MS. GMUR: Good morning, Commissioners.

14 CHAIR REYES: Good morning.

15 MS. GMUR: The City of Newport Beach would like
16 to compliment staff on its analysis insofar as it
17 addresses issues for cities and counties. We support
18 that analysis.

19 My esteemed co-counsel would like to address
20 the balance of that analysis.

21 CHAIR REYES: Thank you.

22 MR. O'HARA: Honorable Commissioners, I'm here
23 to talk about Union Sanitary District and not the bulk of
24 the staff analysis that relates to the City of Newport
25 Beach.

1 We are not going to be talking about stipends
2 paid to officials attending ethics training or
3 disseminating information regarding the training, or
4 keeping records or expense forms or anything like that.
5 What we seek is the \$32,000 that it cost my client in
6 order to have the materials prepared to provide ethics
7 training in 2006.

8 In that case, it was 240 directors of sanitary
9 districts throughout the state of California who attended
10 a California Association of Sanitation Agencies meeting
11 in Monterey.

12 Since then, there have been two more repeats of
13 the ethics training, using essentially the same
14 materials. But this is a claim that was made in 2007 for
15 a set of expenses, and we have not made any subsequent
16 claims for any further compensation other than the
17 \$32,000 involved here.

18 There are three issues that are dealt with
19 regarding Union Sanitary District that are in the staff
20 analysis.

21 The first issue is: Are the directors of
22 sanitary districts required to be paid?

23 And that's very easy. That's, without a doubt,
24 Health and Safety Code section 6489 states, "Each of the
25 members of the board shall receive compensation in an

1 amount not to exceed \$100 per day for each day's
2 attendance of meetings of the board." It goes on to say,
3 "up to six different meetings, or six different days of
4 service per month."

5 As a practical matter today, with the
6 adjustments, they get a little over \$200 per meeting.
7 And, of course, the directors who attended ethics
8 training would have been paid by the district, as well as
9 the other 235 attendees in Monterey in 2006.

10 But that's not what we're dealing with here.
11 This is a threshold issue; and that is, that there's an
12 eligibility for mandate compensation if the compensation
13 to directors is mandatory. And, of course, it's
14 mandatory in this case. That isn't clear from the
15 analysis.

16 The second issue is a little more involved, and
17 that is: Are sanitary districts able to raise
18 discretionary funds through sewer service charges?

19 Now, perhaps when I started representing my
20 client 35 years ago, the client could conceivably have
21 raised more funds through their sewer service charges
22 than they really needed to provide the sewer service.
23 But that was all a thing of the past in 1996, when
24 Proposition 218 was passed.

25 Now, revenue for operations of sanitary

1 districts is extremely limited, and there are no
2 discretionary funds at all, or funds for complying with
3 the law that required ethics training.

4 In 2005, AB 1234 -- or AB 1-2-3-4, as it's
5 referred to -- required that each compensated public
6 official, such as a sanitary district director, must
7 every two years have two hours of ethics training.

8 The unfortunate situation was that when we got into the
9 summer of 2006, having a deadline of the end of the year
10 to provide the ethics training, the only place I could
11 find that had any ethics training materials available,
12 was one law firm located in Oakland, who provided ethics
13 training for their own clients.

14 Therefore, under the auspices of the attorneys'
15 committee for the California Association of Sanitation
16 Agencies -- and I believe your Executive Director was a
17 member of that committee about that time -- several of us
18 volunteered to set about getting a curricula prepared for
19 the ethics training.

20 As it turned out, I ended up writing virtually
21 all of the written materials, preparing the workbook and
22 the PowerPoint, which was no real problem for me. At
23 that point in time, I was younger and had a little bit
24 more energy than I have today.

25 And my client, as is stated in the test claim

1 that we've submitted, paid me a total of \$22,000 for
2 preparation of this particular document, which is a
3 manual that was prepared. I don't have copies because
4 this has been out of print since 2006. But this was the
5 manual that was prepared and distributed to all of the
6 directors who attended the ethics training. And there
7 are other materials that accompanied that and dovetailed
8 in with it.

9 Now, the question here is: When Union Sanitary
10 District paid to comply with the new AB 1234 law, did
11 they have discretionary funds? In other words, are they
12 an enterprise district that has funds that they can
13 utilize for purposes other than for the treatment and
14 disposal of sewage?

15 And the answer to that question is, no, they
16 have no discretionary funds because Proposition 218,
17 enacted in 1996, provides that the revenue derived from
18 a fee or a charge relating to public-agency fees, cannot
19 exceed the funds provided to the property-related
20 service.

21 And there's cases that have established that
22 sewer service charges are properly related charges.

23 Further, article XIII D of the California
24 Constitution provides that "Revenues derived from a fee
25 or a charge must not be used for any purpose other than

1 that for which the fee or charge was imposed." Fairly
2 straightforward there.

3 These days, sanitary districts are not
4 enterprise districts. I think of an enterprise district
5 as -- I know Washington Hospital in Fremont, they made a
6 profit, they were proud to report in about 2005 or 2006,
7 \$50 million. That's an enterprise.

8 Union Sanitary District, however, doesn't do
9 anything that would be an enterprise. They don't process
10 their sewage sludge into pellets for sale, like
11 milorganite or some of the other organic fertilizers.
12 They simply collect, treat, and dispose of sewage that
13 is produced by the cities of Fremont, Newark, and Union
14 City.

15 Part of the scheme of Proposition 218 is that
16 every landowner has a vote in the setting of rates for
17 sanitary services.

18 Generally, every year, the rates are
19 readjusted; but every landowner has a vote. And the bulk
20 of them -- almost all of the sewer service charges are
21 collected on the tax roll.

22 And as I indicated in my reply memorandum and
23 provided some exhibits, of the \$30,900,000 that Union
24 Sanitary District had in calendar year 2006, that we're
25 referring to as sewer service charges, \$30,160,000 of

1 those came from the tax collector.

2 So the sanitary districts being unable to
3 provide through their sewer services or their charges,
4 anything in excess of what it costs to treat and dispose
5 of the sewage, has no alternative when they comply with
6 the new requirement, which is obvious in this case, a new
7 requirement that all of the directors receive the ethics
8 training.

9 Issue number three that comes up then is: Is
10 ethics training a new program? Since it didn't exist, it
11 wasn't required before 2006, from the 2005 legislation,
12 the training has to come from somewhere. It can't come
13 out of the air.

14 As I indicated, at the time I started working
15 on this project, there was just one law firm that had
16 any type of ethics training that could be provided. The
17 staff has indicated that the FPPC has an online course to
18 comply with the ethics training. However, that course
19 wasn't available until October of 2006; and we presented
20 the first of the ethics trainings in Monterey in August
21 of 2006. And I started working on the project in May of
22 2006. So there was a vacuum, essentially, as far as the
23 materials were concerned.

24 In the staff report, it appears that the
25 Department of Finance agrees that this is a new program

1 in that if the sanitary district directors are required
2 to be paid by law, then it is compensable as a state
3 mandate.

4 In closing, we're just asking for the \$32,000,
5 which went for the preparation of materials and arranging
6 the ethics training for the 240 sanitary district
7 directors in Monterey in 2006, and nothing beyond that.
8 So the staff's analysis as it relates to other expenses
9 is not relevant to the claim that we've made here on
10 behalf of Union Sanitary District.

11 CHAIR REYES: Okay, does anybody have any
12 questions?

13 *(No response)*

14 CHAIR REYES: Staff?

15 *(No response)*

16 CHAIR REYES: It sounds like we're asking for
17 something that is really not there for us.

18 Go ahead, Ms. Shelton.

19 CAMILLE SHELTON: Well, our analysis is
20 presented a little bit differently. We have separated
21 out the analysis for the Union Sanitary District because
22 of Mr. O'Hara's claim.

23 And the whole purpose of reimbursement under
24 article XIIIIB, section 6, is to provide reimbursement to
25 those agencies that are subject to the tax-and-spend

1 limitations in the Constitution.

2 The Union Sanitary District does not have any
3 statutory authority to levy taxes. They do have
4 authority to assess fees, and they have decided to assess
5 fees through the ordinance -- through the property taxes
6 of the county. But the money they receive is a fee
7 assessment and not a tax.

8 There hasn't been any evidence submitted into
9 the record that the District has gone out for a special
10 tax requiring two-thirds vote of the voters to authorize
11 a special tax under Prop. 218, and no voter has come
12 forward whereby the court has ruled that their fees are
13 now taxes. So they don't have authority to levy taxes
14 and their money comes from fee revenue.

15 The courts have made it pretty clear that the
16 purpose of our article XIII B, section 6, is not to
17 reimburse for those expenditures of fees or assessments.
18 The purpose is to reimburse for the expenditures of tax
19 revenue. So there's a lot of special districts in the
20 state that are not eligible to claim reimbursement under
21 this process.

22 With respect to developing the training, our
23 recommendation was based on the plain language of the
24 statute, which imposes the duty to get trained on the
25 individual.

1 It doesn't, on the plain language, require that
2 the training be developed; and, in fact, there was the
3 training program prepared as Mr. O'Hara was mentioning by
4 the A.G.'s office and FPPC, which was available online,
5 free of charge, by October 1st, '06.

6 CHAIR REYES: So my take of this is, the
7 closest we can come to this is, if in recovering his
8 \$32,000 he imposed a fee on special districts as part of
9 the cost of providing the ethics training and recover
10 that way, then the special districts would come to us and
11 say, "In order to receive the ethics training, it would
12 cost us X dollars."

13 Right now, you can get the ethics training for
14 50 bucks or 500 bucks to recover the costs -- I'm just
15 making up a number. And it's that cost that then comes
16 before the Commission as a reimbursable mandated cost.

17 And then the question to the Commission is: It
18 is a mandate, but is it reimbursable? And the position
19 of the Commission is that it is not reimbursable because
20 they have fee authority.

21 The claimants then would say that is not --
22 they don't have a fee authority because it is, A, tax;
23 and, B, the fee that they currently charge is only for
24 the processing of the sewage treatment and so forth, and
25 not for the administrative costs.

Commission on State Mandates – May 25, 2012

1 And then the Commission would then say: Yes,
2 but there is an administrative component to doing that,
3 since the water doesn't turn itself on and off, and
4 somebody has to supervise that person, write the check.
5 So some administrative component would need to be added
6 to the fee structure, which should include the ethics
7 training.

8 Is that --

9 CAMILLE SHELTON: Close. Yes.

10 CHAIR REYES: -- close?

11 Okay, I'm tracking. Go ahead.

12 CAMILLE SHELTON: Well, the only other thing
13 I was going to mention is that the Sanitary District's
14 report to the Controller's office does list their
15 revenues from fee authority and their expenses. And it
16 includes, you know, 12 percent for administration and
17 general expenditures, which is paid for by their fee.

18 CHAIR REYES: Which would have included the
19 ethics training?

20 CAMILLE SHELTON: Right.

21 CHAIR REYES: Mr. Burdick, you joined the
22 table, sir.

23 Welcome.

24 MR. BURDICK: Mr. Chairman, Members of the
25 Commission. Allan Burdick here; and my role is director

1 of the CSAC SB-90 Service.

2 And part of it is clarification I kind of want
3 on this issue because I'm a little bit confused. Because
4 the cities have agreed and the League agrees that this is
5 not placing a mandate on cities. However, as I believe
6 the analysis is, that it does place a mandate to some
7 extent, on general-law counties.

8 So my question kind of -- and it appears that
9 one of the things that counties are responsible for doing
10 is to tell their supervisors about the availability of
11 training. But it doesn't appear that the costs of
12 training or going to the training are reimbursed, if I
13 read it right -- I hope I'm reading it wrong.

14 So, for example, your board members for the
15 Del Norte County Board of Supervisors who have to receive
16 this ethics training, and the only closest place to get
17 this ethics training is in Sacramento, as an example, it
18 appears to me to say that if those supervisors were then
19 told, yes, the closest, best, cheapest training available
20 is in Sacramento, they had to travel to Sacramento and
21 go, take the training or whatever and come back, then
22 none of those expenses are reimbursable? Am I reading
23 that right? Is that your recommendation?

24 CAMILLE SHELTON: Well, we haven't reached that
25 issue because there is nothing in the plain language of

1 the statute that requires training be conducted during
2 their normal business hours, number one. And number two,
3 the training is provided free, online. It's a duty
4 imposed on the member of the legislative body.

5 So the requirements are listed -- or the
6 alleged reimbursable activities that we're recommending
7 reimbursement for are on page 41.

8 MR. BURDICK: Well, I would --

9 CAMILLE SHELTON: These are not employees.
10 They're members of a legislative body. It's a little bit
11 different.

12 You know, in past test claims, before the
13 Commission, we've had training claims. And under certain
14 laws and certain federal laws, the agency is required to
15 provide the salary, continued salary of the employee if
16 they receive the training during normal business hours.
17 That law would not apply to a member of a legislative
18 body because they're not employees.

19 MR. BURDICK: They're not employees?

20 CAMILLE SHELTON: Or you could provide some --
21 do you have any legal analysis to say otherwise?

22 CHAIR REYES: But I think to Mr. Burdick's
23 point, though, if they don't incur costs to go to the
24 training site, and you're saying because the training is
25 available online and you're not required to go to a

1 facility...?

2 MS. HALSEY: Backing up a little bit, it's
3 because the agency's not required to provide the
4 training. It's similar to a professional responsibility
5 requirement, where attorneys may be required to have
6 certain training to maintain their status as attorneys,
7 but the employer is not necessarily required to provide
8 that training. It's on the attorney. It's similar. But
9 it is provided.

10 MR. BURDICK: A couple things clearly on the
11 online part: This was not available initially, you know,
12 I don't think. There was a lot of confusion earlier.
13 Now, it may be fine. Back in 2005, I think, when AB 1234
14 was there, there was real questions who did it, it was
15 done differently, whatever.

16 Now, you know, seven years later, people got
17 this under control. It's routine. They understand it,
18 whatever.

19 I'm sure that probably both of our local
20 members have received this training and gone to some
21 training during their tenure, and probably didn't do it
22 online, is my guess. I'm just guessing. Because
23 normally, I think most elected officials go to where the
24 training is provided; provided, generally, the best place
25 for local agencies is by the Institute of Local

1 Self-Government, an organization of CSAC and the League
2 of Cities, for city and county people.

3 But that's what I was looking at, it looked
4 pretty clear to me. If I was -- so let's go back to
5 2005, so we don't have to deal with the other stuff when
6 this first came into place.

7 I'm a member of the Del Norte County Board of
8 Supervisors. I now have this obligation to get this
9 training. And the only place I can get this training,
10 probably, would be to come to Sacramento, San Francisco,
11 some place. I'd doubt if there's any place north of
12 Sacramento at that time that was providing this training,
13 whether or not the time and expenses of those members.

14 Also at that time, I know there's some
15 indication about the fact that, you know, level of
16 compensation could be set. Well, when it was passed,
17 those people, for the term of their office, their
18 compensation had been set. That compensation can't be
19 changed, I don't believe. And I'm not an attorney and
20 I'm not sure of that. But generally speaking, elected
21 officials' compensation is set during their term.

22 And so if, unless you'll say they were getting
23 a hundred dollars a day in Del Norte, it would seem to me
24 that -- and the county had to pay that hundred dollars,
25 that that compensation and their expenses should seem

Commission on State Mandates – May 25, 2012

1 like it would be reimbursable.

2 CHAIR REYES: Well, I think to the first
3 question, would the -- well, I'll ask the supervisor:
4 If you have to go to a training in your role as a
5 supervisor, does the county have to compensate you for
6 that function, for being gone to do that?

7 MEMBER SAYLOR: Well, they're different.
8 County supervisors and some of the special district
9 people that are being described here are different, so
10 they're --

11 CHAIR REYES: All I'm asking you is the
12 supervisor.

13 MEMBER SAYLOR: Okay, no, you're not.
14 Supervisors do not receive compensation on a per diem or
15 per-meeting basis.

16 MS. HALSEY: Right.

17 MEMBER SAYLOR: Nor do city council members nor
18 school board member, unless there are charter or city
19 arrangements that I don't know about.

20 CHAIR REYES: Right.

21 MEMBER SAYLOR: But there are special district
22 representatives who are subject to the AB 1234
23 requirements that do have the per-meeting.

24 That doesn't mean that they have to have a
25 special meeting to do this particular training.

1 Currently, of course, you do have the online
2 versions. You could also combine this meeting -- this
3 training with another meeting, if you had to do it. Most
4 of the organizations are associations of special district
5 or city council members, the League of Cities, the CSB --
6 the School Board Association, CSAC, have provided this
7 kind of training at their annual conferences as a way to
8 make it accessible to people, like the Del Norte folks
9 who may be remote and far away.

10 In the first going, I would -- personal
11 observation is accurate, that in the 2005-2006 era, there
12 was a tremendous panic. People didn't know exactly what
13 this was all going to be, how to do it; and they were all
14 spinning wheels to try to put things in place. So there
15 were circumstances where if they had waited a couple more
16 months, they could have had access to the online
17 training. They didn't know that was going to happen, and
18 they were trying to find ways to deliver the training.
19 So CSAC, the League of Cities, CSBA all did things to try
20 to get the training in place.

21 Cities, in their local areas, would make the
22 training available to whoever was required to do it, so
23 you'd have mixed groups of planning commissioners and
24 school board members and others all in one room, which is
25 my experience that we had.

1 Certainly, there were costs imposed for
2 conducting the training. Whether people had to have all
3 of the those costs is a question. It was at their
4 discretion. There were alternatives that didn't require
5 the cost. But putting in context at that moment in time,
6 did people believe they had to -- they knew they had a
7 requirement. Did they believe they had an option that
8 was a no-cost-option? I think, reasonably, some of them
9 didn't.

10 CHAIR REYES: But the requirement was on you as
11 a supervisor.

12 MEMBER SAYLOR: Yes, it was a requirement for
13 the individual to seek -- to be sure that they had the
14 training. And there were many -- that's correct, yes.

15 And in terms of compensation for the stipend,
16 that sort of thing, I'm not compelled by that.

17 CHAIR REYES: Yes, okay.

18 MEMBER SAYLOR: That's a discretionary act; and
19 there are a variety of ways of achieving the purpose.

20 In terms of the cost to the organization to
21 assemble the materials and provide the training, that's
22 another question.

23 CHAIR REYES: Okay.

24 MR. BURDICK: Chairman Reyes, if I could just
25 clarify?

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: Yes.

2 MR. BURDICK: I wasn't suggesting that there be
3 additional compensation. All I'm saying is, supervisors
4 are compensated. It varies, depends on county, but they
5 get compensation for their work. So they're paid for
6 that day.

7 So when that person goes, they're receiving
8 compensation for the work they perform that day. So I'm
9 not suggesting that there was additional compensation.
10 And it varies by county in terms of their..

11 CHAIR REYES: Absolutely. In some counties,
12 it's full-time job --

13 MR. BURDICK: And I don't know if --

14 CHAIR REYES: -- and other times, it's a
15 volunteer job.

16 MR. BURDICK: Yes, sometimes it's full-time,
17 sometimes it's voluntary. So it's going to vary.

18 CHAIR REYES: Right.

19 MR. BURDICK: But whatever it is, they're
20 compensated; essentially, that that compensation is for
21 that.

22 So you could compute and say -- well, let's say
23 they had to take a whole day and go and do this or
24 whatever. They say, "Well, what is your compensation for
25 a day's work?"

1 And that would be what I would say would be a
2 reimbursable state-mandated cost. I'm not suggesting
3 additional stuff, but...

4 So let's just say --

5 CHAIR REYES: So if you did it on Sunday
6 training, that would be...?

7 MR. BURDICK: Well, they don't offer those
8 trainings to you on a Sunday.

9 CHAIR REYES: I know, but I'm just saying, if
10 they did it on Sunday, you'd split the salary by 31 or
11 30 or 28...

12 MEMBER SAYLOR: With the church -- split it
13 with the church.

14 MR. BURDICK: So I guess the question would be,
15 as an example, if you had to go to training, and went
16 to a conference, and you said, "Okay, well, I'm going to
17 the League's conference, and it's going to be on
18 Saturday, and I can pick up that training on Saturday."
19 The Department of Finance compensates me. So if I go on
20 Saturday, I can't claim any costs because I went on
21 Saturday? But you did something that you're being
22 compensated for, right?

23 CHAIR REYES: Not for Saturdays. Being a
24 salaried employee, I...

25 MR. BURDICK: Well, that's always an issue with

Commission on State Mandates – May 25, 2012

1 the Controller when you talk about people who -- are they
2 compensated for overtime.

3 CHAIR REYES: What is the actual cost, right.

4 MR. BURDICK: But the only thing I'm just
5 saying is, I did not want to suggest that this was
6 additional compensation. I'm just talking about base
7 salary of a supervisor who has to -- who goes to attend,
8 to not take care of his normal business and duties and
9 responsibilities because the state required him or her
10 to attend ethics training.

11 CHAIR REYES: Not compel.

12 Ms. Shelton?

13 CAMILLE SHELTON: Just to clarify. The staff
14 recommendation is that the decision to compensate a
15 member is a local decision. There is no mandated cost to
16 compensate these members.

17 MR. O'HARA: If I might clarify again?

18 CHAIR REYES: Yes, Mr. O'Hara?

19 MR. O'HARA: As Commissioner Saylor pointed
20 out, in 2006, there was panic, this had to be done.
21 There was no assistance.

22 I had to go to both the Attorney General's
23 office and the FPCC to have the outline of my course
24 materials approved. And no one told me that they were
25 going to offer some kind of online or other training at

1 that time.

2 Now, plus, by having this particular training
3 at a meeting that all of these sanitary districts'
4 directors from around the state were attending, anyway,
5 there's transportation, meals, habitation, and tuition
6 that they might have had to spend to go someplace else,
7 particularly if they're from a less populous area.

8 CHAIR REYES: Any questions for follow-up by
9 board members?

10 *(No response)*

11 CHAIR REYES: Any additional comments by staff
12 or Finance?

13 Finance?

14 MR. WARD: Randall Ward, Department of Finance.

15 We support the staff recommendation to deny and
16 partially recommend reimbursement for elements of the
17 mandates.

18 MS. FEREBEE: And Donna Ferebee, Department of
19 Finance.

20 I'd also just like to respond specifically to
21 the arguments presented by Union Sanitary District.

22 As Mr. Ward said, we agree with the staff
23 recommendation. And it did not seem to us that Union
24 Sanitary had met its burden of showing that it is subject
25 to the tax-and-spend limitations of article XIII B --

1 article XIII A and B, and that its revenue is considered
2 proceeds of taxes, particularly I think in light of the
3 conflicting information from the State Controller's
4 Office.

5 And that's all. Thank you.

6 CHAIR REYES: Okay.

7 MR. O'HARA: If I could then respond briefly.

8 In 1991, when the *Fresno* decision was made,
9 article XIII B was the only thing that related to tax-
10 and-spend limitations.

11 But since then, Proposition 218, enacted in
12 1996, added articles XIII C and D, which were tax-and-
13 spend limitations to Union Sanitary District and other
14 sanitation districts because they had what's been
15 determined by other court cases to be property-related
16 fees and charges. And, therefore, they are limited in
17 what they can spend it on.

18 So it's kind of outdated to look back at 1991,
19 when article XIII only had A and B; and 2006, when
20 Proposition 218 added article XIII C and D that relates
21 to the limitations on expenditures and revenues for water
22 districts, sanitary districts, other special agencies.

23 CHAIR REYES: Okay. Is there anybody else from
24 the public who would like to comment on this item?

25 (No response)

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: Okay, seeing none, is there a
2 motion?

3 MEMBER CHIVARO: I'll move staff
4 recommendation.

5 MEMBER LUJANO: Second.

6 CHAIR REYES: Staff recommendation has been
7 moved and seconded.

8 All in favor, say "aye."

9 *(A chorus of "ayes" was heard.)*

10 CHAIR REYES: Opposed?

11 *(No response)*

12 CHAIR REYES: Abstentions?

13 *(No response)*

14 CHAIR REYES: The ayes have it.

15 Thank you.

16 MS. GMUR: Thank you, Commissioners.

17 MR. O'HARA: Thank you very much.

18 MS. FEREBEE: Thank you.

19 CHAIR REYES: Item 6.

20 MS. HALSEY: Mr. Eric Feller will present
21 Item 6, a test claim on *California English Language*
22 *Development Test II*.

23 MR. FELLER: All right, this test claim alleges
24 activities based on statutes and regulation governing
25 bilingual education, or more accurately, identification

1 and instruction of limited English proficient pupils and
2 activities related to the California English Language
3 Development test.

4 Staff found that the test claim should be
5 denied because the bilingual education statute ceased to
6 be operative in 1987, and the remaining regulations are
7 either required under or part and parcel of federal law
8 or part and parcel of a 1988 ballot initiative,
9 Proposition 227.

10 Staff recommends the Commission adopt the
11 attached proposed final staff analysis and statement of
12 decision to deny the test claim.

13 Would the parties and witnesses please state
14 your name for the record?

15 MR. PALKOWITZ: Good morning. Arthur Palkowitz
16 on behalf of the claimant.

17 MS. FEREBEE: Donna Ferebee, Department of
18 Finance.

19 CHAIR REYES: Please.

20 MR. PALKOWITZ: Thank you.

21 I don't know if you wanted to summarize the
22 argument that I'm going to make because you do it a lot
23 better than I do.

24 CHAIR REYES: It seems to me that...

25 No, I'm kidding.

Commission on State Mandates – May 25, 2012

1 I just want to show that I've read the stuff.

2 MR. PALKOWITZ: You're doing a great job.

3 CHAIR REYES: Go ahead. You have the mike,
4 sir.

5 MR. PALKOWITZ: Thank you.

6 Well, I think the issue I would like to focus
7 in on is not the federal-law preemption. And I
8 understand staff analysis, we've submitted that already.

9 I think it's interesting when there is a
10 statute, and then another statute comes about, and the
11 interpretation is the recent legislation carries the same
12 mandate. And, therefore, since the previous statute
13 already existed, it's not a new statute that requires a
14 mandate.

15 I mean, that interpretation leads one to
16 believe that the Legislature passed this bill with really
17 no value to it because the previous statute already had
18 those requirements. And to me, I think there is case law
19 that says we have to have a reasonable basis that the
20 Legislature passes new bills for reasons.

21 And so if there's a recommendation that some of
22 these activities are to be denied because it already
23 existed, to me, flies in the face of legislative intent
24 that there is an intent to create a new statute that has
25 its own activities.

1 I don't know if I misinterpreted staff
2 analysis.

3 And that only applies to some of the
4 activities, not all of the activities.

5 MR. FELLER: I think you're talking about the
6 *Parent Notification* statute, the one at the -- I think
7 it's at page 49, on.

8 And I believe that wasn't a case -- well, that
9 was more of a case of renumbering of an existing statute.

10 MR. PALKOWITZ: Isn't there language in the
11 staff analysis that this -- I mean, if you look at the
12 summary that is on pages 5 and 6 -- well, the one on
13 page 7, the top activity regarding 2003, *English Language*
14 *Learner*, it states the activities are either expressly
15 required by prior statutes and the Ed. Code.

16 And so when that is written, does that mean
17 that this legislation that's part of the test claim, if
18 it has the same activities required, is not to be
19 considered as a mandate because of the prior statute that
20 had those activities?

21 MR. FELLER: I think, if you're talking about
22 the Proposition 227 regulations -- is that under B on
23 page 7? Those -- what happened was, yes, those were
24 regulations adopted in the aftermath of Proposition 227.

25 And so some of the regulations repeated

1 requirements in the Proposition 227 statutes, and it
2 clarified and did some other things as well.

3 CAMILLE SHELTON: And the authority in
4 reference to those regulations are the statutes.

5 MR. FELLER: Right. So those weren't statutes
6 enacted as much as just the regulations the Department of
7 Ed. adopted.

8 MR. PALKOWITZ: And is that the same reasoning
9 with the notices you just mentioned, which was the last
10 activity in the summary of page 6?

11 MR. FELLER: That was actually -- that was a
12 statute that was enacted in 1981 -- or amended in --
13 let's see.

14 It was a '77 statute, amended in 1981.

15 What we found, however, was that an identical
16 statute was enacted in 1976 as Education Code 10926.

17 It appears that the '77 was a renumbering. But
18 because it was the '77 and not the '76 statute that was
19 pled, we had to find that it wasn't a new program.

20 MR. PALKOWITZ: Thank you for the
21 clarification.

22 I have no other comments.

23 CHAIR REYES: No other comments?

24 *(No response)*

25 CHAIR REYES: Finance is fine with it?

Commission on State Mandates – May 25, 2012

1 MS. FEREBEE: Donna Ferebee, Department of
2 Finance.

3 We do concur with the final staff analysis
4 denying the test claim. The statutes claimed do not
5 impose a new program or higher level of service for the
6 reasons that are stated in the analysis; and we urge you
7 to adopt the staff recommendation.

8 Thank you.

9 CHAIR REYES: Any other comments or questions
10 from board members?

11 *(No response)*

12 CHAIR REYES: Any comments from the public?

13 *(No response)*

14 CHAIR REYES: Seeing none, is there a motion?

15 MEMBER OLSEN: I'll move the staff
16 recommendation.

17 CHAIR REYES: It's been moved.

18 MEMBER SAYLOR: Second.

19 CHAIR REYES: It's been seconded.

20 All in favor, say "aye."

21 *(A chorus of "ayes" was heard.)*

22 CHAIR REYES: Opposed?

23 *(No response)*

24 CHAIR REYES: Abstentions?

25 *(No response)*

Commission on State Mandates – May 25, 2012

1 CHAIR REYES: The "ayes" have it.

2 Thank you.

3 And then we have Item 7 is consent, Item 8 is
4 consent.

5 MS. HALSEY: Items 7 through 10 are consent.

6 Moving on to Item 11. Item 11 is reserved for
7 County applications for findings of significant financial
8 distress or SB 1033 applications.

9 No SB 1033 applications have been filed.

10 CHAIR REYES: Okay.

11 MS. HALSEY: Item 12, Nancy Patton will present
12 the legislative update.

13 MS. PATTON: I have no new legislation to
14 report on. We still have the two pending spot-bills
15 which have not moved; of course, not including the budget
16 trailer bills that are going through right now.

17 CHAIR REYES: Thank you.

18 MS. PATTON: Thank you.

19 CHAIR REYES: Nancy, for the benefit of the
20 dais and the folks in the audience, would you please
21 introduce the Nancy-in-training?

22 MS. PATTON: Heidi, do you want to stand up?

23 I think everyone knows Heidi, but she is going
24 to be taking over my duties, at least temporarily after
25 I retire on August 14th. So I think everyone knows Heidi

Commission on State Mandates – May 25, 2012

1 Palchik.

2 CHAIR REYES: Thank you.

3 MEMBER RAMIREZ: Excuse me, Mr. Chair?

4 CHAIR REYES: Yes?

5 MEMBER RAMIREZ: I would like to ask at some
6 appropriate point, information about the two spot-bills,
7 which I'm not familiar with, that you just mentioned.
8 That's all for later.

9 CHAIR REYES: Thank you very much.

10 MEMBER RAMIREZ: Thank you.

11 MS. PATTON: They're listed on Item 12.

12 MEMBER RAMIREZ: Okay.

13 CHAIR REYES: Heather?

14 MS. HALSEY: Okay, Item 13, Chief Legal Counsel
15 Camille Shelton will present the Chief Legal Counsel's
16 report.

17 CAMILLE SHELTON: Good morning.

18 Just a couple of things.

19 The litigation dealing with the Commission's
20 decision on the *Graduation Requirements*, parameters and
21 guidelines amendment, has been continued to September.
22 So that one's put off.

23 Also, for the last time, I'll list this *Fenton*
24 *Avenue Charter School* lawsuit that was brought by charter
25 schools against the Controller's office, where the

Commission on State Mandates – May 25, 2012

1 Controller returned reimbursement claims on 21 separate
2 programs filed by charter schools.

3 The court has finally decided that case, and
4 has dismissed the lawsuit by the charter schools on the
5 ground that they failed to exhaust their administrative
6 remedies with the Commission; and also that the decision
7 on who the eligible claimant was, was not meant for the
8 Controller. It is one that was meant for the Commission.

9 So we could see continuing litigation on that,
10 or we'll see what happens.

11 CHAIR REYES: Okay, thank you.

12 MS. HALSEY: Moving on to Item 14, the
13 Executive Director report.

14 With regard to workload, our backlog reduction
15 plan has been included as an attachment to the Executive
16 Director's report. And it's the most up-to-date document
17 in terms of our workload.

18 And as of today, I'm happy to announce the
19 Commission has completed all the 2002, 2004 test claims,
20 and also all the community college test claims. So that
21 is a big milestone for the Commission.

22 CHAIR REYES: Okay.

23 MS. HALSEY: With regard to the 2012-2013
24 budget, on May 14th, the Governor issued his May Revise.
25 It now includes a reappropriation of \$79,000 for the

Commission on State Mandates – May 25, 2012

1 Commission to pay for staff retirement and related
2 employee costs, increasing our total operating budget to
3 \$1,599,000 for the next fiscal year.

4 Additionally, the May Revise proposes employees
5 savings, equivalent to 5 percent reduction in pay. The
6 Administration's pursuing a four-day, 38-hour workweek.
7 But the Administration is currently negotiating with
8 unions on how that might look.

9 But if his original proposal does go forward,
10 it may mean the closing of the office one day a week and
11 some possible rescheduling of hearings. So I wanted to
12 alert everyone. And we'll definitely notify everyone if
13 our hearings change, and post that on our Web site as
14 well.

15 CHAIR REYES: Okay, thank you.

16 MS. HALSEY: Also, with regard to the budget,
17 there are three major program changes with regard to
18 mandates.

19 One is to suspend and repeal mandates for a
20 decrease in \$728.8 million in the 2012-2013 fiscal year,
21 by suspending most mandates that are not related to law
22 enforcement or property taxes.

23 In addition, the Administration is proposing
24 trailer billing language to repeal or make permissive
25 many of the mandates that have been suspended for two

1 years or more.

2 CHAIR REYES: Okay, thank you.

3 MS. HALSEY: Of particular interest, is the
4 proposal to eliminate many of the -- or the existing
5 mandates claiming process for K-12 -- or, actually,
6 K-14 -- by creating a block grant, rolling many of the
7 mandated programs into a block grant and providing
8 funding that would then go to all school districts
9 without going through the SCO's claiming process.

10 Our understanding is that that would not
11 eliminate the mandate process here. That first new
12 mandates would be found by the Commission, and then
13 the Administration would then roll future mandates
14 conceivably into that block grant in the future.

15 CHAIR REYES: Okay.

16 MS. HALSEY: And then moving on to our 2012
17 meeting calendar. We currently have scheduled, our next
18 few meetings are July 27th, September 28th. We have a
19 tentative meeting on October 26th, and then our final
20 meeting of the year scheduled for December 2nd. And as
21 I said before, keep an eye on the Web site and, of
22 course, we'll be sending out official notices to everyone
23 if anything changes with that.

24 CHAIR REYES: Okay.

25 MS. HALSEY: And finally, we have the backlog

1 reduction plan which everyone should have a copy of now.
2 And just a few highlights from that.

3 The Commission has a backlog of 36 test claims
4 and 129 incorrect reduction claims. And I can actually
5 update that. It's now 127 as of yesterday. And that is
6 down from 51 test claims and 163 IRCs last year at this
7 time. So we are definitely working that backlog
8 expeditiously. And we're going to continue to try and
9 speed that along.

10 And last year, we developed our first backlog
11 reduction plan. This is the first annual update of the
12 plan. It describes several tools we're employing to
13 expeditiously reduce the backlog.

14 Main points include completing all of our 2003
15 test claims in 2012, continuing to support the SCO and
16 claimants in settling incorrect reduction claims,
17 completing all but ten storm-water NPDES claims by the
18 end of 2013. And then ideally, completing the remaining
19 test claims and IRCs in 2014. And part of that will
20 depend on what happens in the court with the NPDES
21 stormwater test-claim cases.

22 And I'm happy to field any questions that any
23 Members have on any of that -- or anyone from the public.

24 CHAIR REYES: Does anyone have anything?

25 Mr. Saylor?

Commission on State Mandates – May 25, 2012

1 MEMBER SAYLOR: Pursuant to your suggestion
2 that we look at the dates -- the alternative dates,
3 anticipating the possibility of Fridays going away, the
4 Yolo County Local Agency Formation Commission is
5 rescheduling its meetings so that I can attend meetings
6 of this Commission on Thursdays.

7 So we should send them a "thank you" note to
8 each of them.

9 MS. HALSEY: Thank you, Yolo County.

10 CHAIR REYES: We wouldn't change anything until
11 negotiations are concluded by the Administration and
12 unions. We don't want to upset anybody.

13 MEMBER SAYLOR: So it's very tentative.

14 CHAIR REYES: It's very -- just kind of a
15 heads-up. It may come up. It may end up something
16 different. But at this point --

17 MEMBER SAYLOR: We will be submitting the claim
18 for the discussions that we've been having about
19 calendar.

20 CHAIR REYES: Very good.

21 Okay, public comments?

22 MR. BURDICK: Chairman Reyes and Members, I
23 would like to address the backlog reduction plan.

24 First, I would like to -- I guess it's
25 personally because I don't have official authority to do

1 this -- is to congratulate you on the selection of your
2 former member, and now Executive Director. Heather
3 Halsey I think was an outstanding selection. And with
4 her knowledge as both a member, staff, and I think it's
5 more of -- we're going to welcome her to the team.

6 And you have an outstanding staff of people
7 that you have, and they did a very nice job on this
8 backlog report.

9 You have one serious problem, and that is the
10 fact that because you do not have enough staff -- and
11 if you look at this backlog plan, one of the things it
12 points out, clearly, is you have a statutory obligation
13 to perform this process in 18 months.

14 The backlog plan talks about hoping to get, I
15 think it's the 2003 test claims done by the end of this
16 calendar year. That's nine years later. That's a little
17 different than the 18 months.

18 You are the exclusive body to determine what
19 is and what is not a reimbursable state mandate. By
20 delaying the action, and every year you delay, you're
21 incurring 20, 30, 50 -- maybe more -- million dollars a
22 year.

23 Let me give you a couple of examples. Last
24 year, a few minutes ago you adopted a statewide cost
25 estimate for *Crime Statistics* DOJ reports. \$120 million.

1 Basically, ten years, starting off earlier now is about
2 \$15 million a year. So every year that was delayed the
3 last few years, the State incurred an additional
4 \$15 million for that one, single mandate.

5 I have prepared, and CSAC has filed four
6 requests for reasonable reimbursement methodologies.
7 Some of those will result in additional obligations to
8 the state. Some of those will reduce the requirements
9 for the State Controller to have to spend the time on the
10 review, payment, and audit of those claims.

11 The amount of money that is incurred by the
12 delay in this process versus the amount of staff you
13 have, to me, in looking at it, is very, very difficult to
14 understand.

15 I was in the office yesterday. I looked at the
16 whiteboard, and could not believe that the number of
17 staff is probably about half of what it was when you
18 first moved into that office.

19 When I first moved in there -- I think there
20 are ten people on that list now. There were about 18,
21 I think, when I first moved in there. And at that time,
22 because of the process which I, as a non-attorney, feel
23 is a little overkill on the legal side but obviously
24 because everything is subject to court review, that's the
25 way it has to be -- I accept that -- the Commission is

1 falling further behind on its ability to stay up.

2 Now, the one thing that's been helpful is
3 because the State is in such a difficult problem the
4 last several years, so many bills have been killed in
5 Appropriations; because if it says "reimbursable state
6 mandated program," those bills don't see the light of
7 day.

8 And so the one thing is, there have been far
9 fewer mandates passed in the last three years than
10 there were since 1979, when this was placed in the
11 Constitution. I can personally adhere to that.

12 So the one thing I'm looking at is, it seems to
13 me that this Commission, who has the responsibility given
14 to it to oversee this process, who has the statutory
15 obligation, up to 18 months, should take a look at this
16 and say, you know, this is a dereliction of our duty to
17 say we're going to adopt something without at least going
18 forward and trying to say this is costing the State
19 money.

20 The Legislature has made it clear, the
21 Administration has made it clear, I'm sure that the
22 Treasurer does not want to incur additional debt. You
23 know, I've talked to the Treasurer personally about the
24 amount of debt that is going to be incurring. And what
25 is happening is, every year you fail to act, that debt

1 is growing. The costs of the State is growing. And my
2 thought is, you should go back and look at it.

3 You probably need at least twice as many staff.
4 What is that, a million? 1.2, 1.5 million? But every
5 year something is delayed because of that, you're
6 incurring tens of millions of dollars, and even more.
7 And I'm just looking at the local government side.

8 My friends from the school district behind me,
9 you know, they have some mandates in there that may even
10 be much more substantial than that.

11 One of the other things that has happened in
12 this process is because of the fact that the more
13 complicated mandates tend to take longer to get there,
14 sometimes the most expensive ones, one of which you're
15 going to be seeing hopefully before the end of this
16 calendar year, that's been delayed for ten years, is
17 going to be even bigger than that \$120 million statewide
18 cost estimate you adopted.

19 Why? Because the Commission didn't have staff.

20 So I was very pleased to see that there was an
21 acknowledgment of the 18-month statutory requirement.

22 The former Executive Director and I had a
23 little dispute about that, having to have been the
24 drafter of AB 1960, Reyes, in 1998 to put that into code,
25 I could not understand how that could not be viewed as a

1 statute. But Paula is not here to defend herself. But
2 it is clear in there that the Commission staff is now
3 saying they have 18 months to hear these claims. And
4 this proposal is to hear 2003 test claims by the end of
5 2012.

6 And I just look at this, in 1981 I was a party
7 to a lawsuit relative to the futility of the process.
8 And one of the reasons also you don't have more IRCs and
9 more other things and other actions is because people
10 look at the futility of this process. And I can tell
11 you that if people felt that this was moving or something
12 was going to happen in a reasonable period of time, your
13 workload would be much greater -- substantially greater.

14 So I think we've gone back to reaching the
15 futility of this process.

16 That lawsuit led to the creation of this
17 Commission. We have some new members that probably
18 weren't there, but this Commission was created based upon
19 a joint meeting of the California Legislature. The
20 Attorney General, the Legislative Counsel Bureau pulled
21 the two houses together in June of '84, and said, "We
22 have a problem: Local government is killing us in the
23 courts." And the key thing that was coming up was what
24 is called *Contra Costa County*, it was really the CSAC
25 lawsuit, in 1981, on the futility of this process.

1 And I think if you look at this workload and
2 look at your duties and responsibilities and those things
3 that you want to do as administrative representatives or
4 as you want to do, I know, as the Controller, the
5 Treasurer's representative is concerned about the debt
6 that California is growing, and the Legislature is
7 concerned about getting decisions quickly so they know
8 what the cost of a mandate is; I would urge you to send
9 this back, ask your staff to come back and say, "What do
10 we need to do to meet our 18-month statutory
11 requirement?" -- take that forward, still have 22 days
12 before the budget is adopted, and at least tell the
13 Legislature, "Look, if you don't do this, if you don't
14 spend this one, one and a half, two million, whatever
15 it's going to take, to add that staff, you're going to be
16 incurring" -- and they can make an estimate better than
17 me.

18 As I said, I read this at ten o'clock last
19 night, so I didn't have much time to do much analysis.
20 And I apologize, and I appreciate you putting up with
21 me -- but I urge you not to accept this, and I urge you
22 to go back and to say, "What do we need to do?"

23 And then if the Legislature and the Governor
24 say, "No, you know, we don't have \$2 million some place,"
25 whatever it is, "to avoid these tens of millions

1 of dollars," then at least you've done your job; because
2 I think you're the ones that are responsible out there
3 to tell the Legislature, when it comes there, that "Hey,
4 wait a minute, you gave us a duty and responsibility to
5 do, but we can't do it with the little money you've given
6 us."

7 So with that, I again thank you so much for
8 putting up with me. Obviously, I feel overly passionate
9 about this issue. But when I read that last night, I...

10 Anyway, thank you very much.

11 CHAIR REYES: Thank you.

12 Any other public comments before we go into
13 closed session?

14 *(No response)*

15 CHAIR REYES: All right, so we're going to go
16 to closed session.

17 And I have to read this:

18 The Commission will meet in closed executive
19 session pursuant to Government Code section 11126,
20 subdivision (e), to confer and receive advice from legal
21 counsel for consideration and action, as necessary and
22 appropriate, upon the pending litigation listed on the
23 published notice and agenda, and to confer with and
24 receive advice from legal counsel regarding potential
25 litigation.

Commission on State Mandates – May 25, 2012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Thank you.

(The Commission met in closed executive session from 11:57 a.m. to 12:03 p.m.)

CHAIR REYES: We're coming back from closed session.

There is nothing to report. We were updated by counsel.

Thank you. And the meeting is adjourned.

Thank you, everybody.

(Proceedings concluded at 12:03 p.m.)



REPORTER'S CERTIFICATE

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified; and

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer-aided transcription.

In witness whereof, I have hereunto set my hand on the 18th of June 2012.

Daniel P. Feldhaus
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter