

COMMISSION ON STATE MANDATES

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October 13, 2011

Mr. Keith Petersen
SixTen and Associates
P.O. Box 340430
Sacramento, CA 95834-0430

And Interested Parties and Affected State Agencies (See mailing list)

Re: Final Staff Analysis, Proposed Statement of Decision, and Hearing Date

Deferred Maintenance (CCDs), 02-TC-48

Education Code Section 84660; Statutes 1981, Chapter 764; Statutes 1990, Chapter 1372
California Code of Regulations, Title 5, Sections 57201, 57202, 57205; Register 82,
No. 28 (July 10, 1982), Pages 677-678; Register 91, No. 23 (June 7, 1991) Pages 377-
378, Register 95, No. 23 (June 9, 1995) Page 379

“Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project
Funding Proposals” Chancellor’s Office, California Community Colleges
Santa Monica Community College District, Claimant

Dear Mr. Petersen:

The final staff analysis on the above-named matter is enclosed.

Hearing

This matter is set for hearing on **Thursday, October 27, 2011**, at 9:00 a.m., in the State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission’s regulations. (Cal. Code Regs., tit. 2, § 1183.01(c)(2).)

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Eric Feller at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Drew Bohan".

Drew Bohan
Executive Director

ITEM 4
TEST CLAIM
FINAL STAFF ANALYSIS
AND PROPOSED STATEMENT OF DECISION

Education Code Section 84660

Statutes 1981, Chapter 764 (SB 841); Statutes 1990, Chapter 1372 (SB 1854)

California Code of Regulations, Title 5, Sections 57201, 57202, 57205

Register 82, No. 28 (July 10, 1982), Pages 677-678; Register 91, No. 23 (June 7, 1991)
Pages 377-378; Register 95, No. 23 (June 9, 1995) Page 379

“Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding
Proposals” Chancellor’s Office, California Community Colleges

Deferred Maintenance (CCD)
02-TC-48

Santa Monica Community College District, Claimant

Attached is the proposed statement of decision for this matter. This executive summary and the proposed statement of decision also function as the final staff analysis, as required by section 1183.07 of the Commission’s regulations.

EXECUTIVE SUMMARY

Overview

The test claim statute and regulations consist of a grant program, the Community College Facility Deferred Maintenance and Special Repair Program, to assist community colleges with deferred maintenance projects. The Legislature, in enacting the program, expressed intent that “funds be allocated . . . to provide for the deferred maintenance and special repair of community college facilities.” Recognizing that there may not be funds in future years to appropriate money to the program, the Legislature also stated that “nothing in this chapter shall be construed to create an annual state obligation to fund this program.”¹

Regulations were adopted for the program that: (1) establish criteria for ranking requests for funding by districts; (2) require districts to prepare and submit to the board of governors a five-year maintenance plan that includes plans for preventative as well as deferred maintenance in order to be eligible for state funding; and (3) require recipient districts to provide an amount of district funds equal to the amount of state funds to be allocated for facility deferred maintenance and special repair as a condition for receipt of state funding, subject to a complete or partial waiver based on a review of the financial condition of the district.

¹ Education Code section 84660 (a).

Districts apply to the Chancellor's Office for funding for deferred maintenance in the form and manner specified by the Chancellor. This application information is in a publication of the Chancellor's Office (also part of the test claim) entitled "Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals" (Chancellor's Office manual).

Procedural History

The test claim was submitted by the Santa Monica Community College District on June 27, 2003. The Department of Finance filed comments on February 9, 2004, and the Chancellor's Office filed comments on March 16, 2004. The claimant filed rebuttal comments on February 26, 2004 and April 28, 2004. Commission staff issued a draft staff analysis on August 9, 2011. The claimant filed comments on the draft staff analysis on September 8, 2011.

Positions of Parties and Interested Parties

Claimant's Position

Claimant Santa Monica Community College District asserts that the test claim statutes, regulations, and manual constitute a reimbursable state mandate. Claimant also argues that legal compulsion is not required to find a state mandate, and the test claim statutes and executive orders constitute practical compulsion to comply with their requirements.

State Agencies' Positions

The Department of Finance states that the district's participation in the Community College Facility Deferred Maintenance Program is "entirely the result of a discretionary decision made by the governing board of each district to apply for available funding." Thus, Finance concludes that the test claim statutes, regulations, and manual do not create a state-mandated reimbursable program, and request that the test claim be denied.

The Chancellor of the California Community Colleges states that the test claim provisions do not impose a new program or higher level of service because the Legislature has appropriated funds specifically intended to fund the costs of the Deferred Maintenance program, and because "participation in the program is not mandatory, but entirely voluntary."

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Staff Analysis

The first issue is whether the Chancellor's Office manual is an executive order as defined in Government Code section 17516. If it is, the Commission would have jurisdiction to determine if the manual is subject to article XIII B, section 6. Staff finds that the manual is an executive order because it contains requirements for the Deferred Maintenance program.

The second issue is whether the test claim statutes and executive orders constitute a state-mandated program. Staff finds that they do not. The plain language in the statutes and regulations authorizes but does not require districts to apply for funding. It is the decision of a community college district to seek state funding assistance for proposed deferred maintenance projects that triggers the activities required by the test claim statute, regulations, and manual. Under these circumstances, the activities are not mandated by the state.

Staff disagrees with the claimant's argument that community colleges are practically compelled to participate in the program and comply with the requirements. The Supreme Court in the *Kern School Dist.* case described practical compulsion as "if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program..."² There is no such penalty in the test claim statutes, regulations, or manual, and no evidence that community college districts will suffer "certain and severe penalties" or other "draconian consequences" if they do not participate. Thus, the state has not imposed a state-mandated program on community college districts.

Conclusion

Staff finds that Education Code section 84660 (Stats. 1981, ch. 764, Stats. 1990, ch. 1372); sections 57201, 57202 and 57205 of the title 5 regulations; and the Chancellor's Office manual do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt the attached proposed statement of decision to deny the test claim. Minor changes, including those to reflect the hearing testimony and the vote count will be included when issuing the final statement of decision.

However, if the Commission's vote on this item modifies the proposed statement of decision, staff recommends that the motion to adopt the proposed statement of decision reflect those changes, which would be made before issuing the final statement of decision. In the alternative, if the changes are significant, staff recommends that the Commission postpone this item to the next Commission hearing.

² *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Section 84660

Statutes 1981, Chapter 764; Statutes 1990,
Chapter 1372

California Code of Regulations, Title 5,
Sections 57201, 57202, 57205

Register 82, No. 28 (July 10, 1982), Pages
677-678; Register 91, No. 23 (June 7, 1991)
Pages 377-378; Register 95, No. 23 (June 9,
1995) Page 379

“Preparation Guidelines for Scheduled
Maintenance and Hazardous Substances
Project Funding Proposals” Chancellor’s
Office, California Community Colleges

Filed on June 27, 2003 by

Santa Monica Community College District,
Claimant

Case No.: 02-TC-48

Deferred Maintenance (CCD)

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT
CODE SECTION 17500 ET SEQ.;
TITLE 2, CALIFORNIA CODE OF
REGULATIONS, DIVISION 2,
CHAPTER 2.5, ARTICLE 7.

(Proposed for Adoption: October 27, 2011)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on October 27, 2011. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 *et seq.*, and related case law.

The Commission [adopted/modified] the staff analysis to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

As a threshold matter, the Commission finds that the Chancellor’s Office manual, “Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals,” is an executive order as defined in Government Code section 17516 because it contains requirements for the Deferred Maintenance program. Thus, the Commission has jurisdiction to determine if the manual is subject to article XIII B, section 6.

The Commission also finds that the test claim statutes and executive orders do not constitute a state- mandated program. The plain language in the statutes and regulations authorizes but does not require districts to apply for funding. It is the decision of a community college district to seek state funding for proposed deferred maintenance projects that triggers the activities required by the test claim statute, regulations, and manual. Under these circumstances, the activities are not mandated by the state.

The Commission disagrees with the claimant’s argument that community colleges are practically compelled to participate in the program and comply with the requirements. The Supreme Court in the *Kern School Dist.* case described practical compulsion as “if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program...”³ There is no such penalty in the test claim statutes, regulations, or manual, and no evidence that community college districts will suffer “certain and severe penalties” or other “draconian consequences” if they do not participate. Thus, the state has not imposed a state-mandated program on community college districts.

In sum, the Commission finds that Education Code section 84660 (Stats. 1981, ch. 764, Stats. 1990, ch. 1372); sections 57201, 57202 and 57205 of the title 5 regulations; and the Chancellor’s Office manual do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution.

COMMISSION FINDINGS

Chronology

- 06/27/2003 Santa Monica Community College District files test claim 02-TC-48
- 02/09/2004 Department of Finance files comments
- 02/26/2004 Claimant files rebuttal comments to Department of Finance’s comments
- 03/16/2004 Community Colleges Chancellor’s Office files comments
- 04/28/2004 Claimant files rebuttal comments to Chancellor’s Office comments
- 11/26/2007 Claimant files a history of the title 5 regulations in the test claim
- 06/25/2008 Claimant files a list of registers and section numbers for the regulations in the test claim
- 08/09/2011 Commission staff issues draft staff analysis.
- 09/08/2011 Claimant files comments on the draft staff analysis.

I. Background

The test claim statute and regulations consist of a grant program to assist community colleges with deferred maintenance and special repair. “Deferred maintenance and special repair” means unusual, nonrecurring work to restore a facility to a safe and continually useable condition for

³ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

which it was intended.” (Ed. Code, § 84660(b)⁴.) The Legislature stated the purpose of the test claim statute as follows:

The Legislature finds and declares that it is in the interests of the people of the State of California to ensure that the facilities of the California Community Colleges are repaired and maintained on a timely basis in order to provide for the safe utilization of these facilities as well as providing for the prevention of further structural damage resulting in more costly repairs. The Legislature recognizes that in many community college districts high operating costs and limited district revenues have combined to restrict the ability of community college districts to provide for the periodic maintenance and timely repair of community college facilities.

It is the intent of the Legislature in enacting this chapter that funds be allocated pursuant to the requirements of this chapter to provide for the deferred maintenance and special repair of community college facilities. However, the Legislature recognizes that there may not be sufficient revenues in future years to provide an annual appropriation for the program provided by this chapter. *Therefore, nothing in this chapter shall be construed to create an annual state obligation to fund this program.* (§ 84660, Stats. 1981, ch. 764, Stats. 1990, ch. 1372; emphasis added.)

To further this purpose, the Legislature established the Community College Facility Deferred Maintenance and Special Repair Program under which the Board of Governors of the California Community Colleges adopts rules and regulations for the allocation of funds for deferred maintenance and special repair of community college facilities. The adopted rules and regulations are to do the following:

- Establish criteria for ranking requests for funding by districts for funds allocated;
- Require districts to prepare and submit to the board of governors a five-year maintenance plan that includes plans for preventative as well as deferred maintenance in order to be eligible for state funding; and
- Require recipient districts to provide an amount of district funds equal to the amount of state funds to be allocated for facility deferred maintenance and special repair as a condition for receipt of state funding, subject to a complete or partial waiver of this requirement based on a review of the financial condition of the district. (§ 84660 (b).)

Community college districts are not to receive funds unless the districts spend at least one-half percent of their current operating budgets for ongoing maintenance, unless the board of governors increases this percentage. (§ 84660(c) & (d).) The legislative intent is for state funds to supplement but not supplant district deferred maintenance funds. (§ 84660(e).)

The regulations adopted by the board of governors list the general requirements for funding, such as preparing and submitting to the Chancellor a five-year maintenance plan (consistent with but not duplicating the five-year capital outlay plan) that provides for ongoing as well as deferred maintenance. Districts are required to maintain a level of ongoing maintenance during which

⁴ All statutory references are to the Education Code unless otherwise indicated.

funds are requested commensurate with the level of activity in prior years. (Cal.Code Regs., tit. 5, § 57201.)

The Chancellor allocates funds for only 50 percent of the cost of deferred maintenance projects. A district accepting funds agrees to spend funds necessary to complete the project. The Chancellor may partially or wholly waive this matching requirement for districts that demonstrate that they cannot make available 50 percent of the cost for the project. The waiver is only for high priority projects, defined as those necessary to prevent a facility from being closed. (Cal.Code Regs., tit. 5, § 57205.)

Districts apply to the Chancellor's Office for funding for deferred maintenance in the form and manner specified by the Chancellor. (Cal.Code Regs., tit. 5, § 57202.) This information is in a publication of the Chancellor's Office (also part of the test claim) entitled "Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals" ("Chancellor's Office manual"). According to this manual:

[D]istricts submit individual project proposals identifying the scope and justification for each project. For fiscal year 1999-2000 over 1,200 scheduled maintenance projects valued at over \$210 million are identified in the individual project proposals. With the funds in this on-going program the state is able to address \$78 million in projects for 1999-00. Some of the common types of problems that tend to plague the colleges are, in priority order: roof, mechanical, and utility repairs/replacement; infrastructure/land erosion control; replacement of doors, windows, floors, ceiling and hardware; exterior/interior refurbishing; and resurfacing of tennis courts, swimming pools, walkways, running tracks and roadways.⁵

The Chancellor's Office manual also contains instructions on filling out a Project Funding Proposal form, a description of the grant process, information on grant management, evaluation criteria, categories for scheduled maintenance projects, and criteria for evaluating a waiver of the district's match.

The Chancellor's Office manual includes similar information on the Hazardous Substances program, a parallel "local assistance" program to help districts "in the control of environmental hazards such as asbestos materials, polychlorinated biphenyl (PCB), lead, chemical removal, radon, and underground tanks and their contents, which pose an immediate danger to human health and safety at California community college facilities."⁶ According to the manual, "[a] Hazardous Substances Project Funding Proposal (241/HS/PFP) is used for requesting financial support for local assistance funds in the state program's budget for that project."⁷ The manual's

⁵ Chancellor's Office of the California Community Colleges, Facilities Planning, "Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals." Revised December 2001, pages 1-2.

⁶ Chancellor's Office of the California Community Colleges, Facilities Planning, "Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals." Revised December 2001, page 21.

⁷ *Id.* at page 23.

instructions are “intended for districts who wish to participate in the state-assisted Hazardous Substances Program assuming availability of funds.”⁸

II. Positions of the Parties and Interested Parties

A. Claimant’s Position

The claimant alleges that the following activities are reimbursable mandates subject to article XIII B, section 6 and Government Code section 17514:

- Prepare and submit to the Chancellor’s Office a current Scheduled Maintenance Five-Year plan (241/SM5Y) on or before December 1st of each year, consistent with the district’s five-year capital outlay plan, but not a duplicate of that plan, including plans for preventative, ongoing and deferred maintenance, pursuant to Education Code Section 84660(b), Title 5, California Code of Regulations Section 57201(a), and the Chancellor’s Office manual of December 2001, page 4.
- Maintain a level of ongoing maintenance during the year for which funds requested are commensurate with the level of activity in prior years, pursuant to Title 5, California Code of Regulations Section 57201 (b). The district must expend at least ½ percent of its current operating budget for ongoing maintenance to receive funds for deferred maintenance or special repair, pursuant to Education Code Section 84660(c), and the Chancellor’s Office manual, page 5.
- Apply for deferred maintenance funding in the form and manner specified by the Chancellor’s Office, pursuant to Title 5, California Code of Regulations Section 57202.
- Provide for a matching contribution for deferred maintenance unless waived by the Chancellor’s Office for financial hardship, pursuant to Education Code Section 84660. When it accepts funds, the district must agree to spend district funds necessary to complete the project (up to 50 percent), unless completely or partially waived by the Chancellor’s Office, pursuant to Title 5, California Code of Regulations Section 57205. If the district cannot meet the financial commitment because of financial hardship, it shall submit a match waiver request, pursuant to the Chancellor’s Office manual, page 7.
- Prepare and submit a Scheduled Maintenance Project Funding Proposal (241/SM/PFP) on or before December 1st of each year, pursuant to the Chancellor’s Office manual, pages 3, 6.
 - Include data that will readily identify the district, college, or center project, and the assigned district priority number, pursuant to the Chancellor’s Office manual, pages 4, 6.
 - Certify the Proposal by the signature of the Chief Executive Officer or other authorized individual, pursuant to the Chancellor’s Office manual, pages 4, 6.
 - Identify what programs are affected, describe the maintenance problem, preventative measures taken, adverse effects if not corrected and corrective

⁸ *Id.* at page 24.

measures needed to remedy the situation, pursuant to the Chancellor's Office manual, page 6.

- Clearly identify project type, facility type(s) involved, how long the problem existed, and the adverse effects if uncorrected (a safety hazard must be supported by valid documentation), pursuant to the Chancellor's Office manual, page 6.
- Include construction management costs (including expenditures for Architects, Engineering, Permit Fees, Plan Check Fees, as well as Construction Management) as a supplemental element of the project cost estimate in the "Permits and Fees" budget summary line item, pursuant to the Chancellor's Office manual, pages 6, 7.
- Use, as may be necessary, district staff for completion of projects if their staff performs these tasks on overtime or weekends, or temporary staff hired to perform tasks from the beginning to the completion of project, pursuant to the Chancellor's Office manual, page 7.
- Issue a written request to the Chancellor's Office Facilities Planning Unit identifying any revisions a district needs to make to the preliminary list of projects to ensure that the scope, costs, and projected match requirements are still feasible, pursuant to the Chancellor's Office manual, page 7.
- Submit the final year claims by May 15th of the fourth year to the Chancellor's Office, pursuant to the Chancellor's Office manual, page 8.
- Notify the program monitor and supply information, if the bid amount is greater than the amount of the proposal, any information of why the bid is greater than the initial cost estimate and how the district plans on meeting the shortfall of funding while addressing the scope of the proposal, pursuant to the Chancellor's Office manual, page 8.
- Submit claims to the Chancellor's Office on a monthly basis for work complete or in progress, except for claims of less than \$1,000 (unless it is the final claim), pursuant to the Chancellor's Office manual, page 9.
- Include in any claims containing district staff hourly charges, the detailed itemized records for the direct expenses showing work performed beyond the normal work period, pursuant to the Chancellor's Office manual, page 9.
- Prepare and submit a Hazardous Substances Project Funding Proposal (241/HS/PFP) on or before January 30th of each year, pursuant to the Chancellor's Office manual, pages 23, 25.
 - Include data that will readily identify the district, college, or center project, and the assigned district priority number, pursuant to the Chancellor's Office manual, pages 24, 25.
 - Certify the Proposal by the signature of the Chief Executive Officer or other authorized individual, pursuant to the Chancellor's Office manual, page 24.
 - Identify what programs are affected, describe the hazardous problem, means of controlling the hazardous materials, adverse effects if not corrected and corrective

measures needed to remedy the situation, and the age and size of the building, pursuant to the Chancellor's Office manual, page 25.

- Clearly identify project type, facility type(s) involved, how long the problem existed, and the adverse effects if uncorrected (a safety hazard must be supported by valid documentation), pursuant to the Chancellor's Office manual, page 25.
- Include construction management costs (including expenditures for Architects, Engineering, Permit Fees, Plan Check Fees, as well as Construction Management) as a supplemental element of the project cost estimate in the "Permits and Fees" budget summary line item, pursuant to the Chancellor's Office manual, pages 25, 26.
- Use, as may be necessary, district staff for completion of projects if their staff performs these tasks on overtime or weekends, or temporary staff hired to perform tasks from the beginning to the completion of project, pursuant to the Chancellor's Office manual, page 26.
- Issue a written request to the Chancellor's Office Facilities Planning Unit identifying any revisions a district needs to make to the preliminary list of projects to ensure that the scope, costs and projected match requirements are still feasible, pursuant to the Chancellor's Office manual, page 26.
- Submit the final year claims by May 15th of the fourth year to the Chancellor's Office, pursuant to the Chancellor's Office manual, page 27.
- Notify the program monitor and supply information, if the bid amount is greater than the amount of the proposal, any information of why the bid is greater than the initial cost estimate and how the district plans on meeting the shortfall of funding while addressing the scope of the proposal, pursuant to the Chancellor's Office manual, page 27.
- Submit claims to the Chancellor's Office on a monthly basis for work complete or in progress, except for claims of less than \$1,000 (unless it is the final claim), pursuant to the Chancellor's Office manual, page 28.
- Include in any claims containing district staff hourly charges, the detailed itemized records for the direct expenses showing work performed beyond the normal work period, pursuant to the Chancellor's Office manual, page 28.

Claimant argues that the comments of the Department of Finance and Chancellor's Office should be excluded from the record because they are not accompanied by a declaration under penalty of perjury that they are true and complete to the best of the representative's personal knowledge or information or belief.⁹

⁹ While the claimant correctly states the Commission's regulation, the Commission disagrees with the request to exclude the comments of Finance and the Chancellor's Office from the official record. Most of the comments argue an interpretation of the law rather than constitute a representation of fact. If this case were to proceed to court on a challenge to the Commission's decision, the court would not require sworn testimony for argument on the law. The ultimate

Claimant submitted comments on the draft staff analysis in September 2011, but did not make any assertions not already in prior comments.

B. State Agencies' Positions

The Department of Finance, in comments submitted in February 2004, states that the district's participation in the Community College Facility Deferred Maintenance Program is "entirely the result of a discretionary decision made by the governing board of each district to apply for available funding." Thus, Finance concludes that the test claim statutes and regulations do not create a state-mandated reimbursable program, and request that the test claim be denied.

The Chancellor's Office, in comments submitted in March 2004, states that the test claim provisions do not impose a new program or higher level of service because the Legislature funds the deferred maintenance program with funding specifically intended to fund the costs of the program, and because "participation in the program is not mandatory, but entirely voluntary."

III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."¹⁰ Thus, the subvention requirement of section 6 is "directed to state mandated increases in the services provided by [local government] ..."¹¹

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.¹²
2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.¹³

determination whether a reimbursable state-mandated program exists is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.)

¹⁰ *County of San Diego, supra*, 15 Cal.4th 68, 81.

¹¹ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹² *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

¹³ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.¹⁴
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁵

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁶ The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁷ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁸

Issue 1 – Is the Chancellor’s Office manual an “executive order” over which the Commission has jurisdiction?

The first issue is whether the Chancellor’s Office manual submitted by the claimant is an “executive order” over which the Commission can take jurisdiction. Government Code section 17516 defines “executive order” for purposes of mandate reimbursement as: “any order, plan, requirement, rule or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the governor. (c) Any agency, department, board, or commission of state government.”

The manual is issued by the Chancellor’s Office of the California Community Colleges, so it is issued by an agency of the state government. Authority for the manual comes from section 57202 of the title 5 regulations (a test claim regulation) that states: “Districts shall apply to the Chancellor’s Office for funding for deferred maintenance in the form and manner specified by the Chancellor.” (Cal.Code Regs., tit. 5, § 57202.)

The manual contains both requirements and guidelines for applying for deferred maintenance and hazardous substances funding. For example, it contains the requirement that project funding proposals are due by December 1 each year “to be considered for the upcoming year’s program.” The manual also states that the “format for submission of each Scheduled Maintenance Program project by a district is the Project Funding Proposal form (241/sm/PFP) and must contain the

¹⁴ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

¹⁵ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

¹⁶ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

¹⁷ *County of San Diego, supra*, 15 Cal.4th 68, 109.

¹⁸ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

following information.” The manual then lists the information that the proposal must contain. These constitute “requirements” for the purposes of the definition of executive order in Government Code section 17516.

Thus, the Commission finds that that Chancellor’s Office manual, “Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals” is an executive order within the meaning of Government Code section 17516.

Issue 2 - Do the test claim statutes, regulations, and Chancellor’s Office manual impose a state mandate on community college districts?

As indicated above, reimbursement under article XIII B, section 6 is required only when, among other requirements, the state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.¹⁹ The Commission finds that the test claim statute, regulations, and manual do not impose a state-mandated program on community college districts because all the activities are only required as a condition of seeking funds in the deferred maintenance program.

The plain language of the test claim statute (§ 84660) is based on the district governing board’s voluntary application for funding. For example, it states:

It is the intent of the Legislature in enacting this chapter that *funds be allocated pursuant to the requirements of this chapter* to provide for the deferred maintenance and special repair²⁰ of community college facilities. However, the Legislature recognizes that there may not be sufficient revenues in future years to provide an annual appropriation for the program provided by this chapter. Therefore, *nothing in this chapter shall be construed to create an annual state obligation to fund this program.* (§ 84660, emphasis added.)

No community college district *shall receive funds pursuant to this chapter* unless the district expends at least ½ percent of its current operating budget for ongoing maintenance. (§ 84660(c), emphasis added.)

The Legislature requires that the rules and regulations adopted for the program do the following:

- Establish criteria for the ranking of *requests for funding* by districts for funds allocated;
- Require districts to prepare and submit to the board of governors a five-year maintenance plan that includes plans for preventative as well as deferred maintenance *in order to be eligible for state funding* of deferred maintenance; and
- Require recipient districts to provide an amount of district funds equal to the amount of state funds to be allocated for facility deferred maintenance and special repair *as a condition for receipt of state funding*, subject to a complete or partial waiver of this

¹⁹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874.

²⁰ “For the purpose of this chapter, ‘deferred maintenance and special repair’ means unusual, nonrecurring work to restore a facility to a safe and continually useable condition for which it was intended.” (§ 84660(b).)

requirement based on a review of the financial condition of the district. (§ 84660 (b), emphasis added.)

Similarly, the title 5 regulations in the test claim state the following:

Each community college district *applying to receive funds* pursuant to this chapter shall:

- (a) Prepare and submit to the Chancellor a current five-year maintenance plan. . . .
- (b) Maintain a level of ongoing maintenance during the year *for which funds are requested* commensurate with the level of activity in prior years. (§ 57201, emphasis added.)

Districts shall *apply* to the Chancellor’s Office for funding for deferred maintenance in the form and manner specified by the Chancellor. (§ 57202.)

The Chancellor will allocate funds for only 50 percent of the costs for a deferred maintenance project. *In accepting funds under this chapter*, a district agrees to spend district funds necessary to complete the project. The Chancellor may waive this requirement . . . [under specified circumstances]. (§ 57205, emphasis added.)

And according to the Chancellor’s Office manual:

- If funded, the [Scheduled Maintenance Project Funding Proposal] becomes an integral part of *the grant agreement* and all budgetary issues reference it. (p. 3, emphasis added.)
- A Hazardous Substances Project Funding Proposal (241/HS/PFP) is used *for requesting financial support for local assistance funds* in the state program’s budget for that project. (p. 23, emphasis added.)
- The instructions are “intended for districts *who wish to participate in the state-assisted Hazardous Substances Program assuming availability of funds.*” (p. 24, emphasis added.)

The highlighted portions above indicate that community college districts are not legally compelled by the state to comply with the requirements imposed by the plain language of the test claim statute, regulations, or manual. Rather, the requirements result from the district’s discretionary decision to apply for funding under the Deferred Maintenance program.

Generally, a community college district has the discretionary authority to: 1) acquire property necessary to carry out the powers or functions of the district; 2) manage and control district property; 3) determine and control the district’s operational and capital outlay budgets; and (4) receive and administer gifts and grants.²¹ Although community college districts are required to repair school property,²² they are not required to seek state funding assistance to pay for the repairs. The plain language of the program provides that any community college may submit a

²¹ Education Code sections 70902(b)(5), (b)(6), (b)(10), (b)(13), 81600, and 81606.

²² Education Code section 81601.

proposed project for review and approval, and “request” state funding assistance.²³ Thus, it is the decision of a community college district to seek state funding assistance for proposed deferred maintenance projects that triggers the activities identified in the test claim statute, regulations, and manual. Under these circumstances, the activities are not mandated by the state.²⁴

A community college district is required by state law to apply for state funding assistance under the Community College Construction Act (§§ 81800 et seq.) whenever the district does not have the funds available to repair, reconstruct, or replace school buildings that have been determined by a licensed structural engineer or licensed architect to be unsafe for use.²⁵ The Deferred Maintenance program, however, is not part of the Community College Construction Act. Moreover, a community college district has other options to pursue projects, such as issuing bonds.²⁶ The claimant, in comments on the draft staff analysis, misconstrues this conclusion that the district has “a legal requirement to apply for funds.” This is only true for funds under the Community College Construction Act and not for the Deferred Maintenance and Special Repair program.

The California Supreme Court declared: “The proper focus under a legal compulsion inquiry is upon the nature of the claimants’ participation in the underlying programs themselves.”²⁷ This approach places the focus of inquiry on the local agency’s (or community college district’s) initial decision whether or not to participate in the underlying program. Accordingly, where decision-making authority is reserved to a local agency, school district, or community college district, and that entity chooses to participate in a voluntary underlying program, the Legislature may issue requirements directing consequent conduct concerning that program. These “downstream” requirements with which the community college district entity must comply do not constitute reimbursable state mandates, as the Supreme Court stated in *Kern School Dist*:

[A]ctivities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds –

²³ Education Code section 84660(b); California Code of Regulations, title 5, sections 57014, 57152.

²⁴ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743; *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

²⁵ Education Code section 81179 states in part that “whenever the community college district does not have funds available to repair, reconstruct, or replace the school buildings referred to in this article or Section 16320, the community college district shall apply for the funds as may be necessary to accomplish the repair, reconstruction, or replacement pursuant to Chapter 4.” Chapter 4 is located within Part 49 of the Education Code and is entitled the “Community College Construction Act of 1980, which is the subject of a separate test claim, *Community College Construction* (02-TC-47). The Deferred Maintenance and Special Repair program is in Chapter 4.7 of Part 50 of the Education Code and, thus, has nothing to do with the requirement in section 81179.

²⁶ Education Code section 81901 et seq.

²⁷ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743.

even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.²⁸

Pursuant to the court's holding in *Kern High School Dist.*, activities performed as a condition of the receipt of funding are not mandated by the state. With respect to optional funded programs like the Deferred Maintenance and Special Repair program, the court reasoned as follows:

As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the . . . requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, on balance, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.²⁹

The activities in the test claim statutes, regulations, and manual are required only if the district makes the discretionary decision to apply for funds. Based on the reasoning in the *Kern High School Dist.* case, since the initial decision to provide for the students is discretionary, the resulting downstream requirements are not legally compelled state mandates.

Claimant, in comments submitted in February and April 2004, argues that legal compulsion is not required to find a mandate. Claimant cites the legislative intent to fund deferred maintenance, and asserts that the program's "carrot and stick" approach "equates to a very large carrot and a very short stick." According to the claimant, ignoring available funding is "so far beyond the realm of practical reality that it leaves community college districts without any rational discretion."

The Commission disagrees. The Supreme Court in the *Kern* case described practical compulsion as "if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program..."³⁰ The penalty must be "certain and severe," such as a penalty imposing "double taxation" or "other draconian consequences" on the district.³¹ There is no such penalty in the test claim statutes or regulations. In fact, the *Kern* court rejected a practical compulsion argument that was similar to claimant's by stating: "the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of various funded programs 'too good to refuse' even though, as a condition of program participation, they have been forced to incur some costs."³²

²⁸ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

²⁹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 753.

³⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731.

³¹ *Id.* at page 752.

³² *Id.* at page 731.

IV. Conclusion

For the reasons discussed above, the Commission finds that Education Code section 84660 (Stats. 1981, ch. 764, Stats. 1990, ch. 1372); sections 57201, 57202 and 57205 of the title 5 regulations; and the Chancellor's Office manual do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution.

Commission on State Mandates

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