

**ITEM \_\_**  
**INCORRECT REDUCTION CLAIM**  
**DRAFT STAFF ANALYSIS**

Statutes of 1984, Chapter 1659

*Emergency Procedures, Earthquake and Disasters*

Fiscal Years 1996-1997 and 1997-1998

01-4241-I-03

San Diego Unified School District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This is an incorrect reduction claim filed by San Diego Unified School District (District)<sup>1</sup> challenging a reduction made by the State Controller's Office to the District's reimbursement claim for costs incurred in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program. Under that program, local agencies and school districts are eligible to claim reimbursement for the costs to school districts to establish an earthquake emergency procedure system in every public or private school building having an occupant capacity of 50 or more students or more than one classroom.

The dispute here involves the costs incurred in fiscal years 1996-1997 and 1997-1998 to implement the mandate. Following an audit, the State Controller's Office reduced the entire claimed reimbursement amounts of \$588,819 for fiscal year 1996-1997 and \$612,617 for fiscal year 1997-1998, for a total of \$1,201,436. The Controller cited a number of reasons for the reduction, all of which are discussed below.

The District seeks a determination from the Commission on State Mandates (Commission) pursuant to Government Code section 17551(d) that the State Controller's Office incorrectly reduced the claim, and requests that the State Controller's Office reinstate the \$1,201,436 reduced.

**Procedural History**

On July 23, 1987, the Commission found that Education Code sections 35295, 35296, and 35297 constitute a reimbursable state-mandated program upon school districts and county offices of

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<sup>1</sup> Exhibit A, incorrect reduction claim of San Diego Unified School District (IRC), Tab Q, San Diego Unified School District Audit Report prepared by the State Controller's Office (SCO Audit), p. 3.

education within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

On November 26, 1997, the District filed a reimbursement claim for fiscal year 1996-1997 in the amount of \$588,810, and on November 16, 1998, the District filed a reimbursement claim for fiscal year 1997-1998 for \$612,617. On December 22, 2000, the State Controller's Office sent the District a letter disallowing \$1,201,436, the entire claimed amount. On March 26, 2000, the District filed an incorrect reduction claim with the Commission.

### **Commission Responsibilities**

Government Code section 17561(b) authorizes the State Controller's Office to audit claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs that the State Controller's Office determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the State Controller's Office has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission's regulations requires the Commission to send the statement of decision to the State Controller's Office and request that the costs in the claim be reinstated.

### **Staff Analysis**

The State Controller's Office cited a number of reasons for its reduction. This incorrect reduction claim involves four areas of dispute, each of which is discussed briefly below.

First, the State Controller's Office argues that the claims data submitted by the District "included time not related to the mandate, such as time related to fires, civil defense, and other school emergencies and disasters."<sup>2</sup> For example, during the audit, the Controller conducted interviews with school site personnel "who indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours."<sup>3</sup>

The District argues that it performed reimbursable activities and submitted claims with adequate documentation. It argues that "[t]here can be no doubt that the 'District' school site staff performed the reimbursable activities. . . ."<sup>4</sup>

Staff finds from a review of the test claim statute, the Commission's statement of decision and parameters and guidelines, and the Controller's claiming instructions that the only reimbursable activities are those related to earthquake safety.

Second, the State Controller's Office sent the District a letter in which it adjusted the claim by a total of \$174,957 for costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness. The District argues that this was inappropriate because "[t]he amounts

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<sup>2</sup> Exhibit B, Response by the State Controller's Office to the Incorrect Reduction Claim by San Diego Unified School District (SCO Response), p. 7-15.

<sup>3</sup> Exh. B, p. 3.

<sup>4</sup> Exh. A, p. 5.

claimed by the ‘District’ are the District’s costs for salaries and benefits to perform the mandated activities.”<sup>5</sup>

The parameters and guidelines applicable to this claim were adopted in 1989 and amended in 1991. Section V (B) of the amended parameters and guidelines states “No reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems.”<sup>6</sup> The documentation submitted by the District to the State Controller’s Office indicates that \$167,423 in salaries and benefits was being claimed for teacher in-classroom instruction. This activity is prohibited by the clear language of the parameters and guidelines because there are no increased costs incurred by a district for activities that take place during in-classroom time.<sup>7</sup> Staff finds that the State Controller’s Office properly adjusted the claim by this amount plus the 4.5% indirect cost rate attributable to the claimed cost.

Third, the District and the State Controller’s Office disagree about the documentation that the District must supply to satisfy the requirements of the parameters and guidelines. The District argues that it performed mandated activities and that its documentation was adequate. The State Controller’s Office argues that the documentation is lacking in numerous respects discussed in section III (C) of this analysis. The parameters and guidelines state, “For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs.” This is very general language that provided little guidance to the District as to precisely what documentation it should maintain for auditing purposes.

The District’s documentation clearly shows that the District performed mandated activities and that it maintained some documentation to satisfy the requirements of the parameters and guidelines. While the documentation submitted to the State Controller’s Office by the District left a lot to be desired, staff finds that the District should not be penalized for maintaining somewhat vague and imprecise documentation when it was following the vague and imprecise parameters and guidelines adopted by the Commission.

Staff finds that the reduction by the State Controller’s Office to zero on the basis of the District’s perceived deficiencies in documentation is incorrect because it is arbitrary and not based on the very general language in the parameters and guidelines.

Fourth, the District argues that the State Controller’s Office failed to complete its audit of the District’s 1996-1997 reimbursement claim in a timely fashion. Pursuant to section 17558.5, the District was “subject to audit by the Controller” until December 31, 1999, two years after the end of the calendar year in which the reimbursement claim was filed. Staff finds from the context of section 17558.5(a) that the State Controller’s interpretation is the better one, and that the State Controller’s Office was required only to initiate its audit within the two-year timeframe.

The State Controller’s Office states, “the audit was started in October 1999.” The District does not dispute this. Accordingly, staff finds that the audit was timely because it was initiated within two years after December 31, 1999, the end of the calendar year in which the reimbursement claim was filed.

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<sup>5</sup> Exh. A, p. 6.

<sup>6</sup> Exh. B, Tab B, 1991 amended parameters and guidelines, p. 2.

<sup>7</sup> *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4<sup>th</sup> 1176, 1195.

## Conclusion

Staff concludes that the State Controller's Office properly reduced the District's fiscal year 1996-1997 reimbursement claim by \$174,957 for the costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness, because under the 1991 amended parameters and guidelines, no reimbursement can be claimed for in-classroom teacher time. Staff further concludes that the State Controller's Office properly reduced the District's reimbursement claims to the extent they sought reimbursement for activities not related to earthquake emergencies.

However, staff also concludes that the State Controller's Office incorrectly reduced the remaining costs incurred by San Diego Unified School District in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program.

## Staff Recommendation

Staff recommends that the Commission adopt this analysis to partially approve the incorrect reduction claim filed by San Diego Unified School District. Staff further recommends that the Commission remand the claim to the State Controller's Office to request that it determine the amount of the District's reimbursement claim that is attributable to earthquake emergencies, and reimburse the District for that amount, less the \$174,957 for in-classroom time that the State Controller's Office properly reduced.

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## STAFF ANALYSIS

### District

San Diego Unified School District

### Chronology

- 07/23/1987 Commission adopts statement of decision on *Emergency Procedures, Earthquake and Disasters* test claim
- 03/23/1989 Commission adopts parameters and guidelines on *Emergency Procedures, Earthquake and Disasters*
- 02/28/1991 Commission adopts amended parameters and guidelines for *Emergency Procedures, Earthquake and Disasters*
- 06/1993 SCO issues its first claiming instructions for *Emergency Procedures, Earthquake and Disasters*
- '95,'96,&'98 SCO issues revised claiming instructions
- 11/26/1997 District files reimbursement claim for costs incurred for fiscal year 1996-1997 in the amount of \$588,819
- 12/16/1998 District files reimbursement claim for costs incurred for fiscal year 1997-1998 in the amount of \$612,717

- 12/22/2000 SCO sends letter to district stating that \$1,201,436, the entire amount of the claims for fiscal years 1996-1997 and 1997-1998, is not allowed
- 07/23/2001 SCO sends two letters to district, one disapproving \$588,819, the entire amount of the reimbursement claim for fiscal year 1996-1997, and another disapproving \$612,617, the entire amount of the reimbursement claim for fiscal year 1997-1998
- 03/26/2000 District files incorrect reduction claim with Commission
- 08/13/2002 SCO submits responses to District's incorrect reduction claim
- 03/23/2011 Commission conducts informal hearing with claimant, the State Controller's Office, and interested parties

**I. Background**

This is an incorrect reduction claim filed by San Diego Unified School District (District) challenging a reduction made by the State Controller's Office to the District's reimbursement claim for costs incurred in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program. This program was enacted by Statutes 1984, chapter 1659 (the "1984 legislation"), in recognition of the fact that California will experience moderate to severe earthquakes in the foreseeable future and that all public and private schools should develop an earthquake emergency procedure system. (Ed. Code, § 35295.) The program required the governing board of each private school and school district and the superintendent of schools for each county to establish an earthquake emergency procedure system in every public or private school building having an occupant capacity of 50 or more students or more than one classroom. (Ed. Code, § 35296.)

The 1984 legislation stated that the earthquake emergency procedure system shall include, but not be limited to, all of the following:

- (a) A school building disaster plan, ready for implementation at any time, for maintaining the safety and care of students and staff.
- (b) A drop procedure. As used in this article, "drop procedure" means an activity whereby each student and staff member takes cover under a table or desk, dropping to his or her knees, with the head protected by the arms, and the back to the windows. A drop procedure practice shall be held at least once a semester in secondary schools.
- (c) Protective measures to be taken before, during, and following an earthquake.
- (d) A program to ensure that the students and staff are aware of, and properly trained in, the earthquake emergency procedure system.<sup>8</sup>

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<sup>8</sup> The 1984 legislation also amended the Education Code to require the governing board of any school district to: (a) grant the use of school facilities for mass care and welfare shelters to public agencies such as the American Red Cross in the event of a disaster or other emergency affecting the public health and welfare; and (b) cooperate with such public agencies in furnishing and maintaining those services as the governing board may deem necessary to meet the needs of

On December 1, 1986, the Los Angeles Unified School District filed a test claim with the Commission, alleging a reimbursable state-mandated program was imposed on school districts by the 1984 legislation. On July 23, 1987, the Commission found that Education Code sections 35295, 35296, and 35297 constitute a reimbursable state-mandated program upon school districts and county offices of education within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission adopted parameters and guidelines for the test claim on March 23, 1989. On February 28, 1991, the Commission amended the parameters and guidelines to delete reimbursement for in-classroom teacher time while allowing reimbursement for other non-teacher costs resulting from the instruction of students in emergency procedures.<sup>9</sup> On September 19, 2002, the State Controller's Office requested the Commission again amend the parameters and guidelines to clarify that reimbursement for the emergency and disaster procedures is limited to establishing an emergency procedure system that addresses *earthquake* emergencies only. On May 29, 2003, the Commission amended the parameters and guidelines to clarify the reimbursable activities and track the statutory language.

The dispute here involves the costs incurred in fiscal years 1996-1997 and 1997-1998 to implement the mandate. Accordingly, the 1991 amended parameters and guidelines are applicable to this claim.

Following an audit, the State Controller's Office reduced the entire claimed reimbursement amounts of \$588,819 for fiscal year 1996-1997 and \$612,617 for fiscal year 1997-1998, for a total reduction of \$1,201,436. The Controller cited a number of reasons for the reduction, all of which are discussed below.

The District seeks a determination from the Commission pursuant to Government Code section 17551(d), that the State Controller's Office incorrectly reduced the claim and requests that the Controller reinstate the \$1,201,436 reduced.

## **II. Positions of the Parties**

### **A. The District**

The San Diego Unified School District contends that the State Controller's Office incorrectly reduced its claims for reimbursement. The District argues that its claims were complete and were prepared in accordance with the 1991 amended parameters and guidelines and claiming instructions issued for this program.

The District believes that the State Controller's Office incorrectly reduced its claims to \$0 "despite the fact that it was never disputed the activities were performed."<sup>10</sup> The District states "[t]here can be no doubt that the "District" school site staff performed the reimbursable activities." The District also argues that the audit performed by the State Controller's Office was

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the community. (Ed. Code, § 40041.5.) This incorrect reduction claim does not involve these activities.

<sup>9</sup> Exh. A, Tab B, 1991 amended parameters and guidelines.

<sup>10</sup> Exh. A, p. 1.

not timely pursuant to Section 17558.5 because it was not completed within two years after the end of the calendar year in which the claim was filed or last amended.

### **B. State Controller's Office**

The State Controller's Office argues that the District's claim was deficient in several ways. First, the District sought reimbursement for activities unrelated to the mandate. Second, the District claimed reimbursement for teacher in-classroom instruction, an activity expressly disallowed by the 1991 amended parameters and guidelines. Third, the District failed to provide adequate documentation to demonstrate the costs claimed had actually been incurred. Finally, the State Controller's Office argues that its audit was timely.

### **III. Discussion**

Government Code section 17561(b) authorizes the State Controller's Office to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs that the State Controller's Office determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the State Controller's Office has incorrectly reduced payments to the local agency or school district. That section states:

The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district filed on or after January 1, 1985, that the Controller has incorrectly reduced payments to the local agency or school district pursuant to paragraph (2) of subdivision (b) of Section 17561.

If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission's regulations requires the Commission to send the statement of decision to the State Controller's Office and request that the costs in the claim be reinstated.

The State Controller's audit found that the District "could not provide adequate documentation substantiating the employees and hours charged to the mandate. Therefore, the State Controller's Office disallowed the entire salaries, benefits, and related indirect costs claimed."<sup>11</sup>

The following is an analysis of the issues raised by the District and the State Controller's Office.

#### **A. The District is only entitled to reimbursement for activities related to earthquake safety, not other emergency activities**

The District argues that it performed reimbursable activities and submitted claims with adequate documentation:

There can be no doubt that the "District" school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. . . . The district provided sufficient documentation to prove each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate. . . . [T]he "District" provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans . . . . [E]ach school site evaluates their evacuation drill and makes

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<sup>11</sup> Exh. A, Tab Q, p. 3.

appropriate changes to the emergency preparedness plans . . . .<sup>12</sup>

The Controller’s Office argues that the claims data submitted by the District “included time not related to the mandate, such as time related to fires, civil defense, and other school emergencies and disasters.”<sup>13</sup> For example, during the audit, the Controller conducted interviews with school site personnel “who indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours.”<sup>14</sup>

It is clear from a review of the test claim statute, the Commission’s statement of decision and parameters and guidelines, and the Controller’s claiming instructions that the only reimbursable activities are those related to earthquake safety.

As discussed below, staff finds that the District’s reimbursement claims contain costs for activities that go beyond the scope of the mandate and are not reimbursable. These activities are not mandated by the state and are not reimbursable under the test claim statute, the statement of decision, and the parameters and guidelines.

### **1. Education Code**

The 1984 legislation is codified in Article 10.5 of the Education Code, entitled “Earthquake Emergency Procedures.” During all relevant times, Article 10.5 contained only three sections, section 35295, 35296, and 35297. Section 35295(c) stated, “It is therefore the intent of the Legislature in enacting this article to authorize the establishment of *earthquake emergency procedure systems* in kindergarten and grades 1 through 12 in all the public or private schools in California.” (Emphasis added.) Section 35296 stated, “The governing board of each private school and school district and the county superintendent of schools of each county shall establish an *earthquake emergency procedure system* in every public or private school building . . . .” (Emphasis added.) Finally, section 35297 stated, “The *earthquake emergency procedure system* shall include . . . .” (Statutes 1984, chapter 1659, emphasis added.) The test claim statute was clearly focused on activities related to earthquakes, not other emergencies.

### **2. Statement of decision**

Section II of the statement of decision echoes the language of the test claim statute: “Article 10.5 . . . of the Education Code . . . requires the governing body of each school district or private school and the county superintendent of schools of each county to establish an *earthquake emergency procedure* in each school building under its jurisdiction.” (Emphasis added.) Section III of the statement of decision states: “The Los Angeles Unified School District has established that this statute has imposed a new program by requiring the governing board of any school district to establish an *earthquake emergency procedure system*, and by requiring the governing board of any school district to grant the use of school facilities, grounds and equipment for mass care and welfare shelters to public agencies in the event of a disaster or other emergency without

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<sup>12</sup> Exh. A, p. 5.

<sup>13</sup> Exh. B, p. 7-15

<sup>14</sup> Exh. A, Tab Q, p. 3.



the ability to recover direct costs from the user.” (Emphasis added.) The statement of decision also clearly focused on activities related to earthquakes, not other emergencies.<sup>15</sup>

### 3. 1991 Amended parameters and guidelines

The first paragraph of the amended parameters and guidelines recites verbatim the language from the statement of decision quoted above that makes it clear that the only reimbursable activities are those related to earthquakes. Under section V (B), “Reimbursable activities,” the amended parameters and guidelines state:

#### 1. Emergency Procedures

- a. The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of non-teacher district employees, including consultants, directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instruction.

The reimbursable costs incurred by non-teacher personnel in providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

- b. Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

Read in isolation, the references in this and other sections of the parameters and guidelines to the general term “emergency procedures” might suggest that the Commission intended reimbursement for activities related to emergencies other than earthquakes. However, read in the context of the test claim and statement of decision, it is clear that the only reimbursable activities are those related to *earthquake* emergencies. Moreover, the parameters and guidelines cannot enlarge the scope of reimbursable activities beyond what is in the statute and statement of decision. (Gov. Code section 17557.)

On March 19, 2001, the State Controller’s Office filed a request with the Commission to amend the parameters and guidelines. On May 29, 2003, the Commission adopted the final staff analysis to amend the parameters and guidelines. It states:

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<sup>15</sup> Exhibit C, statement of decision (CSM 4241), p. 3.

The SCO proposed amendments [to] narrow the parameters and guidelines to clarify that this program only applies to earthquake plans. Therefore, consistent with statutory language, the requested modifications were made, where applicable. (Final Staff Analysis, p. 6.)

This final staff analysis notes that the purpose of the amendments was to “clarify” that the statement of decision only applies to earthquake-related activities. The Commission adopted this staff analysis.

Accordingly, it is clear that the Commission intended to clarify what was always the case: that only earthquake-related activities are reimbursable. Generally, the same rules of construction and interpretation that apply to statutes govern the construction and interpretation of an administrative agency’s rules, such as the Commission’s parameters and guidelines.<sup>16</sup> The interpretation of an administrative agency rule, like the parameters and guidelines, is a question of law.<sup>17</sup> The Commission’s clarification of existing law may be applied to reimbursement claims for costs that predate the parameters and guidelines amendment. The Commission’s clarification is merely a statement of what the law has always been.<sup>18</sup>

#### **4. Claiming instructions**

The claiming instructions cannot authorize reimbursement for more than what the test claim statute or the Commission’s statement of decision or parameters and guidelines authorize. (Gov. Code section 17558(b).) Moreover, a fair reading of the claiming instructions reveals that they are targeted toward earthquake emergencies. The first paragraph of both the original and amended claiming instructions states that the test claim statutes “require the governing body of each school district and the county superintendent of schools of each to establish an earthquake emergency procedure in each school building under its jurisdiction.”<sup>19</sup>

#### **5. Activities performed prior to the period of reimbursement**

The State Controller’s Office also disallowed reimbursement for emergency procedures plans prepared by the District. The State Controller argues that these plans had been originally drafted prior to the reimbursement period and therefore are not reimbursable:

The SCO auditor interviewed seven school principals. The principals stated that the emergency preparedness plans had been developed prior to FY 1996-97 and were merely updated each year thereafter. Review of the plans disclosed that the only changes made during the audit period were updates to the fiscal year, the names of the disaster preparedness committee members (including school staff), and the maps.

The district did not identify employees with assigned responsibility to prepare district earthquake procedures plans and their related costs. The SCO review also disclosed that the emergency preparedness plans relate to disaster preparedness as well as earthquake drills, and not to earthquake drills alone.

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<sup>16</sup> Exhibit D, *Cal. Drive-in Restaurant Ass’n v. Clark* (1943) 22 Cal.2d 287, 292.

<sup>17</sup> Exhibit E, *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86, 93.

<sup>18</sup> Exhibit F, *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.

<sup>19</sup> Exh. A, Tabs C and D.

Consequently, time include on the Data Collection sheets was unsupported and included time not related to the mandate such as time related to fires, civil defense, and other school emergencies and disasters.<sup>20</sup>

The District counters that “[t]he plans are prepared or reviewed and updated each year and the plans provided to the auditors were the plans in effect during the audit period.”<sup>21</sup> While the District is not entitled to reimbursement for any costs incurred prior to the reimbursement period, it is entitled to work done on the plans related to earthquake emergencies that was performed during the reimbursement period.

## 6. Summary

The District is only entitled to reimbursement for activities related to earthquake emergencies. It appears, however, that some of the District’s reimbursement requests involve activities other than earthquake emergency procedures. For example, for one category of activities that the District described as, “Preparing and implementing district earthquake emergency plans and procedures,” the documentation shows that for fiscal year 1997-1998, the District sought reimbursement for two hours of time<sup>22</sup> for each of the involved principals, vice principals, nurses, teachers, support staff, and maintenance staff to attend a meeting.

While conducting its audit, the State Controller’s Office obtained copies of the agenda for this meeting. The two-hour meeting included 8 numbered topics and a total of 26 bulleted items. One of those bulleted items is entitled “Earthquake.” The State Controller’s Office noted, “The agenda did not identify whether earthquake procedures were discussed or the time spent discussing them. The SCO requested copies of agendas or meeting minutes for the other schools but none were provided.”<sup>23</sup>

The test claim statute mandated school districts to perform activities related to earthquake emergencies, and the Commission’s statement of decision clearly reflected this. To the extent the District submitted reimbursement requests for activities not related to earthquakes, the State Controller’s Office was justified in reducing claims accordingly. It is not clear from the record how much of the documented time was spent by the District on earthquake-related activities and how much documented time was spent on other activities. Nor is it clear how much of the State Controller’s reduction was based on the District’s inclusion of activities unrelated to the mandate and how much was based on the State Controller’s perceived inadequate documentation. The State Controller’s Office states, “The unallowable costs resulted primarily from lack of documentation substantiating claimed costs.”<sup>24</sup>

Staff finds that the District’s reimbursement claims contain costs for activities that go beyond the scope of the mandate and are not reimbursable. A reduction of these costs would be correct and

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<sup>20</sup> Exh. B, p. 7-15.

<sup>21</sup> Exh. A, p. 5.

<sup>22</sup> The District sought only one hour of time for counselors.

<sup>23</sup> Exh. B, p. 9-15.

<sup>24</sup> Exh. B, p. 1-15.

in accordance with the test claim statute, the statement of decision, the parameters and guidelines, and the claiming instructions.

However, because the State Controller's Office cited several reasons for reducing the District's claims to zero, it is impossible to determine from the record how much of the reduction was attributable to the fact that the District requested reimbursement for activities unrelated to earthquake emergencies.

Staff recommends that the Commission remand this claim to the State Controller's Office to determine how much of the claimed activities were attributable to mandated earthquake-related activities.

**B. The SCO's August 16, 1999 adjustment of \$174,957 to the District's fiscal year 1996-1997 reimbursement claim was appropriate for the costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness**

On August 16, 1999, the State Controller's Office sent the District a letter in which it adjusted the claim by a total of \$174,957.<sup>25</sup> The District argues that this was inappropriate:

The SCO never provided any basis for the adjustment of the amount of \$176,739. The amounts claimed by the "District" are the District's costs for salaries and benefits to perform the mandated activities. The SCO had no basis to adjust the claim . . . .<sup>26</sup>

Section V (B) of the parameters and guidelines states "No reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems." The documentation submitted by the District to the State Controller's Office indicates that \$167,423 in salaries and benefits was being claimed for teacher in-classroom instruction. This activity is prohibited by the clear language of the parameters and guidelines because there are no increased costs incurred by a district for activities that take place during in-classroom time.<sup>27</sup> Staff finds that the State Controller's Office properly adjusted the claim by this amount plus the 4.5% indirect cost rate attributable to the claimed cost.

**C. The documentation submitted by the District support the hours claimed for reimbursement**

The District and the State Controller's Office disagree about the documentation that the District must supply to satisfy the requirements of the parameters and guidelines. Section VI of the parameters and guidelines requires that the districts "attach a statement showing the actual increased costs incurred to comply with the mandate . . . ." Section VIII states, "For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs." This is very general language that provides little

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<sup>25</sup> According to the SCO, this letter "inadvertently calculated the indirect cost through the desk review to be \$9,316 rather than \$7,534, an overstatement of \$1,782. Consequently, the SCO offset of \$176,739 should have been \$174,957. The difference was corrected during the SCO audit." (Exh. B, p. 12-15.)

<sup>26</sup> Exh. A, p. 6.

<sup>27</sup> *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4<sup>th</sup> 1176, 1195.

guidance as to precisely what documentation the State Controller's Office can properly require from the District.

The District argues that District school personnel performed reimbursable activities and that the District submitted sufficient documentation to meet the requirements of the parameters and guidelines:

The "District" provided SCO time logs of the actual effort expended by the "District's" personnel on the mandated activities for the period indicated. The time logs (after-the-fact certifications) were completed by the individuals who performed the tasks or by a supervisory official having first hand knowledge of the activity performed by employees. . . . The "District's" method of determining the actual costs of performing the mandated activities is reasonable. In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57% of the sites, provided time logs. The district performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.<sup>28</sup>

The "Data Collection" sheets submitted by the District reflect the estimated time spent on four different activities by seven employee classifications: principals, vice principals, nurses, counselors, teachers, support staff, and maintenance staff. The four activities are as follows:

1. Preparing and implementing the district earthquake emergency plans and procedures;
2. Training all staff in the earthquake emergency plans and procedures;
3. Preparing standard lesson plans for training students in earthquake emergency procedures; and
4. Preparing a standard testing program to ensure that students are properly trained in the plan.

The State Controller's Office believes that the District's data is lacking in a number of ways, as discussed in more detail below. The State Controller's final Audit Report issued in December 2000 states:

During this audit, the district could not provide adequate documentation substantiating the employees and hours charged to the mandate. Therefore, the SCO disallowed the entire salaries, benefits, and related indirect costs claimed. The only documents provided by the district were: (1) J-200 Summary, which shows the authorized, excess, and vacant positions for each employee classification; (2) Emergency Procedures Plans, which were not developed during the audit period and encompassed all types of emergencies; and (3) Data

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<sup>28</sup> Exh. A, pp. 4 – 6.

Collection Sheets, which show year-end estimates of hours supposedly spent on the mandate during the year.

The hours claimed by the district consisted of the number of authorized positions, plus or minus excess or vacant positions, multiplied by estimated hours. The number of actual employees performing mandated activities was not provided. The district did not maintain workload data throughout the year or any other supportive documentation to substantiate either the estimated hours or whether the hours were spent for activities required under the mandate. Interviews with school site personnel indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours.

The district provided the SCO auditor with Data Collection Sheets as support for the filed claims. These sheets could not be reconciled to the filed claims. The Data Collection Sheets are completed by principals and vice principals of individual schools within the district at the end of each fiscal year. These sheets show only year-end estimates of hours by position classification (not by employee) supposedly spent on the mandate. These sheets report the number of positions (for example, 25 teachers) that participated in the mandate during the fiscal year, multiplied by an estimated number of hours for each activity. No corroborating documentation was provided to the SCO auditor to confirm the information reported on these sheets. Additionally, all schools within the district did not submit Data Collection Sheets to the district.<sup>29</sup>

### **1. What documentation is required to support a claim that employees performed reimbursable activities?**

Section VI (B)(1)(a) of the 1991 amended parameters and guidelines states:

For those employees whose function is to prepare and implement emergency plans and to provide instruction, *provide a listing of each employee*, describe their function, their hourly rate of pay and related employee benefit costs and the number of hours devoted to their function as they relate to this mandate. (Emphasis added.)

The State Controller's Office states that the District "provided no time records or time logs to support claimed costs" for a number of activities. The State Controller's Office argues, "The Data Collection sheets do not provide the names of each employee or the specific date and time of the charges, as required by the *Amended Parameters and Guidelines* Section VI.B.1(a)."<sup>30</sup> As can be seen from the quoted language above, the parameters and guidelines do not require the "names of each employee" as the State Controller's Office argues; rather, they require a much more general "listing of each employee." Nor do the parameters and guidelines require "the specific date and time of the charges" as the State Controller's Office argues; rather, they require "the number of hours devoted to their function as they relate to this mandate."<sup>31</sup>

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<sup>29</sup> Exh. A, Tab Q, p. 3.

<sup>30</sup> Exh. B, p. 5-15.

<sup>31</sup> Exh. B, p. 5-15; Exh. A, Tab B, Section VI.B.1(a).

Moreover, the State Controller's Office's proffered interpretation is not consistent with its own claiming instructions. Section 7, Claim Forms and Instructions, of the claiming instructions states:

Identify the employee(s), *and/or show the classification of the employee(s) involved*, describe the mandated functions performed as these relate to preparing and implementing emergency plans and providing instruction, specify the actual number of hours devoted to the mandated functions, the productive hourly rate, and the related fringe benefits.

Source documents required to be maintained by the claimant may include, but are not limited to, employee time cards and/or cost allocation reports. (Emphasis added.)<sup>32</sup>

While the State Controller's Office overstates the requirements of the parameters and guidelines, as well as its own claiming instructions, it nevertheless raises a critical issue as to what documentation it may properly require so that it can fulfill its responsibility under Government Code section 17561 to audit and, where appropriate, reduce claims that it determines are "excessive or unreasonable."

The District's data collection worksheets do not provide the names of each employee but do provide a listing of each classification of employee (e.g. principal, vice principal) and in some cases the number of hours devoted to the mandated activities by each employee classification. However, the information in the data collection worksheets is not clear. The worksheets reflect data acquired from just over half (53% in FY '96-'97 and 57% in FY 97-98) of all schools within the District to determine how much each school spent on reimbursable activities. The District states that this data was "completed by the individuals who performed the tasks *or by a supervisory official* having first hand knowledge of the activity performed by the employees." (Emphasis added.)<sup>33</sup> Therefore, only some undefined portion of the data was supplied by the individual employees who actually performed the work and who would be in the best position to accurately identify the number of hours they spent on mandated activities.

The District sent worksheets to each school in the District. The District then extrapolated from the data from the schools that responded to arrive at an estimate of the average amount of time spent by each school on reimbursable activities. The District notes that "the time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was two hours."<sup>34</sup> The District apparently somehow derived these figures from the data collection worksheets submitted by the schools within the District. The State Controller's Office supplied seven samples of these data collection worksheets from schools within the District.<sup>35</sup>

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<sup>32</sup> Exh. A, Tab D, Amended Claiming Instructions, revised 10/98, p. 3.

<sup>33</sup> Exh. A, p. 4.

<sup>34</sup> Exh. A, p. 6.

<sup>35</sup> Exh. B, Tab 3.

It is not at all clear how the District arrived at the average and median times it claims are represented in the worksheets. The instructions on the worksheet direct the preparer to indicate which staff members (principals, vice principals, nurses, counselors, teachers, support staff, maintenance personnel, and other) participated in each of the four types of activities described in the worksheet. Beside each classification of staff member, schools are instructed to identify the “approximate amount of time spent on the activity” per year.

Of the seven worksheets in the record, supplied by five different schools within the District, no two are exactly alike. The form worksheet provides very little explanation, and each school filled the worksheet out in its own way. One school’s worksheet shows a handwritten number of hours in the “time spent per year” column that corresponds to each classification of employee. In the margin beside some of those numbers are indecipherable calculations. It is not clear if these are the preparer’s personal notes or if they are intended to convey some information to the reader.<sup>36</sup>

Another school’s worksheet states “15-20 hrs.” on the first line at the top of the “time spent per year” column, with no indication of whether that is supposed to be the number of hours spent by the principal or if those hours are supposed to somehow be divided up among all eight employee categories.<sup>37</sup> Cryptically, in the margin to the right of the “time spent per year” column, the preparer has written “2\*” with an arrow down the length of the column. Does this mean that the 15-20 hours is to be divided up two hours each between the eight employee categories? If so, that adds up to a total of 16 hours, which makes the “15-20 hrs.” irrelevant. The asterisk beside the “2” does not clearly refer to anything in a footnote or anywhere else. In addition, beside the “other” employee classification, the preparer has written “parents” for three of the four mandated activities. One can reasonably presume that this preparer intended to mean that some of the hours spent that year were attributable to parents, whose time would not be reimbursable.

Each of the eight worksheets is signed at the bottom. Two indicate that the signatory is the principal of the school. It is not clear who the other signers are. It is also not clear what process any of the preparers used to compile the information.

## **2. What type of statistical analysis is allowable?**

The State Controller’s Office argues that the District used an improper statistical analysis to come up with the average amount of time spent by each employee on reimbursable activities. According to the State Controller’s Office:

[The District’s] method of determining the actual costs of performing the mandated activities is not reasonable. In FY 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, submitted time logs. In FY 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, submitted time logs. The district states that it performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. However, the analysis does not meet the requirements for a statistical analysis because the hours from the Data Collection

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid.



sheets were estimates and, therefore, not verifiable. In addition, the 87 sites for FY 1996-97 and the 97 sites for FY 1997-98 were not randomly selected. This lack of randomness prevents the results of the samples from being projected to the total school sites for both years.<sup>38</sup>

The parameters and guidelines are silent regarding the propriety of using a statistical analysis. While the State Controller's Office argues that the District's statistical analysis is wanting, it cites no authority for this position. Nor does the State Controller's Office provide any discussion of what type of statistical analysis would be acceptable. By stating that the District's statistical analysis is unacceptable, the implication is that statistical analyses are acceptable to the State Controller's Office but that the District's is insufficient. The State Controller's Office's website includes a PDF document entitled "Time-Study Guidelines" that describes the circumstances under which a time study is appropriate.<sup>39</sup> The document, dated June 23, 2008, states:

In certain cases, a time study may be used as a substitute for continuous records of actual time spent on multiple activities and/or programs. A time study can be used for an activity when the task is repetitive in nature. Activities that require varying levels of effort are not appropriate for time studies.

While it does not appear that the documentation submitted by the District to the State Controller's Office would meet the requirements of the Time-Study Guidelines, those guidelines demonstrate that the State Controller's Office accepts documentation that does not specifically identify every claimed activity.

The District argues that "after-the-fact" certifications are a recognized and acceptable means of determining costs for a cost objective. As one source of authority for its position, the District points to OMB Circular A-87.<sup>40</sup> The District states:

After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective. The Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs.<sup>41</sup>

The parameters and guidelines do not indicate that either OMB Circular A-87 or memoranda from the California Department of Education are appropriate resources to use to comply with the parameters and guidelines. More importantly, to the extent these resources identified by the District provide useful guidance, the District didn't follow that guidance. For example, OMB Circular A-87, section 11(h), states that personnel activity reports "must be prepared at least monthly and must coincide with one or more pay periods" and "must be signed by the employee." The District makes no attempt to argue that the documentation it supplied meets

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<sup>38</sup> Exh. B, p. 11-15.

<sup>39</sup> This link can be found at [http://www.sco.ca.gov/Files-ARD-Local/mancost\\_timestudyguidelines.pdf](http://www.sco.ca.gov/Files-ARD-Local/mancost_timestudyguidelines.pdf) as of June 3, 2011.

<sup>40</sup> Exh. B, Tab 6.

<sup>41</sup> Exh. A, p. 5.

either of these criteria. Data collection sheets – which are compilations of numerous employees’ activities – were prepared at the end of the year and contained only one signature, that of the principal or other school official.

Nevertheless, the District should not be presumed to have the statistical analysis skills of the State Controller’s Office. The evidence shows the District performed the activities eligible for reimbursement. There is no dispute that the District acted in good faith. It produced worksheets in accordance with the parameters and guidelines, and it signed its claims under penalty of perjury.

### 3. How does the *Clovis* decision impact this analysis?

Last year, California’s Third District Court of Appeal issued an opinion<sup>42</sup> in which it held that the contemporaneous source document rule (CSDR) applied by the State Controller’s Office to a number of mandate reimbursement claims was invalid as an underground regulation. The CSDR states that actual costs must be traceable to source documents that were created at or near the time the actual cost was incurred for the event or activity in question. While the parameters and guidelines at issue here did not include the CSDR, the *Clovis* case nevertheless provides some guidance. The court stated:

From 1991 until June 2, 2003, the Commission’s P & G’s for the [Emergency Procedures, Earthquake and Disaster program] required school districts seeking state-mandated reimbursement for employee salary and benefit costs: (1) to “provide a listing of each employee ... and the number of hours devoted to their [mandated] function”; and (2) “[f]or auditing purposes, all costs may be traceable to source documents and/or worksheets that show evidence of the validity of such costs.” The Controller’s [Emergency Procedures, Earthquake and Disaster program-specific] Claiming Instructions, since 1986, have stated that “Source documents required to be maintained by the [reimbursement] claimant may include, but are not limited to, employee time cards and/or cost allocation reports.”

....

[W]e conclude that the Controller’s CSDR is an underground, unenforceable regulation as applied to the audits of the School Districts’ [Emergency Procedures, Earthquake and Disaster programs] for the applicable periods roughly encompassing the fiscal years 1998 to 2003. These audits are invalidated to the extent they used this CSDR.<sup>43</sup>

In this matter, the State Controller’s Office did not explicitly apply the CSDR to the District’s claims. Instead, it concluded more generally that “During this audit, the district could not provide adequate documentation substantiating the employees and hours charged to the mandate.

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<sup>42</sup> Exhibit G, *Clovis Unified School District et al. v. John Chiang, as State Controller* (Clovis) (2010) 188 Cal.App.4<sup>th</sup> 794.

<sup>43</sup> *Clovis* at p. 806.

Therefore, the SCO disallowed the entire salaries, benefits, and related indirect costs claimed.”<sup>44</sup>

Of particular relevance to this matter is the *Clovis* court’s finding of substantial evidence to show that prior to the use of the CSDR, the State Controller’s Office allowed reimbursement for employee salary and benefit costs based on “an annual accounting of time determined by the number of mandated activities and the average time for each activity.”<sup>45</sup>

#### **4. Summary**

The parameters and guidelines provided the District with little guidance as to what documentation it should maintain. Section VIII of the parameters and guidelines states, “For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs.” This language did not put the District on notice as to what documentation was required. Moreover, the use of “may” rather than “shall” could lead the District to reasonably believe it was not bound by this directive but could choose to follow it or not.

While the District did not submit documents from the original “sources,” namely each employee who performed reimbursable activities, the District did submit data collection worksheets. These worksheets “show evidence” that some costs were incurred even if the evidence is unclear, as discussed above. For several reasons, however, the “validity” of these costs is open to question. First, the primary data from the worksheets was, for the most part, not prepared by the employee who actually performed the mandated activities. OMB Circular A-87 – cited by the District as evidence that after-the-fact determinations are acceptable – requires that the time records be prepared monthly and be signed by the employee who performed the work. The information submitted by the District meets neither of these criteria.

Second, the data collection sheets in the record do not clearly show how much time was spent on the reimbursable activities by each classification of employee. To prepare what the District described as “average” and “mean” times for each employee classification, the District necessarily made assumptions about what the primary data in the worksheets actually meant.

Third, the District received data collection sheets from just over half of all schools within the District. The District then extracted the dubious data from these data collection sheets, and purported to develop a District-wide average number of hours spent by each employee on each of the four mandated activities.

Despite these deficiencies, staff finds that the undisputed evidence in the record clearly shows that the District performed reimbursable mandated activities. The District requested schools within the District to prepare worksheets in an effort to maintain evidence of the validity of the costs claimed. More than half of the schools did indeed prepare worksheets. Given the vagueness of the parameters and guidelines, the District could reasonably believe that the data collection sheets were an adequate means of meeting the requirements. The Commission cannot require claimants to meet a standard that they were not on notice they were required to meet. The amended parameters and guidelines simply do not provide clear instructions regarding the type of documentation a claimant must maintain.

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<sup>44</sup> Exh. A, Tab Q, p. 3.

<sup>45</sup> Exh. G, *Clovis* at p. 802.

In 2002, Commission staff held several workshops with the claimant community and representatives of state agencies, including the State Controller's Office. Participants at the meeting discussed a number of changes to the parameters and guidelines boilerplate language as proposed by the State Controller's Office. On December 18, 2002, the Commission adopted parameters and guidelines amendments for the *School Bus Safety I and II* program and incorporated new language regarding the documentation that claimants must maintain. The following is a comparison between the boilerplate language in the 1991 amended parameters and guidelines applicable to the District in this matter, and the new language added in 2002 (that has subsequently been amended):

1991 amended parameters and guidelines boilerplate language:

For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs.

2001 parameters and guidelines boilerplate language:

Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. . . . Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Had the District been claiming under the new language, the State Controller's argument that the District's documentation is lacking would be more persuasive. However, that is not the case. The District was bound by the very general language in the 1991 amended parameters and guidelines. The District should not be penalized for being vague and imprecise when it was following the vague and imprecise parameters and guidelines adopted by the Commission.

Accordingly, staff finds that the reduction by the State Controller's Office to zero is incorrect because it is arbitrary and not based on the very general language in the parameters and guidelines. Pursuant to section 1185.7 of the Commission's regulations, if the Commission determines that a reimbursement claim has been incorrectly reduced, the Commission is required to send the statement of decision on the incorrect reduction claim to the State Controller's Office and request that the costs in the claim be reinstated.

Staff recommends that the Commission remand the reimbursement claims back to the State Controller's Office and request that it reimburse the District in accordance with this analysis.

#### D. SCO's fiscal year 1996-1997 reimbursement claim audit was timely

The District argues that the State Controller's Office failed to complete its audit of the District's 1996-1997 reimbursement claim in a timely fashion pursuant to Government Code section 17558.5. The District states:

Section 17558.5 requires that any audit be completed no later than two years after the end of the calendar year in which the claim was filed or last amended. The district's Fiscal Year 1996-1997 reimbursement claim was filed on November 26, 1997. Therefore, the audit of the Fiscal Year 1996-1997 must have been completed no later than December 31, 1999. The draft audit report, with respect to Fiscal Year 1996-97, was not timely issued and has no force or effect.<sup>46</sup>

The District misstates the law. The version of Government Code section 17558.5(a), in effect at the relevant time states:

A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter *is subject to audit* by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller *to initiate an audit* shall commence to run from the date of the initial payment of the claim. (Stats. 1995, c. 945 (SB 11), emphasis added.)

The District filed its reimbursement claim on November 26, 1997. Pursuant to section 17558.5, the District was "subject to audit by the Controller" until December 31, 1999, two years after the end of the calendar year in which the reimbursement claim was filed. The District seems to be arguing that the "subject to audit" language in section 17558.5 means that the State Controller's Office must *complete* its audit within the two-year timeframe. The State Controller's Office argues that the language means that it must *initiate* its audit within the two-year timeframe.<sup>47</sup>

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<sup>46</sup> Exh. A, p. 7.

<sup>47</sup> Commission staff reviewed the legislative history of the various bills that led to what ultimately became Government Code section 17558.5. Within the voluminous files at the California State Archives, one can find many individual pieces of information that seem to argue in favor of one conclusion or another, but there is nothing definitive that settles the issue. For example, the files contain support letters and committee analyses that compare the timeframe imposed on the State Controller's Office as a "statute of limitations," similar to the limitations period imposed on auditors from the Internal Revenue Service. One analysis states that the bill "would require that any such audit be completed within four years after the end of the calendar year in which the claim is filed or last amended." These snippets by themselves would mitigate in favor of the conclusion advanced by the District. However, the files also contain snippets of information like a floor statement (which may or may not have actually been read) that the bill "would specify a date upon which the statute of limitations will begin and will provide the Controller with four years after that date to begin an audit." This by itself would mitigate in favor of the conclusion advanced by the State Controller's Office.

Staff finds from the context of section 17558.5 (a), that the State Controller’s interpretation is the better one. While one rule of statutory construction states that the use of differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended, Commission staff finds that inference is not supportable in this case.<sup>48</sup>

Section 17558.5(a), is not a model of clarity. However, a careful reading of the language of the first and second sentences reveals that the primary difference between the two is with regards to appropriations. The second sentence clearly refers to situations where funds *are not* appropriated. It can reasonably be inferred from the context that the first sentence, in contrast, refers to situations where funds *are* appropriated. The use of the word “however” to begin the second sentence signals the contrast between these two situations (when funds are appropriated versus when they are not).

There is nothing about the structure or language of the two sentences to suggest that the Legislature intended any other substantive differences between these two parallel sentences. In each situation, when there is an appropriation (first sentence) and when there is not (second sentence), the State Controller’s Office must perform some activity within a two-year period. The use in the second sentence of the phrase “the time for the Controller to initiate an audit” refers back to “the time” defined in the first sentence, namely two years. Similarly, the use of “initiate” in the second sentence refers to what the Controller is required to do within the two-year period. Read in this way, the two sentences are parallel. In the first sentence, when there is an appropriation, the time to initiate an audit is two years. In the second sentence, when there is no appropriation, the time to initiate an audit is also two years. The only difference between the two situations is the triggering event (an appropriation) that determines when the two-year period to initiate an audit begins to run.

In 2002, the relevant language of section 17558.5 (a), was amended to read as follows (added text is underlined):

A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than . . . . (Stats. 2002, ch. 1128 (AB 2834).)

Commission staff found nothing in the legislation or the legislative history of AB 2834 to suggest that the underlined language was intended to be anything other than clarifying language. Pursuant to the rules of statutory construction, a clarification of existing law may be applied to transactions predating its enactment without being considered a retroactive application of the law. The clarified law is merely a statement of what the law has always been.<sup>49</sup>

It is generally recognized that an agency’s interpretation of its own regulations and governing statutes is entitled to great weight.<sup>50</sup> The *Colmenares* court stated “we are required to give great weight to an administrative agency’s interpretation of its own regulations and the statutes under

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<sup>48</sup> Exhibit H, *Fairbanks v. Superior Court* (2009) 46 Cal.4<sup>th</sup> 56, 62.

<sup>49</sup> Exhibit F, *McClung, supra*, 34 Cal.4<sup>th</sup> at 471.

<sup>50</sup> Exhibit I, *U.S. v Larionoff* (1977) 431 U.S. 864, 872; Exhibit J, *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4<sup>th</sup> 1019.

which it operates.”<sup>51</sup> Commission staff interprets section 17558.5(a) to mean that the State Controller’s Office was required to initiate an audit no later than two years after the end of the calendar year in which the District’s reimbursement claim was filed.

The State Controller’s Office states, “the audit was started in October 1999.” The District does not dispute this. Accordingly, staff finds that the audit was timely because it was initiated within two years after December 31, 1997, the end of the calendar year in which the reimbursement claim was filed.

#### **IV. Conclusion**

Staff concludes that the State Controller’s Office properly reduced the District’s fiscal year 1996-1997 reimbursement claim by \$174,957 for the costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness, because under the 1991 amended parameters and guidelines, no reimbursement can be claimed for in-classroom teacher time. Staff further concludes that the State Controller’s Office properly reduced the District’s reimbursement claims to the extent they sought reimbursement for activities not related to earthquake emergencies.

However, staff also concludes that the State Controller’s Office incorrectly reduced the remaining costs incurred by San Diego Unified School District in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program.

#### **V. Staff Recommendation**

Staff recommends that the Commission adopt this analysis to partially approve the incorrect reduction claim filed by San Diego Unified School District. Staff further recommends that the Commission remand the claim to the State Controller’s Office to request that it determine the amount of the District’s reimbursement claim that is attributable to earthquake emergencies, and reimburse the District for that amount, less the \$174,957 for in-classroom time that the State Controller’s Office properly reduced.

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<sup>51</sup> Exh. J, *Colmenares*, at p. 1029.