

PUBLIC HEARING
COMMISSION ON STATE MANDATES



TIME: 10:32 a.m.
DATE: Friday, January 30, 2009
PLACE: State Capitol, Room 447
Sacramento, California



REPORTER'S TRANSCRIPT OF PROCEEDINGS



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A P P E A R A N C E S

COMMISSIONERS PRESENT

TOM SHEEHY
(Commission Chair)
Representative for MICHAEL GENEST
Director, State Department of Finance

CYNTHIA BRYANT
Director
Office of Planning & Research

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

FRANCISCO LUJANO
Representative for BILL LOCKYER
State Treasurer

SARAH OLSEN
Public Member

J. STEVEN WORTHLEY
Supervisor and Chairman of the Board
County of Tulare



COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director
(Item 13)

NANCY PATTON
Assistant Executive Director
(Item 13)

ERIC FELLER
Senior Commission Counsel
(Items 4 and 5)

HEATHER HALSEY
Commission Counsel

A P P E A R A N C E S

COMMISSION STAFF PRESENT

continued

CAMILLE SHELTON
Chief Legal Counsel
(Items 6, 7, 9, 10 & 12)



PUBLIC TESTIMONY

Appearing Re Items 4 & 5:

For San Diego Unified School District

ART PALKOWITZ
Manager, Office of Resource Development
San Diego City Schools Finance Division
4100 Normal Street, Room 3209
San Diego, California 92103-2682

For Department of Finance:

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

Appearing Re Items 6 and 7:

For Grossmont Union High School District:

KEITH B. PETERSEN, MPA, JD
President
SixTen and Associates
5252 Balboa Avenue, Suite 900
San Diego, California 92117

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 6 and 7: *continued*

For Department of Industrial Relations:

ANTHONY MISCHEL
Department of Industrial Relations
320 W. Fourth Street
Los Angeles, California 90013

GARY O'MARA
Department of Industrial Relations
2424 Arden Way
Sacramento, California 95825

For Department of Finance

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

Appearing Re Item 9:

For California Integrated Waste Management Board

ELLIOT BLOCK
Chief Counsel
California Integrated Waste Management Board
1001 I Street, Mailstop 23A
Sacramento, California 95814

For Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing re Item 13:

ALLAN BURDICK
California State Association of Counties
SB 90 Service
4320 Auburn Boulevard, Suite 2000
Sacramento, California 95841

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I N D E X

<u>Proceedings</u>	<u>Page</u>
I. Roll Call	10
II. Election of Officers	
Item 1 Staff Report	11
III. Approval of Minutes	
Item 2 A. November 6, 2008	14
B. December 29, 2008	14
IV. Proposed Consent Calendar	
(<i>Item 6</i>)	14
V. Appeal of Executive Director Decisions Pursuant to California Code of Regulations Title 2, Section 1181(c)	
Item 3 Appeal of Executive Director's Decision	None
VI. Hearings and Decisions on Claims Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7	
A. Test Claims	
Item 4 <i>Surplus Property Advisory Committees, 02-TC-36 Clovis Unified School District</i>	16
Item 5 Proposed Statement of Decision: <i>Surplus Property Advisory Committees, (See Item 4 above)</i>	30

I N D E X

Proceedings

Page

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

A. Test Claims *continued*

Item 6 *Prevailing Wage Rate, 01-TC-28 Grossmont Union High School District* 31

Item 7 Proposed Statement of Decision: *Prevailing Wage Rate (See Item 6 above)* 67

B. Dismissal of Withdrawn Portions of Test Claim

Item 8* *Stormwater Pollution Control Requirements, 03-TC-21 Cities of Bellflower, Covina, Downey, Monterey Park, and Signal Hill (Consent calendar item)* 15

VII. Informational Hearing Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8

A. Parameters and Guidelines

Item 9 *Integrated Waste Management 05-PGA-16 Integrated Waste Management Board* 67

I N D E X

<u>Proceedings</u>	<u>Page</u>
VII. Informational Hearing Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8	
B. Statewide Cost Estimate	
Item 10* Fire Safety Inspections of Care Facilities, 01-TC-16 City of San José (Consent calendar item)	15
C. Adoption of Proposed Rulemaking Calendar	
Item 11* Proposed Rulemaking Calendar 2009 (Consent calendar item)	15
VIII. Staff Reports	
Item 12 Chief Legal Counsel's Report	72
Item 13 Executive Director's Report	73
IX. Public Comment (None)	90
X. Closed Executive Session	91
XI. Report from Closed Executive Session	91
Adjournment	91
Reporter's Certificate	92

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Commission on State Mandates – January 30, 2009

1 BE IT REMEMBERED that on Friday, January 30,
2 2009, commencing at the hour of 10:32 a.m., thereof, at
3 the State Capitol, Room 447, Sacramento, California,
4 before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR,
5 the following proceedings were held:

6 --oOo--

7 CHAIR SHEEHY: We will call the Commission on
8 State Mandates to order.

9 Paula, could you help us establish a quorum?

10 MS. HIGASHI: Ms. Bryant?

11 MEMBER BRYANT: Here.

12 MS. HIGASHI: Mr. Chivaro?

13 MEMBER CHIVARO: Here.

14 MS. HIGASHI: Mr. Glaab is absent today due to
15 personal illness.

16 Mr. Lujano?

17 MEMBER LUJANO: Here.

18 MS. HIGASHI: Ms. Olsen?

19 MEMBER OLSEN: Here.

20 MS. HIGASHI: Mr. Worthley?

21 MEMBER WORTHLEY: Present.

22 MS. HIGASHI: And Mr. Sheehy?

23 CHAIR SHEEHY: Present.

24 Okay, with the quorum present, we're ready to
25 do business.

Commission on State Mandates – January 30, 2009

1 And I think the first item of business are
2 the minutes.

3 MS. HIGASHI: Actually, we're going to go to
4 the election of officers, since it's a new year. It's
5 Item 1.

6 CHAIR SHEEHY: I'm off to a great start today.

7 MS. HIGASHI: That's okay.

8 CHAIR SHEEHY: All right, strike that. So
9 we're going to go to election of officers.

10 MS. HIGASHI: It's customary that at our
11 January meeting, the Commission elects its officers. And
12 it's also customary that the Executive Director conduct
13 the election of officers.

14 The Members of the Commission that are eligible
15 to be elected as chairperson and vice-chairperson, are
16 John Chiang, Bill Lockyer, Mike Genest, and Cynthia
17 Bryant, Paul Glaab, Steve Worthley, or Sarah Olsen.

18 And I'd like to start with the election of
19 chairperson.

20 Are there any nominations or motions to elect a
21 chairperson for the Commission on State Mandates?

22 MEMBER BRYANT: I move the Director of Finance,
23 Michael Genest, as chair of this Commission on State
24 Mandates.

25 MEMBER WORTHLEY: Second.

Commission on State Mandates – January 30, 2009

1 CHAIR SHEEHY: Okay, we have a motion and a
2 second.

3 MS. HIGASHI: Tom? And then I'll just do it.

4 CHAIR SHEEHY: Okay.

5 MS. HIGASHI: So there's a motion and a second,
6 that the Director of Finance, Mike Genest, be elected
7 chairperson of the Commission on State Mandates.

8 All those in favor of the motion, please
9 signify by saying "aye."

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

11 MS. HIGASHI: Any opposed?

12 *(No response)*

13 MS. HIGASHI: Mike Genest is unanimously
14 elected as chairperson.

15 Mr. Sheehy, would you like to conduct the
16 election for vice-chair?

17 CHAIR SHEEHY: Yes, thank you, now that I've
18 finally caught on with what's going on here.

19 So now, what is appropriate for us to do, is to
20 elect a vice-chair.

21 And Mr. Lujano has been the vice-chair this
22 last year, representing Treasurer Lockyer.

23 And we'd like to entertain a motion right now
24 to elect the vice-chair of the Commission on State
25 Mandates.

Commission on State Mandates – January 30, 2009

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Is there a motion?

MEMBER BRYANT: I'll move --

MEMBER LUJANO: Mr. Chair -- go ahead.

MEMBER BRYANT: I said, I'll move -- I was going to move the State Treasurer, Bill Lockyer, to be vice-chairman of the Commission.

MEMBER LUJANO: Actually, I was going to move that the State Controller serve this year. Actually, it's been customary that we go back and forth.

CHAIR SHEEHY: Ms. Bryant, do you want to withdraw your motion?

MEMBER BRYANT: I'll withdraw my motion, and I'll yield to Mr. Lujano.

CHAIR SHEEHY: So Mr. Lujano has moved that the Controller be the vice-chair of the Commission this year.

MEMBER OLSEN: I second.

CHAIR SHEEHY: We have a second by Ms. Olsen. All in favor?

(A chorus of "ayes" was heard.)

CHAIR SHEEHY: Congratulations, Mr. Chivaro. Okay, now that our election is over --

MEMBER BRYANT: And that was not a vote of no confidence for me.

CHAIR SHEEHY: This is a pretty friendly crowd this morning. Okay.

Commission on State Mandates – January 30, 2009

1 So now I think we need to get to the adoption
2 of the minutes.

3 MS. HIGASHI: That's correct.

4 There are Exhibits A and B, there are two sets
5 of minutes that are proposed, one for the November
6 meeting and one for the December meeting.

7 And since all of you were at both meetings, you
8 can make a motion together, unless there are corrections
9 to be made.

10 CHAIR SHEEHY: Are there any questions,
11 comments, or suggested corrections from members of the
12 Commission?

13 MEMBER WORTHLEY: Move adoption of both
14 minutes.

15 MEMBER OLSEN: Second.

16 CHAIR SHEEHY: We have a motion on the floor.
17 Is there any comment from the public on the
18 matter?

19 *(No response)*

20 CHAIR SHEEHY: Seeing none, all in favor?

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

22 CHAIR SHEEHY: The minutes are adopted. Okay.

23 MS. HIGASHI: This brings us to the proposed
24 Consent Calendar.

25 The proposed Consent Calendar is Item 8,

Commission on State Mandates – January 30, 2009

1 Dismissal of a Withdrawn Portion of the Test Claim,
2 *Stormwater Pollution Control Requirements.*

3 Also, statewide cost estimate, Item 10, *Fire*
4 *Safety Inspections of Care Facilities*, and the third item
5 is the *Adoption of the Proposed Rulemaking Calendar* for
6 the Commission. Items 8, 10, and 11, they're detailed on
7 the green sheets.

8 CHAIR SHEEHY: Okay, thank you, Paula.

9 Any questions by members of the Commission with
10 respect to the Consent Calendar today?

11 *(No response)*

12 CHAIR SHEEHY: Any question or comments from
13 the public?

14 *(No response)*

15 CHAIR SHEEHY: Seeing none, is there a motion?

16 MEMBER OLSEN: So moved.

17 CHAIR SHEEHY: Okay, we have a motion.

18 MEMBER CHIVARO: Second.

19 CHAIR SHEEHY: We have a second.

20 All in favor?

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

22 CHAIR SHEEHY: Adopted the Consent Calendar.

23 MS. HIGASHI: This brings us to the hearing
24 portion of our meeting.

25 We have a couple of test claims.

Commission on State Mandates – January 30, 2009

1 I'd like to ask those persons in the audience
2 who plan to appear on an item before the Commission
3 during this hearing part of our meeting, if you would
4 please stand.

5 *(Several persons stood up to be sworn*
6 *or affirmed)*

7 MS. HIGASHI: Do you solemnly swear or affirm
8 that the testimony which you are about to give is based
9 on your personal knowledge, information, or belief?

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

11 MS. HIGASHI: Thank you very much.

12 Our first item is the test claim *on Surplus*
13 *Property Advisory Committees*. This item will be
14 presented by senior Commission Counsel Eric Feller.

15 CHAIR SHEEHY: Mr. Feller, could you please
16 come forward -- oh, there you are.

17 Thank you, Mr. Feller.

18 MR. FELLER: Good morning. This test claim
19 alleges a reimbursable mandate for costs associated with
20 appointing and supervising a school district advisory
21 committee on surplus property.

22 As indicated in the analysis, staff finds that
23 this is not a reimbursable program because there is no
24 legal or practical compulsion to designate property as
25 surplus or to transfer school district property, so

1 neither formation of the committee nor its duties are
2 state mandated. Staff found that the Court decisions in
3 the *Kern School District* and *City of Merced* cases are
4 controlling.

5 As an alternative ground for denial, staff
6 found that the statutes claimed were not a new program or
7 higher level of service because they predated the
8 statutes pled in the test claim.

9 The Department of Finance submitted comments
10 agreeing with the staff analysis.

11 Claimant disagrees and argues that it is
12 practically compelled to designate property as surplus
13 because of the factors beyond its control. Claimant
14 reiterated this argument in the late filing dated
15 January 20th.

16 Staff addressed this argument in the analysis.
17 The *Kern* Court stated that practical compulsion means
18 that the state must impose substantial penalties for not
19 complying, and staff finds no state-imposed penalties in
20 this case.

21 Thus, staff recommends that the test claim be
22 denied.

23 Would the witnesses and parties please state
24 your names for the record?

25 MR. PALKOWITZ: Good morning. Art Palkowitz on

1 behalf of the test claimant.

2 CHAIR SHEEHY: Thank you, Mr. Palkowitz.

3 Is Mr. Johnson here this morning?

4 MR. PALKOWITZ: No, he is not able to attend
5 today.

6 CHAIR SHEEHY: All right, please,

7 Mr. Palkowitz, continue on.

8 MR. PALKOWITZ: Okay, thank you.

9 As Mr. Feller pointed out, this test claim is
10 to reimburse school districts to appoint, supervise, and
11 consult with a surplus property committee regarding
12 school buildings or space and buildings.

13 Section 17388 states that a governing board,
14 prior to the sale, lease, or rental, shall appoint an
15 advisory committee to advise the governing board.

16 Therefore, the statute is stating that an advisory
17 committee shall be appointed.

18 Statute 17390 goes further to say that this
19 advisory committee shall perform the following duties.
20 They shall review the projected school's enrollment data.
21 They will establish a priority list of surplus property.
22 They will provide for hearings of the community,
23 something that must be done before any sale or lease.
24 They will also make a determination of the properties,
25 and they will also forward their suggestions,

1 recommendations to the district governing board.

2 So you have two statutes that are requiring, A,
3 that a committee be appointed; and, B, what the duties of
4 this committee shall be.

5 If you read further of the legislative intent,
6 the legislative intent was that leases entered into by
7 school districts should receive the community
8 involvement.

9 This way, the community could analyze the
10 attendance data and try to project into the future what
11 properties will be needed and won't be needed as an
12 attempt to help the schools plan on how they should
13 handle their property.

14 It was meant as a way to facilitate the best
15 judgment for the community and the school. And also part
16 of the legislative intent is for school districts to
17 offset revenue losses due to declining enrollment.

18 So these tools that are in these code sections,
19 stating that they shall be done, it was the intent of the
20 Legislature to make sure there is collaboration and
21 transparency with the community so that the best
22 practices for school districts on how they handle their
23 property will be done in the correct manner.

24 Also, I'd like to point out, as this is a very
25 important process for school districts, and that's shown

1 by the fact that a board of a school district cannot sell
2 or lease a property without a two-thirds majority vote.
3 If there are other actions that require two-thirds
4 majority vote, I don't know; but clearly, that type of
5 requirement of a supermajority gives the impact on how
6 important this is that the Legislature felt this would be
7 for school boards.

8 As Mr. Feller said, he commented on the legal
9 compulsion and the practical compulsion analysis. Legal
10 compulsion, I believe, is clearly indicated here by the
11 statutory language that comments on "*shall appoint an*
12 *advisory committee*" and "*shall perform these duties.*"
13 The practical compulsion, I think, is set out in the
14 legislative intent, with the legislators commenting on
15 how the community must be involved and how they should
16 act to offset revenue.

17 Clearly, our schools in our districts, we would
18 want them to optimize their revenue and to avoid any
19 draconian consequences of having schools being closed or
20 having them lose revenue by not using good practices of
21 leasing out empty space.

22 I think as schools move forward in this
23 difficult financial climate, these are important steps
24 that schools must do in order to maintain the high level
25 of education.

1 Therefore, the claimant feels that based on the
2 requirement to perform these duties, to have an advisory
3 committee, the two-thirds board vote that's required and
4 the practical compulsion, that this qualifies as a state
5 mandate.

6 Thank you.

7 CHAIR SHEEHY: Thank you, Mr. Palkowitz.

8 Finance?

9 MS. GEANACOU: Good morning. Susan Geanacou,
10 Department of Finance.

11 The Department of Finance supports the
12 Commission staff analysis in the matter. And I'd like to
13 observe that the duties that the claimant cites as being
14 mandated or required using the word "*shall*" are layered
15 on top of the underlying discretionary choice of a
16 district to find or declare property as surplus, and to
17 make the discretionary decision to dispose of it
18 or transfer it in the first place.

19 And as the Commission staff analysis points
20 out, both the *Kern High School District* case and the
21 *City of Merced* case illustrate that this is not a
22 reimbursable mandate because the districts have the
23 underlying discretionary choice that thereafter triggers
24 the language that Mr. Palkowitz refers to.

25 CHAIR SHEEHY: Thank you, Ms. Geanacou.

Commission on State Mandates – January 30, 2009

1 Are there any other members of the public here
2 today that want to come testify or comment on this item?

3 *(No response)*

4 CHAIR SHEEHY: Seeing none, questions of the
5 Board members? Commission members?

6 MEMBER WORTHLEY: Mr. Chairman?

7 CHAIR SHEEHY: Yes, Mr. Worthley?

8 MEMBER WORTHLEY: Mr. Palkowitz, could you
9 address the issue about whether or not this constitutes
10 a new project? There were two arguments presented by
11 staff. One was that this was discretionary; the other
12 one was that it did not constitute a new program.

13 MR. PALKOWITZ: I think that that part of it,
14 sir, is -- I think it was like the last paragraph or two
15 in the decision.

16 MEMBER WORTHLEY: Yes.

17 MR. PALKOWITZ: I'm sorry, I can't find it --
18 oh, thank you.

19 MEMBER WORTHLEY: Page 13.

20 MR. PALKOWITZ: Right.

21 Well, the way I read it is that, I think, it
22 was the fact that it was amended in 1980. And I just
23 didn't feel that that was the basis for denying the
24 claim. I didn't feel that part of it was an attempt to
25 say that this is not a state mandate. So to me, that was

1 not what I felt was their strong argument, and I didn't
2 really feel it was applicable.

3 MEMBER WORTHLEY: It obviously didn't get
4 nearly the amount of analysis as the other portion did.

5 MR. PALKOWITZ: Right.

6 MEMBER WORTHLEY: I was curious, you didn't
7 really address the issue of the discretionary act on the
8 part of the -- you're using the legislative intent
9 language.

10 Did you have anything further to say about
11 whether or not it constituted a discretionary act, the
12 concept of getting rid of surplus property?

13 MR. PALKOWITZ: Yeah, I mean, when you try to
14 analyze this to say, well, a district may or may not have
15 surplus property and, therefore, everything that flows
16 from that is discretionary, to me, the way I read the
17 statute, is that if you are planning to sell or rent or
18 lease property, you now have to take an action of having
19 an advisory committee. That part of it is clear.

20 Whether you have surplus property, that may be
21 discretionary. But if you're going to take the act that
22 you're going to sell or lease or rent it, you now have
23 property that you are considering taking action on; and,
24 therefore, the duties and the committee that need to be
25 done are required.

Commission on State Mandates – January 30, 2009

1 MEMBER WORTHLEY: My thought was that as a
2 discretionary act, the problem that I have with that
3 concept here is that, let's say the school district has a
4 school, they no longer need a site, and so they can
5 either elect the -- the question amounts to discretion or
6 not -- to decide to sell that property, in which case you
7 then trigger all the requirements.

8 MR. PALKOWITZ: Uh-huh.

9 MEMBER WORTHLEY: Or they could shutter that
10 building.

11 MR. PALKOWITZ: They could what? I'm sorry?

12 MEMBER WORTHLEY: Shutter the building, so it
13 sits there. They still have to maintain it, they still
14 have to mow the lawn, they still have to irrigate it,
15 they still have to keep things fixed, they have to keep
16 their windows from breaking out, or they've got to patch
17 it up.

18 Certainly, it's very poor policy to think that
19 they would not declare that. But it seems like you could
20 make the argument that, in a sense, they are required to
21 because it does not make sense for a district with
22 limited resources to keep a piece of property which they
23 cannot use and cost them money to maintain.

24 It's not unlike the next case we're going to
25 talk about, when we talk about there is practical

1 compulsion when it comes to repairs and maintenance. In
2 a sense, excess property is very similar that way. It
3 makes no sense for a district to hang on to property when
4 they could be sold and the money could be used for other
5 purposes, and it's limited what it can be used for,
6 capital-type projects. And to keep the property would
7 constitute a cost.

8 Property in and of itself -- ownership of it
9 costs money, it costs the district money. If they can't
10 use it, it's a waste of money. So I struggle with the
11 idea that this is not a compulsory type of a situation.

12 If a district has got extra property, they
13 really should get rid of it because otherwise you're
14 going to be wasting their resources, keeping that
15 property.

16 MR. PALKOWITZ: And I think this is being
17 exacerbated throughout California with declining
18 enrollment.

19 MEMBER WORTHLEY: That's a good point. And
20 you look at, you know, certain districts, especially like
21 the Los Angeles district, where you have schools that
22 are situated in areas where the populations have --

23 MR. PALKOWITZ: Shifted.

24 MEMBER WORTHLEY: They've gotten older, and
25 there was need for that school forty years ago, and now

Commission on State Mandates – January 30, 2009

1 there is no need for that school. There are many
2 situations like that.

3 Plus, overall, in the state of California, we
4 have a declining enrollment population. I think last
5 year, it was like 30,000 students.

6 So there are going to be situations in
7 districts where you will have facilities that are excess.
8 And it seems like good public policy would say they
9 should turn those things over.

10 MR. PALKOWITZ: Yes, I would estimate that LA
11 probably has 40 to 50 properties that they have to review
12 regularly regarding the leases.

13 I think the tough decision for boards and
14 committees are the sale. They're always concerned that,
15 well, if I sell this and things change, I may not be able
16 to get back in, with real estate being expensive. But
17 they're leasing these properties to bring in the income,
18 see how things progress. And that is adding up to a lot
19 of money that's going to affect programs. And we'll have
20 serious consequences if they don't act prudently.

21 Now, I think this Commission has showed to me
22 how government needs to act prudently and not to think
23 that they should not be making decisions as a business
24 would be.

25 CHAIR SHEEHY: If only government was run like

1 a business.

2 Ms. Olsen?

3 MEMBER OLSEN: To me, this case seems to hinge
4 on two words. And the word I keep hearing is "*should*";
5 and the word that, it seems to me, has to be there for
6 practical compulsion to exist is "*must*." And I don't
7 hear that being used here.

8 Best business practices means that the school
9 district should, but it doesn't have to. And the other
10 part of it that I'd like some closure on is, is it
11 possible for the school district to recover its costs of
12 this program through the lease? If it goes this route,
13 can it build those costs into the lease?

14 And it seems to me, there's nothing to preclude
15 it from doing that.

16 MR. PALKOWITZ: Okay, on your first comment,
17 there are languages or words, "*shall*." I'm not sure if
18 you define "*shall*" as "*must*," but there are words of
19 "*shall*" versus "*should*."

20 MEMBER OLSEN: But I'm talking about the
21 underlying issue of whether or not a district decides to
22 go the route of declaring something surplus property.
23 They don't have to do that.

24 MR. PALKOWITZ: Uh-huh.

25 MEMBER OLSEN: Now, Mr. Worthley has pointed

1 out some circumstances under which they probably should
2 do that. And, to me, that's the issue, is they don't
3 have to.

4 And then it doesn't seem to me that there's
5 anything in the law that precludes them from
6 negotiating a -- having decided that they should and,
7 therefore, deciding to do it, that they can't recover
8 their costs through the lease agreement.

9 MR. PALKOWITZ: Well, you know, I would not
10 say -- that's just not feasible that they could raise
11 the rents to justify the costs. Now, maybe that will not
12 happen in the marketplace based on that.

13 But to me, what you have here is strong
14 language with a legislative intent that is sending a
15 clear message that this is important, you must get the
16 community involved, the board must vote two-thirds vote,
17 and with the legislative intent to offset revenue, that
18 clearly the Legislature is saying, you need -- these
19 actions are important; you must do these things before
20 you sell or lease the property.

21 MEMBER OLSEN: I understand your point. I
22 just go back to the issue that there is no -- there's no
23 compulsion for the district to go down this path.

24 MR. PALKOWITZ: I respectfully disagree. That,
25 if anything, if you're not going to put weight into the

Commission on State Mandates – January 30, 2009

1 language of "shall" and "shall," you could put weight
2 into the practical compulsion, that there could be
3 serious consequences for districts that don't try to
4 offset this revenue and use it for the opening and
5 maintaining of schools or educational programs.

6 CHAIR SHEEHY: Okay, thank you, Ms. Olsen.

7 Additional questions from Commission members?

8 *(No response)*

9 CHAIR SHEEHY: Okay, hearing none, is there a
10 motion on this item?

11 MEMBER OLSEN: I move adoption of the staff
12 recommendation.

13 CHAIR SHEEHY: We have a motion to adopt the
14 staff recommendation.

15 MEMBER BRYANT: I'll second it.

16 CHAIR SHEEHY: We have a second on that motion.

17 So, Paula, can you call the roll to see if we
18 have enough votes to adopt the staff recommendation?

19 MS. HIGASHI: Ms. Bryant?

20 MEMBER BRYANT: Aye.

21 MS. HIGASHI: Mr. Chivaro?

22 MEMBER CHIVARO: Aye.

23 MS. HIGASHI: Mr. Lujano?

24 MEMBER LUJANO: Aye.

25 MS. HIGASHI: Ms. Olsen?

Commission on State Mandates – January 30, 2009

1 MEMBER OLSEN: Aye.

2 MS. HIGASHI: Mr. Worthley?

3 MEMBER WORTHLEY: No.

4 MS. HIGASHI: Mr. Sheehy?

5 CHAIR SHEEHY: Aye.

6 Okay, so that item has five votes.

7 So we've adopted the staff recommendation on
8 Item 4.

9 Then on Item 5, Mr. Feller, could you please
10 propose the Statement of Decision for Item 4?

11 MR. FELLER: Thank you.

12 Unless there's objection, staff recommends the
13 Commission adopt the staff analysis to deny the test
14 claim, and also recommends the Commission allow minor
15 changes to be made to the decision, including reflecting
16 the witnesses' hearing testimony and vote count that will
17 be included in the Final Statement of Decision.

18 CHAIR SHEEHY: I'm sorry, Mr. Feller, I missed
19 that last sentence.

20 MR. FELLER: We also recommend that the changes
21 be made to allow us to put in the final witnesses'
22 hearing testimony and vote count.

23 CHAIR SHEEHY: Okay, and with those changes
24 then, is there a motion?

25 MEMBER OLSEN: Motion.

Commission on State Mandates – January 30, 2009

1 CHAIR SHEEHY: Second?

2 MEMBER CHIVARO: Second.

3 CHAIR SHEEHY: Second by Mr. Chivaro.

4 Paula, could you call the roll on this? Or can
5 you use the prior roll call?

6 MEMBER WORTHLEY: I will vote "aye" on this.

7 CHAIR SHEEHY: Okay, so all in favor?

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

9 MS. HIGASHI: Thank you for making it easy.

10 This brings us to Item 6. Item 6 is the test
11 claim filed on *Prevailing Wage Rate* by Grossmont Union
12 High School District, claimant; and Chief Counsel Camille
13 Shelton, will introduce this item.

14 CHAIR SHEEHY: Thank you.

15 MS. SHELTON: Good morning.

16 This test claim addresses the California
17 Prevailing Wage Law which is designed to enforce the
18 minimum wage standards on public works projects that
19 exceed \$1000 and are funded in whole or in part with
20 public funds. The prevailing wage law applies to school
21 districts and community college districts that award a
22 contract to a private contractor for projects including
23 the construction, alteration, repair or maintenance of
24 school property.

25 The law requires school districts, as the

1 awarding body, to perform a number of activities to
2 ensure that the employees of the private contractor are
3 receiving prevailing wages. For the reasons stated in
4 the analysis, staff finds that only the activities
5 required by Labor Code section 1776, subdivisions (g) and
6 (h), and section 16403, subdivision (a), and 16408,
7 subdivision (b), of the Department of Industrial
8 Relations regulations that are listed on pages 4 and 5
9 of the executive summary constitute a reimbursable
10 state-mandated program within the meaning of
11 Article XIIIIB, Section 6 of the California Constitution,
12 and only when school districts and community college
13 districts are required to contract for the repair or
14 maintenance of school property.

15 Staff further finds that there is fee authority
16 that applies to some of these activities which shall be
17 identified in the parameters and guidelines as offsetting
18 revenue. In addition, there may be some grant funding
19 that may apply to reduce a reimbursement claim.

20 Staff recommends that the Commission deny
21 the test claim with respect to all other statutes,
22 regulations, and other alleged executive orders that
23 have been pled by the claimant.

24 Staff recommends that the Commission adopt the
25 analysis to partially approve this test claim.

Commission on State Mandates – January 30, 2009

1 Will the parties and their representatives
2 please state your names for the record?

3 CHAIR SHEEHY: Will the witnesses please
4 identify themselves for the record?

5 MR. PETERSEN: Keith Petersen representing the
6 test claimant.

7 MR. O'MARA: Gary O'Mara, with the Department
8 of Industrial Relations.

9 MR. MISCHEL: Anthony Mischel, from the
10 Department of Industrial Relations. I may have testimony
11 to give.

12 CHAIR SHEEHY: You're not sure?

13 MR. MISCHEL: Well, it sort of depends on where
14 Mr. Petersen goes, to begin with.

15 CHAIR SHEEHY: Okay.

16 MR. PETERSEN: To all ends.

17 MR. MISCHEL: All right, then I'm sure to
18 testify. I believe I have some factual comments to make
19 for my own knowledge or my understanding of this.

20 CHAIR SHEEHY: You're, rather, indecisive this
21 morning, aren't we, Mr. Mischel?

22 MR. MISCHEL: I am. I start off indecisive and
23 then I sort of ramp up.

24 CHAIR SHEEHY: You kind of build momentum and
25 you go?

Commission on State Mandates – January 30, 2009

1 MR. MISCHEL: Yes.

2 CHAIR SHEEHY: Mr. Petersen, please?

3 MR. PETERSEN: This test claim deals with
4 the --

5 CHAIR SHEEHY: I'm sorry, Finance?

6 MS. FEREBEE: Just to identify, Donna Ferebee,
7 Department of Finance.

8 CHAIR SHEEHY: I'm sorry about that, Donna.

9 MR. PETERSEN: Okeydoke.

10 This test claim deals with the administrative
11 activities to enforce the prevailing wage law, to
12 contract with private companies to construct, repair, and
13 replace buildings.

14 Before you can get to the scope of those
15 activities, there are two threshold questions to be
16 decided. The first is whether school districts are
17 compelled to build schools, and the second threshold
18 issue is whether school districts, in building these
19 schools, are compelled to seek out state financing. And,
20 of course, when you seek out state financing, you need to
21 comply with state rules. In this case, a labor
22 compliance plan.

23 The staff analysis has come to the strange
24 conclusion that local public school districts and
25 community college districts are not required to build

1 schools because they could not find the word "*shall*"
2 which is the legal compulsion that you all discussed in
3 the last case, and, of course, for months and months over
4 the various different test claims.

5 The issue then is whether the local school
6 districts are practically compelled to construct schools.
7 We know, as a matter of law, that residents of a certain
8 age in this state are required to attend public schools.
9 We also know as a matter of law that school districts and
10 community colleges are required to enroll those students.

11 As more students show up, you need more
12 facilities. Someone has to build those facilities to
13 comply with law on housing students. You can't conduct
14 classes on the soccer field.

15 You must -- to house students, you must follow
16 the state laws and regulations on class size, and that
17 sort of thing. So somebody has to build the schools or
18 replace the schools for these new and continuing
19 students.

20 Again, the word "*shall*" was not found in a
21 statute connected with the school districts. We know
22 constitutionally that the Legislature is required to
23 provide for public schools.

24 The Legislature accomplishes this by delegating
25 most of that activity to the local school boards by

1 statute over the last hundred-plus years.

2 School districts, community college districts,
3 are the only ones authorized by the State Legislature to
4 build public schools. Nobody else is authorized. Nobody
5 else does it. Therefore, if someone is compelled to
6 build schools -- and they are because the students show
7 up, and the Legislature is responsible and has delegated
8 that authority to the local districts -- it would appear
9 that -- it's not a big leap in logic to conclude that the
10 local public school districts and colleges are required
11 to build those schools.

12 The second threshold issue is the utilization
13 of public state funds in the construction of the schools.

14 Again, there is no legal compulsion in the
15 staff analysis, we could not find the words that "you
16 shall use state funds."

17 However, as cited in at least eight or nine
18 places in my response, the Legislature has pointed out
19 that it is responsible for providing for schools and
20 facilities, and it wants to assist the districts in doing
21 that by providing state funding.

22 Now, does the local district have to go for
23 state funding? Well, once upon a time, a long, long time
24 ago, in happier days, local school districts had control
25 of their property tax. That changed in 1977. The

1 Legislature has since recognized -- again, cited in our
2 response several times -- that the local property tax is
3 insufficient to build new schools. And since the state
4 has a responsibility for building new schools, they're
5 assisting the local districts by providing public
6 funding.

7 You saw in the staff analysis and the other
8 documents, the billions and billions of dollars of state
9 funding being provided for the construction of these
10 facilities. And we also cited a study from the State
11 Department of General Services, State Allocation Board,
12 that said they need 16 new classrooms per day built in
13 this state.

14 So the need for construction is clear. The
15 only public entity authorized to build local schools or
16 local public agencies -- excuse me, local school
17 districts and community colleges, as they are delegated
18 by the Legislature to do so.

19 Therefore, I think the staff recommendation
20 should be rejected. I think you should send it back and
21 request that they find that local public school agencies
22 are required -- are compelled to build new facilities and
23 replace old facilities.

24 And since they are compelled to do that,
25 they're compelled to follow the Public Contract Code and

Commission on State Mandates – January 30, 2009

1 Labor Code sections adopted after 1974 for administering
2 those contracts.

3 And second, because the Legislature has not
4 provided sufficient taxing power to the local agencies
5 to adequately fund the construction, local districts must
6 rely upon state funds; and to rely upon state funds is
7 to follow the state rules, and including the Labor
8 Compliance Program.

9 CHAIR SHEEHY: Mr. Petersen, are you done?

10 Isn't it true that many schools are being
11 constructed in the state without any state funds at all?

12 MR. PETERSEN: Yes.

13 CHAIR SHEEHY: So then they don't have to rely
14 upon --

15 MR. PETERSEN: Some districts don't have to.

16 CHAIR SHEEHY: Many districts don't have to.

17 MR. PETERSEN: I don't have any evidence about
18 "many."

19 CHAIR SHEEHY: Well, I'm the chairman of the
20 State Allocation Board and I sit in on meetings every
21 month where we allocate school bonds. And I would add to
22 the record that there are many that do.

23 MR. PETERSEN: Those are the new 55 percent
24 local prop --

25 CHAIR SHEEHY: Well, that's different sources

Commission on State Mandates – January 30, 2009

1 of revenue that goes into school construction. Surely,
2 you're not saying that it's state funds only that build
3 schools.

4 MR. PETERSEN: No, I never said that.

5 CHAIR SHEEHY: In fact, the School Facilities
6 Program requires a local match if there's any state
7 dollars involved.

8 MR. PETERSEN: No, I'm saying, some districts
9 are compelled to use state funds.

10 CHAIR SHEEHY: Right. In fact, the largest
11 school district in the state, Los Angeles, just recently
12 passed billions of dollars in new bond authority. And
13 even though the Pooled Money Investment Board took action
14 in December to slow down and, in fact, stopped -- almost
15 completely stopped any release of money out of the Pooled
16 Money Investment Account in the form of AB 55, LA's
17 construction program is zipping right along because
18 they've got so much local authority and local bond money.

19 Were you aware of that?

20 MR. PETERSEN: Yes. And I say hooray for
21 Los Angeles Unified, but there's over 900 other
22 districts.

23 CHAIR SHEEHY: Yes, but they're the largest;
24 aren't they?

25 MR. PETERSEN: Yes.

Commission on State Mandates – January 30, 2009

1 CHAIR SHEEHY: And there's a number of other
2 districts that also have passed bonds.

3 In fact, I think in this last election cycle,
4 the majority of the local bond issues that were on the
5 ballot were successful.

6 MR. PETERSEN: Yes, probably.

7 CHAIR SHEEHY: All right, that's all I had,
8 Mr. Petersen.

9 Mr. Mischel, do you want to respond?

10 MR. PETERSEN: Can I respond to that?

11 CHAIR SHEEHY: Sure.

12 MR. PETERSEN: My point being, some districts
13 need to resort to state aid, not all districts. And
14 those districts that can do it locally, hooray for them.

15 CHAIR SHEEHY: Okay, Mr. Mischel, are you
16 revved up?

17 MR. MISCHEL: Yes, I'm revved up.

18 I think I will testify a little bit, although
19 finding out you're chair of the State Allocation Board
20 is going to temper some of my comments, possibly.

21 I live and work in Los Angeles --

22 MEMBER OLSEN: The rest of us aren't the chair
23 of the State Allocation Board.

24 MR. MISCHEL: I know, I understand.

25 MEMBER OLSEN: So you can speak to the rest of

1 us.

2 MR. MISCHEL: Okay. I live and work in
3 Los Angeles, and also one of my functions for the
4 Department of Industrial Relations is to be the lead on
5 all prevailing-wage enforcement cases brought into the
6 department or by labor compliance programs against
7 private contractors and subcontractors for failing to pay
8 prevailing wage, or failing to provide adequate certified
9 payroll records.

10 MR. O'MARA: Hearing officer.

11 MR. MISCHEL: I'm sorry, I'm the lead hearing
12 officer. So all disputes come through me at some level,
13 either for review or just for assignment and advice.

14 It is absolutely true, Los Angeles Unified
15 School District is in just an enormous effort to build
16 new schools. And I think it actually proves the fallacy
17 of the test claimant's argument. Because for 35 years
18 Los Angeles school district, the largest school district
19 in this state, built no new schools -- not one. And as
20 a result, it had crumbling schools, it had schools that
21 were, in fact, dangerous and needed to be repaired, which
22 the draft analysis said would be a mandate.

23 And this county -- the voters in the school
24 district went through a series of bonds, the most recent
25 of which Mr. Sheehy just referred to. There is

1 \$23 billion of construction going on today in
2 Los Angeles, almost all of it bond money from the county.

3 CHAIR SHEEHY: Thank you. Mr. Mischel, I just
4 want to interrupt you for one second.

5 Now, do you know for a fact it's \$23 billion?

6 MR. MISCHEL: That's what the general counsel
7 for the school district told me.

8 CHAIR SHEEHY: Okay, I just want to put on the
9 record, that's four and a half times the amount of the
10 present bond authority that exists on the books for the
11 State of California. That's 450 percent more than the
12 funds the State of California has available for local
13 schools.

14 MR. MISCHEL: Wow. Okay.

15 The courts talk about practical compulsion as,
16 there is a penalty for failing to comply with a statute
17 that might -- that sounds as if it were discretionary.

18 The largest school district in the state could get
19 away without building schools for 35 years. I put to
20 you, there was no penalty attached to all of the alleged
21 mandates the test claimant is claiming, or the LA school
22 district would have been put in receivership.

23 Now, we can talk about this is horrendous, this
24 is bad business, all of those things. But these are the
25 practical realities of any budgetary cycle, any budgetary

1 situation, voter decisions. And it's not for the state
2 to have to reimburse every time the costs go up. That's
3 not what the state mandate statute says.

4 What the state mandate statute says is when the
5 Legislature says "*Thou shall*" or "*Thou should, but if you*
6 *don't, this is the problem,*" such as in unemployment --
7 this is punishment, I mean -- that's the compulsion.

8 When the cost of living goes up, however, that
9 doesn't become a state mandate; that becomes a reality
10 that everybody has.

11 And I think that the problems of school
12 financing, which are severe, which are serious -- I'm not
13 for a moment gainsaying -- are not caused by the state
14 requirements to house students.

15 Los Angeles got away with year-round classes,
16 with multi-tracks in school systems. They overcrowded
17 the schools, but they were able to survive as the largest
18 school district. So it wasn't compelled. There was no
19 punishment.

20 So I'm not going to argue that the repair and
21 maintenance -- non-emergency repair and maintenance the
22 staff refers to is not a legal mandate. We made our
23 opposition, I think, clear in terms of the confusion.
24 The staff has a different opinion. I won't belabor that
25 issue.

Commission on State Mandates – January 30, 2009

1 If the Commission is going to adopt the
2 overarching idea that new construction is not a mandate,
3 then I will go on to the more narrow points that the
4 staff recommends finding a mandate on, because I do have
5 some disagreements and some other comments.

6 CHAIR SHEEHY: Thank you, Mr. Mischel.

7 Mr. O'Mara, did you want to add anything to
8 Mr. Mischel's testimony?

9 MR. O'MARA: No, not at this time.

10 CHAIR SHEEHY: Thank you.

11 Mr. Petersen, did you want to respond?

12 MR. PETERSEN: Yes. He mentioned that they
13 haven't floated a local bond in about 35 years. That
14 coincides nicely with Proposition 13, eliminating local
15 sources of bonding. And everybody knows how difficult it
16 is politically to get supermajority bonds, that sort of
17 thing. The situation has gotten much better in the last
18 four or five years with the 55 percent bonds.

19 Apparently, the local boards are able to
20 generate 55 percent instead of the 66 and
21 two-thirds percent that it took before. So things are
22 getting better on local bonds.

23 Using local bonds, of course, is you have to
24 use the Labor Compliance Program if you use the
25 55 percent bond. So you're driven into that requirement,

1 even though it's not state money.

2 I was going to say hooray for LA Unified
3 before. But since he pointed out kids were attending in
4 dilapidated and decrepit buildings, we really can't say
5 hooray anymore. It's a shame they weren't able to
6 replace those.

7 For some districts, the only source of funding
8 is the state funding, the matching -- the different
9 programs. There's developer fees, there's all sorts of
10 sources. In fact, if you sell surplus property, you can
11 use that for construction. But, again, I think the focus
12 is on the two threshold issues. Somebody has to build
13 schools eventually, although there's no penalty for not
14 building them other than students attending in crumbling
15 schools or overcrowded classrooms.

16 The court cases cited don't speak to the
17 compulsion that exists here. The court cases talk about
18 the draconian results, like loss of money. Since that
19 was the only thing in front of the court, that's what the
20 court ruled on. The draconian results of not building
21 new classrooms are overcrowding, non-compliance, and
22 children attending in unsafe structures. That's the
23 draconian result of not building.

24 So in short, someone has to build. The
25 Constitution says the Legislature is in charge of public

Commission on State Mandates – January 30, 2009

1 schools. The Legislature discharges their duty by
2 delegating to the school districts as they're the only
3 ones in statute that can build schools. So somebody has
4 to build them sometime, it looks like the public schools
5 are compelled to do it.

6 CHAIR SHEEHY: Thank you, Mr. Petersen.

7 Ms. Ferebee?

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

10 Finance has nothing to add beyond the comments
11 submitted on April 15th. And really, those have to do
12 with the identification of possible offsetting revenues.
13 So my comments are limited to that. And, actually, I
14 just wanted to ask a point of clarification on that, but
15 can come back around to that if this is not the
16 appropriate time.

17 CHAIR SHEEHY: The Chair would like to know if
18 Finance supports or opposes the Commission's staff
19 recommendation on this item?

20 MS. FEREBEE: Finance supports the final staff
21 analysis, yes.

22 CHAIR SHEEHY: Okay, thank you.

23 Questions of the Commissioners?

24 *(No response)*

25 CHAIR SHEEHY: Seeing none, is there additional

Commission on State Mandates – January 30, 2009

1 testimony from any of the witnesses today?

2 MR. PETERSEN: No.

3 CHAIR SHEEHY: Is there anybody in the
4 public -- yes, Mr. Mischel?

5 MR. MISCHEL: Well, I would like to address the
6 six claimed mandates, which I avoided, not knowing where
7 the Commission was going to go on the larger overarching
8 issue Mr. Petersen asked for a complete rethinking of the
9 staff analysis. And rather than -- if that were where
10 the Commission was going to go, I was not going to want
11 to take up your time with the specifics. If the
12 Commission is inclined to agree with the staff's analysis
13 on the overarching compulsion issue, then I do have some
14 comments about the six claimed mandates.

15 CHAIR SHEEHY: The pleasure of the Commission.
16 Should we hear from Mr. Mischel?

17 MEMBER OLSEN: Well, I would like to because
18 there's no way of assuming where -- until we take a vote,
19 and then it precludes the testimony.

20 CHAIR SHEEHY: I agree. I agree, Ms. Olsen.
21 Mr. Mischel?

22 MR. MISCHEL: I apologize. I just don't come
23 up here enough.

24 We're really dealing here with one statute,
25 which is statute 1978, Chapter 1249, which is what

1 created Labor Code section 1776, in a regulation adopted
2 in 1984 in response to a 1983 statute concerning the
3 costs of copying certified payroll records.

4 I'd like to first talk about where I think the
5 staff analysis is incorrect. And I say that with all due
6 respect for the very hard work of taking this complicated
7 problem apart. But I think there are some problems with
8 the analysis.

9 And I would also like to then talk about why
10 what is left is not really subject as a state mandate.

11 CHAIR SHEEHY: I'm sorry, I just want to
12 understand your position.

13 So you don't think there should be any partial
14 approval at all? You disagree with it completely?

15 MR. MISCHEL: Yes. I don't think there should
16 be any partial approval. But it's more a nuance than
17 just "it's all wrong." I think --

18 CHAIR SHEEHY: All right. Continue, please.

19 MR. MISCHEL: Thank you.

20 The staff analysis, I think, misreads what
21 CCR 16400 through 16403 says. So let me try to give you
22 a description. And this is the description that the
23 Labor Commissioner gives to awarding bodies and members
24 of the public. I've actually confirmed that with both
25 staff at the Labor Commissioner's office, as well as

1 their chief counsel.

2 The awarding body, under normal circumstances,
3 has no obligation to ask for a contractor or
4 subcontractor for certified payroll records. These are
5 records the contractor is required to keep on a weekly
6 basis of every employee with name, home address, Social
7 Security number, classification, amount of hours worked,
8 wages paid, fringe benefits paid, and the like.

9 And the awarding body has no obligation to ask
10 for copies.

11 It can, in its own independent monitoring, if
12 it's a labor compliance program, which is really not
13 subject to -- the staff thinks is not a mandate -- it
14 would as an enforcer but not as an awarding body.

15 The only time it is obligated to ask for
16 certified payroll records is when a member of the
17 public -- which could be a labor compliance organization,
18 a labor management compliance organization, or just a
19 member of the public -- asks for these records.

20 And depending on whether or not it's a labor
21 management organization or a member of the public, there
22 is a certain amount of redaction that must occur because
23 of the Information Practices Act. So home addresses must
24 be redacted, Social Security numbers have to be redacted
25 and all personal identifiers. And this is an independent

1 requirement any local or state agency has. That goes way
2 back.

3 What 16400 does and where the staff makes the
4 mistake is, it gives awarding bodies, when they give a
5 request -- I'm sorry, I'm addressing the points in the
6 staff analysis that recommends finding copying of
7 certified payroll records to be a mandate. I should have
8 been more clear on that, and I apologize.

9 Awarding bodies under 16400(c) and (d) have the
10 ability to either redact and produce copies of certified
11 payroll records or tell the contractor to redact and copy
12 certified payroll records and produce them to the
13 awarding body. It's an either/or.

14 And so if an awarding body, which is the school
15 district, chooses to do it itself, because it has the
16 records or something, it's not at that point a mandate,
17 because they do have the ability to require the private
18 contractor to do the copying and the redaction.

19 This is borne out not only in 16400; but if you
20 look at 16403, which is the limitation on copying costs
21 of a dollar for the first page, 25¢ for the second page,
22 and \$10 for the certification, it is what the awarding
23 body tells the contractor it can charge. It is not a
24 limit on the awarding body.

25 The awarding body's limitation is in 1776(i),

1 which says it has to comply with the Public Records Act,
2 which back to 1968, says you could only charge direct
3 costs.

4 And in 1984, the Department estimated those
5 kinds of direct costs -- and so the purpose of making the
6 contractor limited to these copying costs is to ensure
7 the contractor doesn't make a profit over producing the
8 CPRs and redacting them. That's how this works.

9 So awarding bodies never turn over CPRs, in
10 the Department's experience. They always tell the
11 contractor, "Redact, copy. Send them to us. This is the
12 maximum you can charge."

13 And that's the bulk of this mandate as the
14 staff analysis -- in terms of money, certainly, and in
15 terms of what the staff recommends approving. And it's
16 a misreading of the regulation. It's a misreading of the
17 regulation. It is a misreading of how it actually works.

18 CHAIR SHEEHY: Ms. Shelton, would you like to
19 respond to Mr. Mischel's comments regarding the staff
20 analysis?

21 MS. SHELTON: Sure. I believe he's looking on
22 pages 61, where we're discussing the mandate issue on
23 section 16400 of the regulations. And then there's also
24 a discussion on page 81 with regard to whether those
25 activities constitute a new program or higher level of

1 service.

2 And as I read subdivision (c) of 16400, there
3 definitely is a "shall" in that language. It says,
4 *"The public entity receiving the request for the payroll*
5 *records shall acknowledge receipt of the records and*
6 *indicate the cost of providing the payroll records based*
7 *on an estimate of the contractor or subcontractor or the*
8 *public entity."*

9 I'm not sure what language you were pointing
10 to where it says that either they shall redact or the
11 contractor shall redact. And I'll let you point that out
12 to us.

13 CHAIR SHEEHY: Please.

14 MR. MISCHEL: If you keep going in that
15 section, it says -- because I was not addressing the
16 acknowledgment of receipt.

17 MS. SHELTON: Okay.

18 MR. MISCHEL: I was going to come back to that.
19 *"The acknowledgment of receipt may be accomplished by the*
20 *public entities furnishing a copy of its written*
21 *correspondence requesting certified payroll records sent*
22 *to the specified contractor pursuant to 16400(d) below."*

23 So in other words, the acknowledgment is when
24 the awarding body sends the contractor notice that it
25 must redact, and if you looked at 16403, it says -- I'm

1 sorry, 16402, I misspoke -- "*The cost of preparation to*
2 *each contractor, subcontractor, or public entity when*
3 *request is made shall be...*"

4 So the contractor is in this with a limitation
5 of the cost. And the district can comply with the
6 obligation to provide certified payroll records by
7 demanding it of the contractor.

8 I'm sorry?

9 MR. O'MARA: Notice is just a cc.

10 MR. MISCHEL: Yes, and the acknowledgment of
11 this notice is simply a cc, which is making one photocopy
12 and whatever postage is.

13 And I would like to point -- and I would like
14 to point out once again -- maybe I don't need to again --
15 but the costs at 16402 were as of 1984. And, again, I
16 think that you have to think about --

17 CHAIR SHEEHY: I'm sorry, what do you mean by
18 that the costs were as of 1984?

19 MR. MISCHEL: Because this regulation was
20 issued in 1984, and has continued in this very form.

21 CHAIR SHEEHY: All right.

22 MR. MISCHEL: And so in judging -- we had
23 raised that the -- it was the District -- it was the test
24 claimant's obligation to prove these costs were not
25 adequate. And somehow, it's supposed to be on us to

1 prove it.

2 But I put it to you at 1984, it's pretty
3 obvious that a dollar for the first page, at 25¢ for
4 every page thereafter, was more than a reasonable cost
5 under the Public Records Act.

6 And so it's met by just pointing out that
7 whatever increase in costs there are for copying, it is
8 not because of a new mandate or a higher level of service
9 required. It was offset at the time. It is, that the
10 cost of living has gone up.

11 So I don't know if that answers your -- if that
12 was responsive. I hope it was.

13 CHAIR SHEEHY: Ms. Shelton?

14 MS. SHELTON: I'm just trying to get clear what
15 activities you're saying are not mandated. I understand
16 your argument, and we weren't understanding it that way
17 when we did review your comments.

18 There is going to be some activity for the
19 local -- the school district to receive the request from
20 the public. Certainly that's going to be a mandated
21 activity.

22 And I'm not sure which activities you're
23 suggesting are not mandated other than the redaction
24 portion you're suggesting is discretionary on the part
25 of the --

Commission on State Mandates – January 30, 2009

1 CHAIR SHEEHY: He is also suggesting that the
2 copies are not mandated; right?

3 MR. MISCHEL: Yes, the copying costs for the
4 district.

5 MS. SHELTON: Sending the copies.

6 MR. MISCHEL: The copying costs to the
7 district.

8 CHAIR SHEEHY: The copying costs?

9 MR. MISCHEL: Yes. So, yes, I agree -- my
10 comments did not go to acknowledging receipt of the
11 request.

12 MS. SHELTON: Okay.

13 MR. MISCHEL: And forwarding it on if it goes
14 to the district -- I think it actually has to go to the
15 awarding body, that they then have to physically send it
16 or provide it. So those would not be covered by my
17 comments.

18 MS. SHELTON: So the only activity you're
19 suggesting to be deleted would be making the redactions?

20 CHAIR SHEEHY: And the cost of the copying.

21 MS. SHELTON: We don't have that on here.

22 The activities are obtaining the payroll
23 records from the contractor, sending the acknowledgment
24 to the requester, including notification of the costs to
25 be paid for preparing the records, and then making the

1 redactions, and then providing the copies to the
2 requester.

3 MR. MISCHEL: You know, I think that I was --
4 I misled myself. Because in the staff's analysis,
5 getting to that point, we had said there was an offset
6 for the cost of copying. And the staff rejected that,
7 saying it was for us to prove there was an offset. But
8 that was at -- but I see, in looking at this, that the
9 cost of copying is not in there.

10 CHAIR SHEEHY: Okay.

11 MR. MISCHEL: It's just getting and receiving.

12 That being the case, I would like to address
13 an argument we've made in our comments, we've made
14 repeatedly, that when this huge claim as it was
15 originally filed is now whittled down to six things --
16 or five things, whatever -- I mean, however you define
17 them -- there isn't much left. And I don't think -- and
18 I was hoping there would be somebody from Grossmont to
19 ask questions about -- but this is not \$200 worth, let
20 alone a thousand. And it doesn't meet -- if this were
21 filed as this claim, it would not meet your filing
22 requirements.

23 CHAIR SHEEHY: Excuse me, Ms. Shelton, could
24 you clarify for my benefit the programmatic consequences
25 of that? Isn't that for the Controller to determine

1 whether they meet the cost threshold? That's not for
2 this body to, or is it?

3 MS. SHELTON: Well, the Government Code
4 statutes say no claimant can file either a test claim or
5 a reimbursement claim if they don't have -- today, it's a
6 thousand dollars.

7 So if the Commission were to approve any
8 portion of this test claim, no school district would be
9 able to file a reimbursement claim with the Controller's
10 office unless they showed under penalty of perjury that
11 they have incurred a thousand dollars in costs.

12 At the time this test claim was filed, school
13 districts and community-college districts were not
14 required to provide their statewide cost estimate for
15 specific activities. They only had to allege \$200 of
16 costs. And so that was the law that was provided during
17 the time they filed their test claim.

18 So at this point, there's no evidence in the
19 record either way. And the Commission is not required to
20 make findings with respect to specific costs to each
21 individual claimant.

22 CHAIR SHEEHY: So notwithstanding -- if we
23 just, for purposes of argument, stipulate for a moment
24 that Mr. Mischel's right -- I'm not saying you are -- but
25 just for a moment, he's right -- there's nothing that

1 would prevent this body from adopting the staff
2 recommendation or some version thereof because it somehow
3 may not add up to the minimum threshold; is that correct?

4 MS. SHELTON: That's correct. I think
5 Mr. Mischel is talking about some language in the last
6 Supreme Court decision in *San Diego Unified School*
7 *District*; right?

8 MR. MISCHEL: Yes.

9 MS. SHELTON: And there, the Court was dueling
10 with due-process requirements that followed an expulsion
11 recommendation. A student had to have certain
12 due-process requirements. And the Court acknowledged
13 that some of the state due-process activities -- and
14 there were a few notice requirements -- exceeded federal
15 law.

16 And the Court said, "Well, those are just
17 de minimis in cost, and they're part and parcel of
18 federal due-process requirements."

19 That is the first time that the Court has used
20 that language. The Court did not analyze the \$1,000
21 threshold in statute at the time. And to this point, the
22 Commission has never adopted a test-claim decision
23 regarding a de minimis amount.

24 I really, at this point, don't know exactly
25 what that means, when the threshold and statute is very

1 slow.

2 Typically, for the activities that are
3 recommended in the conclusion, we do recommend them to be
4 mandated activities that do constitute a new program or
5 higher level of service. And at the time they filed
6 their test claim, all they had to show was \$200 in costs,
7 which at that point did constitute costs mandated by the
8 state. So those do reach a level of an approved test
9 claim.

10 CHAIR SHEEHY: Okay, Mr. Petersen, I'll get to
11 you in a minute.

12 But, Camille, do you agree with Mr. Mischel
13 that the exception in the staff recommendation to make
14 the redactions, that that could be taken out as a
15 reimbursable item? And would you be comfortable with
16 that?

17 MS. SHELTON: I am comfortable with that. I
18 see the logic in that.

19 Based on that language, then the other language
20 in -- where is that -- in "B" -- in (d)(2)(B) of that
21 regulation, that does put the penalty on the contractor
22 for not complying in a certain time period.

23 I can get to that conclusion.

24 CHAIR SHEEHY: Okay, thank you, Ms. Shelton.

25 Mr. Petersen?

Commission on State Mandates – January 30, 2009

1 MR. PETERSEN: On the jurisdictional issue of
2 \$200, \$1,000, the test claimant district alleges those
3 costs based on if you adopted the test claim as filed,
4 not how it turns out.

5 MS. SHELTON: Right.

6 CHAIR SHEEHY: Right. Okay.

7 MR. PETERSEN: So you can, indeed -- it's going
8 to be more than \$200 if you adopt it as filed.

9 CHAIR SHEEHY: Okay, thank you for clarifying
10 that for the record.

11 I think we're okay, Mr. Mischel, unless you
12 have a burning desire to say something.

13 MR. MISCHEL: Well, I would like to say
14 something about the Commission maybe wanting to take a
15 stab --

16 CHAIR SHEEHY: Apparently you do, so go ahead.

17 MR. MISCHEL: I do, thank you -- of how to
18 define "de minimis." Because it is both -- in *San Diego*,
19 it's also in the *County of Los Angeles* two cases, that
20 actually San Diego School District refers to.

21 And generally -- and I would be willing to
22 supply authority for this -- but there are regulations --
23 there are a lot of statutes in California that talk about
24 de minimis activities. And it's generally defined as
25 something insignificant, something that doesn't make a

1 difference.

2 In Kern, the Kern School District, it was not
3 addressing de minimis, but it referred to the one
4 activity that might have been a mandate as a relatively
5 minor reallocation of programmatic funds.

6 All of these indicate that there should be a --
7 I don't know -- yes, of course, Mr. Petersen filed an
8 adequate claim -- an estimate based on his claim. But
9 I have been unable to find -- and I've never seen, in my
10 experience, a single request to withhold contract funds
11 for 1776(g) violations, which is one of the mandates
12 here. I've never, ever seen it in eight years. No one in
13 the Labor Commissioner's office can tell me that they
14 have ever requested contract funds being withheld.

15 Most of the time, when the Labor Commissioner
16 requests contract funds to be withheld -- when they issue
17 a citation, the job is over and all the money has been
18 spent. There's nothing to withhold.

19 And I put it to you -- you're down to send a
20 carbon copy of a letter, put in a clause in a form
21 contract that you use over and over and over again, and
22 have had to since 1984. This is a test claim that goes
23 back to 2000 -- or, yes, 2000. That these are -- these
24 are insignificant. They are mere add-ons to what is not
25 a mandate. And the Commission shouldn't now put

1 everybody through -- it's going to cost more for the
2 Commission and the Department of Finance and the
3 Controller's office to figure out whether anybody gets
4 anything out of this. And it should just be stopped now.

5 Thank you.

6 CHAIR SHEEHY: Ms. Shelton?

7 MS. SHELTON: Just a couple of comments.

8 One, Article XIIIIB, Section 6 does require
9 reimbursement for all costs mandated by the state. So
10 the State Constitution requires the State to
11 reimbursement for all those costs.

12 When you talk about the de minimis standard
13 that the courts have talked about in the *San Diego* case
14 and the *County of Los Angeles* case, in both situations,
15 there was already existing due-process requirements, and
16 in the *County of LA* case, requirements when somebody was
17 charged with a crime, the crime of murder, and what was
18 required to provide them adequate counsel.

19 In both circumstances, there was federal law
20 that already was triggered and already had to be complied
21 with. And the State implemented that federal law and did
22 a little bit of tinkering by adding just a few more
23 things to it. But those holdings were made only in the
24 situation when you had an existing federal due-process
25 requirement, and then the State comes and implements

1 here.

2 And it's not the case here. You don't have --
3 I don't feel comfortable extending that holding to
4 something beyond the circumstances in *San Diego* and
5 *County of Los Angeles*.

6 I agree that the costs are small and that the
7 burden would be on the school districts to show that
8 they have at least a thousand dollars worth of costs for
9 the activities as the Commission may approve. But I
10 still think those activities at this phase being a
11 question of law do constitute a reimbursable
12 state-mandated program.

13 CHAIR SHEEHY: Thank you, Ms. Shelton.

14 Questions of the Commissioners?

15 *(No response)*

16 CHAIR SHEEHY: Is there any further testimony?

17 *(No response)*

18 CHAIR SHEEHY: Ms. Ferebee, do you have
19 anything more to add?

20 MS. FEREBEE: Yes. But, again, it goes to the
21 identification of possible offsetting revenue.

22 Is this an appropriate time?

23 CHAIR SHEEHY: Sure, this would be an
24 appropriate time.

25 MS. FEREBEE: This is a slightly different

1 subject. In our letter of April 15th, 2008, the
2 Department of Finance identified two possible offsetting
3 revenue sources. One was the State School Deferred
4 Maintenance Program, and the other, the Community
5 Colleges Facility Deferred Maintenance and Special Repair
6 Program. And it looked as though the staff analysis only
7 called out the first one, the State School Deferred
8 Maintenance Program, but not the second.

9 And although I do see it says, "...and any other
10 eligible funding," would be identified at the parameters
11 and guidelines phase, but I just wanted to ask a point
12 of clarification, that the second funding source was not
13 intentionally omitted for some reason, that it was found
14 not to be a source.

15 MS. SHELTON: I have to be honest, the staff
16 attorney that did write this analysis has retired, and
17 I did not go back and look at those specific funding
18 sources because we do have it there as any other eligible
19 grant program as a possible offsetting revenue. And
20 those can be clarified during parameters and guidelines.

21 CHAIR SHEEHY: Okay, so are you okay with that,
22 Donna?

23 MS. FEREBEE: So long as there is nothing to
24 prevent us from coming forward at that stage and --

25 CHAIR SHEEHY: With the Ps & Gs?

Commission on State Mandates – January 30, 2009

1 MS. FEREBEE: -- and asserting that each of
2 those programs is an offset.

3 CHAIR SHEEHY: Ms. Shelton, is there anything
4 that would prevent Finance from coming forward when the
5 Ps & Gs are being worked on with that additional
6 offsetting revenue?

7 MS. SHELTON: No, there's no denial of any
8 potential offsetting revenue source.

9 MS. FEREBEE: Thank you.

10 CHAIR SHEEHY: Anything else?

11 *(No response)*

12 CHAIR SHEEHY: Seeing none, is there a motion
13 on this item?

14 *(No response)*

15 CHAIR SHEEHY: I would be prepared to make a
16 motion, but since I'm chair, I prefer not to.

17 Ms. Olsen?

18 MEMBER OLSEN: I need to ask a question.

19 CHAIR SHEEHY: Please.

20 MEMBER OLSEN: Ms. Shelton, is it your position
21 then, that I think I just heard you say, is that you
22 would recommend that we adopt the staff recommendation
23 as it came to us, irrespective of Mr. Mischel's comments?
24 Or are you suggesting that we make a modification to it?

25 MS. SHELTON: My recommendation is that you do

Commission on State Mandates – January 30, 2009

1 make a modification after reviewing that language again
2 and looking at that penalty provision on the contract for
3 redacting that information. That certainly -- I can see
4 that interpretation of that regulation, yes.

5 CHAIR SHEEHY: So would it be fair to say then
6 that the staff recommendation now is what it was, minus
7 the redaction?

8 MS. SHELTON: Correct.

9 MEMBER OLSEN: So moved.

10 MEMBER LUJANO: Second.

11 CHAIR SHEEHY: We have a motion by Ms. Olsen, a
12 second by Mr. Lujano.

13 Further discussion by the Commission members?

14 *(No response)*

15 CHAIR SHEEHY: Seeing none, all in favor?

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

17 CHAIR SHEEHY: Okay, so we've adopted the staff
18 recommendation as modified.

19 MEMBER WORTHLEY: There's one "no." That's all
20 right.

21 CHAIR SHEEHY: I'm sorry.

22 MEMBER WORTHLEY: That's okay.

23 CHAIR SHEEHY: I apologize.

24 MEMBER WORTHLEY: A small minority.

25 CHAIR SHEEHY: I'm sorry. Let the record show

Commission on State Mandates – January 30, 2009

1 that Mr. Worthley is a "no" on this item.

2 MS. HIGASHI: Ms. Shelton will present Item 7.

3 MS. SHELTON: Item 7 is the Proposed Statement
4 of Decision. And this decision, obviously, would need to
5 be changed to reflect the Commission's vote with regard
6 to taking out the redaction, and to authorize staff to
7 make those changes with regard to that finding, as well
8 as other non-substantive changes.

9 In that respect, that the staff recommends that
10 the Commission adopt a proposed decision.

11 CHAIR SHEEHY: Is there such a proposed motion?

12 MEMBER OLSEN: So moved.

13 CHAIR SHEEHY: We have a motion.

14 MEMBER BRYANT: Second.

15 CHAIR SHEEHY: A second.

16 Mr. Worthley?

17 MEMBER WORTHLEY: I'll vote "aye."

18 CHAIR SHEEHY: All in favor?

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

20 CHAIR SHEEHY: Okay.

21 MS. HIGASHI: This brings us to Item 9.

22 This item will also be presented by

23 Ms. Shelton.

24 MS. SHELTON: Item 9 is a request filed by the
25 Integrated Waste Management Board pursuant to Government

1 Code section 17557, subdivision (d), to amend the
2 original parameters and guidelines for the Integrated
3 Waste Management Program.

4 The Board requests that the parameters and
5 guidelines be amended in Section VIII, Offsetting Cost
6 Savings, to include language requiring community-college
7 districts to analyze avoided disposal costs and other
8 offsetting and savings related to staffing, overhead
9 materials, and storage as a result of the test-claim
10 statutes when filing reimbursement claims.

11 A similar request was made by the Board at the
12 Commission's September hearing and the Commission denied
13 that request.

14 For the reasons stated in the analysis, staff
15 recommends that the Commission deny this request today.

16 The Board also requests that specified language
17 be included in Section IX of the parameters and
18 guidelines to require the Controller's claiming
19 instructions to ensure that only additional expenses
20 related to the mandate are included in a reimbursement
21 claim, and that any offsetting savings not be included.

22 Staff recommends that the Commission deny this
23 request as well. The parameters and guidelines already
24 contain offsetting cost savings language and boilerplate
25 language allowing reimbursement for only increased costs.

Commission on State Mandates – January 30, 2009

1 Therefore, staff recommends that the Commission adopt
2 the analysis and deny the Board's request to amend the
3 parameters and guidelines.

4 Will the parties and their representatives
5 please state your names for the record?

6 MR. BLOCK: Elliott Block for the Waste
7 Management Board.

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

10 CHAIR SHEEHY: Thank you.

11 Ms. Shelton, does the Integrated Waste
12 Management Board have the authority to issue their own
13 regulations on this matter?

14 MS. SHELTON: I believe they do. But Mr. Block
15 would be able to answer that.

16 CHAIR SHEEHY: Mr. Block, does the Integrated
17 Waste Management Board have the authority to issue its
18 own regulations on this matter?

19 MR. BLOCK: We have the authority to issue
20 regulations regarding the reports. As with any
21 regulations, we would have to show necessity for adopting
22 those regulations. At this point in time, we do not have
23 any regulations or requirements for dollar amounts.

24 CHAIR SHEEHY: Wouldn't that sort of solve your
25 problem, though, if you adopted regs? I mean, I almost

1 feel like --

2 MR. BLOCK: Actually, no, because it would be
3 an additional mandate.

4 CHAIR SHEEHY: It almost seems like you're
5 asking this body to adopt some sort of underground
6 regulation or something to the action that you're
7 seeking.

8 MR. BLOCK: Well, I guess with all due respect,
9 I would think that since what you're all in the business
10 of doing is determining what, if any, that mandate is,
11 that that's within your purview to deal with. The Board
12 is not tasked with determining what those costs are, and
13 I think we would have some difficulty adopting
14 regulations along those lines.

15 CHAIR SHEEHY: The reason why I open up by
16 asking those questions rather than going through all the
17 testimony is, this is not the first time that this item
18 has come before this body. I think we're all familiar
19 with this matter.

20 MR. BLOCK: And just so you know, I was not
21 planning on making a presentation today. We submitted
22 written comments. We wanted the record to reflect,
23 again, the comments we had made previously.

24 The only thing I was going to say was actually
25 along the lines you've just asked me, which is there is

1 a comment in the staff analysis about this information on
2 cost savings is already available to the Board. And I
3 wanted the record to be clear that that is not the case.
4 That what the Board has in-house at this point is some
5 information about reduction in disposal tonnage at
6 landfills.

7 We do not require -- the information we have
8 does not include the actual costs associated with that.
9 We've used that information to come up with a statewide
10 estimate in the past using average tipping-fee costs,
11 but we do not have information for specific
12 community-college districts. And that will vary around
13 the state. Likewise, we do not have any cost information
14 relating to other savings that might result. For
15 instance, if a community-college district goes to
16 two-sided copies instead of one-sided copy, presumably
17 they would be buying less paper. That's information, a
18 level of detail that we do not require, and most likely
19 will not require.

20 I wasn't raising that to argue the point. I
21 think that the Commission's position is pretty clear on
22 this matter. I just wanted the record to be clear.

23 CHAIR SHEEHY: Thank you, Mr. Block.

24 Ms. Geanacou, would you want to comment?

25 MS. GEANACOU: Susan Geanacou, Department of

Commission on State Mandates – January 30, 2009

1 Finance.

2 Finance supports the staff analysis as we did
3 in, I believe, it was the September 2008 hearing to
4 oppose the amendments as requested by the Board for the
5 reasons stated in the Commission's staff analysis.

6 CHAIR SHEEHY: Thank you, Ms. Geanacou.

7 Questions or comments by the Board -- by
8 Commission members?

9 *(No response)*

10 CHAIR SHEEHY: Seeing none, is there anybody in
11 the public that would like to comment on this item?

12 *(No response)*

13 CHAIR SHEEHY: Seeing no requests there, is
14 there a motion on this item?

15 MEMBER WORTHLEY: Move staff analysis -- or the
16 recommendation, rather.

17 MEMBER OLSEN: Second.

18 CHAIR SHEEHY: We have a motion and a second.

19 All in favor?

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

21 CHAIR SHEEHY: Okay, that item is done.

22 Thank you, Mr. Block.

23 MS. HIGASHI: This brings us to Item 12.

24 Ms. Shelton?

25 MS. SHELTON: I don't have any updates.

Commission on State Mandates – January 30, 2009

1 The two oral arguments that we had in
2 December and one this January, we have not yet received
3 any issued decisions yet. So as soon as we do, we'll let
4 everybody know.

5 I did want to take this time to introduce our
6 new staff attorney that has been with our office since
7 December, Heather Halsey, if you want to stand.

8 She is a former staff counsel with the
9 Department of Health Services. She has been a committee
10 consultant for the Legislature, and also worked at OPR.
11 She has sat as a member of the Commission during the
12 Davis Administration, and has worked in private practice
13 representing local government. So she's got broad
14 experience.

15 CHAIR SHEEHY: Welcome. And thanks for joining
16 the staff at the Commission on State Mandates.

17 MR. HALSEY: Thank you.

18 *(Applause)*

19 CHAIR SHEEHY: Okay, Paula?

20 MS. HIGASHI: Item 13, my report.

21 The first item on our report is workload as
22 usual. I'd just like to note for the record that this
23 week, we have received a couple of new test-claim filings
24 as well as a new incorrect-reduction claim. So we'll be
25 doing completeness review on those. And we also received

1 a filing on review of claiming instructions for
2 *Graduation Requirements*. All of those will be processed
3 in the next few days.

4 We have added a new category of workload, which
5 has been around in the past. And that is applications
6 for findings of significant financial distress.

7 We wanted to give you a heads-up that they
8 might be back. And I've asked Ms. Patton to do a little
9 bit of research and to report to us on just what is
10 happening out in county land, and what would the costs be
11 and what are our options.

12 And so, Ms. Patton?

13 MS. PATTON: Good morning. As Paula reported
14 in the ED report, three counties have made inquiries
15 regarding the process for filing applications for finding
16 of significant financial distress. This is also known as
17 the "SB 1033 process."

18 Current law authorizes any county to file an
19 application with the Commission, and it requires the
20 Commission to conduct a public hearing in the applicant
21 county, and issue preliminary and final decisions on that
22 application all within 90 days. This is a complex and
23 expensive process, and it requires the Commission to
24 review the applicant county's budgets and provide
25 thorough and fiscal and legal analysis.

Commission on State Mandates – January 30, 2009

1 Current law prohibits the Commission from
2 making a finding of significant financial distress unless
3 the County has made a compelling case that basic county
4 services, including public safety, cannot be maintained.

5 The Commission typically contracts with
6 Department of Finance's Office of Audits and Evaluations
7 to conduct the fiscal portion of the analysis when we
8 get these applications. And we're not budgeted for this
9 process. So whenever we get an application, we must
10 submit a request for deficiency funding with the
11 Department of Finance under budget control section 9840.

12 The last application was Butte County in 2005.
13 And we spent approximately \$106,000 to process that
14 application.

15 CHAIR SHEEHY: I'm sorry, how much?

16 MS. PATTON: \$106,000.

17 That included 93,000 to contract with Finance.
18 And we also hired a retired annuitant to perform other
19 parts of the analysis and to organize the process.

20 And on top of that, we spent probably about
21 180 hours of Commission staff time reviewing, and also
22 doing some further analysis.

23 I called Finance's audit unit this week, and
24 they did a really rough estimate, and they said today,
25 if an application was filed, it would probably cost

Commission on State Mandates – January 30, 2009

1 between \$130,000 and \$150,000 to contract with them to
2 perform the fiscal analysis. That's not including the
3 travel time that -- you know, travel costs we would need
4 to pay for our public members to go to the applicant
5 county, and staff, and the staff of Finance's audit unit.

6 If an application is filed, the Commission will
7 need to decide how they want to conduct the hearing
8 process. They can choose for the entire Commission to go
9 to the applicant county and conduct the hearing, and
10 approve the preliminary and final analysis; or you could
11 decide to select the subcommittee of Commission members
12 that would go to the applicant county, and then report to
13 the full commission for your decision on the analysis.

14 Again, I want to tell you, we have no
15 applications yet, but we've had some inquiries. We'll
16 keep you apprised as we get more inquiries.

17 Also, I want to let you know that the County
18 folks are meeting this afternoon following our hearing.
19 And that is one of the issues that they're going to
20 discuss, what they hear out there about possible filings.

21 CHAIR SHEEHY: Ms. Patton, since we don't have
22 any actual requests or filings yet, I guess this is just
23 sort of an early notification for us to think about? Or
24 should we engage in a discussion now about how to handle
25 it if it happens?

Commission on State Mandates – January 30, 2009

1 Paula, do you have a recommendation?

2 MS. HIGASHI: I think it would be helpful to
3 staff to have an idea of how you would like to proceed
4 if one does come in, because we would have to wait then
5 for the next meeting to bring it back up on the agenda
6 before we could even finalize our budget request.

7 CHAIR SHEEHY: Okay.

8 MS. HIGASHI: So if we have an idea,
9 generally -- and in the past, I would say I think every
10 single application, everyone on the Commission did
11 participate in the hearing.

12 CHAIR SHEEHY: Say that again, that last part?

13 MS. HIGASHI: All of the past, all of the other
14 applications that have been processed, every Commission
15 member participated in the review process and in the
16 hearing, in the applicant county. There has not been an
17 exception to that.

18 And so we --

19 CHAIR SHEEHY: So there's not been an exception
20 to that; but we could, if we chose --

21 MS. HIGASHI: But regulations -

22 CHAIR SHEEHY: -- have the authority to do
23 something with it.

24 MS. HIGASHI: Exactly. The regulations provide
25 for it to be another way.

Commission on State Mandates – January 30, 2009

1 CHAIR SHEEHY: Okay, and then as far as budget
2 goes, if this were to happen, I'm guessing we're in
3 January -- for all intents and purposes, we're in
4 February now. How long is the process from when there's
5 a filing until -- what is our requirement once there's a
6 filing in terms of the timing before we have to have a
7 hearing?

8 MS. HIGASHI: Well, what would happen is the
9 process -- the clock would stop until we received the
10 funding from the filing report.

11 CHAIR SHEEHY: Let me put it another way. So
12 let's say Butte County --

13 MS. HIGASHI: So it should be 90 days, but --

14 CHAIR SHEEHY: 90 days?

15 MS. HIGASHI: But if we don't have the funding
16 in which to start the processing, then the clock would
17 stop.

18 CHAIR SHEEHY: Let me just tell what my concern
19 is. I think Ms. Olsen could probably relate to this,
20 probably Ms. Bryant, and any others who have worked in
21 the Legislature. My guess is, if we sent a spring
22 letter -- if the Department of Finance were to send a
23 spring letter up to the Legislature for this matter, they
24 would reject it and say this is contingency budgeting.
25 You don't know how much you need.

Commission on State Mandates – January 30, 2009

1 MS. HIGASHI: We would not put in the letter
2 unless an application is filed.

3 CHAIR SHEEHY: Okay, so let's say one
4 application is filed, you put in a letter, and then three
5 weeks later, two more applications get filed. And
6 then -- I mean, with the way our economy is going, it's
7 not inconceivable that we could have nine, ten, 11, 12
8 counties -- well, that's not inconceivable. I mean,
9 local revenues are just dropping, unfortunately, like a
10 bad elevator. And, you know, sales-tax revenues,
11 property-tax revenues, and so on.

12 So I just think there needs to be some further
13 discussion. Perhaps we can do it offline on how to
14 handle this from a budget standpoint, but I don't think
15 the Legislature's going to be real anxious to appropriate
16 more general-fund money to the Commission on State
17 Mandates unless it has a pretty good grasp on what you're
18 going to need. That's -- I'm just thinking out loud
19 here. I think it's important. I'd like to hear what
20 other Commission members think.

21 And so one option would be to do a spring
22 letter, if we really knew what you needed.

23 And the second option would be to just wait,
24 and then run a 9840 request as a deficiency. But that
25 would be probably more appropriate to do -- you can't run

1 the deficiency until -- I mean, really -- the problem is
2 that until you know what it is, you really can't make the
3 request.

4 MS. HIGASHI: No, I'm not suggesting that we
5 would file a request before an application is filed.
6 But I'm just suggesting that if we have an idea of what
7 the Commission members would like to do, we can at least
8 have all of our numbers ready to roll if an application
9 does come in. And then we have the authorization from
10 the Commission to proceed. But it's just planning and
11 estimating that we're trying to do at this stage.

12 MS. PATTON: Mr. Sheehy, can I just tell you a
13 couple things?

14 Our budget actually has language in it so that
15 we would ask for the money using the 9840 control
16 section. We would not ask for the money prior to an
17 application being filed. And also, there is language in
18 the governing statutes that if we get multiple claims,
19 they wait.

20 So it says we have 90 days once we get the
21 funding, to complete an application once we get the
22 funding. And if more than one claim comes in, they have
23 to wait their turn so we're not doing six claims at a
24 time.

25 CHAIR SHEEHY: Does the definition -- I'm

Commission on State Mandates – January 30, 2009

1 sorry, go ahead.

2 MS. PATTON: So that we don't do them
3 simultaneously.

4 CHAIR SHEEHY: Does the definition of "getting
5 the funding," does that therefore mean that once the
6 Joint Legislative Budget Committee blesses the 9840
7 request, is that the definition of getting the funding?
8 Or does it mean when an actual appropriations bill is
9 passed up in the Legislature?

10 MS. HIGASHI: It's when Finance is comfortable
11 to start working on the contract.

12 CHAIR SHEEHY: Okay, all right.

13 MEMBER LUJANO: Mr. Chair?

14 CHAIR SHEEHY: Yes, Mr. Lujano?

15 MEMBER LUJANO: Can I suggest that we direct
16 staff to use the same process that we used for Butte
17 County? And then if we do get an application, then
18 you'll let us know ahead of time.

19 MS. HIGASHI: Absolutely.

20 CHAIR SHEEHY: Okay, that's a good suggestion.

21 MS. HIGASHI: No, we're comfortable with that.
22 We just needed to bring it up because times are
23 different.

24 MEMBER OLSEN: And I also may be misreading
25 between the lines, but I'm getting the sense that you're

Commission on State Mandates – January 30, 2009

1 trying to get some sense of subcommittee versus full
2 committee.

3 MS. HIGASHI: And whether or not there's any
4 interest in that.

5 MEMBER OLSEN: Right. Because personally, from
6 my point of view as the public member, when I look at the
7 rest of the committee, everybody is coming from either a
8 local government or a state perspective. I'm the only
9 one who isn't. So I personally feel like I have to be at
10 all of the hearings because I'm the only one that doesn't
11 come from one of those two perspectives. So I'm
12 volunteering for the subcommittee or I'm volunteering all
13 of us to be there in full committee.

14 CHAIR SHEEHY: Well, we need at least two
15 people on the subcommittee.

16 Is there a second volunteer?

17 MS. HIGASHI: Mr. Worthley?

18 MEMBER WORTHLEY: I would be the likely
19 candidate. But there again, we run into the problem of
20 probably the reason why the whole Commission in the past
21 has participated, is because my tendency might be
22 contrary to other commissioners given the fact I am a
23 county supervisor.

24 But I would certainly want to be on it -- if we
25 were going to go with a smaller subcommittee, I'd want to

Commission on State Mandates – January 30, 2009

1 be a member of that.

2 CHAIR SHEEHY: So that's good to know,
3 Mr. Worthley and Ms. Olsen, but we don't need to decide
4 that now.

5 MS. HIGASHI: No. But from a staff
6 perspective, I'd just like to ask if Mr. Worthley and
7 Ms. Olsen would feel comfortable acting as kind of a
8 policy subcommittee that, if we have questions, we just
9 need to talk them through with other commission --
10 between the meetings --

11 CHAIR SHEEHY: You mean, formal action by us
12 today in order to establish that?

13 MS. HIGASHI: No, just kind of a working
14 subcommittee, that's fine.

15 CHAIR SHEEHY: So that Mr. Worthley and
16 Ms. Olsen will be that working subcommittee now, just for
17 policy.

18 MS. HIGASHI: Okay.

19 CHAIR SHEEHY: How many entities have stirred
20 the pot with you a little bit?

21 MS. HIGASHI: Nancy has actually heard from --

22 MS. PATTON: Three.

23 MS. HIGASHI: -- three.

24 CHAIR SHEEHY: Okay.

25 MEMBER WORTHLEY: Including some unusual ones.

Commission on State Mandates – January 30, 2009

1 MS. HIGASHI: Large, too.

2 MS. PATTON: Large counties.

3 CHAIR SHEEHY: Yes, if you could identify
4 yourself?

5 MR. BURDICK: If I could just comment. Allan
6 Burdick on behalf of CSAC SB 90 Service. And I
7 appreciate the Commission considering at this time.

8 A couple things I just wanted to point out in
9 your considerations because they may end up being
10 executive-session items. I'm not sure exactly how you
11 will handle them. But as was pointed out, that, you
12 know, the consideration has just been taken place
13 recently amongst counties. And today, there's going to
14 be some meetings and some additional consideration. And
15 the CSAC staff is going to be working with Nancy on
16 trying to alert that.

17 And this is always kind of a last alternative
18 for counties usually to do, but once they do it and make
19 that decision, it's critical that hopefully it will move
20 forward.

21 And the only thing I just wanted to comment
22 primarily on was, you know, let's put them in line, you
23 know, one at a time-type thing. And I think if people --
24 if a county gets to this point and needs the Commission
25 to go to that and authorize that so they can make the

Commission on State Mandates – January 30, 2009

1 reduction in their GA payments, they need that to be done
2 as quickly as possible.

3 And so hopefully the Commission will not say,
4 "Well, first in gets to go and then the next one has got
5 to wait." They'll look at some process to consider
6 timely consideration of all the counties that may have
7 to apply if that, in fact, does take place.

8 I would also like to point out -- and Camille
9 could probably -- and Paula could clarify this -- that
10 this provision takes precedence over test claims. And,
11 therefore, you know, to the extent that these do happen,
12 then the other test claimants, both counties, cities, and
13 school districts, will be negatively impacted by this
14 process. So I just want to make sure that the Commission
15 understands that the way this was set up is that it
16 becomes the priority of the Commission.

17 So I just wanted to do that.

18 And also, as Nancy mentioned, CSAC staff will
19 be reporting to her on a regular basis as it relates to
20 people are considering this.

21 And I think some of this may not happen until
22 after we have a state budget, and then counties will know
23 much more what their fiscal situation is.

24 So we also have a little bit of a delay in the
25 sense of waiting to see -- you know, for the other shoe

Commission on State Mandates – January 30, 2009

1 to drop from the state and its impact on counties.

2 Thank you very much.

3 MS. HIGASHI: Let me just add for
4 clarification. When the process first started, virtually
5 the Commission did stop hearing test claims for probably
6 about a year, and only heard applications.

7 What we've done since the Butte County
8 applications have been filed, the last couple, is we have
9 contracted with Finance to do the entire analysis, not
10 just looking at the dollars and the budget issues, but
11 also looking at the programmatic issues connected to the
12 budget.

13 So Commission staff has not done the
14 first-level analysis and read-through, but has worked
15 with Finance staff as they have prepared that analysis,
16 reviewed it, approved it, before it's finally issued to
17 the County and to the Commission.

18 And so it's a much different process than it
19 used to be. Because when we did the Butte application,
20 we were still having test claims heard at regular
21 Commission meetings. And I think Nancy found our old
22 work sheets, and noted that I had spent about 60 hours
23 on the last Butte application. So it was not 100 percent
24 of my time, for instance.

25 Other issues that I've reported are just that

1 we have the typical reports going into the Legislature.
2 One of those reports is the AB 3000 report sent to the
3 Legislature by the Controller.

4 And I had excerpted some columns, some dollar
5 amounts from that report on the cost of mandates. And
6 I had a question from one of the members, because you
7 could not add or subtract and come to a number.

8 CHAIR SHEEHY: Right.

9 MS. HIGASHI: And the reason for that is
10 because I excerpted data. And so I'm giving you copies
11 of the pages in which the data was excerpted, so you can
12 see that there were other columns of data reported. But
13 because it's on legal-sized paper and the type font is
14 so small, I just happened to pull the numbers from three
15 columns.

16 CHAIR SHEEHY: Okay, thank you, Paula.

17 MS. HIGASHI: And so what I've given you are
18 the actual pages where the data was excerpted from.

19 And if you want to look at the entire report,
20 of course, it is online on the State Controller's Web
21 site.

22 The only other -- the main issue of note
23 regarding our budget, of course, is that the issue of
24 state furloughs was heard in Court yesterday. And we
25 all know what the judge decided. And I'm sure there are

1 entities out there, employee organizations that are
2 contemplating what next steps would be taken.

3 At this point, according to the press reports,
4 we've all been advised that DPA will give us further
5 guidance. And as of this morning, we hadn't heard any
6 further details.

7 But in the meantime, from a staff perspective,
8 we are working through what we would need to do from a
9 public-notice perspective, to be sure that our
10 constituents in the mandates community know what's
11 happening, that we have information on our Web site; and
12 that, internally, we have administrative procedures for
13 handling mail, phone calls, e-mail, et cetera, on those
14 days that are coming up.

15 Are there any questions, or do any of the
16 members have further information they wish to share?

17 CHAIR SHEEHY: But as you make those decisions
18 on how you're going to handle that, just keep us
19 informed.

20 MS. HIGASHI: Okay, we will.

21 CHAIR SHEEHY: Thank you, Paula.

22 Do you have anything else?

23 MS. HIGASHI: We've given you an alert, as to
24 the Leg. Analyst report issued. And on the education
25 part of the budget, and there are mentions of education

Commission on State Mandates – January 30, 2009

1 mandate reform, we're all waiting to hear what that might
2 entail. We understand that there are analysts looking
3 at all of the education mandates, contemplating if any
4 of them could be changed or suspended.

5 And also, earlier this week, a separate report
6 was issued on realignment in criminal justice programs.
7 Mentioned in that proposal was POBOR and a proposal to
8 fund it at, I think it was, \$140 per officer. The
9 Commission last adopted Ps & Gs with a rate of \$37.25 per
10 officer. And so folks may want to take a look at that.
11 We'll be following it.

12 And then just the tentative agendas for the
13 March hearing and for the May hearing.

14 Are there any questions?

15 *(No response)*

16 MS. HIGASHI: Public comment?

17 *(No response)*

18 CHAIR SHEEHY: Is there any further public
19 comment at this point in our hearing?

20 *(No response)*

21 CHAIR SHEEHY: Seeing none, we're going to go
22 into closed session.

23 The Commission on State Mandates will meet in
24 closed executive session pursuant to Government Code
25 section 11126, subdivision (e), to confer with and

Commission on State Mandates – January 30, 2009

1 receive advice from legal counsel for consideration and
2 action, as necessary and appropriate, upon the pending
3 litigation listed on the published notice and agenda, and
4 to confer with and receive advice from legal counsel
5 regarding potential litigation. The Commission will also
6 confer on personal matters listed on the published notice
7 and agenda.

8 We will reconvene in open session in
9 approximately 15 minutes.

10 Thank you very much for your cooperation as you
11 leave the room.

12 *(The Commission met in executive closed*
13 *session from 12:04 p.m. to 12:13 p.m.)*

14 CHAIR SHEEHY: The Commission on State Mandates
15 met in closed executive session pursuant to Government
16 Code section 11126, subdivision (e), to confer with and
17 receive advice from legal counsel for consideration and
18 action, as necessary and appropriate, upon the pending
19 litigation listed on the published notice and agenda, and
20 potential litigation, and pursuant to Government Code
21 section 11126, subdivision (a), and 17526 to confer on
22 personnel matters listed on the published notice and
23 agenda.

24 The Commission will now reconvene in open
25 session.

Commission on State Mandates – January 30, 2009

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Is there any further business today to come before the Commission on State Mandates?

(No response)

CHAIR SHEEHY: In that case, seeing none, a motion to adjourn would be in order.

MEMBER WORTHLEY: So moved.

MEMBER BRYANT: Second.

CHAIR SHEEHY: All in favor?

(A chorus of "ayes" was heard.)

CHAIR SHEEHY: This meeting is adjourned.

MS. HIGASHI: Thank you.

(The meeting concluded at 12:13 p.m.)

--oOo--

REPORTER'S CERTIFICATE

I hereby certify:

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

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

In witness whereof, I have hereunto set my hand on February 18, 2009.



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