

**ITEM 4**  
**TEST CLAIM**

**PROPOSED STATEMENT OF DECISION**

Education Code Sections 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, 49078, 76220, 76223, 76225, 76234, 76244, 76245, 76246

Statutes 1975, Chapter 816 (SB 182); Statutes 1976, Chapter 1010 (AB 3100); Statutes 1976, Chapter 1297 (SB 1493); Statutes 1980, Chapter 1347 (AB 2168); Statutes 1983, Chapter 498 (SB 813); Statute 1989, Chapter 593 (SB 1546); Statutes 1993, Chapter 561 (AB 1539); Statutes 1995, Chapter 758 (AB 446); Statutes 1996, Chapter 879 (AB 1721); Statutes 1998, Chapter 311 (SB 933); Statutes 1998, Chapter 846 (SB 1468); Statutes 2000, Chapter 67 (AB 2453)

*Student Records*

02-TC-34

Riverside Unified School District and Palomar Community College District, Co-Claimants

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**EXECUTIVE SUMMARY**

The sole issue before the Commission on State Mandates (Commission) is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the May 29, 2009 hearing on the above named test claim.<sup>1</sup>

**Recommendation**

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page three, which accurately reflects the staff analysis and recommendation on this test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission's vote on item 3 modifies the staff analysis, staff recommends that the motion to adopt the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a proposed Statement of Decision be continued to the July 31, 2009 Commission hearing.

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<sup>1</sup> California Code of Regulations, title 2, section 1188.1, subdivision (a).



BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Education Code Sections 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, 49078, 76220, 76223, 76225, 76234, 76244, 76245, and 76246;

Statutes 1975, Chapter 816 (S.B. 182);  
Statutes 1976, Chapter 1010 (A.B. 3100);  
Statutes 1976, Chapter 1297 (S.B. 1493);  
Statutes 1980, Chapter 1347 (A.B. 2168);  
Statutes 1983, Chapter 498 (S.B. 813);  
Statute 1989, Chapter 593 (S.B. 1546);  
Statutes 1993, Chapter 561 (A.B. 1539);  
Statutes 1995, Chapter 758 (A.B. 446);  
Statutes 1996, Chapter 879 (A.B. 1721);  
Statutes 1998, Chapter 311 (S.B. 933);  
Statutes 1998, Chapter 846 (S.B. 1468);  
Statutes 2000, Chapter 67 (A.B. 2453);

Filed on June 23, 2003,

By Riverside Unified School District and  
Palomar Community College District, Co-  
Claimants.

Case No.: 02-TC-34

*Student Records*

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

*(Proposed for Adoption on May 29, 2009)*

**PROPOSED STATEMENT OF DECISION**

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. [Witness list will be included in the final Statement of Decision.]

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

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision] to partially approve this test claim.

## Summary of Findings

This test claim was filed on June 23, 2003, by Riverside Unified School District and Palomar Community College District regarding statutes that address various areas of pupil and student record management for K-12 school districts and community college districts including access to and the privacy of pupil and student records. The test claim statutes are Education Code sections 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, 49078, 76220, 76223, 76225, 76234, 76244, 76245, and 76246.

The Commission finds that Education Code sections 49069.3, 49069.5, and 49076.5 constitute reimbursable state-mandated programs on kindergarten through 12<sup>th</sup> grade school districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities:

1. Provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. (Ed. Code, § 49069.3.)
2. Cooperate with the county social service or probation department to ensure that a pupil's education record is transferred to the receiving local education agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency. (Ed. Code, § 49069.5, subd. (b) (Stats. 1998, ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)
3. Cooperate with the county social service or probation department to ensure that educational background information for a pupil's health and educational record is transferred to the receiving local educational agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement.

Educational background information transferred pursuant to Education Code section 49069.5, subdivision (c), includes but is not limited to: (1) a health and education summary as described in Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353); (2) the location of the pupil's records; (3) the last school and teacher of the pupil; (4) the pupil's current grade level; and (5) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law. (Ed. Code, § 49069.5, subs. (c) and (d) (Stats. 1998., ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

4. Transfer the educational and health record of a pupil in foster care to the pupil's new local educational agency within five working days of receipt of information regarding the new educational placement of the pupil. (Ed. Code, § 49069.5, subd. (e) (Stats. 1998, ch. 311).)
5. Release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. (Ed. Code, § 49076.5, subd. (a).)

In addition, the Commission finds that Education Code 76234 constitutes a reimbursable state-mandated program on community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activity:

Inform the alleged victim of sexual assault or physical abuse (as defined by Ed. Code, § 76234), within three days of the results of any disciplinary action by the community college and the results of any appeal, whenever there is included in any student record information concerning any disciplinary action taken by a community college concerning the alleged sexual assault or physical abuse. (Ed. Code, § 76234.)

The Commission also finds the fee authority to charge a fee that does not exceed the actual cost of furnishing copies of any pupil/student records, set forth in Education Code sections 49065 and 76223, is applicable to the state-mandated programs described above. This fee authority does not extend to furnishing the first two transcripts of former pupils' records/students' records, or the first two verifications of various records of former pupils/students, or the search for or retrieval of any pupil/student record. Therefore, any revenue resulting from the fee authority set forth in Education Code sections 49065 and 76223 is offsetting revenue and shall be deducted from the costs claimed for furnishing pupil/student records.

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

## BACKGROUND

This test claim addresses the access to and privacy of the records of pupils in kindergarten through 12<sup>th</sup> grade (K-12) school districts and students in community colleges.

### Test Claim Statutes:

The test claim statutes, Education Code sections 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, 49078, 76220, 76223, 76225, 76234, 76244, 76245, and 76246 are all part of two larger statutory schemes (Education Code sections 49060 – 49085, and 76200 – 76246) governing K-12 school district and community college district management of pupil and student records. The test claim statutes address various areas of pupil and student record management for K-12 school districts (Ed. Code, §§ 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, and 49078) and community college districts (76220, 76223, 76225, 76234, 76244, 76245, and 76246) including the establishment, maintenance, and destruction of records; charges for copies of transcripts; regulations regarding evaluation of achievement; transfer of pupil and student records; transfer of pupil records for foster children; release of information to peace officers; furnishing of pupil and student information in compliance with a court order or subpoena; and notice to others concerning a student's disciplinary records.

Education Code sections 49060 and 76200 provide that the legislative intent of the two statutory schemes is to resolve potential conflicts between California law regarding pupil/student records and the federal Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C. § 1232g) in order to ensure the continued receipt of federal funds by K-12 school districts and

community colleges, and to revise generally and update the law relating to pupil and student records.<sup>2</sup> In this context the Legislature has added and amended various code sections within the statutory schemes governing K-12 school district and community college district management of pupil and student records. As a result, although FERPA and other federal laws parallel California laws regarding certain aspects of pupil and student record management, California law goes beyond federal law in other aspects.

Federal Law:

*The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act):*

As further discussed below, the Chancellor's Office asserts that the some of the activities required by the test claim statutes are federally mandated by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) (20 U.S.C. § 1092 (f), 34 C.F.R. § 668.1 et seq., as amended by Pub.L. No. 105-244). The Clery Act addresses the dissemination of crime statistics and the notification of victim rights to the campus community. The Clery Act, originally enacted as the Crime Awareness and Campus Security Act of 1990,<sup>3</sup> conditions participation in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965 (HEA) and/or any program under part C of subchapter I of chapter 34 of Title 42 (Federal Work Study programs (42 U.S.C. § 2751 et seq.) on compliance with the provisions of the Clery Act.

The Clery Act was enacted amid concerns that the proliferation of campus crime created a growing threat to students, faculty, and school employees.<sup>4</sup> Congress recognized that contemporary campus communities had become increasingly dangerous places and noted that in roughly eighty percent of campus crimes the perpetrator and the victim were both students.<sup>5</sup> These factors led Congress to find, among other things that, "students and employees of institutions of higher education should be aware of the incidence of crime on campus and policies and procedures to prevent crime or report occurrences of crime."<sup>6</sup> In addition, Congress established the requirement that all participating institutions "make timely reports to the campus community on crimes considered to be a threat to other students and employees ... that are reported to campus security or local law police agencies."<sup>7</sup> The reports are to be provided to students and employees in a manner that is timely and that will aid in the prevention of similar occurrences.

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<sup>2</sup> See Education Code sections 49060 and 76200 for legislative intent.

<sup>3</sup> Title II of the Student Right to Know and Campus Security Act (Pub.L. No. 101-542 (Nov. 8, 1990) 104 Stat. 2381) amending 20 U.S.C. sections 1092, 1094, and 1232g.

<sup>4</sup> *Havlik v. Johnson & Wales University* (1<sup>st</sup> Cir. 2007) 509 F.3d 25, 30, citing to H.R.Rep. No. 101-518, p. 7 (1990) and Pub.L. No. 101-542, section 202, 104 Stat. 2381.

<sup>5</sup> *Ibid.*

<sup>6</sup> Section 202 of Pub.L. 101-542.

<sup>7</sup> Title 20 United States Code section 1092 (f)(3).

In 1992, Congress sought to provide victims of sexual assault on campus certain basic rights. Congress added to the Clery Act the requirement that participating institutions develop and distribute a policy statement concerning their campus sexual assault programs targeting the prevention of sex offenses. The policy must address the procedures to be followed if a sex offense occurs. In addition, the policy must contain a statement that the alleged victim of sexual assault must be notified of any disciplinary action taken against the alleged assailant.

***The Family Educational Rights and Privacy Act of 1974 (FERPA):***

In 1974, Congress enacted the Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C. § 1232g, 34 C.F.R. § 99.1 et seq.). FERPA was enacted to protect parents and students' right to access the student's records<sup>8</sup> and "to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent."<sup>9</sup> FERPA conditions federal funds to an educational agency or institution on the agency or institution's compliance with the provisions of FERPA and its implementing regulations.<sup>10</sup>

FERPA's provisions generally prohibit the release of a student's educational records without adherence to specified procedural safeguards for the privacy rights of parents and students. These procedural safeguards include the provision of notice to parents or students regarding the release of specified information, and the need for consent in order to release specified information or records. FERPA's provisions also provide exceptions in which educational institutions or agencies may release a student's educational record without the consent of a parent or student. However, some of these exceptions set forth additional safeguards for the privacy rights of parents and students.

**Claimants' Position**

The claimants, Riverside Unified School District and the Palomar Community College District, contend that the test claim statutes constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.

The claimants assert that prior to January 1, 1975, there were no statutes, code sections or regulations which required school districts to search and retrieve, furnish or forward student records.<sup>11</sup> In addition, the claimants argue that meeting the new requirements of the test claim statutes require increased costs for K-12 school districts and community college districts to implement the following activities:

I. SCHOOL DISTRICTS

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<sup>8</sup> Title 20 United States Code section 1232g (a)(1)(A). See 20 United States Code section 1232g (d) for applicability of FERPA's provisions to students that have attained eighteen years of age or that are attending institutions of postsecondary education.

<sup>9</sup> *United States v. Miami University* (6<sup>th</sup> Cir. 2002) 294 F.3d 797, 806.

<sup>10</sup> Title 20 United States Code section 1232g; 34 Code of Federal Regulations part 99.1 (Nov. 15, 2007).

<sup>11</sup> Test claim 02-TC-34, p. 2 (Exhibit A to Item 3, May 29, 2009 Commission Hearing).

- A) To establish and implement policies and procedures, and periodically update those policies and procedures as required for the searching, retrieving and furnishing of student records pursuant to Chapter 6.5 of Part 27, Division 4, Title 1 of the Education Code.
- B) Pursuant to Education Code Section 49062, establishing, maintaining and destroying pupil records, including health records, according to regulations adopted by the State Board of Education.
- C) Pursuant to Education Code Section 49065, the furnishing of (1) up to two transcripts of former pupils' records or (2) up to two verifications of various records of former pupils, and (3) for searching and retrieving pupil records when transcripts or verifications are requested.
- D) Pursuant to Education Code Section 49067, subdivision (a), conferencing with, or providing a written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course. Pursuant to subdivision (b), adopting and implementing regulations, when assigning a failing grade based upon excess absences, which include, but not be limited to, the following:
- (1) A reasonable opportunity for the pupil or the pupil's parent or guardian to explain the absences.
  - (2) A method for identification in the pupil's record of the failing grades assigned to the pupil on the basis of excessive unexcused absences.
- E) Pursuant to Education Code Section 49068, whenever a pupil transfers from one school district to another or to a private school, or transfers from a private school to a school district within the state, transferring the pupil's permanent record or a copy thereof upon receipt of a request from the district or private school where the pupil intends to enroll. For any school district requesting such a transfer of a record, notifying the parent of his or her right to receive a copy of the record and a right to a hearing to challenge the content of the record.
- F) Pursuant to Education Code Section 44069.3, allowing access to records of grades and transcripts, and any individualized education plans (IEP) that may have been developed pursuant to Chapter 4 (commencing with Section 56300) of Part 30 maintained by school districts of those pupils to Foster family agencies with jurisdiction over currently enrolled or former pupils.
- G) Pursuant to Education Code Section 49069.5, subdivision (b), cooperating with the county social service or probation department, a regional center for the developmentally disabled, or other placing agency to ensure that the education record of a pupil in foster care is transferred to the receiving local education agency in an expedited manner upon the request of those agencies. Pursuant to subdivision (d), the information provided shall include, but not be limited to, the following: (1) The location of the pupil's records, (2) the last school and teacher of the pupil, (3) the pupil's current grade level, and (4) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law.



H) Pursuant to Education Code Section 49076.5, releasing information specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. In order to protect the privacy interests of the pupil, a request to a school district for pupil record information pursuant to this section shall meet the following requirements:

(1) For the purposes of this section "proper police purpose" means that probable cause exists that the pupil has been kidnapped and that his or her abductor may have enrolled the pupil in a school and that the agency has begun an active investigation.

(2) Only designated peace officers and federal criminal investigators and federal law enforcement officers, as defined in Section 830.1 of the Penal Code, whose names have been submitted to the school district in writing by a law enforcement agency, may request and receive the information specified in subdivision (a). Each law enforcement agency shall ensure that each school district has at all times a current list of the names of designated peace officers authorized to request pupil record information.

I) Pursuant to Education Code Section 49077, making a reasonable effort to notify the parent or legal guardian and the pupil in advance of compliance with a lawfully issued subpoena and, in the case of compliance with a court order, if lawfully possible within the requirements of the order.

J) Pursuant to Education Code Section 49078, upon service of a lawfully issued subpoena or a court order solely for the purpose of producing records of a pupil, either personally appearing as a witness in the proceeding or, in lieu of a personal appearance, submitting to the court, or other agency, or person designated in the subpoena, at the time and place required by the subpoena or court order, a copy of that record, accompanied by an affidavit certifying that the copy is a true copy of the original record on file in the school or school office.

## II. COMMUNITY COLLEGES

K) To establish and implement policies and procedures, and periodically update those policies and procedures, for the searching, retrieving and furnishing student records pursuant to Chapter 1.5 of Part 47, Division 7 of Title 3 of the Education Code.

L) Pursuant to Education Code Section 76220, establishing, maintaining, and destroying student records according to regulations adopted by the Board of Governors of the California Community Colleges.

M) Pursuant to Education Code Section 76223, providing, free of charge, (1) up to two transcripts of students' records or (2) up to two verifications of various records of students; and for searching or retrieving any student records when transcripts or verifications are required.

N) Pursuant to Education Code Section 76225, whenever a student transfers from one community college to another, or to a public or private institution of postsecondary education within the state, transferring appropriate records or

copies and notifying the student of his or her right to receive a copy of the record and his or her right to a hearing to challenge the content of the record.

O) Pursuant to Education Code Section 76234, whenever there is included in any student record information concerning any disciplinary action taken by a community college in connection with any alleged sexual assault or physical abuse, or any conduct that threatens the health and safety of the alleged victim, informing the alleged victim of the results of any disciplinary action by the community college and the results of any appeal.

P) Pursuant to Education Code Section 76244, making a reasonable effort to notify a student in advance of compliance with a lawfully issued subpoena and, in the case of compliance with a court order, if lawfully possible within the requirements of the order.

Q) Pursuant to Education Code Section 76245, upon service of a lawfully issued subpoena or a court order solely to produce a school record regarding any student, either personally appearing as a witness in the proceeding or, in lieu of a personal appearance, submitting to the court, or other agency, or person designated in the subpoena, at the time and place required by the subpoena or court order, a copy of that record, accompanied by an affidavit certifying that the copy is a true copy of the original record on file in the community college or community college office.

R) Pursuant to Education Code Section 76246, complying with appropriate rules and regulations adopted by the Board of Governors of the California Community Colleges to insure the orderly implementation of this chapter.<sup>12</sup>

The claimants filed comments, dated October 10, 2003, and April 23, 2004, in rebuttal to Finance's and the Chancellor's Office comments set forth immediately below. Co-claimant, Riverside Unified School District, filed comments dated April 13, 2009, in response to the draft staff analysis. The claimants' arguments in response to comments by Finance and the Chancellor's Office and to the draft staff analysis will be addressed as necessary in the discussion below.

#### **Department of Finance's Position (Finance)**

In comments submitted on September 15, 2003, Finance asserts that several of the activities for which state reimbursement is sought by the claimants were already required by the state and/or federal law in 1974 or before. This is contrary to the claimants' assertion that "prior to 1975, there were no statutes, code sections or regulations which required school districts to search and retrieve, furnish or forward student records."<sup>13</sup> Finance contends that the claimants did not include "a written narrative that includes a detailed description of the activities required under prior law or executive order," as required by Title 2, Code of Regulations, Section 1183, subdivision (d)(3)(A). Thus, Finance questions the completeness of the test claim and requested

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<sup>12</sup> Test claim 02-TC-34, p. 27-32, (Exhibit A to Item 3, May 29, 2009 Commission Hearing).

<sup>13</sup> Finance Comments on 02-TC-34, dated September 15, 2003, p. 1, referencing test claim 02-TC-34, page 2, (Exhibit C to Item 3, May 29, 2009 Commission Hearing).

that the Commission direct the claimants to accurately provide the information required by the regulations.<sup>14</sup>

### **California Community Colleges-Chancellor's Office Position (Chancellor's Office)**

The Chancellor's Office, regarding the portion of the test claim applicable to community colleges (Ed. Code, §§ 76220, 76223, 76225, 76234, 76244, 76245, and 76246), asserts that the entire test claim should be denied. The Chancellor's Office argues that a substantial part of the test claim should be denied, as most of the provisions of the test claim statutes were enacted by Senate Bill No. (SB) 182, an act designed to bring California law into conformity with FERPA. The Chancellor's Office also argues that specific test claim statutes: (1) do not require any activities either pursuant to their plain language or because the activity is the result of an underlying discretionary activity; and (2) do not constitute new programs or higher levels of service as the activities were required by prior state and/or federal law.

The Chancellor's Office comments will be addressed as necessary in the discussion below.

### **COMMISSION FINDINGS**

The courts have found that article XIII B, section 6 of the California Constitution<sup>15</sup> recognizes the state constitutional restrictions on the powers of local government to tax and spend.<sup>16</sup> "It's purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."<sup>17</sup> A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or requires a local agency or school district to engage in an activity or task.<sup>18</sup> The required activity or task must be new, constituting a "new program", or it must create a "higher level of service" over the previously required level of service under existing programs.<sup>19</sup>

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<sup>14</sup> Test claim 02-TC-34 was deemed complete on July 8, 2003, and all claimants and interested parties were noticed. Issues of law raised by claimants and interested parties will be considered in the analysis, as necessary.

<sup>15</sup> Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

<sup>16</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

<sup>17</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>18</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

<sup>19</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878

The courts have defined a “program” that is subject to article XIII B, section 6 of the California Constitution (“hereinafter “article XIII B, section 6”), as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.<sup>20</sup> To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.<sup>21</sup> A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public”<sup>22</sup>. Finally, the newly required activity or higher level of service must impose costs on local agencies as a result of local agencies’ performance of the new activities or higher level of service that were mandated by the state statute or executive order.<sup>23</sup>

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>24</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>25</sup>

**Issue 1: Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?**

In its March 16, 2004 comments to the test claim, the Chancellor’s Office asserts that much of the test claim should be denied as federally-mandated. The Chancellor’s Office argues that many of the test claim statutes are necessary to implement the Clery Act and FERPA, and thus, do not constitute state-mandated activities. In addition to the federal mandate issue raised by the Chancellor’s Office, some of the activities required by the test claim statutes raise court mandate issues, and therefore, may not be subject to article XIII B, section 6 of the California Constitution.

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(*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

<sup>20</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*Los Angeles I*); *Lucia Mar*, *supra*, 44 Cal.3d 830, 835).

<sup>21</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

<sup>22</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

<sup>23</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

<sup>24</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>25</sup> *County of Sonoma*, *supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Article XIII B places spending limits on both the state and local governments, however, costs mandated by courts or federal law are expressly excluded from these spending limits.

Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any “[a]ppropriations required to complying with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly.”

Regarding federal mandates, Government Code section 17556, subdivision (c), provides that the Commission shall not find costs mandated by the state if the test claim statute imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. In addition, when analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that “[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies’ taxing and spending limitations” under article XIII B.<sup>26</sup>

However, when federal law imposes a mandate on the state, and the state “freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.”<sup>27</sup>

As will be further discussed below, the federal mandate issues and court mandate issues arise in regard to Education Code sections 49068, 49077, 76225, 76244, and 76234. Education Code sections 49068 and 76225 address the transfer of a pupil’s permanent record and a student’s appropriate records between schools and institutions of higher education and the rights of parents/student when a transfer occurs. Education Code sections 49077 and 76244 address the provision of pupil/student information in compliance with a court order or subpoena and the rights of parents/student prior to a districts compliance with the court order or subpoena. Education Code section 76234 addresses the notification of an alleged victim of sexual assault or physical abuse of any disciplinary action by the community college taken against any student for the alleged sexual assault or physical abuse and the results of any appeal.

The remaining test claim statutes address other areas of pupil and student record management including the establishment, maintenance, and destruction of records; charges for copies of transcripts; and regulations regarding evaluation of achievement. These test claim statutes address issues that exceed the scope of federal law or any court mandate, and therefore, are subject to article XIII B, section 6 of the California Constitution.

The following discussion will first analyze whether the provisions of the Clery Act and/or FERPA constitute federal mandates on K-12 school districts and community colleges. Then the discussion will analyze whether the activities required by Education Code sections 49068,

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<sup>26</sup> *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4<sup>th</sup> 1564, 1593 citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code section 17513.

<sup>27</sup> *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1594.

49077, 76225, and 76244 are federally-mandated. Finally, the discussion will analyze whether the provisions of Education Code sections 49077 and 76244 constitute a court mandate.

*A. Do the provisions of the Clery Act and FERPA constitute federal mandates on K-12 school districts and/or community college districts?*

**The Clery Act:**

The Chancellor's Office argues that any requirement of Education Code section 76234 is federally mandated under the Clery Act. Education Code section 76234 provides:

Whenever there is included in any student record information concerning any disciplinary action taken by a community college in connection with any alleged sexual assault or physical abuse, including rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or threat of sexual assault, or any conduct that threatens the health and safety of the alleged victim, the alleged victim of that sexual assault or physical abuse shall be informed within three days of the results of any disciplinary action by the community college and the results of any appeal. [¶] ... [¶].

The Clery Act was originally enacted as the "Crime Awareness and Campus Security Act of 1990" addressing the disclosure of campus security policies and campus crime statistics for postsecondary educational institutions.<sup>28</sup> The Crime Awareness and Campus Security Act of 1990 was enacted amid concerns that the proliferation of campus crime created a growing threat to students, faculty, and school employees.<sup>29</sup> Congress recognized that contemporary campus communities had become increasingly dangerous places and noted that in roughly eighty percent of campus crimes the perpetrator and the victim were both students.<sup>30</sup> These factors led Congress to find, among other things that, "students and employees of institutions of higher education should be aware of the incidence of crime on campus and policies and procedures to prevent crime or report occurrences of crime."<sup>31</sup>

The Crime Awareness and Campus Security Act of 1990 conditioned participation in any Title IV student financial assistance program and Federal Work-Study programs upon compliance with its provisions. These provisions require participating institutions to disclose crime statistics for the most recent three years, as well as disclose the institution's security policies.<sup>32</sup> In addition, the Crime Awareness and Campus Security Act of 1990 established the requirement that all participating institutions make timely reports to the campus community on crimes considered to be a threat to other students and employees that are reported to campus

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<sup>28</sup> Title II of the Student Right to Know and Campus Security Act (Pub.L. No. 101-542) (Nov. 8, 1990) (104 Stat. 2381) amending 20 U.S.C. sections 1092, 1094, and 1232g.

<sup>29</sup> *Havlik v. Johnson & Wales University* (1<sup>st</sup> Cir. 2007) 509 F.3d 25, 30, citing to H.R.Rep. No. 101-518, p. 7 (1990) and Pub.L. No. 101-542, section 202, 104 Stat. 2381.

<sup>30</sup> *Ibid.*

<sup>31</sup> Section 202 of Public Law 101-542.

<sup>32</sup> Title 20 United States Code section 1092 (f), as amended by section 204 of Pub.L. No. 101-542.

security or local police agencies. The reports are to be provided to students and employees in a manner that is timely and that will aid in the prevention of similar occurrences.<sup>33</sup>

The Crime Awareness and Campus Security Act of 1990 also amended FERPA, specifically 20 U.S.C. section 1232g (b), by providing that FERPA, "shall not be construed to prohibit an institution of postsecondary education from disclosing to an alleged victim of any crime of violence ... the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime."<sup>34</sup> Therefore, a postsecondary educational institution could disclose the results of a disciplinary proceeding regarding a crime of violence, including sexual assault, to the alleged victim of the crime without being in violation of FERPA's provisions.

In 1992, Congress amended the Crime Awareness and Campus Security Act of 1990 by enacting the Campus Sexual Assault Victim's Bill of Rights as part of the Higher Education Amendments of 1992 (Pub. L. No. 102-325, § 486 (c); see also 20 U.S.C. § 1092(f)). The Campus Sexual Assault Victim's Bill of Rights provides victims of sexual assault on campus certain basic rights and requires participating institutions to develop and distribute a policy statement concerning their campus sexual assault programs targeting the prevention of sex offenses.<sup>35</sup> The policy must address the procedures to be followed if a sex offense occurs. As relevant to this test claim, the policy is required to address:

... Procedures for on-campus disciplinary action in cases of alleged sexual assault, which shall include a clear statement that--

[¶] ... [¶]

... both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.<sup>36</sup>

In 1998, the Crime Awareness and Campus Security Act of 1990 was amended and renamed the Clery Act. The activity stated immediately above remained substantively the same.

Thus, under the Clery Act participating community college districts are required to perform the following activity:

Inform both the accuser and the accused of the outcome of any campus disciplinary proceeding brought alleging a sexual assault. (20 U.S.C. § 1092(f)(8)(B)(iv)(II).)

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<sup>33</sup> Title 20 United States Code section 1092 (f)(3), as amended by section 204 of Pub.L. No. 101-542.

<sup>34</sup> Title 20 United States Code section 1232g (b), as amended by section 203 of Pub.L. No. 101-542.

<sup>35</sup> Title 20 United States Code section 1092 (f), as amended by section 486 of Pub.L. No. 102-325.

<sup>36</sup> Title 20 United States Code section 1092 (f)(7)(B)(iv)(II), as amended by section 486 of Pub.L. No. 102-325 (currently 20 U.S.C. § 1092 (f)(8)(B)(iv)(II)).

This requirement is imposed directly upon each eligible institution, including community college districts, participating in any student financial assistance program authorized by Title IV of the HEA and/or Federal Work-Study Programs.<sup>37</sup> Therefore, the provisions of the Clery Act are applicable to community colleges and directly imposed on community colleges as eligible institutions participating in student financial assistance programs authorized by Title IV.

However, the provisions of the Clery Act are conditions for the participation in Title IV student financial assistance programs and Federal Work Study programs. Community college districts are not obligated to accept the conditions, and thus, community college districts are not *legally* compelled to comply with the provisions of the Clery Act. As a result, it is necessary to determine whether community college districts are *practically* compelled to comply with the provisions of the Clery Act. The court in *Hayes v. Commission on State Mandates* discussed this type of "cooperative federalism" scheme employed by FERPA noting that:

[T]he vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than direct compulsion. ... However, "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense."<sup>38</sup>

The court went on to say that "[t]he test for determining whether there is a federal mandate is whether compliance with federal standards 'is a matter of true choice.'"<sup>39</sup> To make this determination the court set out various factors, including: (1) the nature and purpose of the federal program, (2) whether its design suggests an intent to coerce, and (3) any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.<sup>40</sup>

The nature and purpose of the Clery Act is to provide protection to the campus community against specified criminal offenses and to provide rights to victims of sexual offenses by requiring the provision of crime statistics, timely notification of the occurrence of crimes considered a threat to students and employees, notification of campus sexual assault programs and the procedures followed once a sex offense has occurred. This purpose was reiterated in 1996 when Congress, displeased with the Department of Education's efforts to enforce the Clery Act, passed a resolution calling for the Department of Education to make "[s]afety of students ... the number one priority."<sup>41</sup>

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<sup>37</sup> All California Community Colleges existing during the 2001-2002 fiscal year participated in the Federal Pell Grant Program and the Federal Supplemental Educational Opportunity Grant Program, see attached Student Financial Aid Awards report from the Chancellor's Office Data Mart. For a list of Title IV student financial assistance programs, see title 34 of the Code of Federal Regulations part 668.1.

<sup>38</sup> *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1581-1582, citing to *City of Sacramento, supra*, 50 Cal.3d at p. 73-74.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Havlik, supra*, 509 F.3d at p.31, citing to H.R.Rep. No. 104-875, p. 61 (1996).



Although the nature and purpose of the Clery Act is significant, the intent to coerce participation, however, does not appear to be. The Chancellor's Office asserts that the provisions of the Clery Act applies to "each institution receiving federal financial assistance (which includes all community college districts) ... ."<sup>42</sup> However, as discussed above, the language of the Clery Act limits its application to institutions participating in Title IV student financial assistance programs and/or Federal Work Study programs, not on *all* federal financial assistance. In addition, the Clery Act does not impose any penalties or create any private cause of action against an institution that chooses not to participate in Title IV student financial assistance programs or Federal Work Study programs. Unlike in *City of Sacramento*, community colleges do not face certain and severe penalties such as full and double taxation.<sup>43</sup> Nor do community colleges face a "barrage of litigation with no real defense" as in *Hayes*.<sup>44</sup> In fact, even if a community college does participate in Title IV student financial assistance programs or Federal Work Study programs, the Clery Act specifically provides that it does not "create a cause of action against any institution of higher education or any employee of such institution for any civil liability; ... or establish any standard of care."<sup>45</sup> Rather, the Secretary of Education is given sole authority to enforce the Clery Act and may limit, suspend, or terminate an institution's participation or impose a civil penalty upon a participating institution, however, as stated these sanctions only apply to *participating* institutions.

In regard to practical consequences, an institution's noncompliance with the Clery Act could result in increased hurdles for students that utilize Title IV student financial assistance programs and/or Federal Work Study programs to assist in the costs of attending community college. However, there is no evidence in the record regarding the extent that community college students as a whole rely on Title IV student financial assistance programs and/or Federal Work Study programs to attend community colleges.

In sum, although the purpose of the Clery Act is very significant, in light of the lack of intent to coerce participation, and the lack of any certain and severe penalties for failing to comply with the Clery Act outside of forgoing participation in Title IV student financial assistance programs and Federal Work Study programs, the Commission finds that the provisions of the Clery Act (20 U.S.C. § 1092 (f)) do not constitute federal mandates upon community college districts. Thus, the provisions of Education Code section 76234 are not federally-mandated by the Clery Act. The remaining issues regarding whether Education Code section 76234 mandates a new program or higher level of service under article XIII B, section 6, are discussed on page 53.

#### **FERPA:**

As noted above, FERPA was enacted to protect parents and students' right to access the student's records<sup>46</sup> and "to protect [parents' and students'] rights to privacy by limiting the transferability

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<sup>42</sup> Chancellor's Office Comments on 02-TC-34, dated March 16, 2004, p. 5.

<sup>43</sup> *City of Sacramento, supra*, 50 Cal.3d at p. 74.

<sup>44</sup> *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1592.

<sup>45</sup> Title 20 United States Code section 1092 (f)(14).

<sup>46</sup> Title 20 United States Code section 1232g (a)(1)(A). See 20 United States Code section 1232g (d) for applicability of FERPA's provisions to students that have attained eighteen years of age or that are attending institutions of postsecondary education.

of their records without their consent.”<sup>47</sup> FERPA conditions federal funds to an educational agency or institution on the agency or institution’s compliance with the provisions of FERPA and its implementing regulations.<sup>48</sup>

As relevant to this test claim, FERPA provides that an educational agency or institution may transfer the education record of a student, without the written consent of the student or student’s parents, to:

officials of other schools or school systems in which the student seeks or intends to enroll, *upon condition* that the student’s parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.<sup>49</sup> (Italics added.)

FERPA further provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--

[¶] ... [¶]

... such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.<sup>50</sup>

FERPA’s implementing regulations further explain that an educational agency may disclose personally identifiable information from an education record of a student if the disclosure is to comply with a judicial order or lawfully issued subpoena and “... only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance ... .”<sup>51</sup>

In regard to students eighteen years of age or attending an institution of postsecondary education FERPA provides:

... [W]henever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

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<sup>47</sup> *United States v. Miami University* (6<sup>th</sup> Cir. 2002) 294 F.3d 797, 806.

<sup>48</sup> Title 20 United States Code section 1232g; 34 Code of Federal Regulations part 99.1 (Nov. 15, 2007).

<sup>49</sup> Title 20 United States Code section 1232g (b)(1)(B).

<sup>50</sup> Title 20 United States Code section 1232g (b)(2)(B).

<sup>51</sup> 34 C.F.R. section 99.31, subdivision (a)(9).

Thus, any notification or right given to parents of pupils in K-12 schools under FERPA is also accorded to students in community college. In addition, FERPA provides that educational agencies or institutions must:

... effectively [inform] the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by [20 U.S.C. section 1232g].<sup>52</sup>

Therefore, under FERPA K-12 school districts and community college districts are required to perform the following activities:

1. Notify a student's parents or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of the transfer of the student's education records, provide a copy of the education records if desired by the parents, and give the parents an opportunity for a hearing to challenge the content of the record. (20 U.S.C. § 1232g (b)(1)(B).)
2. Notify a student's parents or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of a lawfully issued subpoena or court order seeking "personally identifiable information" in advance of compliance with the lawfully issued subpoena or court order. (20 U.S.C. § 1232g (b)(2)(B).)
3. Inform the parent of a student or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of the rights accorded them by FERPA (20 U.S.C. § 1232g). (20 U.S.C. § 1232g (e).)

These requirements are imposed directly upon "educational agencies and institutions" in receipt of any federal funds, including K-12 school districts and community college districts.<sup>53</sup>

However, because the requirements of FERPA and its implementing regulations are conditions for the receipt of federal funds, K-12 school districts and community college districts are not obligated to accept the conditions, and may choose to not receive federal funds and thus avoid the conditions imposed by FERPA. Thus, K-12 school districts and community college districts are not *legally* compelled to comply with the provisions of FERPA, and therefore, it is necessary to determine whether K-12 school districts and community college districts are *practically* compelled to comply with the provisions of FERPA.

The court in *Hayes v. Commission on State Mandates* discussed this type of "cooperative federalism" scheme employed by FERPA noting that:

[T]he vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than direct compulsion. ... However, "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense."<sup>54</sup>

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<sup>52</sup> Title 20 United States Code section 1232g (e).

<sup>53</sup> See *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1584.

<sup>54</sup> *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1581-1582, citing to *City of Sacramento, supra*, 50 Cal.3d at p. 73-74.

The court went on to say that “[t]he test for determining whether there is a federal mandate is whether compliance with federal standards ‘is a matter of true choice.’”<sup>55</sup> To make this determination the court set out various factors, including: (1) the nature and purpose of the federal program, (2) whether its design suggests an intent to coerce, and (3) when state and/or local participation began.<sup>56</sup>

Here, as noted above, the nature and purpose of FERPA is to “protect [parents’ and students’] rights to privacy by limiting the transferability of their records without their consent.”<sup>57</sup>

Congress’ high regard for the privacy rights of students was noted by the court in *United States v. Miami University* (6<sup>th</sup> Cir. 2002) 294 F.3d 797. Citing to 20 U.S.C. section 1232i, the court stated:

Because Congress holds student privacy interests in such high regard:

the refusal of a[n] ... educational agency or institution ... to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance.

In other words, Congress places the privacy interests of students and parents above the federal government’s interest in obtaining necessary data and records.<sup>58</sup>

With regard to whether the design of the federal program suggests an intent to coerce, as noted above, the receipt of all federal funds by K-12 school districts and community college districts is conditioned on compliance with the provisions of FERPA and its implementing regulations. Failure to comply with the provisions of FERPA and its implementing regulations would jeopardize funds which have been made available under programs administered by the Secretary of State. As noted by the court in *Hayes v. Commission on State Mandates*, federal funding to education is pervasive.<sup>59</sup> Failure to comply with the provisions of FERPA would result in a loss of all federal funding received by K-12 school districts and community college districts.

In addition, K-12 school districts and community college districts have complied with FERPA and received federal funds for a significant period of time. Education Code sections 49060 and 76200 set forth the legislative intent of Education Code sections 49060 – 49085 and 76200 - 76246. As enacted in 1976, Education Code section 49060 provided in relevant part:

It is the intent of the Legislature to resolve potential conflicts between California law and the provisions of Public Law 93-380 [FERPA] regarding parental access to, and the confidentiality of, pupil records in order to insure the *continuance of*

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *United States v. Miami University, supra*, 294 F.3d at p. 806.

<sup>58</sup> *Id* at 807.

<sup>59</sup> *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, 1584.

*federal education funds* to public educational institutions within the state ...<sup>60</sup>  
(Italics added.)

Education Code section 76200 substantively mirrors the language of Education Code section 49060 quoted above. The language of sections 49060 and 76200, as enacted in 1976, was made operative on April 30, 1977. Thus, receipt of federal funds by K-12 school districts and community college districts has been conditioned upon compliance with the provisions of FERPA since at least 1977. In addition, the language of section 49060 and 76200 indicates the reliance on federal funds conditioned on compliance with the provisions of FERPA for at least 30 years.

In sum, because of the purpose of FERPA to protect the privacy rights of parents and students and Congress' high regard for these rights, and the loss of all federal funds by K-12 school districts and community college districts, and the extent to which these funds are relied upon, the Commission finds that the following provisions of FERPA (20 U.S.C. § 1232g) and its implementing regulations (34 C.F.R. § 99.1 et seq.) constitute federal mandates on K-12 school districts and community college districts:

1. Notify a student's parents or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of the transfer of the student's education records, provide a copy of the education records if desired by the parents, and give the parents an opportunity for a hearing to challenge the content of the record. (20 U.S.C. § 1232g (b)(1)(B).)
2. Notify a student's parents or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of a lawfully issued subpoena or court order seeking "personally identifiable information" in advance of compliance with the lawfully issued subpoena or court order. (20 U.S.C. § 1232g (b)(2)(B).)
3. Inform the parent of a student or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of the rights accorded them by FERPA (20 U.S.C. § 1232g). (20 U.S.C. § 1232g (e).)

To the extent that these same activities are mandated by a test claim statute, they are not subject to article XIII B, section 6 of the California Constitution.<sup>61</sup>

Do the requirements of the test claim statutes exceed the federal mandates of FERPA?

Government Code section 17556, subdivision (c), provides that the Commission shall not find costs mandated by the state if the test claim statute imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. In addition, the court in *Hayes v. Commission on State Mandates* held that when the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."<sup>62</sup> Thus, it is necessary to

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<sup>60</sup> Education Code section 49060 (Stats. 1976, ch. 1010).

<sup>61</sup> *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1581.

<sup>62</sup> *Hayes, supra*, 11 Cal.App.4<sup>th</sup> at p. 1594.

determine whether the mandates of the test claim statutes exceed the federal mandates of FERPA.

Transfer of Education Records Between Schools (Ed. Code, §§ 49068 and 76225):

Education Code sections 49068 and 76225 address the transfer of a pupil's permanent record and a student's appropriate records between schools and institutions of higher education.

Section 49068 provides in relevant part:

Whenever a pupil transfers from one school district to another or to a private school, or transfers from a private school to a school district within the state, the pupil's permanent record or a copy thereof shall be transferred by the former district or private school upon a request from the district or private school where the pupil intends to enroll. Any school district requesting such a transfer of a record shall notify the parent of his right to receive a copy of the record and a right to a hearing to challenge the content of the record. . . .

The language of section 76225 substantively mirrors the language of Education Code section 49068 as made applicable to community college districts. Except that section 76225 provides that "appropriate records" shall be transferred upon a request from the student.

The plain language of Education Code sections 49068 and 76225 require K-12 school districts and community colleges to perform the following activities:

1. Transfer a pupil's permanent record, or a copy of the permanent record, to the K-12 school district or private school where the pupil intends to enroll upon the request of the K-12 school district or private school where a pupil intends to transfer. (Ed. Code, § 49068.)
2. Transfer appropriate records or a copy thereof to a community college or public or private institution of postsecondary education within California that a student intends to transfer to upon request from the student. (Ed. Code, § 76225.)
3. Notify a parent of his or her right to receive a copy of the pupil's permanent record and the right to a hearing to challenge the content of the pupil's permanent record when the K-12 school district requests the transfer of a pupil's permanent record from the pupil's former K-12 school district or private school. (Ed. Code, § 49068.)
4. Notify a student of his or her right to receive a copy of his/her appropriate record and his or her right to a hearing to challenge the content of the record when he or she transfers to another community college or public or private institution of postsecondary education and requests the transfer of the record. (Ed. Code, § 76225.)

As discussed above, the provisions of FERPA require K-12 school districts and community college districts to:

1. Notify a student's parents or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of the transfer of a student's education records, provide a copy of the education records if desired by the parents, and give the parents an opportunity for a hearing to challenge the content of the record. (20 U.S.C. § 1232g (b)(1)(B).)

2. Inform the parent of a student or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of the rights accorded them by FERPA (20 U.S.C. § 1232g). (20 U.S.C. § 1232g (e).)

As shown by the above requirements, FERPA (specifically 20 U.S.C. § 1232g (b)(1)(B) and (e)) requires the notification of parents/students of the transfer of a student's "education record" and the parents'/student's right to a copy of the "education record" or to contest the content of the "education record." While Education Code section 49068 requires notification of a parent upon the transfer of a pupil's "permanent record" and Education Code section 76225 requires the notification of a student upon the transfer of his/her "appropriate record." In order to determine whether the requirements of Education Code sections 49068 and 76225 exceed those of FERPA, it must be determined whether "permanent record" and "appropriate record" is greater in scope than "education record."

Title 20 United States Code section 1232g (a)(4) defines the term "education records" as used in FERPA. Section 1232g (a)(4) broadly defines "education records" as records, files, documents, and other materials which contain information directly related to a student, and are maintained by an educational agency or institution or by a person acting for such agency or institution. Section 1232g (a)(4) further provides that "education records" does not include:

- (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
- (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
- (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or
- (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

The scope of the terms "permanent record" and "appropriate records" are undefined in the governing statutes. In order to determine the meaning of these terms, it is necessary to read these terms in the context of the whole statutory scheme and not as individual parts or words standing

alone.<sup>63</sup> The Legislature, through the enactment of Education Code sections 49062 and 76220, place the authority to define what pupil and student records are to be established with the Board of Education and the Board of Governors.<sup>64</sup> In addition to defining "mandatory permanent pupil records," the Board of Education sets forth definitions for "mandatory interim pupil records," and "permitted pupil records."<sup>65</sup> The Board of Education's regulations then delineate what information each record shall include.<sup>66</sup>

The Board of Education's regulations provide that "mandatory permanent pupil records" include:

- (A) Legal name of pupil.
- (B) Date of birth.
- (C) Method of verification of birth date.
- (D) Sex of pupil.
- (E) Place of birth.
- (F) Name and address of parent of minor pupil.
  - 1. Address of minor pupil if different than the above.
  - 2. An annual verification of the name and address of the parent and the residence of the pupil.
- (G) Entering and leaving date of each school year and for any summer session or other extra session.
- (H) Subjects taken during each year, half-year, summer session, or quarter.
- (I) If marks or credit are given, the mark or number of credits toward graduation allows for work taken.
- (J) Verification of or exemption from required immunizations.
- (K) Date of high school graduation or equivalent.

All of the above examples of "permanent records" constitute "education records" as defined by FERPA, and do not fall within any of the exceptions to the definition of "education records" as set forth by FERPA. Thus, the Commission finds that "permanent record" as used in Education Code section 49062 does not exceed the scope of FERPA's definition of "education records."

The term "appropriate records," as used in Education Code section 76225, must be viewed in the context of the whole of Education Code section 76225, because the Board of Governors' regulations do not define "appropriate records." "Appropriate records" is used in section 76225 within the context of a student transferring from one community college or public or private

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<sup>63</sup> *Fontana Unified School Dist.*, *supra*, 45 Cal.3d at p. 218.

<sup>64</sup> Education Code sections 49062 and 76220 are further discussed below.

<sup>65</sup> California Code of Regulations, title 5, section 432, subdivision (b)(2)(B), Register 77, No. 39 (Sept. 23, 1977).

<sup>66</sup> *Ibid.*



institution of postsecondary education to another within the state. It follows that "appropriate records" is limited to those education records appropriate for the transfer of a student. Thus, the term "education records" as used in FERPA is inclusive of "appropriate records" as used in Education Code section 76225.

As a result, the Commission finds that the following activities required by Education Code sections 49068 and 76225 do not exceed the provisions of FERPA, and therefore, are not subject to article XIII B, section 6 of the California Constitution:

1. Notify a parent of his or her right to receive a copy of the pupil's permanent record and the right to a hearing to challenge the content of the pupil's permanent record when the K-12 school district requests the transfer of a pupil's permanent record from the pupil's former K-12 school district or private school. (Ed. Code, § 49068.)
2. Notify a student of his or her right to receive a copy of his/her appropriate record and his or her right to a hearing to challenge the content of the record when he or she transfers to another community college or public or private institution of postsecondary education and requests the transfer of the record. (Ed. Code, § 76225.)

However, the following activities required by Education Code sections 49068 and 76225 exceed the provisions of FERPA, and are therefore, subject to article XIII B, section 6 of the California Constitution:

1. Transfer a pupil's permanent record, or a copy of the permanent record, to the K-12 school district or private school where the pupil intends to enroll upon the request of the K-12 school district or private school where a pupil intends to transfer. (Ed. Code, § 49068.)
2. Transfer appropriate records or a copy thereof to a community college or public or private institution of postsecondary education within California that a student intends to transfer to upon request from the student. (Ed. Code, § 76225.)

In Riverside Unified School District's comments to the draft staff analysis, Riverside Unified School District argues:

The DSA ... concludes, the following activities required by Education Code section 49068 exceed the provisions of FERPA, and are therefore, subject to Article XIII B, section 6 of the California Constitution.

Transfer a pupil's permanent record or a copy of the permanent record to the K-12 district or private school where the pupil intends to enroll upon the request of the K-12 district or private school where a pupil intends to transfer.

The above activity is not included as one of the specific new activities in the conclusion of the DSA ... . It is well established in case law and previous Commission decisions, activities required by the Education Code are reimbursable state mandates when the activities exceed the requirements of federal law and meet the other requirements of a state reimbursable mandate.<sup>67</sup>

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<sup>67</sup> Riverside Unified School District Comments to Draft Staff Analysis, dated April 13, 2009, p. 1-2, (Exhibit I to Item 3, May 29, 2009 Commission Hearing).

The claimant is correct that the draft staff analysis found that section 49068 is *subject* to article XIII B, section 6 of the California Constitution, however, without restating the analysis below on pages 39-42, in order to constitute a reimbursable state-mandated activity it is not enough that the provisions of a test claim statute require activities beyond those required by federal law. Established case law requires that the provisions of the test claim statute constitute a new program or higher level of service in order to constitute a reimbursable state mandate under article XIII B, section 6 of the California Constitution.<sup>68</sup> As discussed in the analysis below on pages 39-42, the above activity does not constitute a “new program or higher level of service.” Therefore, the above activity does not “meet the other requirements of a state reimbursable mandate,” and as a result is not included as a new activity that constitutes a reimbursable state-mandated program in the conclusion of this analysis.

Provision of Student Information in Compliance with a Court Order or Subpoena (Ed. Code, §§ 49077 and 76244):

Education Code sections 49077 and 76244 address the provision of pupil/student information in compliance with a court order or subpoena. Specifically, section 49077 provides:

Information concerning a student shall be furnished in compliance with a court order or a lawfully issued subpoena. The school district shall make a reasonable effort to notify the parent or legal guardian and the pupil in advance of compliance with a lawfully issued subpoena and, in the case of compliance with a court order, if lawfully possible within the requirements of the order.

The language of section 76244 substantively mirrors the language of Education Code section 49077 as made applicable to community college districts. The plain language of Education Code sections 49077 and 76244 require K-12 school districts and community college districts to perform the following activities:

1. Furnish information concerning a pupil in compliance with a court order or lawfully issued subpoena. (Ed. Code, §§ 49077.)
2. Furnish information concerning a student in compliance with a court order or lawfully issued subpoena. (Ed. Code, §§ 76244.)
3. Make reasonable effort to notify the parent or legal guardian and the pupil of the lawfully issued subpoena or court order, if lawfully possible within the requirements of the court order, in advance of compliance with a lawfully issued subpoena or court order. (Ed. Code, § 49077.)
4. Make reasonable effort to notify the student of the lawfully issued subpoena or court order, if lawfully possible within the requirements of the court order, in advance of compliance with a lawfully issued subpoena or court order. (Ed. Code, § 76244.)

The claimants note that the test claim does not allege furnishing information in compliance with a court order or lawfully issued subpoena.<sup>69</sup> However, as shown by the plain language of

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<sup>68</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

<sup>69</sup> Claimants’ response to Chancellor’s Office Comments on 02-TC-34, *supra*, p. 14, (Exhibit F to Item 3, May 29, 2009 Commission Hearing).

sections 49077 and 76244, K-12 school districts and community college districts are required to perform the above listed activities.

As discussed above, the provisions of FERPA require K-12 school districts and community college districts to:

Notify a student's parents or the student, if he/she is eighteen years of age or older or is attending an institution of postsecondary education, of a lawfully issued subpoena or court order seeking "personally identifiable information" in advance of compliance with the lawfully issued subpoena or court order. (20 U.S.C. § 1232g (b)(2)(B).)

However, when comparing FERPA with the requirement of Education Code section 49077 and 76244, FERPA requires the notification of parents/students of a lawfully issued subpoena or court order seeking "*personally identifiable information*" in advance of compliance, while Education Code section 49077 and 76244 require notification of parents/students of a lawfully issued subpoena or court order seeking "*information concerning [the] student.*" In order to determine whether the requirements of Education Code sections 49077 and 76244 exceed those of FERPA (specifically 20 U.S.C. § 1232g (b)(2)(B)), it must be determined whether "information concerning a student" (as provided by Ed. Code, §§ 49077 and 76244) equates to "personally identifiable information" (as provided by FERPA). To make this determination it is necessary to read Education Code sections 49077 and 76244 in light of the statutory scheme as a whole.

Education Code section 49077 was adopted as part of article 5 of Chapter 6.5 of part 27 of division 4 of title 2 of the Education Code which addresses the privacy of pupil records. Similarly, Education Code section 76244 was adopted as part of article 1 of Chapter 1.5 of part 47 of division 7 of title 3 of the Education Code which addresses the privacy of student records. Education Code sections 49061 and 76210, which set forth the definitions of their respective chapters, provide, in relevant part, that "pupil/student record" means any item of information directly related to an identifiable pupil/student . . . ." Read in the context of the statutory scheme as a whole, "information concerning a student," as referenced in Education Code sections 49077 and 76244, refers to information from a pupil/student record which consists of information directly related to an identifiable pupil/student. Based on the context of the statutory scheme as a whole, both FERPA and Education Code sections 49077 and 76244 require K-12 school districts and community college districts to notify a parent/student of a lawfully issued subpoena or court order seeking information of an identifiable pupil/student. Thus, the following activities required by Education Code sections 49077 and 76244 do not exceed the provisions of FERPA.

The Commission finds that the following activities required by Education Code sections 49077 and 76244 constitute federal mandates, and therefore, are not subject to article XIII B, section 6 of the California Constitution:

1. Make reasonable effort to notify the parent or legal guardian and the pupil of the lawfully issued subpoena or court order, if lawfully possible within the requirements of the court order, in advance of compliance with a lawfully issued subpoena or court order. (Ed. Code, § 49077.)

2. Make reasonable effort to notify the student of the lawfully issued subpoena or court order, if lawfully possible within the requirements of the court order, in advance of compliance with a lawfully issued subpoena or court order. (Ed. Code, § 76244.)

However, the following activities required by Education Code sections 49077 and 76244 do exceed the provisions of FERPA:

1. Furnish information concerning a pupil in compliance with a court order or lawfully issued subpoena. (Ed. Code, §§ 49077.)
2. Furnish information concerning a student in compliance with a court order or lawfully issued subpoena. (Ed. Code, §§ 76244.)

These activities may be subject to article XIII B, section 6 of the California Constitution if they are not considered mandates of the court. This issue is analyzed immediately below.

**B. Do the provisions of Education Code sections 49077 and 76244 constitute a court mandate?**

Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any “[a]ppropriations required for purposes of complying with mandates of the courts or the federal government which, without discretion,<sup>[70]</sup> require an expenditure for additional services or which unavoidably make the providing of existing services more costly.” [Emphasis added.] Article XIII B places spending limits on both the state and local governments. Costs mandated by the courts are expressly excluded from these ceilings.<sup>71</sup> Since court mandates are excluded from the constitutional spending limit, reimbursement under article XIII B, section 6 is not required for costs incurred to comply with a court mandate.

Education Code sections 49077 and 76244 require K-12 school districts and community college districts to:

Furnish information concerning a pupil/student in compliance with a court order or lawfully issued subpoena. (Ed. Code, §§ 49077 and 76244.)

As shown by the language of sections 49077 and 76244, furnishing information concerning a pupil/student is triggered by either: (1) a court order, or (2) a subpoena.

The required activity of furnishing information concerning a pupil/student when triggered by a court order leaves K-12 school districts and community college districts without discretion to depart from the activity. Since the activity is required to comply with a court-ordered mandate, furnishing information concerning a pupil/student in compliance with a court order is not subject

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<sup>70</sup> In *City of Sacramento v. State of California*, *supra*, 50 Cal. 3d 51, which interpreted section XIII B, section 9, the court held that “without discretion” as used in section 9 (b) is not the same as legal compulsion. Rather it means that the alternatives are so far beyond the realm of practical reality that they leave the state without discretion to depart from the federal standards. Thus, the court held that the state enacted the test claim statute in response to a federal mandate for purposes of article XIII B, so the state statute was not reimbursable. (*Id.* at p. 74). Although the context in *City of Sacramento* was federal mandates analyzed under article XIII B, section 9, subdivision (b), the analysis is instructive in this case.

<sup>71</sup> *Id.* at page 57.

to article XIII B, section 6 because it falls within the exclusion of article XIII B, section 9, subdivision (b). As a result, the Commission finds that furnishing information concerning a pupil/student in compliance with a court order constitutes a court mandate, and therefore, is not subject to article XIII B, section 6 of the California Constitution.

Subpoenas are writs or orders directed to a person that require the person's attendance at a particular time and place to testify as a witness, and/or require a witness to produce any documents or things under the witness' control which the witness is bound by law to produce in evidence.<sup>72</sup> Failure to comply with a lawfully issued subpoena may be punished as a contempt of court and a forfeiture of \$500 and all damages sustained by the aggrieved party resulting from the person's failure to comply.<sup>73</sup> For these reasons, K-12 school districts and community college districts are left without discretion to comply with a lawfully issued subpoena. As distinguished from a court order, however, subpoenas may be lawfully issued by various entities and individuals, including the courts.<sup>74</sup> To the extent that K-12 school districts or community colleges are required to furnish information concerning a pupil/student in compliance with a lawfully issued subpoena *issued by a court*, this required activity also constitutes a court-mandate, and is not subject to article XIII B, section 6 of the California Constitution.

To the extent that K-12 school districts or community colleges are required to furnish information concerning pupils/students in compliance with lawfully issued subpoenas issued by non-court entities, such as administrative agencies, this required activity does not fall within the court-mandate exclusion and is therefore subject to article XIII B, section 6 of the California Constitution. As a result, the Commission finds that the following activity is required by Education Code sections 49077 and 76244 does not constitute court mandates, and therefore, is subject to article XIII B, section 6 of the California Constitution:

Furnish information concerning a pupil/student in compliance with a lawfully issued subpoena issued by a non-court entity, such as administrative agencies.  
(Ed. Code, §§ 49077 and 76244.)

**Issue 2: Do the test claim statutes mandate new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution?**

The following discussion will analyze whether the test claim statutes, including the non-federal/court mandate portions of Education Code sections 49068, 49077, 76225, and 76244, mandate new programs or higher levels of service on K-12 school districts and community college districts.

Education Code sections 49062, 49065, 49067, 49068, 49069.3, 49069.5, 49076.5, 49077, 49078, 76220, 76223, 76225, 76234, 76244, 76245, and 76246 are all part of two larger statutory schemes (Education Code sections 49060 – 49085, and 76200 – 76246) governing K-12 school district and community college district management of pupil and student records. Because the

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<sup>72</sup> Code of Civil Procedure section 1985.

<sup>73</sup> Code of Civil Procedure sections 1991 and 1992.

<sup>74</sup> Courts, attorneys of record, administrative agencies, and grand juries. See Code of Civil Procedure section 1985, Government Code section 11181, and Penal Code section 939.2.

statutory scheme governing K-12 school districts (Education Code sections 49060 – 49085) address many of the same issues as the scheme governing community college districts (Education Code sections 76200 – 76246), many of the code sections substantively mirror each other. For ease of discussion, the test claim statutes that substantively mirror each other will be discussed together.

Establishment, Maintenance, and Destruction of Records (Ed. Code, §§ 49062 and 76220):

*Do Education Code sections 49062 and 76220 mandate any activities?*

Education Code sections 49062 and 76220 address the establishment, maintenance, and destruction of pupil records by K-12 school districts and student records by community college districts. Section 49062 provides:

School districts shall establish, maintain, and destroy pupil records according to regulations adopted by the State Board of Education. Pupil records shall include a pupil's health record. Such regulations shall establish state policy as to what items of information shall be placed into pupil records and what information is appropriate to be compiled by individual school officers or employees under the exception to pupil records provided in subdivision (b) of Section 49061. No pupil records shall be destroyed except pursuant to such regulations or as provided in subdivisions (b) and (c) of Section 49070.

The language of Education Code section 76220 substantively mirrors the language of Education Code section 49062 as made applicable to community college districts and community college students, except for the absence of the language, "Pupil records shall include a pupil's health record."

Pursuant to the plain language of sections 49062 and 76220, the establishment, maintenance, and destruction of pupil/student records must be done according to regulations adopted by the State Board of Education and the Board of Governors. Additionally, in regard to K-12 school districts pupil records are required to include a pupil's health record. Thus, sections 49062 and 76220 require K-12 school districts and community college districts act in accordance with the regulations adopted by the State Board of Education and the Board of Governors when establishing, maintaining, and destroying pupil/student records.

The claimants appear to assert that an emphasis should be placed on the "shall establish, maintain and destroy student records" portion of sections 49062 and 76220, and thus, the activities required by sections 49062 and 76220 are to establish, maintain, and destroy student records.<sup>75</sup> This interpretation of Education Code sections 49062 and 76220 would render the language "according to regulations adopted by the State Board of Education [or Board of Governors]" mere surplusage contrary to the rules of statutory construction.<sup>76</sup> Therefore, Education Code section 49062 and 76220 require K-12 school districts and community college

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<sup>75</sup> Claimants' response to Chancellor's Office Comments on 02-TC-34, dated April 23, 2004, p. 8, (Exhibit F to Item 3, May 29, 2009 Commission Hearing).

<sup>76</sup> *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 218.

districts to perform the following activities:

1. Establish, maintain, and destroy pupil records according to regulations adopted by the State Board of Education. (Ed. Code, § 49062.)
2. Include a K-12 pupil's health record in pupil records. (Ed. Code, § 49062.)
3. Establish, maintain, and destroy student records according to regulations adopted by the Board of Governors. (Ed. Code, § 76220.)

The California Supreme Court held in *Kern High School Dist.* that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.<sup>77</sup>

As relevant to this discussion, Education Code section 49062 and 76220 require that K-12 school districts and community college districts destroy pupil/student records according to regulations adopted by the State Board of Education and the Board of Governors, respectively. The regulations adopted by the State Board of Education referenced in Education Code section 49062 are set forth in California Code of Regulations, title 5, sections 430-438 and 16020-16028. Title 5, sections 430 and 432 set forth three types of pupil records: (1) mandatory permanent pupil records; (2) mandatory interim pupil records; and (3) permitted pupil records.<sup>78</sup> Title 5, section 437 provides that "mandatory permanent pupil records" shall be preserved in perpetuity by all California schools, "mandatory interim pupil records" may be adjudged to be disposable when the student leaves the district or when their usefulness ceases, and "permitted pupil records" may be destroyed when their usefulness ceases. As indicated by the State Board of Education's regulations, permanent pupil records are not subject to destruction by a K-12 school district. Rather, the State Board of Education's regulations *prohibit* the destruction permanent pupil records, and therefore, are not required to be destroyed pursuant to Education Code section 49062. In addition, the destruction of interim and permitted pupil records by K-12 school districts is within the discretion of the districts but is not mandated by the state. Decisions made by a K-12 school district, rather than the state, to incur the costs of a statutory requirement do not constitute state-mandated activities.<sup>79</sup> Thus, the requirement of Education Code section 49062 to destroy pupil records according to regulations adopted by the State Board of Education does not constitute a state-mandated activity.

The regulations adopted by the Board of Governors referenced in Education Code section 76220 regarding the destruction of student records are set forth in California Code of Regulations, title 5, sections 59020 – 59033. Title 5, sections 59022 – 59025 set forth a procedure in which the governing board of a district classifies records as "Class-1 Permanent," "Class 2-Optional," or "Class 3-Disposable." These sections provide that specific records, including student records regarding enrollment and scholarship for each student are to be classified as "Class 1-Permanent" records. Districts may classify records "Class 2-Optional" if they are worthy of further preservation but not classified as "Class 1-Permanent." The remaining records that a

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<sup>77</sup> *Kern High School Dist.*, *supra*, 30 Cal 4<sup>th</sup> at p. 743.

<sup>78</sup> California Code of Regulations, title 5, sections 430 and 432, Register 77, No. 39, (Sept. 23, 1977).

<sup>79</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal. 4<sup>th</sup> at p. 880.

district does not classify as "Class 1-Permanent" or "Class 2-Optional" are to be classified as "Class 3 – Disposable." Only records classified by the district as "Class 3 Disposable" records may be destroyed.

Title 5, section 59026 provides in relevant part that "Generally, a Class 3-Disposable record, unless otherwise specified in this subchapter, *should* be destroyed during the third college year after the college year in which it originated . . ." Title 5, sections 59027 – 59033 set forth the procedures for destruction of records. These sections provide that after a district's chief administrative officer has classified records "Class 3-Disposable" and submitted this list of records recommended to be destroyed, a district governing board must then approve or disapprove the recommendation. Title 5, section 59029 then provides in relevant part, "*Upon the order of the governing board* that specified records shall be destroyed, such records shall be permanently destroyed . . ." Thus, in order for a student record to be destroyed, a community college district must: (1) classify a record to be destroyed, and (2) the governing board of the district must approve and order those records to be destroyed. Like K-12 school districts, the decision to destroy student records is within a community college district's discretion. Therefore, the requirement of Education Code section 76220 to destroy student records according to regulations adopted by the Board of governors does not constitute a state-mandated activity.

The Commission finds that the requirement of Education Code sections 49062 and 76220 to destroy pupil/student records according to regulations adopted by the State Board of Education/Board of Governors does not constitute a state-mandated activity. However, the Commission finds that Education Code sections 49062 and 76220 impose the following state-mandated activities on K-12 school districts and community college districts:

1. Establish and maintain pupil records according to regulations adopted by the State Board of Education. (Ed. Code, § 49062.)
2. Include a pupil's health record in pupil records. (Ed. Code, § 49062.)
3. Establish and maintain student records according to regulations adopted by the Board of Governors. (Ed. Code, § 76220.)

*Do the activities mandated by Education Code sections 49062 and 76220 constitute new programs or higher levels of service for K-12 school districts and community college districts?*

In order for state-mandated activities to constitute new programs or higher levels of service, the activities must be new in comparison with the pre-existing scheme.<sup>80</sup> Here, the claimants have pled Education Code section 49062, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 10933, and renumbered to current Education Code section 49062 by Statutes 1976, chapter 1010. Similarly, the claimants have pled Education Code section 76220, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 25430.2, and renumbered to current Education Code section 76220 by Statutes 1976, chapter 1010.

Section 49062 (formerly section 10933) as added in 1975, mandates that K-12 school districts establish and maintain pupil records in accordance with regulations adopted by the State Board

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<sup>80</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.



of Education. In 1980, section 49062 was amended to include the following state-mandated activity, "Include a pupil's health record in pupil records."<sup>81</sup>

In addition, as pled by the claimants, section 76220 mandates community college districts to establish and maintain student records according to regulations adopted by the Board of Governors.

However, in 1963 former Education Code section 1031 provided in relevant part:

The governing board of every school districts shall:

[¶] ... [¶]

Make or maintain such other records or reports as are required by law.<sup>82</sup>

Also, title 5 of the California Code of Regulations section 432, as amended in 1977, provides in relevant part:

"Mandatory Interim Pupil Records" are those records which schools are required to compile and maintain for stipulated periods of time and are then destroyed as per California statute or regulation. Such records include:

[¶] ... [¶]

Health information ... .<sup>83</sup>

The requirements of former Education Code sections 1031 was made applicable to community college districts by former Education Code section 25422.5 which provided:

Except as otherwise provided in this code, the powers and duties of community colleges are such as are assigned to high school boards.<sup>84</sup>

Former Education Code section 1031 and 25422.5 were in existence in 1974<sup>85</sup> and were not repealed until the renumbering of the Education Code by Statutes 1976, chapter 1010.<sup>86</sup> As

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<sup>81</sup> Statutes 1980, chapter 1347.

<sup>82</sup> Former Education Code section 1031, subdivision (d) (Stats. 1963, ch. 629).

<sup>83</sup> California Code of Regulations, title 5, section 432, subdivision (b)(2)(B), Register 77, No. 39 (Sept. 23, 1977).

<sup>84</sup> Former Education Code section 25422.5 (Stats. 1970, ch. 102).

<sup>85</sup> "Education Code 1973 – Sections 1-12851" and "Education Code 1973 – Sections 20101-45065." The "Foreword" of these attachments note that these editions of the Education Code show "all sections as they are in effect on and after January 1, 1974," (Exhibit H to Item 3, May 29, 2009 Commission Hearing, p. 479).

<sup>86</sup> "California State Assembly and Senate Final History – 1973-74 Session" and "California State Assembly and Senate Final History – 1975-76 Session." These documents published by the Legislative Counsel provide an index of each section of the California Constitution, codes and uncodified laws affected by measures introduced during legislative sessions. Both attachments indicate no repeal of former Education Code sections 1031, 1034, and 25422.5 between 1973-1975. Pursuant to Evidence Code section 664 "It is presumed that official duty has been regularly performed," (Exhibit H to Item 3, May 29, 2009 Commission Hearing, p. 647-651).

shown by the language of former Education Code section 1031, K-12 school districts and community college districts were required to establish and maintain records as required by law since 1963. "Law" is inclusive of regulations adopted by the State Board of Education and the Board of Governors, as administrative regulations "have the dignity of statutes."<sup>87</sup> In addition, prior to 1980 K-12 school districts were required to include a pupil's health record in pupil records. As a result, the activities mandated by Education Code sections 49062 and 76220 are not new as compared to the pre-existing scheme, and therefore do not constitute new programs or higher levels of service. The claimants have not pled California Code of Regulations, title 5, section 432, and as a result, the Commission makes no findings regarding California Code of Regulations, title 5, section 432 as amended in 1977.

In Riverside Unified School District's comments to the draft staff analysis dated April 13, 2009, the claimant argues:

Staff concluded the following activities were imposed by the Education Code:

1. Establish and maintain pupil records according to regulations adopted by the State Board of Education.
2. Include a pupil's health record in pupil's records.

Staff's recommendation to deny reimbursement for the above activities is incorrect as it pertains to the first activity. The basis of denial on the premise of a "pre-existing scheme" is speculative and lacks clarity. Unlike activity two that existed prior to the code sections included in the test claim, activity one should be reimbursable including the activity of destroying records.<sup>88</sup>

To clarify the analysis immediately above, the activity of establishing and maintaining pupil records according to regulations adopted by the State Board of Education does not equate to "establishing and maintaining pupil records." As discussed on page 30 of this analysis, the language, "according to regulations adopted by the State Board of Education," cannot be rendered mere surplusage. Read as a whole, the language of section 49062 requires K-12 school districts to act in accordance with the State Board of Education's regulations. Accordingly, if the State Board of Education's regulations do not require K-12 school districts to act, as in the case of the destruction of records (see page 31-32 of this analysis), then K-12 school districts are not required to engage in that act. As discussed in the analysis immediately above, the requirement to establish and maintain records as are required by law, which includes the State Board of Education's regulations, existed since at least 1963. Thus, the activities mandated by Education Code section 49062 do not constitute a "new program or higher level of service."

In addition, even if section 49062, as added in 1975, were interpreted to specifically require "establishing and maintaining pupil records," former California Code of Regulations, title 5, sections 430-432, as adopted on September 23, 1969 (Register 69, no. 39) already required those activities. Former California Code of Regulations, title 5, section 430 required the principal of each school to "keep on file a record of enrollment and scholarship for each pupil currently

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<sup>87</sup> *Young v. Gannon* (2002) 97 Cal.App.4<sup>th</sup> 209, 221.

<sup>88</sup> Riverside Unified School District Comments to Draft Staff Analysis, *supra*, p. 1, (Exhibit I to Item 3, May 29, 2009 Commission Hearing).

enrolled in his school.”<sup>89</sup> The former regulation sections also required the records to include specific information, and to be retained.<sup>90</sup> Thus, the activities mandated by section 49062 were required prior to 1975, and as a result, do not constitute a new program or higher level of service.

The Commission finds that Education Code sections 49062 and 76220 do not mandate new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution.

Fee for Copies of Pupil or Student Records (Ed. Code, §§ 49065 and 76223):

*Do Education Code sections 49065 and 76223 mandate any activities?*

The claimants assert that sections 49065 and 76223 require K-12 school districts and community college districts to furnish up to two transcripts of former pupils/students’ records or up to two verifications of various records of former pupils/students, and to search and retrieve pupil/student records when transcripts or verifications are requested.<sup>91</sup>

The plain language of sections 49065 or 76223, however, does not require K-12 school districts or community college districts to engage in any activities, including those identified by the claimants. Rather, sections 49065 and 76223 provide K-12 school districts and community college districts the authority to charge for copies of any pupil/student record and places limits on this authority. Specifically, section 49065 provides:

Any school district *may* make a reasonable charge in an amount not to exceed the actual cost of furnishing copies of any pupil record; provided, however, that no charge shall be made for furnishing (1) up to two transcripts of former pupils’ records or (2) up to two verifications of various records of former pupils. No charge may be made to search for or to retrieve any pupil records. (Emphasis added.)

Thus, section 49065 provides K-12 school districts with fee authority by providing that a “school district may make a reasonable charge . . . .” The remaining portion of section 49065 acts to limit this fee authority by providing, “however, no charge shall be made for . . . .” The language of section 76223 substantively mirrors the language of Education Code section 49065 as made applicable to community college districts, except that the limitations to the fee authority for copies of student records applies to “students” rather than “former pupils.” “Pupil record” as used in section 49065 is defined by Education Code section 49061 as:

[A]ny item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.

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<sup>89</sup> Register 70, number 9 (Feb. 28, 1970), see note regarding adoption of Chapter by Register 69, number 30 (Sept. 23, 1969.)

<sup>90</sup> Former California Code of Regulations, title 5, sections 431 and 432.

<sup>91</sup> Test claim 02-TC-34, p. 27, (Exhibit A to Item 3, May 29, 2009 Commission Hearing).

Education Code section 49061 limits the scope of "pupil record" by providing that:

"Pupil record" does not include informal notes related to a pupil compiled by a school officer or employee which remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute.

"Directory information" means one or more of the following items: pupil's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous public or private school attended by the pupil.

"Student record" as used in section 76223 is defined by Education Code section 76210. Section 76210 defines "student record" in a similar manner as "pupil record," however, section 76210 limits the scope of "student record" by providing that:

"Student record" does not include (A) confidential letters and statements of recommendations maintained by a community college on or before January 1, 1975, if these letters or statements are not used for purposes other than those for which they were specifically intended, (B) information provided by a student's parents relating to applications for financial aid or scholarships, or (C) information related to a student compiled by a community college officer or employee that remains in the sole possession of the maker and is not accessible or revealed to any other person except a substitute. For purposes of this paragraph, "substitute" means a person who performs, on a temporary basis, the duties of the individual who made the notes and does not refer to a person who permanently succeeds the maker of the notes in his or her position.

"Student record" also does not include information related to a student created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity, and that is created, maintained, or used only in connection with the provision of treatment to the student and is not available to anyone other than persons providing that treatment. However, that record may be personally reviewed by a physician or other appropriate professional of the student's choice.

"Student record" does not include information maintained by a community college law enforcement unit, if the personnel of the unit do not have access to student records pursuant to Section 76243, the information maintained by the unit is kept apart from information maintained pursuant to subdivision (a), the information is maintained solely for law enforcement purposes, and the information is not made available to persons other than law enforcement officials of the same jurisdiction. "Student record" does not include information maintained in the normal course of business pertaining to persons who are employed by a community college, if the information relates exclusively to the person in that person's capacity as an employee and is not available for use for any other purpose.

“Directory information” means one or more of the following items: a student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous public or private school attended by the student, and any other information authorized in writing by the student.

As a result, Education Code section 49065 authorizes K-12 school districts to charge a fee not to exceed the actual cost of furnishing copies of *any* pupil record as defined by section 49061. This fee authority does not extend to the first two transcripts of *former* pupils' records or the first two verifications of various records of *former* pupils, or the cost to search for or retrieve the pupil records. Similarly, Education Code section 76223 provides fee authority to community college districts for the actual cost of furnishing copies of *any* student records as defined by section 76210. The fee authority provided by section 76223 does not extend to the first two transcripts of *students'* records or the first two verifications of various records of *students*, or the cost to search for or retrieve the student records. Unlike section 49065, the fee authority provided by section 76223 does not extend to the first two transcripts or various records of both *current* and *former* students.

Thus, pursuant to the plain language of the test claim statutes, the Commission finds that Education Code sections 49065 and 76223 do not mandate new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution.

Evaluation of K-12 School District Pupil Achievement (Ed. Code, §§ 49067):

*Does Education Code section 49067 mandate any activities?*

Education Code section 49067 addresses the evaluation of K-12 school districts' pupils' achievement. Section 49067 provides in relevant part:

- (a) The governing board of each school district shall prescribe regulations requiring the evaluation of each pupil's achievement for each marking period and requiring a conference with, or a written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course. The refusal of the parent to attend the conference, or to respond to the written report, shall not preclude failing the pupil at the end of the grace period.
- (b) The governing board of any school district *may* adopt regulations authorizing a teacher to assign a failing grade to any pupil whose absences from the teacher's class that are not excused [citation] equal or exceed the maximum number which shall be specified by the board. [¶] ... [¶]. (Emphasis added.)

The remaining portion of subdivision (b) sets forth required content of a K-12 school district's regulations if the governing board of that district *decides* to adopt regulations allowing teachers to assign failing grades due to excessive unexcused absences. Subdivision (c) of section 49067 provides that section 49067 applies to the parent or guardian of any pupil regardless of the pupil's age.

The Commission finds that Education Code section 49067 imposes the following state-mandated activity on K-12 school districts:

Prescribe regulations requiring the evaluation of each pupil's achievement for each marking period and requiring a conference with, or a written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course. (Ed. Code, § 49067, subd. (a).)

*Does the activity mandated by Education Code section 49067 constitute a new program or higher level of service for K-12 school districts?*

The claimants have pled Education Code section 49067, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 10938, and renumbered to current Education Code section 49067 by Statutes 1976, chapter 1010. As pled by the claimants, section 49067 imposes the following state-mandated activity:

Prescribe regulations requiring the evaluation of each pupil's achievement for each marking period and requiring a conference with, or a written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course. (Ed. Code, § 49067, subd. (a).)

However, in 1973 former Education Code section 10759 provided in relevant part:

The governing board of each school district shall prescribe regulations requiring the evaluation of each pupil's achievement for each marking period and requiring a conference with, or a written report to, the parent or guardian of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course.<sup>92</sup>

Former Education Code section 10759 was repealed and renumbered to former Education Code section 10938 in 1975 by Statutes 1975, chapter 816. Thus, as shown by the language of former Education Code section 10759, K-12 school districts were already required to prescribe regulations requiring the evaluation of each pupil's achievement for each marking period and requiring a conference with, or a written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course since 1973. Thus, the state-mandated activity imposed by Education Code section 49067, subdivision (a) does not constitute a new program or higher level of service. The Commission finds that Education Code section 49067 does not mandate new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution.

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<sup>92</sup> Former Education Code section 10759 (Stats. 1973, ch. 381), repealed and renumbered to Former Education Code section 10938 by Statutes 1975, chapter 816, repealed and renumbered to Education Code section 49067 by Statutes 1976, chapter 1010.

Transfer of Education Records Between Schools (Ed. Code, §§ 49068 and 76225):

*Do Education Code sections 49068 and 76225 mandate any activities?*

As noted above in the federal mandates discussion, Education Code sections 49068 and 76225 address the transfer of a pupil's permanent record and a student's appropriate records between schools and institutions of higher education. Because some of the activities required by Education Code sections 49068 and 76225 have already been determined to constitute federal mandates, the following discussion will focus on the portions of Education Code sections 49068 and 76225 that exceed federal law. Education Code section 49068 provides in relevant part:

Whenever a pupil transfers from one school district to another or to a private school, or transfers from a private school to a school district within the state, the pupil's permanent record or a copy thereof shall be transferred by the former district or private school upon a request from the district or private school where the pupil intends to enroll. . . .

The language of section 76225 substantively mirrors the language of Education Code section 49068 as made applicable to community college districts, except that section 76225 provides that "appropriate records" shall be transferred upon a request from the student.

The plain language of Education Code sections 49068 and 76225 mandate K-12 school districts and community colleges to perform the following activities:

1. Transfer a pupil's permanent record, or a copy of the permanent record, to the K-12 school district or private school where the pupil intends to enroll upon the request of the K-12 school district or private school where a pupil intends to transfer. (Ed. Code, § 49068.)
2. Transfer appropriate records or a copy thereof to a community college or public or private institution of postsecondary education within California that a student intends to transfer to upon request from the student. (Ed. Code, § 76225.)

*Do the activities mandated by Education Code sections 49068 and 76225 constitute new programs or higher levels of service?*

The claimants have pled Education Code section 49068, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 10939, and renumbered to current Education Code section 49068 by Statutes 1976, chapter 1010. Similarly, the claimants have pled Education Code section 76224, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 25430.7, and renumbered to current Education Code section 76225 by Statutes 1976, chapter 1010. As pled by the claimants, section 49068 imposes the following state-mandated activity:

Transfer a pupil's permanent record, or a copy of the permanent record, to the K-12 school district or private school where the pupil intends to enroll upon the request of the K-12 school district or private school where a pupil intends to transfer. (Ed. Code, § 49068.)

In addition as pled by the claimants, section 76225 imposes the following state-mandated activity:

Transfer appropriate records or a copy thereof to a community college or public or private institution of postsecondary education within California that a student intends to transfer to upon request from the student. (Ed. Code, § 76225.)

However, in 1959 former Education Code section 10752 provided in relevant part:

Whenever a pupil transfers from one school district to another within this State, the cumulative record of the pupil, which may be available to the pupil's parent for inspection during consultation with a certificated employee of the district, or a copy of the record, shall be transferred to the district to which the pupil transfers; provided, a request for such cumulative record is received from the district to which the transfer is made.<sup>93</sup>

The requirements of former Education Code section 10752 was made applicable to community college districts by former Education Code section 25422.5 which provided:

Except as otherwise provided in this code, the powers and duties of community colleges are such as are assigned to high school boards.<sup>94</sup>

Former Education Code section 10752 was repealed and renumbered to former Education Code section 10939 in 1975 by Statutes 1975, chapter 816. In addition, as noted above, former Education Code section 25422.5 was in existence in 1974<sup>95</sup> and was not repealed until the renumbering of the Education Code by Statutes 1976, chapter 1010.<sup>96</sup> As shown by the above language, prior to 1975, K-12 school districts and community college districts were required to transfer a pupil/student's "cumulative record." Currently, K-12 school districts are required to transfer a pupil's "permanent record," and community colleges districts are required to transfer "appropriate records." The scope of the term "cumulative record" was undefined in the pre-1975 governing statutes. Similarly, the scope of the terms "permanent record," and "appropriate

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<sup>93</sup> Former Education Code section 10752 (Statutes 1959, ch. 1989), repealed and renumbered to former Education Code section 10939 by Statutes 1975, chapter 816, repealed and renumbered to Education Code section 49068 by Statutes 1976, chapter 1010.

<sup>94</sup> Statutes 1970, chapter 102.

<sup>95</sup> See attachments "Education Code 1973 – Sections 1-12851" and "Education Code 1973 – Sections 20101-45065." The "Foreword" of these attachments note that these editions of the Education Code show "all sections as they are in effect on and after January 1, 1974."

<sup>96</sup> See attachments "California State Assembly and Senate Final History – 1973-74 Session" and "California State Assembly and Senate Final History – 1975-76 Session." These documents published by the Legislative Counsel provide an index of each section of the California Constitution, codes and uncodified laws affected by measures introduced during legislative sessions. Both attachments indicate no repeal of former Education Code sections 1031, 1034, and 25422.5 between 1973-1975. Pursuant to Evidence Code section 664 "It is presumed that official duty has been regularly performed."



records” are undefined in the governing statutes. As a result, an ambiguity arises to what K-12 school districts and community college districts were required to transfer pre-1975 and what K-12 school districts and community college districts are required to transfer now. Thus, it is necessary to determine what “permanent record,” “appropriate records,” and “cumulative record” mean.

In order to determine the meaning of “permanent record” and “appropriate records” it is necessary to read these terms in the context of the whole statutory scheme and not as individual parts or words standing alone.<sup>97</sup>

As quoted above, Education Code sections 49062 and 76220 provide that pupil/student records are to be established, maintained, and destroyed according to regulations adopted by the State Board of Education and the Board of Governors. As a result, the Legislature has placed the authority to define what pupil and student records are to be established in the hands of the Board of Education and the Board of Governors.

The regulations of the Board of Education define “mandatory permanent pupil records” as “those records which are maintained in perpetuity and which schools have been directed to compile by California statute, regulation, or authorized administrative directive.”<sup>98</sup> In addition to defining “mandatory permanent pupil records,” the Board of Education sets forth definitions for “mandatory interim pupil records,” and “permitted pupil records.”<sup>99</sup> The Board of Education’s regulations then delineates what information each record shall include.<sup>100</sup> Therefore, “permanent record” is a subset of a larger group of records.

The regulations of the Board of Governors do not define “appropriate records.” In order to define “appropriate records” it is necessary to view the term “appropriate records” in the context of the whole of Education Code section 76225. “Appropriate records” is used in section 76225 within the context of a student transferring from one community college or public or private institution of postsecondary education to another within the state. It follows that “appropriate records” is limited to those appropriate for the transfer of a student.

As noted above, the pre-1975 governing statutes did not define the scope of “cumulative record” as used in former Education Code section 10752. To determine the scope of “cumulative record” it is necessary to look at the plain language of the term. The American Heritage Dictionary defines “cumulative” as, “Acquired by or resulting from accumulation.”<sup>101</sup> Thus, the plain language of former Education Code section 10752 required K-12 school districts and community college districts to transfer the accumulated records of a pupil/student. Therefore, the scope of what former Education Code section 10752 required to be transferred was not limited to a pupil/student’s “permanent record” as defined post 1975, nor was it limited to records appropriate for the transfer of a student. Rather, all of the pupil/student records accumulated by

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<sup>97</sup> *Fontana Unified School Dist., supra*, 45 Cal.3d at p. 218.

<sup>98</sup> California Code of Regulations, title 5, section 430, Register 77, No. 39 (Sept. 23, 1977).

<sup>99</sup> *Ibid.*

<sup>100</sup> California Code of Regulations, title 5, section 432, subdivision (b)(2)(B), Register 77, No. 39 (Sept. 23, 1977).

<sup>101</sup> American Heritage Dictionary (new college ed. 1979) p. 322.

a K-12 school district or community college district regarding a particular pupil/student were required to be transferred to the pupil/student's new school or college. As a result, the pupil/student records required to be transferred by former Education Code section 10752 included the "permanent record" and "appropriate records."

Pursuant to the above discussion, former Education Code section 10752 required K-12 school districts and community college districts to transfer a pupil's permanent record and a student's "appropriate records," or a copy of the permanent/appropriate record, to the new school where the pupil/student intends to enroll upon the request of the new school or the student. Thus, the activities required by Education Code sections 49068 and 76225 do not constitute a new program or higher level of service. The Commission finds that Education Code sections 49068 and 76225 do not mandate new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution.

Foster Family Agency Access to Education Records (Ed. Code, § 49069.3):

*Does Education Code section 49069.3 mandate any activities?*

Education Code section 49069.3 addresses a foster family agency's access to records of grades, transcripts, and individualized education plans of currently enrolled or former pupils. Specifically, section 49069.3 provides:

Foster family agencies with jurisdiction over currently enrolled or former pupils may access records of grades and transcripts, and any individualized education plans ... maintained by school districts or private schools of those pupils.

Pursuant to the plain language of section 49069.3, foster family agencies with jurisdiction over a pupil are authorized to access the pupil's records of grades and transcripts and any individualized education plans maintained by K-12 school districts. Although the plain language does not expressly state that a K-12 school district must provide a foster family agency with access to a pupil's record of grades and transcripts, and any individualized education plans, section 49069.3 must be read in the context of the whole statutory scheme and not as individual parts or words standing alone.<sup>102</sup> In addition, section 49069.3 "must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity."<sup>103</sup>

Section 49069.3 was adopted under article 4 of Chapter 6.5 of part 27 of division 4 of title 2 of the Education Code addressing the rights of parents in the context of pupil records. Education Code section 49069, immediately preceding section 49069.3, provides that parents of currently enrolled and former pupils have an absolute right to access any and all pupil records related to their children and requires K-12 school districts to adopt procedures to provide access to parents. "Parents" is defined by Education Code section 49061 as a natural parent, an adopted parent, or legal guardian. Therefore, parents or foster parents who have been made a guardian of a pupil had access to the records of a pupil, but foster family agencies did not.

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<sup>102</sup> *Fontana Unified School Dist.*, *supra*, 45 Cal.3d at p. 218.

<sup>103</sup> *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal. App. 4<sup>th</sup> 1193.

Immediately following section 49069.3, Education Code section 49069.5 provides in relevant part:

The Legislature finds and declares that the mobility of pupils in foster care often disrupts their educational experience. The Legislature also finds that efficient transfer of pupil records is a critical factor in the swift placement of foster children in educational settings.<sup>104</sup>

In this context, Education Code section 49069.3 was adopted to lessen the negative effect of a pupil's mobility in foster care on the pupil's educational experience. The legislative history of section 49069.3 indicates this intent, acknowledging that:

... private foster agencies find it difficult to track the records of children in their care since they do not have direct access except through the government social worker assigned to the pupil's case.

Foster children are placed in numerous homes throughout their stay in foster care. Each time they are moved, the new foster parent must access the pupil's school records and attempt to reconstruct the child's educational background. If the private foster agency had permission to access these records they would be able to take some of the burden off of the new parent, and expedite their review of the child's school records.<sup>105</sup>

In light of the statutory scheme surrounding Education Code section 49069.3 and the legislative intent behind its adoption, a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers is that K-12 school districts are required to provide a foster family agency access to the records of grades and transcripts, and any individualized education plans maintained by the K-12 school district regarding a student under the jurisdiction of the foster family agency. An interpretation to the contrary would render a foster family agency's right to access meaningless.

The Commission finds that Education Code section 49069.3 mandates K-12 school districts to perform the following activity:

Provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. (Ed. Code, § 49069.3.)

*Does the activity mandated by Education Code section 49069.3 constitute a new program or higher level of service?*

In order for state-mandated activities to constitute new programs or higher levels of service the activities must carry out the governmental function of providing a service to the public, or impose unique requirements on local governments that do not apply to all residents and entities

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<sup>104</sup> Education Code section 49069.5, subdivision (a) (Stats. 1998, ch. 311).

<sup>105</sup> Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Assembly Bill 2453 (1999-2000 Reg. Sess.) as amended April 6, 2000, (Exhibit H to Item 3, May 29, 2009 Commission Hearing, p. 641).

in the state in order to implement a state policy.<sup>106</sup> In addition, the requirements must be new in comparison with the pre-existing scheme and must be intended to provide an enhanced service to the public.<sup>107</sup> To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to its enactment.<sup>108</sup>

In *Long Beach Unified School Dist.*, the court held, “although numerous private schools exist, education in our society is considered to be a peculiarly governmental function.”<sup>109</sup> Here, the activity mandated by Education Code section 49069.3 constitutes a program under article XIII B of the California Constitution by carrying out the governmental function of education. The requirement of Education Code section 49069.3 aids a pupil’s educational goals by minimizing the disruption to a pupil’s education due to transferring between schools. Thus, the activity mandated by Education Code section 49069.3 constitutes a “program.”

In addition, prior to the enactment of Education Code section 49069.3 in 2000,<sup>110</sup> K-12 school districts were not required to provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. The Commission finds that Education Code section 49069.3 mandates the following new program or higher level of service on K-12 school districts:

Provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. (Ed. Code, § 49069.3.)

Transfer of Foster Children’s Records Between Local Educational Agencies (Ed. Code, § 49069.5):

*Does Education Code section 49069.5 mandate any activities?*

Education Code section 49069.5 addresses the transfer of foster children’s educational and background records from one local educational agency to another. Education Code section 49069.5 was added by Statutes 1998, chapter 311, and subsequently amended by Statutes 2003, chapter 682, and Statutes 2005, chapter 639. As added by Statutes 1998, chapter 311, Education Code section 49069.5 provided:

(a) The Legislature finds and declares that the mobility of pupils in foster care often disrupts their educational experience. The Legislature also finds that efficient transfer of pupil records is a critical factor in the swift placement of foster children in educational settings.

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<sup>106</sup> *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

<sup>107</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Long Beach Unified School Dist., supra*, 225 Cal.App.3d at p. 172.

<sup>110</sup> Statutes 2000, chapter 67 (Assem. Bill No. 2453).

(b) Upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency, a local education agency with which a pupil in foster care has most recently been enrolled that has been informed of the next educational placement of the pupil shall cooperate with the county social service or probation department to ensure that the pupil's education record is transferred to the receiving local education agency in a timely manner.

(c) Whenever a local educational agency with which a pupil in foster care has most recently been enrolled is informed of the next educational placement of the pupil, that local educational agency shall cooperate with the county social service or probation department to ensure that educational background information for that pupil's health and educational record, as described in Section 16010 of the Welfare and Institutions Code, is transferred to the receiving local educational agency in a timely manner.

(d) Information provided pursuant to subdivision (c) of this section shall include, but not be limited to the following:

- (1) The location of the pupil's records.
- (2) The last school and teacher of the pupil.
- (3) The pupil's current grade level.
- (4) Any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law.

(e) Notice shall be made within five working days and information transferred within five additional working days of receipt of information regarding the new educational placement of the pupil in foster care.

As added in 1998, section 49069.5, subdivision (b) mandates a K-12 school district with which a pupil in foster care has most recently been enrolled to cooperate with the county social service or probation department to ensure that the pupil's education record is transferred to the receiving local education agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency.

Subdivision (c) of section 49069.5 mandates K-12 school districts to cooperate with the county social service or probation department to ensure that educational background information for that pupil's health and educational record, as described in Welfare and Institutions Code section 16010, is transferred to the receiving local educational agency in a timely manner.

Welfare and Institutions Code section 16010 provides that a health and education summary shall include, but is not limited to, the following information: (1) the names and addresses of the child's health, dental, and education providers; (2) the child's grade level performance; (3) the child's school record; (4) assurances that the child's placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement; (5) a record of the child's immunizations and allergies; (6) the child's known medical problems; (7) the child's current medications; (8) past health problems and hospitalizations; (9) a record of the child's relevant mental health history; (10) the child's known mental health condition and medications; (11) and any other relevant mental health, dental, health, and education information concerning

the child determined to be appropriate by the Director of Social Services.<sup>111</sup> Subdivision (d) of section 49069.5, further defines what educational background information is to include.

Subdivision (e) of section 49069.5 provides that “notice shall be made” and “information transferred,” however, an ambiguity arises as the plain language of the subdivision is silent as to who is responsible for these activities. Due to this ambiguity, it is necessary to determine whether K-12 school districts are required to provide notice and/or transfer information pursuant to subdivision (e). In order to make this determination, subdivision (e) must be interpreted in light of all of the provisions of section 49069.5. Subdivision (a) and (b) both provide that a K-12 school district must cooperate when it “has been *informed* of the next educational placement of the pupil.” In light of this language it is evident that the “notice” referenced in subdivision (e) is notice *to* K-12 school districts, and the requirement that “notice shall be made” is not directed at K-12 school districts. Instead the requirement that “notice shall be made” is directed toward county social service or probation departments, regional centers for the developmentally disabled, or other placing agencies. In regard to the transferring of information, from the plain language of subdivisions (b) and (c), K-12 school districts and the county social service or probation department are to cooperate to ensure the transfer of a pupil’s information. As a result, pursuant to subdivision (e) of section 49069.5, K-12 school districts are required to transfer a pupil’s information to a pupil’s new local educational agency within five working days of notice that the pupil in foster care is transferring.

In 2003, section 49069.5 was substantially amended by Statutes 2003, chapter 862. The claimants have not pled the 2003 amendments, or any subsequent amendments, to section 49069.5, and as a result, the Commission makes no independent findings regarding section 49069.5, as amended by Statutes 2003, chapter 862, or any amendments thereafter. However, it is necessary to determine whether the activities mandated by section 49069.5, as added in 1998, continue after the operative date of the 2003 amendments.

The 2003 amendments to section 49069.5 removed the requirements as set forth by subdivisions (b)-(d), which required that K-12 school districts cooperate with county social service or probation departments to ensure the transfer of specific pupil information. The 2003 amendment to section 49069.5 continued to require that K-12 school districts “deliver the educational information and records of the pupil to the next educational placement” upon receiving a transfer request from a county placing agency, as previously required by subdivision (e) of the 1998 version of section 49069.5.<sup>112</sup> The operative date of the 2003 amendment is January 1, 2004. As a result, after December 31, 2003, the activities required by Education Code section 49069.5, subdivisions (b)-(d), as added by Statutes 1998, chapter 311, are no longer required. However, the requirement of Education Code section 49069.5, subdivision (e) remains.

In summary, the Commission finds that Education Code section 49069.5, as added by Statutes 1998, chapter 311, mandates K-12 school districts to perform the following activities:

1. Cooperate with the county social service or probation department to ensure that a pupil’s education record is transferred to the receiving local education agency in a timely manner

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<sup>111</sup> Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353).

<sup>112</sup> Education Code section 49069.5, subdivision (d), as amended by Statutes 2003, chapter 862.

after the K-12 school district has been informed of the pupil's next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency. (Ed. Code, § 49069.5, subd. (b) (Stats. 1998, ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

2. Cooperate with the county social service or probation department to ensure that educational background information for a pupil's health and educational record is transferred to the receiving local educational agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement.

Educational background information transferred pursuant to Education Code section 49069.5, subdivision (c), includes but is not limited to: (1) a health and education summary as described in Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353); (2) the location of the pupil's records; (3) the last school and teacher of the pupil; (4) the pupil's current grade level; and (5) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law. (Ed. Code, § 49069.5, subds. (c) and (d) (Stats. 1998., ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

3. Transfer the educational and health record of a pupil in foster care to the pupil's new local educational agency within five working days of receipt of information regarding the new educational placement of the pupil. (Ed. Code, § 49069.5, subd. (e) (Stats. 1998, ch. 311).)

*Do the mandated activities of Education Code section 49069.5 constitute new programs or higher levels of service?*

Education Code section 49069.5 constitutes a "program" by carrying out the governmental function of education. Like Education Code section 49069.3, Education Code section 49069.5 aids a pupil's educational goals by minimizing the disruption to pupils due to transferring between schools. In addition, prior to the enactment of Education Code section 49069.5 in 1998,<sup>113</sup> K-12 school districts were not required to engage in the activities mandated by Education Code section 49069.5. The Commission finds that Education Code section 49069.5, as added by Statutes 1998, chapter 311, mandates the following new programs or higher levels of service on K-12 school districts:

1. Cooperate with the county social service or probation department to ensure that a pupil's education record is transferred to the receiving local education agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency. (Ed. Code, § 49069.5, subd. (b) (Stats. 1998, ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)
2. Cooperate with the county social service or probation department to ensure that educational background information for a pupil's health and educational record is transferred to the receiving local educational agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement.

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<sup>113</sup> Statutes 1998, chapter 311.

Educational background information transferred pursuant to Education Code section 49069.5, subdivision (c), includes but is not limited to: (1) a health and education summary as described in Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353); (2) the location of the pupil's records; (3) the last school and teacher of the pupil; (4) the pupil's current grade level; and (5) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law. (Ed. Code, § 49069.5, subs. (c) and (d) (Stats. 1998., ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

3. Transfer the educational and health record of a pupil in foster care to the pupil's new local educational agency within five working days of receipt of information regarding the new educational placement of the pupil. (Ed. Code, § 49069.5, subd. (e) (Stats. 1998, ch. 311).)

Release of Pupil Information to Peace Officers (Ed. Code, § 49076.5):

*Does Education Code section 49076.5 mandate any activities?*

Education Code section 49076.5 addresses the release of a pupil's information to peace officers. Specifically, section 49076.5 provides:

(a) Notwithstanding Section 49076, each school district shall release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information.

(b) In order to protect the privacy interests of the pupil, a request to a school district for pupil record information pursuant to this section shall meet the following requirements:

(1) For the purposes of this section "proper police purpose" means that probable cause exists that the pupil has been kidnapped and that his or her abductor may have enrolled the pupil in a school and that the agency has begun an active investigation.

(2) Only designated peace officers and federal criminal investigators and federal law enforcement officers, as defined in Section 830.1 of the Penal Code, whose names have been submitted to the school district in writing by a law enforcement agency, may request and receive the information specified in subdivision (a). Each law enforcement agency shall ensure that each school district has at all times a current list of the names of designated peace officers authorized to request pupil record information.

(3) This section does not authorize designated peace officers to obtain any pupil record information other than that authorized by this section.

(4) The law enforcement agency requesting the information shall ensure that at no time shall any information obtained pursuant to this section be disclosed or used for any purpose other than to assist in the investigation of suspected criminal



conduct of kidnapping. A violation of this paragraph shall be punishable as a misdemeanor.

(5) The designated peace officer requesting information authorized for release by this section shall make a record on a form created and maintained by the law enforcement agency which shall include the name of the pupil about whom the inquiry was made, the consent of a parent having legal custody of the pupil or a legal guardian, the name of the officer making the inquiry, the date of the inquiry, the name of the school district, the school district employee to whom the request was made, and the information that was requested.

(6) Whenever the designated peace officer requesting information authorized for release by this section does so in person, by telephone, or by some means other than in writing, the officer shall provide the school district with a letter confirming the request for pupil record information prior to any release of information.

(7) No school district, or official or employee thereof, shall be subject to criminal or civil liability for the release of pupil record information in good faith as authorized by this section.

The plain language of Education Code section 49076.5 requires K-12 school districts to release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within California or any other state or to a private school in California to a designated peace officer upon the officer's request, when a proper police purpose exists for the use of that information.

The claimants allege activities resulting from subdivision (b) of section 49076.5,<sup>114</sup> however, as shown by the above quoted language, subdivision (b) defines "proper police purpose" and sets forth requirements of police officers seeking pupil records. Thus, subdivision (b) does not require any activities on K-12 school districts.

The Commission finds that Education Code section 49076.5, subdivision (a), mandates K-12 school districts to perform the following activity:

Release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. (Ed. Code, § 49076.5, subd. (a).)

*Does the mandated activity of Education Code section 49076.5 constitute a new program or higher level of service?*

As noted by the court in *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, police and fire protection are two of the most essential and basic functions of local government.<sup>115</sup> Education Code section 49076.5 was adopted for the purpose of giving

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<sup>114</sup> Test claim 02-TC-34, p. 29.

<sup>115</sup> *Carmel Valley Fire Protection Dist.*, *supra*, 190 Cal.App.3d. at p. 537.

peace officers the authority to access the school records of children suspected of having been kidnapped as a method to help find these children.<sup>116</sup> For this reason, Education Code section 49076.5 carries out a governmental function of police protection of children. In addition, prior to 1993,<sup>117</sup> K-12 school districts were not required to release information specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district to designated peace officers. Therefore, the Commission finds that Education Code section 49076.5 mandates the following new program or higher level of service on K-12 school districts:

Release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. (Ed. Code, § 49076.5, subd. (a).)

Provision of Student Information in Compliance with a Court Order or Subpoena (Ed. Code, §§ 49077 and 76244):

*Do Education Code sections 49077 and 76244 mandate any activities?*

As noted during the federal mandates discussion above, Education Code sections 49077 and 76244 address the provision of pupil/student information in compliance with a court order. Because part of Education Code sections 49077 and 76244 have been determined to constitute federal mandates and court mandates, the following discussion will focus on the parts that exceed federal law and the court mandate. Specifically, section 49077 provides in relevant part:

Information concerning a student shall be furnished in compliance with a ...  
lawfully issued subpoena. ... .

The language of section 76244 substantively mirrors the language of Education Code section 49077 as made applicable to community college districts. The plain language of Education Code sections 49077 and 76244 mandate K-12 school districts and community college districts to perform the following activities:

1. Furnish information concerning a pupil in compliance with a lawfully issued subpoena issued by a non-court entity. (Ed. Code, §§ 49077.)
2. Furnish information concerning a student in compliance with a lawfully issued subpoena issued by a non-court entity. (Ed. Code, §§ 76244.)

The claimants note that the test claim does not allege furnishing information in compliance with a court order or lawfully issued subpoena,<sup>118</sup> however, as shown by the plain language of

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<sup>116</sup> Office of Senate Floor Analyses, Analysis of Senate Bill Number 1539 (1993-1994 Reg. Sess.) as amended August 30, 1993, (Exhibit H to Item 3, May 29, 2009 Commission Hearing, p. 645).

<sup>117</sup> Statutes 1993, chapter 561.

<sup>118</sup> Claimants' response to Chancellor's Office Comments on 02-TC-34, *supra*, p. 14 (Exhibit F to Item 3, May 29, 2009 Commission Hearing).

sections 49077 and 76244, K-12 school districts are required to perform the above listed activities.

*Do the mandated activities of Education Code sections 49077 and 76244 constitute new programs or higher levels of service?*

The claimants have pled Education Code section 49077, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 10948, and renumbered to current Education Code section 49077 by Statutes 1976, chapter 1010. Similarly, the claimants have pled Education Code section 76244, as added by Statutes 1975, chapter 816, formerly numbered as Education Code section 25430.16, and renumbered to current Education Code section 76244 by Statutes 1976, chapter 1010. As pled by the claimants, sections 49077 and 76244 impose the following state-mandated activity:

Furnish information concerning a pupil/student in compliance with a lawfully issued subpoena issued by a non-court entity.

However, as set forth in the Code of Civil Procedure sections 1985-1997,<sup>119</sup> K-12 school districts and community college districts were required to furnish information concerning a student in compliance with a lawfully issued subpoena, whether as a witness or via the production of documents, prior to the adoption of the Education Code sections 49077 and 76244. Derived from Statutes 1851, chapter 5, section 402, the Code of Civil Procedure section 1985 defines "subpoena" as a writ or order requiring a person's attendance to testify as a witness or to bring any books, documents, or other things under the witness's control. Also derived from Statutes 1851, chapter 5, sections 409 – 411, the Code of Civil Procedure sections 1985 – 1997, a failure to furnish information in compliance with a lawfully issued subpoena subjects the person in noncompliance to punishment for contempt, forfeiture of five hundred dollars and damages in a civil action, and/or arrest.<sup>120</sup> Thus, K-12 school districts and community college districts were required to furnish information concerning students in compliance with a lawfully issued subpoena prior to 1975 as pled by the claimants. As a result, the activities required by Education Code sections 49077 and 76244 do not constitute new programs or higher levels of service. Therefore the Commission finds that Education Code sections 49077 and 76244 do not mandate new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution.

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<sup>119</sup> See Government Code section 11180 – 11191 for administrative subpoenas (added by Stats. 1945, ch.111).

<sup>120</sup> Code of Civil Procedure sections 1991 – 1993, derived from Statutes 1851, chapter 5, section 409-411. See Government Code sections 11187 – 11189, providing that enforcement of administrative agency subpoena can be enforced through the courts in the same manner provided by the Code of Civil Procedure. Government Code sections added by Statutes 1945, chapter 111.

Means of Complying with a Lawfully Issued Subpoena or Court Order (Ed. Code, §§ 49078 and 76245):

*Do Education Code sections 49078 and 76245 mandate any activities?*

Education Code sections 49078 and 76245 address the means of complying with a lawfully issued subpoena or a court order upon a public school/community college employee solely for the purpose of causing him or her to produce a school record pertaining to any pupil/student. Specifically, section 49078 provides:

The service of a lawfully issued subpoena or a court order upon a public school employee solely for the purpose of causing him or her to produce a school record pertaining to any pupil may be complied with by that employee, in lieu of the personal appearance as a witness in the proceeding, by submitting to the court, or other agency, or person designated in the subpoena, at the time and place required by the subpoena or court order, a copy of that record, accompanied by an affidavit certifying that the copy is a true copy of the original record on file in the school or school office. The copy of the record shall be in the form of a photostat, microfilm, microcard, or miniature photograph or other photographic copy or reproduction, or an enlargement thereof.

Section 76245 substantively mirrors Education Code section 49078 as made applicable to community colleges and community college districts.

The claimants assert that sections 49078 and 76245 require K-12 school/community college employees to personally appear as a witness upon service of a lawfully issued subpoena or court order seeking the production of records of a pupil/student, or to submit a copy of the record in lieu of a personal appearance.<sup>121</sup> In response, the Chancellor's Office notes that community college districts are subject to the law of general application set forth in Code of Civil Procedure section 1985 et seq., requiring compliance with subpoenas.<sup>122</sup> The claimants respond that the Chancellor's Office errs in its analysis, because a determination of whether a test claim statute contains a law of general application must be directed to the test claim statute.<sup>123</sup> However, a discussion regarding whether the alleged requirements of section 76245 constitutes a law of general application is unnecessary, because it first must be determined whether the alleged required activities are actually required by the language of the test claim statute.

The plain language of sections 49078 and 76245 do not require any activity of K-12 school districts/community college districts. Rather, the plain language of sections 49078 and 76245 provide an alternative means of complying with a lawfully issued subpoena or court order. Specifically, sections 49078 and 76245 authorize K-12 school/community college employees to submit a copy of a pupil/student's records to a court, agency, or person designated in a subpoena

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<sup>121</sup> Test Claim 02-TC-34, p. 30-32, (Exhibit A to Item 3, May 29, 2009 Commission Hearing).

<sup>122</sup> Chancellor's Office Comments on 02-TC-34, *supra*, p. 6, (Exhibit E to Item 3, May 29, 2009 Commission Hearing).

<sup>123</sup> Claimants' response to Chancellor's Office Comments on 02-TC-34, *supra*, p. 15, (Exhibit F to Item 3, May 29, 2009 Commission Hearing).

in lieu of personally appearing in court in order to comply with the subpoena (or court order). Therefore the Commission finds that Education Code sections 49078 and 76245 do not mandate new programs or higher levels of service on K-12 school districts or community college districts subject to article XIII B, section 6 of the California Constitution.

Notification of Victims of Sexual Assault of Disciplinary Actions (Ed. Code, § 76234):

*Does Education Code section 76234 mandate any activities?*

Education Code section 76234 addresses the notification of an alleged victim of sexual assault or physical abuse of any disciplinary action by the community college taken against any student for the alleged sexual assault or physical abuse and the results of any appeal. Specifically, section 76234 provides:

Whenever there is included in any student record information concerning any disciplinary action taken by a community college in connection with any alleged sexual assault or physical abuse, including rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or threat of sexual assault, or any conduct that threatens the health and safety of the alleged victim, the alleged victim of that sexual assault or physical abuse shall be informed within three days of the results of any disciplinary action by the community college and the results of any appeal. [¶] ... [¶].

The plain language of section 76234 mandates community colleges to perform the following activity:

Inform the alleged victim of sexual assault or physical abuse (as defined by Ed. Code, § 76234), within three days of the results of any disciplinary action by the community college and the results of any appeal, whenever there is included in any student record information concerning any disciplinary action taken by a community college concerning the alleged sexual assault or physical abuse. (Ed. Code, § 76234.)

*Does the activity mandated by Education Code section 76234 constitute a new program or higher level of service?*

Education Code section 76234 constitutes a “program” within the meaning of article XIII B section 6 by carrying out the governmental function of protecting a student’s educational records and limiting access to these records to specified instances. In addition, prior to the enactment of Education Code section 76234 in 1989,<sup>124</sup> community colleges were not required to engage in the activities mandated by Education Code section 76234. The Commission finds that Education Code section 76234 mandates the following new program or higher level of service on community colleges:

Inform the alleged victim of sexual assault or physical abuse (as defined by Ed. Code, § 76234), within three days of the results of any disciplinary action by the community college and the results of any appeal, whenever there is included in any student record information concerning any disciplinary action taken by a

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<sup>124</sup> Statutes 1989, chapter 593.

community college concerning the alleged sexual assault or physical abuse. (Ed. Code, § 76234.)

Adoption of Rules and Regulations for the Implementation of California Law Regarding Student Records (Ed. Code, § 76246):

*Does Education Code section 76246 mandate any activities?*

Education Code section 76246 addresses the adoption of rules and regulations for the orderly implementation of Education Code sections 76200 – 76246. Specifically, section 76246 provides:

The Board of Governors of the California Community Colleges shall adopt appropriate rules and regulations to insure the orderly implementation of this chapter. A community college district governing board may adopt rules and regulations which are not inconsistent with this chapter or with those adopted by the board of governors in order to ensure the orderly implementation of this chapter.

The claimants allege that section 76246 requires community college districts to comply with appropriate rules and regulations adopted by the Board of Governors of the California Community Colleges to insure the orderly implementation of this chapter. However, the plain language of section 76246 makes no mention of “complying with appropriate rules and regulations adopted by the Board of Governors.”<sup>125</sup> Rather, the plain language of section 76246 requires the Board of Governors to adopt rules and regulations, and authorizes the governing boards of community college districts to adopt rules or regulations. As a result, community college districts are not required to engage in any activities pursuant to the plain language of section 76246.

In response to the Chancellor’s Office comments that argue that Education Code section 76246 does not require community college districts to engage in any activity, the claimants argue, “Certainly the [Chancellor’s Office] cannot mean that community college districts need not comply with appropriate rules and regulations adopted by its Board of Governors.”<sup>126</sup> However, a finding that Education Code *section 76246* does not require community college districts to engage in any activities does not lead to a conclusion that community college districts need not comply with the rules and regulations of the Board of Governors. Rather, the finding *only* provides that the plain language of Education Code *section 76246* does not require this activity.

Thus, the Commission finds that Education Code section 76246 does not mandate a new program or higher level of service on K-12 school districts or community college districts subject to article XIII B, section 6 of the California Constitution.

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<sup>125</sup> Test Claim 02-TC-34, p. 32, (Exhibit A to Item 3, May 29, 2009 Commission Hearing).

<sup>126</sup> Claimants’ response to Chancellor’s Office Comments on 02-TC-34, *supra*, p. 16, (Exhibit F to Item 3, May 29, 2009 Commission Hearing).

Summary of new programs or higher levels of service on K-12 school districts and community college districts subject to article XIII B, section 6 of the California Constitution:

Pursuant to the above discussion, the Commission finds that Education Code sections 49069.3, 49069.5, and 49067.5 mandate the following new programs or higher levels of service on K-12 school districts subject to article XIII B, section 6 of the California Constitution:

1. Provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. (Ed. Code, § 49069.3.)
2. Cooperate with the county social service or probation department to ensure that a pupil's education record is transferred to the receiving local education agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency. (Ed. Code, § 49069.5, subd. (b) (Stats. 1998, ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)
3. Cooperate with the county social service or probation department to ensure that educational background information for a pupil's health and educational record is transferred to the receiving local educational agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement.

Educational background information transferred pursuant to Education Code section 49069.5, subdivision (c), includes but is not limited to: (1) a health and education summary as described in Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353); (2) the location of the pupil's records; (3) the last school and teacher of the pupil; (4) the pupil's current grade level; and (5) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law. (Ed. Code, § 49069.5, subs. (c) and (d) (Stats. 1998., ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

4. Transfer the educational and health record of a pupil in foster care to the pupil's new local educational agency within five working days of receipt of information regarding the new educational placement of the pupil. (Ed. Code, § 49069.5, subd. (e) (Stats. 1998, ch. 311).)
5. Release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. (Ed. Code, § 49076.5, subd. (a).)

In addition, pursuant to the above discussion the Commission finds that Education Code sections 76234 mandates the following new program or higher level of service on community college districts subject to article XIII B, section 6 of the California Constitution:

Inform the alleged victim of sexual assault or physical abuse (as defined by Ed. Code, § 76234), within three days of the results of any disciplinary action by the community college and the results of any appeal, whenever there is included in

any student record information concerning any disciplinary action taken by a community college concerning the alleged sexual assault or physical abuse. (Ed. Code, § 76234.)

**Issue 3: Do the state-mandated new programs or higher levels of service impose costs mandated by the state on K-12 school districts and community college districts within the meaning of article XIII B, section 6, and Government Code section 17514?**

In order for the test claim statutes to impose a reimbursable state-mandated program under the California Constitution, the test claim statutes must impose costs mandated by the state.<sup>127</sup> Government Code section 17514 defines “cost mandated by the state” as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

The claimants estimated that they “will incur approximately \$1,000, or more, annually, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002”<sup>128</sup> to implement all duties alleged by the claimants to be mandated by the state.

Thus, the Commission finds that the record supports the finding of costs mandated by the state and that none of the exceptions in Government Code section 17556 apply to deny these activities. As a result, the Commission finds that Education Code sections 49069.3, 49069.5, and 49076.5 impose costs mandated by the state on K-12 school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

1. Provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. (Ed. Code, § 49069.3.)
2. Cooperate with the county social service or probation department to ensure that a pupil’s education record is transferred to the receiving local education agency in a timely manner after the K-12 school district has been informed of the pupil’s next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency. (Ed. Code, § 49069.5, subd. (b) (Stats. 1998, ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)
3. Cooperate with the county social service or probation department to ensure that educational background information for a pupil’s health and educational record is transferred to the receiving local educational agency in a timely manner after the K-12 school district has been informed of the pupil’s next educational placement.

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<sup>127</sup> *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

<sup>128</sup> Test Claim, Exhibit 1, Declarations of Bill Hendrick and Herman C. Lee, (Exhibit A to Item 3, May 29, 2009 Commission Hearing).



Educational background information transferred pursuant to Education Code section 49069.5, subdivision (c), includes but is not limited to: (1) a health and education summary as described in Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353); (2) the location of the pupil's records; (3) the last school and teacher of the pupil; (4) the pupil's current grade level; and (5) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law. (Ed. Code, § 49069.5, subds. (c) and (d) (Stats. 1998., ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

4. Transfer the educational and health record of a pupil in foster care to the pupil's new local educational agency within five working days of receipt of information regarding the new educational placement of the pupil. (Ed. Code, § 49069.5, subd. (e) (Stats. 1998, ch. 311).)
5. Release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. (Ed. Code, § 49076.5, subd. (a).)

Similarly, the Commission finds that Education Code section 76234 imposes costs mandated by the state on community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activity:

Inform the alleged victim of sexual assault or physical abuse (as defined by Ed. Code, § 76234), within three days of the results of any disciplinary action by the community college and the results of any appeal, whenever there is included in any student record information concerning any disciplinary action taken by a community college concerning the alleged sexual assault or physical abuse. (Ed. Code, § 76234.)

In addition, Education Code sections 49065 and 76220 provide K-12 school districts and community college districts with fee authority to cover "the actual cost of furnishing copies of *any* pupil/student record" as defined by Education Code sections 49061 and 76210. This fee authority does not extend to furnishing the first two transcripts of records of former pupils or current/former students, or the first two verifications of various records of former pupils or current/former students, or the cost of searching for or retrieving any pupil or student record. Subject to the limitations discussed, this fee authority is applicable to all of the state-mandated activities identified above. Therefore, any revenue resulting from the fee authority set forth in Education Code sections 49065 and 76220 is offsetting revenue and shall be deducted from the costs claimed for furnishing pupil records and student records respectively.

## CONCLUSION

The Commission concludes that Education Code sections 49069.3, 49069.5, and 49076.5 constitute reimbursable state-mandated programs on kindergarten through 12<sup>th</sup> grade school districts within the meaning of article XIII B, section 6 of the California Constitution, and

Government Code section 17514, for the following specific new activities:

1. Provide access to records of grades and transcripts, and any individualized education plans of a current or former pupil under the jurisdiction of a foster family agency to the foster family agency. (Ed. Code, § 49069.3.)
2. Cooperate with the county social service or probation department to ensure that a pupil's education record is transferred to the receiving local education agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement and upon the request of a county social service or probation department, a regional center for the developmentally disabled, or other placing agency. (Ed. Code, § 49069.5, subd. (b) (Stats. 1998, ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)
3. Cooperate with the county social service or probation department to ensure that educational background information for a pupil's health and educational record is transferred to the receiving local educational agency in a timely manner after the K-12 school district has been informed of the pupil's next educational placement.

Educational background information transferred pursuant to Education Code section 49069.5, subdivision (c), includes but is not limited to: (1) a health and education summary as described in Welfare and Institutions Code section 16010 (Stats. 2001, ch. 353); (2) the location of the pupil's records; (3) the last school and teacher of the pupil; (4) the pupil's current grade level; and (5) any information deemed necessary to enable enrollment at the receiving school, to the extent allowable under state and federal law. (Ed. Code, § 49069.5, subds. (c) and (d) (Stats. 1998., ch. 311.) (Period of reimbursement July 1, 2001-Dec. 31, 2003).)

4. Transfer the educational and health record of a pupil in foster care to the pupil's new local educational agency within five working days of receipt of information regarding the new educational placement of the pupil. (Ed. Code, § 49069.5, subd. (e) (Stats. 1998, ch. 311).)
5. Release any information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within this state or any other state or to a private school in this state to a designated peace officer, upon his or her request, when a proper police purpose exists for the use of that information. (Ed. Code, § 49076.5, subd. (a).)

The Commission further concludes that Education Code 76234 constitutes a reimbursable state-mandated program on community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activity:

Inform the alleged victim of sexual assault or physical abuse (as defined by Ed. Code, § 76234), within three days of the results of any disciplinary action by the community college and the results of any appeal, whenever there is included in any student record information concerning any disciplinary action taken by a community college concerning the alleged sexual assault or physical abuse. (Ed. Code, § 76234.)

In addition, the Commission concludes the fee authority to charge a fee that does not exceed the actual cost of furnishing copies of any pupil/student records, set forth in Education Code

sections 49065 and 76223, is applicable to the state-mandated programs described above. This fee authority does not extend to furnishing the first two transcripts of former pupils' records/students' records, or the first two verifications of various records of former pupils/students, or the search for or retrieval of any pupil/student record. Therefore, any revenue resulting from the fee authority set forth in Education Code sections 49065 and 76223 is offsetting revenue and shall be deducted from the costs claimed for furnishing pupil/student records.

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.