Hearing Date: October 27, 2011
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ITEM __
TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 17582, 17583, 17584, 17584.1, 17584.2, 17585, 17586, 17587, 17588, 17589, 17590, 17591, 17592, 49410, 49410.2, 49410.5 and 49410.7 as added or amended by Statutes 1979, Chapter 282, Statutes 1980, Chapters 40 and1354, Statutes 1981, Chapters 371, 649 and 1093, Statutes 1982, Chapter 525, Statutes 1983, Chapters 753 and 800, Statutes 1984, Chapters 1234 and 1751, Statutes 1985, Chapter 759 and 1587, Statutes 1986, Chapters 886, 1258 and 1451, Statutes 1987, Chapters 917 and 1254, Statutes 1989, Chapter 83 and 711, Statutes 1990, Chapter 1263, Statutes 1996, Chapter 277, Statutes 1999, Chapter 390, and Statutes 2002, Chapters 1075 and 1084

Title 2, California Code of Regulations Sections 1866, 1866.1, 1866.2, 1866.3, 1866.4, 1866.4.1, 1866.4.2, 1866.4.3, 1866.4.4, 1866.4.6, 1866.4.7, 1866.5, 1866.5.1, 1866.5.2, 1866.5.3, 1866.5.4, 1866.5.5, 1866.5.6, 1866.5.7, 1866.5.8, 1866.5.9, 1866.7, 1866.8, 1866.9, 1866.9.1, 1866.10, 1866.12, 1866.13, 1866.14 and 1867.2 as added or amended by Registers 80-16, 80-26, 81.18, 82-31, 86-9, 86-45, 86-49, 86-52, 87-17, 87-46 and 03-03

Deferred Maintenance Program Handbook of 2003

Deferred Maintenance Programs

(02-TC-44)

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

Overview

This test claim addresses activities required as a condition of participation in a state grant program: the Deferred Maintenance Program (DMP). The DMP was established to assist school districts in maintaining school buildings. Any K-12 school district or county superintendent of schools may choose to participate in the DMP by establishing a "district deferred maintenance account" and seeking state matching funds to finance major repair or replacement of plumbing, heating, air conditioning, electrical, roofing and floor systems and the exterior and interior painting of school buildings, or such other items of maintenance as may be approved by the State Allocation Board (SAB). As a condition of participating in the program, school districts are required to comply with certain program and accounting requirements.

Procedural History

This test claim was filed with the Commission on June 27, 2003. The Commission received comments and responses to comments on the test claim from the claimant, the Office of Public School Construction (OPSC), the Department of Education (DOE) and the Department of Finance (DOF).

Positions of the Parties and Interested Parties

Claimant's Position

Claimant alleges that the test claim statutes, regulations, and alleged executive order impose the following activities which are new and reimbursable under article XIII B, section 6 of the California Constitution and which generally require school districts and county superintendents to do the following:

- Establish the district deferred maintenance fund and appropriate district funds to it;
- Demonstrate eligibility and prepare and submit requests for state matching funds;
- Plan for and report on the use of the funds; and
- Comply with accounting requirements related to the use of DMP funds.[1]

Claimant argues that the requirements of the DMP are not discretionary and that bypassing matching funds is not a viable option.[2]

Department of Finance's Position

DOF states that a school district's participation in the State's DMP is the result of a discretionary action taken by the governing board of the district and is not state-mandated, therefore this test claim should be denied.[3]

Department of Education's Position

DOE asserts that the test claim statutes do not impose a mandated program.[4] Rather, school districts elect to participate in this program to receive funding for deferred maintenance and for the removal and containment of asbestos or lead.[5] Any requirements regarding this program are applicable only after districts elect to participate in the program.[6]

Office of Public School Construction Position

OPSC contends that this test should be denied because:

- Participation in the DMP is voluntary and the program elements described in the test claim are only required if a district chooses to participate in the program.[7]
- Government Code section 17556(d) precludes the Commission from finding costs mandated by the State because districts have the authority to meet program costs through the passage of local bonds, developer fees and other revenue expenses.[8]

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[1] Claimant, test claim, p.p. 55-68.

[2] Claimant, response to DOF's comments on the test claim, dated October 10, 2003, p.p. 2-4.

[3] DOF, comments on the test claim, September 15, 2003, p. 1.

[4] DOE, comments on the test claim, August 11, 2003, p. 2.

[5] *Ibid*.

[6] *Ibid*.

[7] OPSC, comments on the test claim, August 11, 2003, p. 1.

- Funds are appropriated for DMP annually, primarily from the following three sources:
  - Excess repayments from the State School Building Aid Program (SSBAP)
  - The State School Site Utilization Fund, and
  - Appropriations in the Budget Act.[9]

Commission Responsibilities

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

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[10]

Claims

The following chart provides a brief summary of the claims and issues raised by the claimant, and staff's recommendation.

Claim	Description	Issues	Staff Recommendation
The Deferred Maintenance Program Handbook of 2003	A handbook prepared by OPSC that provides an overview of the DMP.	Claimant alleges this handbook imposes state-mandated costs.	*Denied*: The handbook is not an executive order within the meaning of Government Code section 17516 and is not subject to article XIII B, section 6 of the California Constitution.
Education Code Sections 17582, 17583, 17584, 17584.1, 17584.2, 17585, 17586, 17587, 17588, 17589, 17590, 17591, 17592, 49410, 49410.2, 49410.5 and 49410.7 and Title 2, California Code of Regulations Sections 1866, 1866.1,	These code sections and regulations impose requirements on districts and county superintendents of public instruction that	Claimant alleges these code sections and regulations impose state-	*Denied*: The activities required by the test claim statutes and regulations are downstream requirements of a district's or

[8] *Id*, p. 2.

[9] OPSC, comments on the test claim, August 11, 2003, p. 3.

[10] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802.

1866.2, 1866.3, 1866.4, 1866.4.1, 1866.4.2, 1866.4.3, 1866.4.4, 1866.4.6, 1866.4.7, 1866.5, 1866.5.1, 1866.5.2, 1866.5.3, 1866.5.4, 1866.5.5, 1866.5.6, 1866.5.7, 1866.5.8, 1866.5.9, 1866.7, 1866.8, 1866.9, 1866.9.1, 1866.10, 1866.12, 1866.13, 1866.14 and 1867.2	choose to participate in the DMP.	mandated costs.	superintendent's discretionary decision to participate in the DMP and under the analysis in *Kern*, do not impose a state-mandated program.

Analysis

Staff finds that the Deferred Maintenance Program Handbook of 2003 is not an executive order. An executive order is "any order, plan, requirement, rule or regulation" issued by the Governor or any official serving at the pleasure of the Governor.[11] Although the above-mentioned handbook is issued by a state agency director who serves at the pleasure of the Governor, it does not impose an "order, plan, requirement, rule or regulation" and therefore is not subject to article XIII B, section 6 of the California Constitution.

Staff finds that the test claim statutes and regulations do not impose a state-mandated program on school districts or county superintendents of schools because all the requirements are imposed as a condition of establishing a district deferred maintenance fund and seeking matching funds from the state DMP. Therefore, the requirements of the test claim statutes and regulations are downstream requirements of the local discretionary decision to participate in the DMP and, under the analysis in *Department of Finance v. Commission on State Mandates* (*Kern*),[12] do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff finds that Education Code sections 17582, 17583, 17584, 17584.1, 17584.2, 17585, 17586, 17587, 17588, 17589, 17590, 17591, 17592, 49410, 49410.2, 49410.5 and 49410.7;
Title 2, California Code of Regulations Sections 1866, 1866.1, 1866.2, 1866.3, 1866.4, 1866.4.1, 1866.4.2, 1866.4.3, 1866.4.4, 1866.4.6, 1866.4.7, 1866.5, 1866.5.1, 1866.5.2, 1866.5.3, 1866.5.4, 1866.5.5, 1866.5.6, 1866.5.7, 1866.5.8, 1866.5.9, 1866.7, 1866.8, 1866.9, 1866.9.1, 1866.10, 1866.12, 1866.13, 1866.14 and 1867.2; and the Deferred Maintenance Program Handbook of 2003 do not impose a reimbursable state-mandated program for the following reasons:

1. The Deferred Maintenance Program Handbook of 2003 does not impose any requirements and is not a plan, but rather conveys an overview of what is required by statutes and regulations. Therefore, it is not an executive order within the meaning of Government Code section 17516 and not subject to article XIII B, section 6 of the California Constitution.
2. The requirements of the test claim statutes and regulations are only required as a condition of establishing a district deferred maintenance fund and seeking and receiving matching funds from the State DMP. Under the analysis in *Kern*, the requirements are downstream requirements of a district's discretionary decision to

[11] Government Code section 17516.

[12] (2003) 30 Cal.4th 727

participate in the program and do not constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this staff analysis and deny this test claim.

STAFF ANALYSIS

Claimant

Clovis Unified School District

Chronology

06/27/2003	Claimant, Clovis Unified School District, filed the test claim with the Commission on State Mandates (Commission)[13]
07/15/2003	Commission staff issued a completeness review letter for the test claim and requested comments from state agencies
08/11/2003	The Office of Public School Construction (OPSC) submitted comments on the test claim
08/11/2003	The Department of Education (DOE) submitted comments on the test claim
08/14/2011	Department of Finance (DOF) requested an extension to file comments on test claim
08/18/2003	Commission staff granted DOF an extension to September 15, 2003 to file comments on the test claim
09/13/2003	Claimant submitted a response to OPSC's comments on test claim
09/15/2003	DOF submitted comments on the test claim
10/10/2003	Claimant submitted a response to DOF's comments on test claim
11/26/2007	Claimant submitted a supplemental filing on test claim
06/04/2008	Claimant submitted a supplemental filing on test claim

I. Introduction

This test claim addresses activities required as a condition of participation in a state grant program: the Deferred Maintenance Program (DMP). Assembly Bill 8 (Stats. 1979, ch. 282) established the DMP to assist school districts in maintaining school buildings. Any K-12 school district or county superintendent of schools may choose to participate in the DMP by establishing a "district deferred maintenance account" and complying with statutory and regulatory requirements of the program. This account can be used to finance major repair or replacement of plumbing, heating, air conditioning, electrical, roofing and floor systems and the exterior and interior painting of school buildings, or such other items of maintenance as may be approved by the State Allocation Board (SAB). In order to qualify for this program, a district must establish a five-year deferred maintenance plan approved by the SAB and meet specified accounting requirements.

Generally, the SAB apportions to eligible school districts one dollar for each district dollar deposited in the district deferred maintenance account, up to a maximum of one-half percent of the district's total annual general fund budget exclusive of capital outlay or debt service.

[13] The filing date of June 27, 2003, establishes the potential period of reimbursement for this test claim beginning on July 1, 2001.

However, if a district meets the extreme hardship criteria in Education Code section 17587, SAB may apportion up to 100 percent of the district's maintenance cost and may waive repayment by the district of any state loan that had been previously issued to the district for building school facilities. AB 8 established in the State Treasury a State School Deferred Maintenance Fund which is appropriated for this purpose. This fund receives continuous appropriations from the excess annual payments by school districts on state loans under the State School Building Aid Laws of 1949 and 1952 and from appropriations in the annual state budget act.[14]

The test claim statutes and regulations for the program generally:

1. Authorize schools district to establish a district deferred maintenance fund and, if a district chooses to establish such a fund, require the district to:
    a. Annually appropriate district funds to the deferred maintenance fund equal to the amount of state matching funds (this requirement may be waived in whole or in part if the district is an extreme hardship district); or
    b. Provide a report to the Legislature explaining why it did not appropriate funds and how they intend to meet their deferred maintenance needs;
2. Authorize school districts to apply for state matching funds, and if a district chooses to apply for such funds, require the district to:
    a. Demonstrate eligibility and prepare and submit requests for state matching funds;
    b. Plan for and report on the use of the funds;
    c. Discuss the plans in a regularly scheduled public hearing; and
    d. Comply with accounting requirements related to the use of DMP funds.

Districts apply to the SAB for funding for deferred maintenance in the form and manner specified by the test claim statutes and regulations. General information about the program and application process is also provided in a publication of the OPSC entitled "The Deferred Maintenance Program Handbook."

[14] Note that recent amendments to the DMP statutes reduce the requirements of the program as follows: add a flexibility clause allowing districts to use the funding for "...any educational purpose" through 2013; deem all districts to be in compliance with program and funding requirements through 2014; temporarily reduce state funding for the program; suspend funding for new extreme hardship projects until July 1, 2013; suspend the district matching share requirement from fiscal years 2008/09 through 2012/13; suspend the requirement for county offices of education to certify to deposits for district matching funds; and suspend the requirement for Certification of Deposits (Form SAB 40-21), for 2007/08 through 2011/12. See Statutes 2009, chapter 12 (SBX3 4 – Ducheny) and Statutes 2009, chapter 2 (ABX4 2– Evans). These amendments are not included in this test claim.

II. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant asserts that that the Deferred Maintenance Program Handbook of January 2003 is an "Executive Order" as defined in Government Code section 17516.[15] The Handbook, together with the statutes, Education Code sections, and regulations referenced in the test claim result in school districts incurring costs mandated by the state, as defined in Government Code section 17514.[16] Claimant alleges that the test claim statutes, regulations, and alleged executive order impose the following activities which are new and reimbursable under article XIII B, section 6 of the California Constitution and which generally require school districts and county superintendents to do the following:

- Establish the district deferred maintenance fund and appropriate district matching funds to it;
- Demonstrate eligibility and prepare and submit requests for state matching funds and additional apportionments, if applicable;
- Plan for and discuss proposals and plans for expenditure of funds for the deferred maintenance of school district facilities at a regularly scheduled public hearing;
- Submit a report to the Legislature and others in any year that the school district does not set aside specified district matching funds and make the report available to the public;
- Comply with all of the applicable statutory and regulatory requirements and SAB polices for the apportionment and release of funds;
- Report on the use of the funds; and
- Comply with accounting requirements related to the use of DMP funds.[17]

B. Department of Finance's Position

DOF states that a school district's participation in the state's deferred maintenance program is the result of a discretionary action taken by the governing board of the district.[18] DOF asserts that the cited state laws do not create a reimbursable program; therefore the test claim should be denied.[19] Specifically, DOF states:

> As noted in the CUSD's test claim, Education Code section 17582 states, "the governing board of each school <u>may establish</u> a restricted fund to be known as the 'district deferred maintenance fund' for the purpose of major repair and replacement of plumbing, heating, air conditioning, electrical, roofing…" (underlining added).

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[15] Claimant, test claim, p. 55.

[16] *Ibid*.

[17] Claimant, test claim, p.p. 55-68; for a detailed list of activities alleged see pages 55-68 of the test claim.

[18] DOF, comments on the test claim, September 15, 2003, p. 1.

[19] *Ibid*.

> While a majority of school districts elect to participate in the program each year, there are some school districts that elect not to participate in the program. Thus, school district's participation in the program is due to a discretionary action taken by the school district; therefore it is not a State-mandated activity. Further, we note that the Deferred Maintenance Handbook of January 2003, which CUSD's [sic] declared an "Executive Order as defined in [sic] Government Code Section 17516["] in the test claim, and the Education Code sections and regulations referenced in the test claim <u>are applicable only after school districts elect to participate in the program.</u>[20]

(Emphasis in the original.)

C. Department of Education's Position

DOE asserts that the test claim statutes do not impose a mandated program.[21] Rather, school districts elect to participate in this program to receive funding for deferred maintenance and for the removal and containment of asbestos or lead.[22] Any requirements regarding this program are applicable only after districts elect to participate in the program.[23]

D. Office of Public School Construction's Position

OPSC contends that:

> Participation in the DMP, established through Education Code…Sections 17582 through 17558 and 17591 through 17592.5, is voluntary on the part of school districts. [Education Code] section 17582 states that "…a district may establish an account to be known as the…district deferred maintenance account…" No requirement is made in statute that a district …establish this account and therefore participate in the program. Districts may choose to maintain facilities through the use of district raised funds. The program elements described in the test claim are only required if a district chooses to participate in the program. Therefore, it is our opinion that the declaration on page 55 of the test claim that the DMP Handbook is an "Executive Order" as defined by Government Code Section 17516 is unfounded, as it only applies to districts choosing to participate in the DMP.[24]

Additionally, OPSC concludes that Government Code section 17556(d) precludes the Commission from finding costs mandated by the State because districts have the authority to meet program costs through the passage of local bonds, developer fees for capital outlay needs, and other revenue sources.[25]

Finally, OPSC asserts that State funds are appropriated for DMP annually; primarily from the following three sources:

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[20] *Ibid*, underlining in the original.

[21] DOE, comments on the test claim, August 11, 2003, p. 2.

[22] *Ibid*.

[23] *Ibid*.

[24] OPSC, comments on the test claim, August 11, 2003, p. 1.

[25] *Id*, p. 2.

- Excess repayments from the State School Building Aid Program (SSBAP)
- State School Site Utilization Fund, and
- Appropriations in the Budget Act.[26]

The 2001/2002 and 2002/2003 budget years had the following available funds for the program:

2001/2002 Fiscal Year

SSBAP	$15, 566,143
Site Utilization	$2,368,921
2002/2003 Budget Act	$205,548,000
Total	$223,483,064

2002/2003Fiscal Year

SSBAP	$13,952,845
Estimated Site Utilization	$2,000,000
2002/2003 Budget Act	$76,818,000
Total	$92,770,845[27]

III. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[28] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[29]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[30]

[26] OPSC, comments on the test claim, *supra*, p. 3.

[27] *Ibid*.

[28] *County of San Diego, supra,* 15 Cal.4th 68, 81.

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

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

2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[31]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[32]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [33]

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.[34] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[35] 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."[36]

A. The Deferred Maintenance Program Handbook of 2003 is not an Executive Order Subject to Article XIII B, Section 6.

Staff finds that the Deferred Maintenance Program Handbook of 2003 is not an executive order within the meaning of Government Code section 17516. That section defines an executive order as "any order, plan, requirement, rule or regulation" issued by the Governor or any official serving at the pleasure of the Governor. Although the above-mentioned handbook is issued by a state agency director who serves at the pleasure of the Governor, it does not impose an "order, plan, requirement, rule or regulation." The Deferred Maintenance Program Handbook of January 2003 was developed by OPSC to "assist school districts in applying for and obtaining 'grant' funds for the purposes of performing deferred maintenance work on school facilities."[37]

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

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

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

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

[35] *County of San Diego, supra,* 15 Cal.4th 68, 109.

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

[37] Office of Public School Construction, Deferred Maintenance Program Handbook, 2003, p. iii.

According to OPSC, "it is intended to provide an overview of the program for use by school districts, architects, and other interested parties on how a district or county superintendent of schools becomes eligible for and applies for the two different types of state funding available."[38] Importantly, the Handbook directs the reader to the DMP regulations for detailed information on the "application process, project type, or the eligibility of expenditures" and for "complete project specific information."[39]

Because the handbook does not impose any requirements and is not a plan, but rather conveys an overview of what is required by statutes and regulations, it is not an executive order. The handbook merely provides an overview of the program established in statute and regulation, summarizing requirements that have been established pursuant to statutory and regulatory provisions, including the test claim statutes and test claim regulations. It does not add any additional requirements above what is required by the relevant statutes and regulations. Moreover, claimant's "statement of the claim" on pages 55-68 of the test claim does not allege that any specific activities are imposed by the handbook. School districts may refer solely to the test claim statutes and regulations and related statutes and regulations and consult with their attorneys to determine how to navigate the DMP funding process to maximize the amount of state-grant money they receive, if that is their preference. Therefore, staff finds that the Deferred Maintenance Program Handbook of 2003 is not an executive order within the meaning of Government Code section 17516 and is not subject to article XIII B, section 6 of the California Constitution.

B. The Remaining Requirements of the Test Claim Statutes and Regulations Are Downstream Requirements of the District's Discretionary Decision to Participate in the Deferred Maintenance Program and, Thus, Do Not Constitute a State-Mandated Program.

As discussed below, staff finds that the test claim statutes and regulations do not impose a state-mandated program on school districts because all the requirements are imposed as a condition of establishing a district deferred maintenance fund and seeking matching funds from the state DMP. Therefore, the requirements of the test claim statutes and regulations are downstream requirements of the district's discretionary decision to participate in the DMP.

The DMP is administered by the SAB for the purpose of funding the deferred maintenance of building systems that are necessary components of a school facility. Deferred maintenance is defined as "[t]he repair or replacement work performed on school facility components that is not performed on an annual or on-going basis but planned for the future" and falls within one of the categories specified on the application form.[40] Education Code section 17582 states that "[a] district *may* establish an account to be known as the district deferred maintenance account." Once an application is approved, school districts are provided "state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of

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[38] *Ibid*.

[39] *Ibid*.

[40] California Code of Regulations, title 2, section 1866.

existing school building components."[41] Education Code section 17582(b) states that "[f]unds deposited in the district deferred maintenance fund shall only be expended for maintenance purposes as provided pursuant to subdivision (a)." The maintenance purposes referenced in this code section include:

> [F]or the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by the State Allocation Board.[42]

The plain language of the test claim statutes demonstrates that the requirements are based on the district governing board's voluntary decision to establish a district deferred maintenance fund and apply to the state for matching funds. For example, the plain language of the test claim statutes states the following:

- The governing board of each school district *may establish a restricted fund* known as the "district deferred maintenance fund…;[43]
- …whenever state funds…are insufficient to fully match the local funds deposited in the deferred maintenance fund, *the governing board of each school district may transfer excess local funds deposited in that funds to any other expenditure classifications in the other funds of the district*;[44]
- *…in order to be eligible to receive state aid* pursuant to subdivision (b), no district shall be required to budget from local district funds an amount greater than ½ percent of the district's current-year revenue limit daily average attendance. . .;[45]
- *School districts may submit applications* to the State Allocation Board for deferred maintenance funding in addition to the amounts specified in Section 17584…;[46]
- *Each district desiring an apportionment* pursuant to Section [17584] shall file with the State Allocation Board and receive approval of a five-year plan…,[47]

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[41] Deferred Maintenance Program Handbook, Office of Public School Construction. January 2003.

[42] Education Code section 17582(a).

[43] Education Code section 17582.

[44] Education Code section 17583.

[45] Education Code section 17584(c).

[46] Education Code section 17585.

- "*School districts and county offices of education may apply to the State Allocation Board. . . for funds* for the purposes of containment of asbestos materials posing a hazard to health";[48]

The italicized portions above indicate that school districts are not legally compelled by the state to comply with the requirements imposed by the plain language of the test claim statutes and regulations. Rather, the requirements result from the district's discretionary decisions to establish a district deferred maintenance fund and apply for state grant funding under the DMP.

Claimant argues, however, that the DMP is not discretionary and cites to Education Code section 17584.1 in support of that assertion. Education Code section 17584.1, as it appeared from January 1, 2000 to February 19, 2009, provided in relevant part, the following:

> (a) The governing board of a school district shall discuss proposals and plans for expenditure of funds for the deferred maintenance of school district facilities at a regularly scheduled public hearing.
>
> (b) In any year that the school district does not set aside ½ of one percent of its current-year revenue limit average daily attendance for deferred maintenance, the governing board of a school district shall submit a report to the legislature by March 1, with copies to the Superintendent of Public Instruction, the State Board of Education, the Department of Finance, and the State Allocation Board.
>
> (c) The report required pursuant to subdivision (b) shall contain all of the following. . .
>
> (d) Copies of the report shall be made available at each schoolsite within the school district and shall be provided to the public upon request.
>
> (e) The purpose of this section is to inform the public regarding the local decisionmaking process relating to the deferred maintenance of school facilities, and to provide a foundation for local accountability in that regard.[49]

The plain language of this section requires school districts to:

- Discuss proposals and plans for expenditure of funds for the deferred maintenance of school district facilities at a regularly scheduled public hearing;
- In any year that the district does not set aside ½ of one percent of its current-year revenue limit average daily attendance for deferred maintenance, submit a report containing the information specified in section 17584.1(c) to the Legislature, with copies to the Superintendent of Public Instruction, the State Board of Education, the Department of Finance, and the State Allocation Board; and
- Make copies of the report available at each schoolsite in the district and provide them to the public upon request.

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[47] Education Code section 17591.

[48] Education Code section 49410.2.

[49] Education Code section 17584.1 as added by Statutes 1999, chapter 390.

However, there is some ambiguity as to which school districts section 17584.1 applies to: all districts or only those participating in the DMP? According to the California Supreme Court: "[w]hen interpreting a statute, our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent."[50] Further, our Supreme Court has noted: "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . ."[51] However, if there is ambiguity, we look to extraneous sources. The first place to look is within the same code and chapter as the provision at issue since the courts "construe every statute with reference to the entire scheme of law of which it is part. . . ."[52] If read in the context of the other code sections and the regulations establishing the DMP program which have been pled in this test claim, these requirements are conditions of a discretionary program, and are not state-mandated.

All of the other test claim statutes that make up the DMP use permissive or conditional language such as "may," "each district desiring," and "to be eligible." Likewise, the test claim regulations provide that eligibility to receive DMP grants requires a district to establish a "district deferred maintenance fund" authorized by Education Code section 17582 and to have SAB approved "Five Year Plan."[53] The Article 3 (DMP Application Procedure) regulations include the introductory language "an eligible district seeking funding."[54] Article 4 (Basic Grant Request and Apportionment) lays out the planning requirements, permissible uses and calculation of apportionments for the basic grant. It also requires the district to deposit a matching share "to receive the basic grant" and provides that a deposit of less than the maximum amount will trigger the report to the Legislature required by Education Code section 17854.1.[55] Finally, it requires the county superintendent of schools to report on the district's deposit within 60-days of the state apportionment as a condition of release of the state funds to the district.

Similarly, Article 5 (Extreme Hardship Grant Application and Apportionment) provides the eligibility and application requirements and award criteria for Extreme Hardship Grants. It also provides for reimbursement of district expenditures, permissible uses of grants, increases in funding, fund release requirements, reporting requirements, and exceptions from district contributions. Finally, Article 6 (Miscellaneous) provides for various reporting, application, and accounting requirements for applicant districts. Thus, the regulations by their own terms apply to districts that make the discretionary decision to participate in the DMP by establishing a district deferred maintenance fund and preparing a SAB approved Five Year Plan.

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[50] Exhibit I, *Freedom Newspapers, Inc v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.

[51] *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.

[52] *Clean Air Constituency v. California State Air Resources Bd*. (1974) 11 Cal.3d 801.

[53] Title 2, California Code of Regulations, section 1866.1.

[54] See Title 2, California Code of Regulations, sections 1866.2, 1866.2.

[55] See Article 4 of the SAB regulations, 2, California Code of Regulations, sections 1866.4-1866.4.7.

The comments submitted by DOF, DOE and OPSC assert that all of the requirements of the test claim statutes and regulations are downstream requirements of the discretionary decision to participate in the DMP. OPSC staffs the SAB and in that capacity drafts the regulations, policies, and procedures of the SAB. The SAB, the agency responsible for implementing the DMP, has adopted regulations to implement the test claim statutes. Specifically, to implement Education Code section 17584.1, SAB has adopted Title 2, California Code of Regulations, section 1866.4.7. Section 1866.4.7, "Failure to Deposit Matching Funds" provides:

> A total deposit less than the maximum amount will require the district to comply with the reporting requirements of EC Section 17584.1. The OPSC will present to the Board in March reports received annually and request that any unmatched apportionments be adjusted to reflect actual amount of funds deposited.

The language in the second sentence of this regulation presupposes a district's participation in the DMP since the "apportionments" to be "adjusted" are only made to those districts participating in the DMP that otherwise meet the DMP eligibility requirements. That means the district must have established a district deferred maintenance fund as authorized by Education Code section 17582 and submitted a five-year deferred maintenance plan that was approved by the SAB pursuant to Education Code section 17591. In other words, it must be a "participating district" that, in the year in question, made a deposit of "less than the maximum amount" into its district deferred maintenance fund. This regulation is consistent with the interpretation of the law put forth in the comments of the state agencies on the test claim.

Moreover, though there is no regulation addressing the section 17584.1(a) requirement to discuss the district's deferred maintenance plan in a regularly scheduled public hearing, it is clear that OPSC has always interpreted that requirement to apply only to participating districts. The Deferred Maintenance Program Handbook of 2003 states that section 17584.1 "sets criteria that the district's Five Year Plan be discussed in a public hearing at a regularly scheduled school board meeting. . ."[56] The provision in the preface of the Handbook defining "district" supports this conclusion. It provides: "the term 'district' applies to those entities eligible to apply for deferred maintenance funds under Regulation Section 1866.1, unless otherwise noted."[57] In other words, when discussing "district," "participating district" is what is intended since only districts that opt to establish a district deferred maintenance fund and prepare a Five Year Plan are eligible under regulations section 1866.1. The interpretation of a statute by the agency charged with its administration is accorded great respect by the courts.[58] Therefore, staff finds that section 17584.1(a) only applies to districts that make the discretionary decision to participate in the DMP and does not make the program legally required for all school districts as alleged by the claimant.

Based on the court's analysis in *Kern*, whether a district establishes a district deferred maintenance fund and applies for funding through the State's DMP is completely at the discretion of the school district and, therefore, the requirements imposed by the test claim statutes

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[56] Deferred Maintenance Program Handbook, 2003, Appendix 5.

[57] *Id*., Preface, p. iii.

[58] *Bodinson Mfg. Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 325.

and regulations do not qualify as a state-mandated program within the meaning of article XIII B, section 6.[59]

In *Kern*, the Supreme Court analyzed the issue of legal compulsion by examining the nature of the claimants' participation in the underlying programs themselves. The court ruled that even if participation in the programs in question was legally compelled, the claimants were not eligible for reimbursement because they were "free at all relevant times to use funds provided by the state for that program to pay required program expenses. . ."[60]

The Court also addressed the issue of whether a district that incurs costs as a result of participating in an optional government funding program is eligible for reimbursement. The court held that there was no "practical" compulsion to participate in these programs because a district that chooses to not participate in the program or ceases participation in a program does not face "certain and severe…penalties" such as "double… taxation" or other "draconian" consequences.[61] The court rested its analysis on the premise that local entities possessing discretion will make the choices that are ultimately the most beneficial for the parties involved:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[62]

The holding in *Kern* applies here. School districts have complete discretion in determining whether to establish a district deferred maintenance fund and apply to receive matching state funding from the state's grant program.

There is nothing in the law requiring a school district to participate in the DMP program and comply with the program requirements. If the costs of taking the actions necessary to be eligible for these funds are too high, then the school district can forgo participation in this program in exercise of its discretionary authority. Furthermore, school districts are not subjected to any penalties for not participating in this program. Nothing in the law imposes a consequence or penalty for choosing to not participate in the DMP.

In *City of Merced v. State of California,* (1984) 153 Cal.App.3d 777, the court determined whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill when a local agency exercised the power of eminent domain. The court stated:

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[59] *Kern, supra*, 30 Cal.4th 727, 754.

[60] *Id.* at page 731.

[61] *Id.* at page 754.

[62] *Id.* at page 753.

> [W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[63]

The court's holding in *City of Merced* demonstrates the underlying notion that in order to constitute a state-mandated activity, the school district or agency must have no other option but to perform the activities specified in the test claim statute or executive order. In *Kern,* the Supreme Court reaffirmed the *City of Merced* by stating the following:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[64]

There has been no shifting of costs from the state to the school districts by the test claim statutes. The test claim statutes provide state grant money to assist school districts that would otherwise be required to fund deferred maintenance using only local funding sources. Prior to 1976, school facilities, including modernization and repair and maintenance projects, were funded entirely by local tax revenues with the assistance of state loans and land grants and private donations.[65] The Legislature enacted of the Leroy Greene State School Building Lease-Purchase Law in 1976 which provided school facility loans to school districts.[66] The Legislature also provided school districts with authority to raise local funds though the Mello-Roos Community Facilities District Act and the imposition of developer fees.

The Leroy F. Greene School Facilities Act of 1998, Education Code sections 17070.10 – 17079.30, was chaptered into law on August 27, 1998, establishing the state school facility program (SFP) and amending the Leroy Greene State School Building Lease-Purchase Law to create one SFP.[67] A modernization grant under the SFP is another way for districts to obtain state funding for major maintenance projects. The SFP provides funding grants for school

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[63] *City of Merced, supra,* 153 Cal.App.3d 777, 783.

[64] *Kern, supra,* 30 Cal.4th 727, 743.

[65] See generally: *School Facility Financing – A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds* (Cohen, Joel, February 1999), and *Financing School Facilities in California* (Brunner, Eric J., October 2006).

[66] Education Code sections 17700- 17766, Statutes 1976, chapter 1010.

[67] Statutes 1998, chapter 407, section 32 (SB 50).

districts to acquire school sites, construct new school facilities, or modernize existing school facilities. The modernization grant provides funding on a 60/40 basis. Districts that are able to meet the financial hardship provisions may be eligible for additional state funding of up to 100 percent of the local share of cost. There are a number of requirements that a district must meet in order to receive state funding under the SFP. One of the requirements that all but the smallest districts must meet, is that the district must establish a restricted account in the district's general fund to fund major maintenance projects and agree to deposit a sum into the fund annually, equal to between two and three percent of the district's general fund expenditures, for at least 20 years after receipt of SFP funds.[68] This maintenance fund is completely separate from the "district deferred maintenance fund" authorized by the test claim statutes, although district deposits into the restricted maintenance fund that exceed the minimum required amount may be count towards the district matching fund requirement to receive apportionments under the DMP.[69]

Moreover, school districts have other sources of local funding for school maintenance available. School districts may utilize their Proposition 98 apportionment. Additionally, Education Code section 15300 *et seq*. provides authority for the formation of a school facilities improvement district, consisting of a portion of the territory of a school district, and for the issuance of general obligation bonds by the district. The school facilities improvement district may issue bonds for specified purposes, which include making improvements to existing school facilities.[70] Government Code section 53311 authorizes the imposition of Mello-Roos fees which may be used for a variety of community facilities projects, including school maintenance.[71]

Staff finds that the requirements of the test claim statutes and regulations are conditions of participation in the DMP and receipt of state grant funds. School districts are not mandated by the state to participate in this program. The courts' holding in the *Kern* and *Merced* cases preclude the finding of a mandate where districts are free to participate in the program at will. Therefore, Education Code Sections and regulations sections pled do not impose state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution.

CONCLUSION

Staff finds that Education Code sections 17582, 17583, 17584, 17584.1, 17584.2, 17585, 17586, 17587, 17588, 17589, 17590, 17591, 17592, 49410, 49410.2, 49410.5 and 49410.7; Title 2, California Code of Regulations Sections 1866, 1866.1, 1866.2, 1866.3, 1866.4, 1866.4.1, 1866.4.2, 1866.4.3, 1866.4.4, 1866.4.6, 1866.4.7, 1866.5, 1866.5.1, 1866.5.2, 1866.5.3, 1866.5.4, 1866.5.5, 1866.5.6, 1866.5.7, 1866.5.8, 1866.5.9, 1866.7, 1866.8, 1866.9, 1866.9.1, 1866.10, 1866.12, 1866.13, 1866.14 and 1867.2; and the Deferred Maintenance Program Handbook of 2003 do not impose a reimbursable state-mandated program for the following reasons:

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[68] Education Code section 17070.75.

[69] Education Code section 17070.75(b)(2).

[70] Education Code section 15302.

[71] However, contrary to OPSC's assertions in its comments on the test claim, though school districts may impose developer fees for the construction or reconstruction of school facilities, they are specifically prohibited from using developer fees to fund deferred maintenance. (Ed. Code, § 17620(a)(3)(C).)

1. The Deferred Maintenance Program Handbook of 2003 does not impose any requirements and is not a plan, but rather conveys an overview of what is required by statutes and regulations. Therefore, it is not an executive order within the meaning of article XIII B, section 6 of the California Constitution.
2. The requirements of the test claim statutes and regulations are only required as a condition of establishing a district deferred maintenance fund and seeking and receiving matching funds from the State DMP. Under the analysis in *Kern*, the requirements are downstream requirements of a district's discretionary decision to participate in the program and do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this staff analysis and deny this test claim.