BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 70901(b)(1)(B), 87356, 87357, 87358, 87359, 87360, 87610.1, 87611, 87663, 87714, 87740, 87743.2, 87743.3, 87743.4, 87743.5

Statutes 1981, Chapter 470, Statutes 1988, Chapter 973, Statutes 1990, Chapter 1302, Statutes 1993, Chapter 506, Statutes 1995, Chapter 758, Statutes 1998, Chapter 1023, Statutes 2000, Chapter 124

California Code of Regulations, Title 5, Sections 53130, 53403, 53406, 53407, 53410, 53410.1, 53412, 53414, 53415, 53416, 53417, 53420, 53430

Register 90, No. 37 (July 5, 1990), Register 90, No. 49 (Nov. 30, 1990), Register 91, No. 23 (June 7, 1991), Register 91, No. 50 (July 19, 1991), Register 92, No. 9 (Nov. 24, 1991), Register 92, No. 26 (July 27, 1992), Register 92, No. 45 (Nov. 6, 1992), Register 93, No. 25 (June 4, 1993), Register 93, No. 42 (Nov. 4, 1993), Register 93, No. 46 (Oct. 8, 1993), Register 94, No. 38 (Oct. 6, 1994), Register 95, No. 19 (Mar. 19, 1995), Register 96, No. 40 (Oct. 4, 1996)

Filed June 13, 2003, by the Santa Monica Community College District, Claimant

Case No.: 02-TC-27

Employment of Community College Faculty and Administrators

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

(Adopted July 28, 2011)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 28, 2011. Keith Petersen appeared on behalf of claimant. Donna Ferebee and Ed Hanson appeared on behalf of the Department of Finance. Steve Bruckman appeared on behalf of the Chancellor's Office of the California Community Colleges.

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 the staff analysis to deny the test claim at the hearing by a vote of 6-0.

Summary of Findings

This test claim addresses various activities related to determining the minimum qualifications for academic employees in community colleges, as well as for hiring procedures, evaluating, and providing tenure grievance procedures and faculty service areas for them.

Most of the test claim statutes are based on the Community College Reform Act of 1988 (1988 Reform Act), which abolished the credential system for community college faculty and administrators, and required the Board of Governors of the California Community Colleges (Board of Governors) to establish minimum standards for the employment of academic and administrative staff in community colleges.

The 1988 Reform Act also changed faculty evaluation procedures, such as reducing the evaluation frequency from every two years to every three years for regular (tenured) employees, and requiring temporary employees to be evaluated within the first year of employment, and once every six semesters or nine quarters thereafter.

The 1988 Reform Act also set up a process, in districts where tenure evaluation procedures are collectively bargained and there is a contractual grievance procedure resulting in arbitration, whereby an employee may file a grievance and seek review before an arbitrator for certain allegations. Districts without a contractual grievance procedure resulting in arbitration follow the hearing process in Education Code section 87740.[1] Decisions on grievances and arbitrator hearings under the test claim statute are subject to judicial review.

The Act also required community college districts to establish "faculty service areas" by July 1, 1990. A faculty service area (FSA) is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." Each faculty member is required to qualify for one or more FSAs at the time of initial employment, and if qualified, may apply for more FSAs. Any disputes due to denial of FSA applications are treated as grievances. Districts are required to maintain records of faculty members' FSAs in the faculty members' personnel files.

For the reasons below, *the Commission denies this test claim and finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.*

Although the activities listed below mandate a new program or higher level of service, there is no substantial evidence in the record to support a finding that the claimant has incurred increased costs mandated by the state pursuant to Government Code section 17514 to perform these activities.

1. Determine the Minimum Qualifications of Applicants for Faculty and Educational Administrator Positions as follows (§ 87359(a), as added by Stats. 1988, ch. 973; Cal. Code Regs, tit. 5, § 53430(a).):

    - Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.

[1] All statutory references are to the Education Code unless otherwise indicated.

- The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action. (§ 53430(a).)

Community college districts are *not* entitled to reimbursement for these activities above when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), and noncredit courses (Cal. Code Regs., tit. 5, § 53412).

2. Develop Process, Criteria, and Standards for Determinations on Faculty (§ 87359(b), Stats. 1988, ch. 973; Stats. 1993, ch. 506; Cal. Code Regs, tit. 5, § 53430(b) & (c).):

- The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359(a); Cal. Code Regs, tit. 5, § 53430(b).)
- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359, subd. (a), Cal. Code Regs, tit. 5, § 53430(b).)
- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359, subd. (a), Cal. Code Regs, tit. 5, § 53430(c).)
- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359, subd. (a); Cal. Code Regs, tit. 5, § 53430(b).)

Community college districts are *not* entitled to reimbursement for the activities listed above when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

3. Faculty Evaluations:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semester or once every nine regular quarters thereafter. (§ 87663(a), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Include a peer review process in evaluations of academic employees, on a departmental or divisional basis, that addresses the forthcoming demographics of California and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to

affirmative action concerns, all without compromising quality and excellence in teaching. (§ 87663(c)and (d), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)

- Develop "evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative" for probationary faculty. (§ 87663(h).)
- Establish and disseminate written evaluation procedures for administrators (§ 87663(i), Stats. 1988, ch. 973, Stats. 1990, ch. 1302).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150.)[2]

Community college districts are *not* entitled to reimbursement for these evaluations activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

4. Hearings on Reappointing Probationary Employees

To hold hearings pursuant to section 87740 regarding:

- Allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

Community college districts are *not* entitled to reimbursement for these hearing activities when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

5. Faculty Service Areas:

- Receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. (§ 87743.3, Stats. 1988, ch. 973.)
- Procedurally address as a grievance, or use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. (§ 87743.3, Stats. 1988, ch. 973.)

[2] California Code of Regulations, title 5, section 53130, Register 91, No. 23 (June 7, 1991). A new article heading was added by Register 93, No. 25 (June 18, 1993). Editorial correction of the history was made by Register 95, No. 19 (March 19, 1995).

- Maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possess the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4, Stats. 1988, ch. 973.)

Community college districts are *not* entitled to reimbursement for these FSA activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

There is no substantial evidence in the record, however, to support a finding that the claimant has incurred increased costs mandated by the state to perform these activities.

During the period of reimbursement, funding between $2.1 and $3.9 billion has been specifically appropriated for the costs of the mandated activities through the base funding in the budget acts (line item 6870-101-0001), and pursuant to section 84755(b) and (d), that funding must first be used to pay for the mandated activities listed above.

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

Pursuant to Government Code section 17556(e) and section Education Code section 84755(b) and (d), revenue has been appropriated that was specifically intended to fund the costs of the state mandate.

The claimant argues, however, that there is no evidence in the record that the base funding provided in the budget acts is sufficient to cover the costs of the mandated activities and that since the claimant has alleged an estimate of $1,000 in costs for this test claim, it has met its burden of proof.

The Commission disagrees with the claimant's arguments in this case. It is a general principle of law that the party bringing the claim has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim. This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. By statute, only the local agency or school district may bring a claim, and the local entity must present and prove that it has incurred increased costs mandated by the state pursuant to Government Code section 17514, and is therefore entitled to reimbursement.

In many cases, a declaration from the claimant that alleges that the claimant has incurred $1,000 in costs to pay for the program satisfies the claimant's burden of proving it has incurred increased costs mandated by the state pursuant to Government Code section 17514. This is true, for example, when legislation mandates a new program or higher level of service, but does not appropriate any funding with the new requirements. It may also be true when the Legislature

appropriates general funding for a block of programs, one of which is the test claim program, but does not establish a priority use of the funding. In this second example, local government has discretion to use the funding for any of the programs identified, and offsetting revenue may only be identified and deducted from the claim if a claimant has used the funds for the mandated program.

Here, however, there is enough evidence to show the relevance of Government Code section 17556(e); a significant amount of money has been appropriated every fiscal year to community college districts that was specifically intended by the state to fund the costs of the mandated activities. Funding between $2.1 and $3.9 billion has been specifically appropriated to community college districts in the budget acts for allocation to the districts' through their base funding appropriation between 2001 and 2010. Pursuant to sections 84755(b) and (d), the state has directed that these appropriations must be *first* used to pay for the costs of the mandated activities identified above before a community college can exercise its discretion to use the funding for other authorized purposes.

Although there is no evidence in the record showing that the claimant's plan for expenditures prepared in accordance with section 84755(d) was, in fact, approved; that funding was actually allocated to the claimant during the period of reimbursement; or that the funding allocated to the claimant was sufficient to cover the costs of the mandated activities, it may be presumed that the official duties required of state and local officials by section 84755(d) have been regularly performed.[3] Thus, it is presumed that community college districts complied with the law in section 84755(d) and submitted a plan for expenditures showing that the allocation of funding would first pay for the mandated activities. It is further presumed that the Board of Governors complied with section 84755(d) before approving the plans and including the district's allocation as part of the district's base budget by ensuring that the proposed expenditures are consistent with the authorized expenditures in section 84755, including the requirement to pay for the mandated activities first. And it is presumed that the districts, after receiving the yearly base-funding allocation, paid for the mandated activities first. There is no evidence in this case that the state and local community college districts failed to comply with these requirements.

The cost issue in this case is similar to what occurred in the *Kern High School District* case.[4] *Kern High School Dist.* addressed legislation requiring school site councils to comply with modified open meeting act requirements, including posting a notice and an agenda of their meetings. School site councils were created by several state and federal programs that included funding for "reasonable district administrative expenses."[5] The school site councils test claim was filed with the Commission in 1994. For the Commission to take jurisdiction of the test claim filing, the claimant was required to estimate costs of at least $200 pursuant to the former Government Code section 17564 and section 1183 of the Commission's regulations. Based on the statutory schemes that created the school site councils, the court noted that the program funding available for the programs was often substantial – "for example, on a statewide basis, funding provided by the state for school improvement programs [citations omitted] for the 1998-

[3] Evidence Code section 664.

[4] *Department of Finance v. Commission on State Mandates (Kern High School Dist)* (2003) 30 Cal.4th 727, 746-747.

[5] *Id.* at page 747.

1999 fiscal year totaled approximately $394 million. (Cal.Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)"[6] In addition, the statutes allowed school districts to use the program funding for "administrative expenses," but did not establish a priority use of the funds. Despite the allegations by the claimant of increased costs mandated by the state, the court still denied the claim.

The facts here are even more compelling than *Kern*. Here, community college districts are required by law to use the allocations received to *first* pay for the mandated activities before the funding could be spent on other authorized expenses. The declaration filed by the claimant in this case estimating increased costs of $1,000, while satisfying the test claim filing requirements when this test claim was filed in 2002, is not enough to show that the claimant actually incurred increased costs mandated by the state above and beyond the significant funding specifically appropriated by the state to first pay for the mandated activities.

Accordingly, the Commission denies this test claim and finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program.

BACKGROUND

The Community College Reform Act of 1988 (Stats. 1988, ch. 973, Reform Act), which provides the basis for most of this test claim, was based largely on a study by the Commission for the Review of the Master Plan for Higher Education (Review Commission) entitled "The Challenge of Change: A Reassessment of the California Community Colleges" (Reassessment Report). In its authorization of the Reassessment Report (Stats. 1984, ch. 1506) the Legislature stated:

> (a) The Legislature finds and declares that the community colleges are a large and important segment of California's system of public higher education. In the last 20 years, [1964-1984] community colleges have not only experienced tremendous growth in the numbers of students enrolled, but have undergone a major transition in the types of students served and the types of programs and courses offered. Community colleges have also experienced an unacceptable degree of uncertainty and instability in their revenues over the last decade.
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> (b) The Legislature further finds and declares that legislative actions regarding community colleges have not been based on a comprehensive policy on the role that community colleges should play in public education. Community colleges have been reacting and responding to narrow changes in state policy that have shaped the functions of the colleges by default, rather than by design.
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> (c) It is, therefore, the intent of the Legislature to require the Commission for the Review of the Master Plan for Higher Education established pursuant to Senate Bill 1570 of the 1983-84 Regular Session to set the reassessment of the mission of the community colleges as its first and highest priority.

The Reassessment Report was submitted to the Joint Legislative Committee for the Review of the Master Plan for Higher Education in March 1986 and recommended many of the changes enacted in the 1988 Reform Act.

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[6] *Id.* at page. 732.

Minimum Qualifications for the Employment of Faculty and Educational Administrators

Before the 1988 Reform Act, the Chancellor's Office issued credentials to prospective faculty (including counselors and librarians) and administrators at community colleges. Interested individuals would apply to the Chancellor's Office, which would review the applicants' education and experience to determine if they were eligible for a credential. (Former Cal. Code Regs., tit. 5, § 52030 et seq., Register 83, No. 29 (July 16, 1983) p. 628.15.)

The Review Commission's 1986 Reassessment Report recommended that the community college credential system be abolished, and that community college faculty be subject to peer review, as follows:

> The Community Colleges must recruit and retain faculty and administrators with the highest professional qualifications. To this end, the Board of Governors must establish qualifications appropriate to postsecondary institutions and make certain that both full-time and part-time faculty appointments are subject to peer review, as they are in other collegiate institutions.
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> California is the only state to retain a system of credentialing for community college faculty and administrators originally developed for the elementary and secondary schools. Under this system, new faculty are to obtain a credential in one or more of sixty-six subject matter areas based on a *pro forma* paper review. There is no requirement that proposed new faculty appointments be reviewed by tenured faculty in the appropriate department or division of each college. This system is unnecessarily rigid, cumbersome, and unsuited to the academic rigor of postsecondary institutions.
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> *The Commission recommends:*
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> 34. That the Legislature delete from the *Education Code* existing credential requirements for Community College faculty and administrators.
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> 35. That the Legislature authorize the Board of Governors, in consultation with the faculty, to (a) establish qualifications for employment of faculty and administrators, and (b) require that new faculty appointments, both full-time and part-time, be subject to peer review in addition to other administrative procedures.[7] (Emphasis in original.)

Consequently, the 1988 Reform Act stated that one of the duties of the Board of Governors of the California Community Colleges, a state agency, is to "establish minimum standards … for the employment of academic and administrative staff in community colleges." (§ 70901(b)(1)(B), Stats. 1988, ch. 973.) Similarly, the Reform Act imposed a duty on community college districts to: "Employ and assign all personnel not inconsistent with the minimum standards adopted by the Board of Governors, and establish employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state." (§

[7] Commission for the Review of the Master Plan for Higher Education. "The Challenge of Change: A Reassessment of the California Community Colleges." March 1986, pages 13-16. See: <http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/post1960.html> as of June 1, 2011.

70902(b)(4), Stats. 1988, ch. 973.) Regarding these minimum standards or qualifications, the 1988 Reform Act declared the following legislative intent:

> (q)(1) In general, the appropriate focus of minimum qualifications is in helping the colleges to ensure that they will select faculty who are competent in subject matter and possess the basic academic preparation needed to work effectively at the college level. The minimum qualifications for all faculty should be the same except where the application of qualifications without differentiation would be clearly unreasonable or impractical.
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> (2) The minimum qualifications for administrators should help the colleges to ensure that they will select individuals who are competent to perform the kind of administrative responsibilities that administrators are normally required to assume, such as supervision, organizational planning, and budget development and administration, and who understand the needs of faculty and the learning process. [¶]…[¶]
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> (s) [¶]…[¶] (4)…[C]olleges may establish criteria for hiring that go well beyond the minimum qualifications set by regulation. The establishment of additional criteria of this sort should be expected and encouraged. (Stats. 1988, ch. 973, § 4.)

The 1988 Reform Act requires the Board of Governors to adopt regulations that establish the minimum qualifications for community college faculty teaching credit courses, extended opportunity programs and services workers, handicapped student programs and service workers, and instructional or student services administrators. (§ 87356.) These regulations were adopted between 1990 and 1994, many of which are part of this test claim. (Cal. Code Regs., tit.5, § 53400 et seq.) The regulations require all degrees and units used to satisfy the minimum qualifications to be from accredited institutions, as defined. (Cal. Code Regs., tit. 5, § 53406.) The statute requiring adoption of regulations on minimum qualifications (§ 87356, Stats 1993, ch. 506) was reenacted in 1993 to require the adoption of regulations for specified faculty member and administrator positions.

The 1988 Reform Act also requires the Board of Governors to "adopt regulations setting forth a process authorizing local governing boards to employ faculty who do not meet the applicable minimum qualifications specified in the regulations . . . ." but requires that a new hire have qualifications that are equivalent to the minimum qualifications in the regulations. (§ 87359.) The statute also requires that the governing boards follow a process in developing the process, criteria, and standards by which a district's governing board "reaches its determinations regarding faculty." (*Ibid*.) The title 5 regulation (§ 53430) that implements section 87359 was adopted in 1990. Thus, each district may adopt its own minimum qualifications that are equivalent to the minimum qualifications in the regulations.

Faculty Evaluations

Community colleges have been required to evaluate employees at least since 1971. (Stats. 1971, ch. 1653.) The 1988 Reform Act (§ 87663) made changes that: (1) reduced the evaluation frequency from every two years to every three years for regular (tenured) employees; (2) required temporary employees to be evaluated within the first year of employment, and once every six semesters or nine quarters thereafter; (3) required evaluations to include a peer review

process, as specified; (4) required consultation between the faculty's "exclusive representative"[8] and the academic senate where evaluation procedures are negotiated as part of the collective bargaining process; (5) expressed legislative intent that faculty evaluation procedures include student evaluations to the extent practicable; (6) where the faculty has elected an exclusive representative, accorded probationary faculty the right to be evaluated under clear, fair, and equitable evaluation procedures locally defined through collective bargaining, not to include de facto tenure rights; and (7) required governing boards to establish and disseminate written evaluation procedures for administrators that include, to the extent possible, faculty evaluation.

Tenure Grievance Arbitration

Before the 1988 Reform Act, if the district chose to keep the employee in a probationary or contract status for the second year, at the end of that year the district had only two choices: to grant permanent status or not to grant such status and terminate the teacher's employment. (§87609; *McGuire v. Governing Board* (1984) 161 Cal.App.3d 871, 874.) Termination procedures were and are governed by section 87740 hearings (originally enacted by Stats. 1976, ch. 1010) as to whether "cause" existed for the termination.

In the 1988 Reform Act, the Legislature stated the following regarding tenure reform: "The current tenure system lacks adequate participation by faculty, provides an inadequate probationary period for the evaluation of permanent faculty, and does not provide uniform systemwide procedures for due process and grievance." (Stats. 1988, ch. 973, § 4(l) & (m).)

Thus, under the test claim statute (§ 87610.1, Stats. 1988, ch. 973, Stats. 2000, ch. 124), in districts where tenure evaluation procedures are collectively bargained, and there is a contractual grievance procedure resulting in arbitration, the employee may file a grievance and seek review before an arbitrator for the following allegations:

- That the district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable;
- That the district violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees; and
- That the district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

Districts without a contractual grievance procedure resulting in arbitration follow the hearing process in section 87740. (§ 87610.1(b).)

This statute also outlines grievance procedures (§ 87610.1(c)) and the authority of the arbitrator. (§ 87610.1(d).) Decisions on grievances and arbitrator hearings under the test claim statute are subject to judicial review. (§ 87611.)

[8] "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer. (Gov. Code, § 3540.1(e).)

Faculty Service Areas

A Faculty Service Area ("FSA"), also added by the 1988 Reform Act, is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." (§ 87743.1.) Each faculty member is required to qualify for one or more FSAs at the time of initial employment, and if qualified, may apply for more FSAs. Any disputes due to denial of FSA applications are treated as grievances (§ 87743.3.) Districts are required to maintain records of faculty members' FSAs in the faculty members' personnel files. (§ 87743.4.) Each community college district is required to establish criteria to determine competency to serve in the FSA by July 1, 1990. (§ 87443.5.) According to a "Frequently Asked Questions" document on the academic senate's website:

> Faculty Service Areas are established by each district and serve as the basis for making decisions in the event of a layoff or reduction in force (RIF). Some districts construct their FSAs by designating each discipline listed in the Disciplines List as an FSA. Other districts combine several disciplines into an FSA. And other districts combine all disciplines into one single FSA. Upon hire, a faculty member is placed in the FSA that includes the discipline for their position. If your FSA includes more than one discipline, it does not mean that you are qualified for service in each of the disciplines listed in that FSA, but only for those in which you meet the MQs [minimum qualifications].[9]

State Funding

The Legislature established a "trigger provision" in section 70 of the 1988 Reform Act, stating intent that the Act be implemented in two phases of "transitional program improvement"[10] until program-based funding was implemented in fiscal year 1991-1992.[11]

Phase I of transitional program improvement included the statutes regarding minimum qualifications (§§ 87356, 87357, 87358, 87359) and hiring criteria (§87360), as well as employee evaluations (§ 87663), and FSAs (§§ 87743.2-87743.5). The Reform Act requires the hiring criteria (§ 87360) and FSAs (§ 87743.2 & 87743.5) be implemented by July 1, 1990, and a list of disciplines was to be established by the Board of Governors by July 1, 1989. (§ 87357(b).) The Legislature stated its intent "that moneys appropriated during Phase I fully fund any state-mandates created pursuant to this section."[12]

Phase II consisted of tenure reform and program-based funding, including the tenure grievance arbitration procedures (§§ 87610.1 & 87611) in this claim. The Legislature stated its intent "that moneys appropriated during Phase II fully fund any state-mandate created pursuant to this section."[13]

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[9] Academic Senate for California Community Colleges, FAQs on Minimum Qualifications, p. 4.

[10] Statutes 1988, chapter 973, section 70 (b).

[11] Education Code section 84755 (a).

[12] Statutes 1988, chapter 973, section 70(b)(1).

[13] Statutes 1988, chapter 973, section 70(b)(2).

The 1988 Reform Act made its state-mandated provisions conditional on certification of adequate funding by the Board of Governors of the California Community Colleges. Section 70 (d) of the Reform Act states that certain Education Code sections are conditional on state certification of adequate funding for Phase I and Phase II transitional program improvement. The Phase I certification requirement is as follows:

> [Sections of the Reform Act that include the Phase I test claim statutes] shall be implemented by the board of governors and be mandatory with regard to implementation by community college districts only if the board of governors certifies in writing to the Governor and to the Legislature that adequate funding has been provided for Phase I of transitional program improvement and for any applicable state mandates, as authorized by Section 84755 of the Education Code.

The Board of Governors provided certification of adequate funding for Phase I in September 1989.[14] The Phase II adequate funding certification was provided in November 1990.[15]

The 1988 Reform Act also contained the following legislative declarations:

> The Legislature finds and declares that the reforms enacted through this act form a mutually dependent and related set of provisions. While some few provisions could be enacted independently, other sections of this act depend upon adequate support for the programs of the community colleges. There is a direct linkage between those sections of this act which constitute the further professionalization of the faculty and the moneys required to enhance the programs of the community colleges for "transitional program improvement," as specified in Section 84755 of the Education Code.
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> For instance, the elimination of credentials must be accompanied by the establishment of minimum qualifications by the board of governors. Minimum qualifications in turn must be implemented by districts through the establishment of faculty service areas, competency criteria, and various waiver processes. The extension of the tenure probationary period to four years as well as the revisions to layoff procedures also depend upon faculty service areas and competency criteria. Similarly, because so many of the reforms call for faculty involvement in the determination and implementation of policy, and because the quality, quantity, and composition of full-time faculty have the most immediate and direct impact on the quality of instruction, overall reform cannot succeed without sufficient members of full-time faculty with sufficient opportunities for continued staff development, and with sufficient opportunity for participation in institutional governance.
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> The Legislature further finds that, absent resources to reimburse the state-mandated costs of this act, new full-time faculty to replace part-time faculty, and expanded programs for staff development, the viability or success, or both, of

[14] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

[15] Board of Governors, California Community Colleges, Board Certification Regarding Adequate Funding for Phase II of AB 1725. (Agenda Item 14) November 8-9, 1990.

many of the reforms in this act will be jeopardized. The Legislature recognizes that due to unanticipated fiscal conditions the State cannot immediately fund all of the reforms contained in this act. The Legislature also recognizes, however, that if minimal funding is not soon provided that it would be inappropriate to proceed with many reforms. (Stats. 1988, ch. 973, § 70(a).)

Claimants' Position

Claimant Santa Monica Community College District asserts that the test claim statutes and regulations constitute a reimbursable state mandate within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to do the following pursuant to the code sections and title 5 regulations cited:

Education Code

A) Establishing and implementing policies and procedures, and periodically updating those policies and procedures regarding the employment of faculty and the resolution of disputes on hiring and tenure issues.

B) Establishing and implementing minimum standards for the employment of academic and administrative staff. (§ 70901(b)(1)(B).)

C) Consulting with and advising the board of governors regarding the minimum qualifications for faculty and administrators. (§ 87357(a)(1).)

D) Conducting or otherwise assisting, at least every three years, in any review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators (§ 87357(a)(2)).

E) Participating, as designated by the board of governors, in the review of each community college district's application of minimum qualifications to faculty and administrators (§ 87358).

F) Complying with the process adopted by the board of governors providing for the employment of faculty members and educational administrators who do not meet the applicable minimum qualifications specified in the regulations adopted by the board of governors pursuant to Section 87356. (§ 87359.) These regulations shall require all of the following:

   (1) No one may be hired to serve as a community college faculty member or educational administrator unless the governing board determines that he or she possesses qualifications that are at least equivalent to the minimum qualifications specified in regulations of the board of governors adopted pursuant to Section 87356.

   (2) The process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty members, shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The process shall further require that the governing board provide the academic senate with an opportunity to present its views to the governing board before the board makes a determination, and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Section 87358.

(3) In the event a joint agreement is not reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect.

G) Complying with the criteria established by the governing board when hiring faculty and administrators that includes a sensitivity to, and understanding of, the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. Pursuant to subdivision (b), developing and agreeing, and updating, with representatives of the governing board and the academic senate hiring criteria, policies, and procedures for new faculty members. In the event a joint agreement is not yet reached, the existing district process in January 1, 1989, shall remain in effect (§ 87360(a)).

H) Consulting with the faculty's exclusive representative prior to engaging in collective bargaining on these procedures in those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, (§ 87610.1(a)).

I) Participating in arbitration procedures in response to grievance allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).

J) Participating in arbitration procedures in response to grievance allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).

K) In the event there is no contractual grievance procedure resulting in arbitration pursuant to section 87610.1(b) conducting the hearing and making a decision in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if a request is made therefore within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the faculty. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations,

or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds (§ 87740(c)).

L) Complying with an arbitrator's make-whole remedies, which may include, but need not be limited to, backpay and benefits, reemployment in a probationary position, and reconsideration (§ 87610.1(d)).

M) The legal cost of appearing in a court or before any other hearing panel when appealing, or in response to a petition appealing, a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1 (§ 87611).

N) Conducting evaluations of faculty members of a community college district using a peer review process on a departmental or divisional basis, which shall address the forthcoming demographics of California and the principles of affirmative action (§ 87663(c) & (d)).

(1) When negotiated as part of the collective bargaining process, conducting evaluations of faculty members of a community college district pursuant to the terms of that agreement (§ 87663(e)).

(2) In those districts where faculty evaluation procedures are collectively bargained, consulting with the faculty's exclusive representative prior to engaging in collective bargaining regarding those procedures (§ 87663(f)).

(3) Conducting evaluations of faculty members of a community college district to the extent practicable using student evaluations (§ 87663(g)).

(4) Evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative (§ 87663(h)).

(5) Evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation (§ 87663(i)).

O) Providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed (§ 87714).

P) Establishing and updating faculty service areas, within the scope of meeting and negotiating pursuant to Section 3543.2 of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals (§ 87743.2).

Q) Receiving and determining faculty applications to add faculty service areas for which the faculty member qualifies (§ 87743.3).

R) Classifying and procedurally addressing any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board (§ 87743.3).

S) Maintaining a permanent record in each faculty member's personnel file, for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards (§ 87743.4).

T) Establishing and updating competency criteria for faculty members employed by the district within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code (§ 87743.5).

Title 5, California Code of Regulations Provisions

A) Adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties (Cal. Code Regs., tit. 5, § 53130).

B) Establish and implement policies to recognize faculty who were qualified to teach in their respective discipline under the minimum qualifications when they were employed (Cal. Code Regs., tit. 5, § 53403).

C) Determine whether applicants for college faculty or educational administrator positions have qualifications that are at least equivalent to the minimum conditions specified, including verifying all of the following (Cal. Code Regs., tit. 5, § 53430(a)):

(1) All degrees and units used to satisfy minimum qualifications are from accredited institutions, unless otherwise specified (Cal. Code Regs., tit. 5, § 53406).

(2) Disciplines requiring a Master's Degree and those disciplines in which a Master's Degree is not generally expected or available by reference to publications and lists maintained by the Chancellor's Office (Cal. Code Regs., tit. 5, § 53407).

(3) The minimum qualifications for service as a community college faculty member teaching any credit course, or as a counselor or librarian (Cal. Code Regs., tit. 5, § 53410).

(4) Possession of a bachelor's degree in the discipline of the proposed assignment plus a professional license or certification (Cal. Code Regs., tit. 5, § 53410.1).

(5) Possession of the minimum qualifications for a faculty member teaching a noncredit course (Cal. Code Regs., tit. 5, § 53412).

(6) Possession of the minimum qualifications for a faculty member teaching disabled programs and services (Cal. Code Regs., tit. 5, § 53414).

(7) Possession of the minimum qualifications for a faculty member teaching as a learning assistance or learning skills coordinator or instructor, or tutoring coordinator (Cal. Code Regs., tit. 5, § 53415).

(8) Possession of the minimum qualifications for a faculty member instructing or coordinating general or occupational work experience education (Cal. Code Regs., tit. 5, § 53416).

(9) Possession of a current, valid certificate to work or a license to practice in California whenever the instructor's possession of such a certificate or license is required for program or course approval (Cal. Code Regs., tit. 5, § 53417).

(10) Possession of the minimum qualifications for service as an educational administrator (Cal. Code Regs., tit. 5, § 53420).

D) Develop and agree upon the process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty, jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty member employed under the authority granted by this section possess qualifications that are at least the equivalent to the applicable minimum qualifications specified in this Division (Cal. Code Regs., tit. 5, § 53430(b)).

E) The agreed upon process further requires that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination; and that the written record of the decision, including the views of the academic senate, shall be available for review, pursuant to section 87358 (Cal. Code Regs., tit. 5, § 53430(c)).

F) To be bound by the provisions of the subchapter until a joint agreement is reached and approved pursuant to subdivision (b) (Cal. Code Regs., tit. 5, § 53430, subd. (d)).

In complying with these alleged mandates, claimant alleges more than $1,000 in costs "in excess of any funding provided to community college districts and the state for the period from July 1, 2001 through June 30, 2002 …."[16]

Claimant's rebuttal comments regarding specific statutes or regulations are discussed below.

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[16] In its April 2004 rebuttal comments, claimant asserts that the March 11, 2004 comments of the California Community College Chancellor's Office are incompetent and should be excluded from the record because they are not signed under penalty of perjury "with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief" in accordance with section 1183.02(c) of the Commission's regulations. While the claimant correctly states the rule in the Commission's regulations, the Commission disagrees with the request to exclude the Chancellor's comments from the official record in this case. Most of comments from the Chancellor's Office argue an interpretation of the law, rather than constitute a representation of fact. If this case were to proceed to court on a challenge to the Commission's decision, the court would not require sworn testimony for argument on the law. The ultimate determination whether a reimbursable state-mandated program exists is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.)

When facts are asserted and are relevant to one of the mandate elements, however, rules of evidence do come into play. The Commission may take official notice of any fact that may be judicially noticed by the courts, and the Commission takes official notice of certain facts in this case; i.e., minutes of a board of governors' meeting that certified adequate funding had been provided for Phase I and Phase II of the test claim program and State Budget Act appropriations. (Cal. Code Regs., tit. 2, § 1187.5 (c); Gov. Code. § 11515.) Official acts of the legislative and executive branches of government are properly subject to judicial notice. (Evid. Code, § 452(c).) The Commission may also consider facts provided by sworn testimony at the hearing on this item, or facts asserted in writing and supported with a declaration signed under penalty of perjury.

State Agency Position

The Chancellor's Office of the California Community Colleges filed comments on March 11, 2004, asserting that none of the activities in the statutes or regulations claimed constitute reimbursable mandates. According to the Chancellor's Office, the activities either do not mandate a program on a community college district, or do not constitute a new program or higher level of service, or do not impose "costs mandated by the state" because the activities are already funded. The comments are described in more detail below.

The Department of Finance did not file comments on the test claim.

COMMISSION FINDINGS

Issue 1: Do the test claim statutes and regulations impose a state-mandated new program or higher level of service subject to article XIII B, section 6, of the California Constitution?

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."[17] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[18]

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.[19]
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.[20]
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.[21]

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

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

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

[20] *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.

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. [22]

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.[23] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[24] 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."[25]

A. Minimum Qualifications for the Employment of Faculty and Educational Administrators

As indicated in the background, the test claim statutes and regulations changed the process of credentialing faculty and educational administrators at community colleges to a process of establishing minimum qualifications for the hiring of these employees. "Faculty" is defined in section 87003 and section 53402 as:

> [T]hose employees of a community college district who are employed in academic positions that are not designated as supervisory or management . . . and for which minimum qualifications for service have been established by the board of governors . . . . Faculty include, but are not limited to, instructors, librarians, counselors, community college health services professionals, handicapped student programs and services professionals, extended opportunity programs and services professionals, and individuals employed to perform a service that, before July 1, 1990, required nonsupervisorial, nonmanagement, community college certification qualifications.

"Educational administrator" is defined in section 87002(b) and section 53402 as:

> [A]n administrator who is employed in an academic position designated by the governing board of the district as having direct responsibility for supervising the operation of or formulating the policy regarding the instructional or student services program of the college or district. Educational administrators include, but are not limited to, chancellors, presidents, and other supervisory or

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[21] *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.

[22] *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.

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

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

[25] *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.

management employees designated by the governing board as educational administrators.

Section 70(d), of Statutes 1988, chapter 973 that codified the Minimum Qualifications program states that the requirements imposed shall be implemented and "be mandatory" only if the state Board of Governors certifies that adequate funding has been provided for Phase I of the program.

> Sections 27 to 34, inclusive, and Sections 51 to 56, inclusive, of this act [section 28 codifies the Minimum Qualifications] shall be implemented by the board of governors and be mandatory with regard to implementation by community college districts only if the board of governors certifies in writing to the Governor and to the Legislature that adequate funding has been provided for Phase I of transitional program improvement and for any applicable state mandates, as authorized by Education Code section 84755 [program based funding]. If the board of governors so certifies, each of these sections shall be implemented on the date of certification, or upon any operative date specified for the particular section in this act, whichever is later. For purposes of this subdivision, "adequate funding" means those moneys required to provide an increased quality of instruction and programs, and to carry out applicable mandates of this act, within the California Community Colleges. Based upon estimates provided by the board of governors and exhaustive review of the community colleges' operations by the Joint Committee for the Review of the Master Plan for Higher Education, the Legislature finds and declares that its estimate of this funding amount is seventy million dollars ($70,000,000).

At its September 1989 meeting, the state Board of Governors certified that adequate funding had been provided for Phase I and, thus, community college districts were required to implement the activities mandated by the state as of that date.[26] Although the requirements were certified to have adequate funding," the analysis continues to determine which activities impose a state-mandated new program or higher level of service on community college districts. The analysis of the funding is provided under issue 2.

1. Requirements Imposed on the State Board of Governors do not Impose State-Mandated Duties on Community College Districts.

a) <u>Establishing minimum standards for employment</u>

Section 70901(b)(1)(B)[27]was added by the 1988 Reform Act and states in pertinent part the following:

> [I]n consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance of those purposes, perform the following functions: (1) Establish minimum standards as

[26] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

[27] Former section 200.11 (as amended by Stats. 1970, ch. 102) stated: "The board of governors shall establish minimum standards for the employment of academic and administrative staff in community colleges."

> required by law, including, but not limited to, the following: [¶]. . . [¶] (B) Minimum standards for the employment of academic and administrative staff in community colleges.

Claimant asserts, in its April 2004 comments, that the minimum standards for the employment of academic and administrative staff must be established "in consultation with community college districts," so that consultation activities of community college districts are mandated by the state as of the enactment of Statutes 1988, chapter 973.

The Chancellor's Office, in its March 11, 2004 comments, states that this statute is not a state mandate because it does not apply to local districts, only to the Board of Governors of the California Community Colleges, a state agency. The Chancellor's Office also states that this law was in existence before 1975 (former § 200.11, Stats. 1969, ch. 1026), and therefore not required to be reimbursed under article XIII B, section 6.

The Commission finds that section 70901(b)(1) does not impose a state-mandated activity on community college districts. In determining whether consultation is required of the districts, section 70901(e), which is cited in subdivision (b), sheds light on the legislative intent. The pertinent part of subdivision (e) states:

> In performing the functions specified in this section, the board of governors shall establish and carry out a process for consultation with institutional representatives of community college districts so as to ensure their participation in the development and review of policy proposals. The consultation process shall also afford community college organizations, as well as interested individuals and parties, an opportunity to review and comment on proposed policy before it is adopted by the board of governors. (Emphasis added.)

There is nothing in the plain language of section 70901 that requires community college districts to consult with the Board of Governors.

In comments on the draft staff analysis, the claimant argues that consultation with the Board of Governors regarding the minimum standards for employment is mandated by the state and points out section 70902(b)(14), which requires district "[p]articipation in the consultation process established by the Board of Governors for the development and review of policy proposals." Claimant also points out section 53207, which grants release time to the president and vice-president of the academic senate for purposes of meeting and consulting with the Board of Governors. However, section 70902 and section 53207 have not been pled in this test claim. Moreover, the plain language of section 70901 imposes no duties on community college districts.

Therefore, the Commission finds that section 70901(b)(1)(B) (Stats. 1988, ch. 973, Stats. 1998, ch. 1023), does not impose any state mandated duties on community college districts within the meaning of article XIII B, section 6.

b) Adopt regulations to establish minimum qualifications and discipline lists

Section 87356(a) requires the state Board of Governors to:

> [A]dopt regulations to establish and maintain the minimum qualifications for service as a faculty member teaching credit instruction, a faculty member teaching noncredit instruction, a librarian, a counselor, an educational administrator, an

extended opportunity programs and services worker, a disabled students program and services worker, an apprenticeship instructor, and a supervisor of health.

Section 87357(a) provides the rules for establishing and maintaining minimum qualifications pursuant to section 87356, and subdivision (b) requires the state to prescribe by regulation a working definition of "discipline." Specifically, the Board of Governors is required to:

- Consult with, and rely primarily on the advice and judgment of the statewide academic senate for the minimum qualifications of faculty;
- Consult with, and rely primarily on the advice and judgment of an appropriate statewide organization of administrators for the minimum qualifications of educational administrators;
- Consult with, and rely primarily on the advice and judgment of appropriate apprenticeship teaching faculty and labor organization representatives for the minimum qualifications of apprenticeship instructors;
- Provide a reasonable opportunity for comment by other statewide representative groups in establishing the minimum qualifications;
- Establish a process to review at least every three years the continued appropriateness of the minimum qualifications and the adequacy of the means to which they are administered. The process shall be provided for the appointment of a representative group of community college faculty, administrators, students, and trustees to conduct or otherwise assist in the review, including particularly, representatives of academic senates, collective bargaining organizations, and statewide faculty associations; and
- Relying primarily on the advice and judgment of the statewide academic senate, prescribe by regulation a working definition of the term "discipline" and prepare and maintain a list of disciplines that are reasonably related to one another. The Board of Governors shall also prepare and maintain a list of disciplines in which the master's degree is not generally expected or available.[28]

Claimant requests reimbursement to consult with and advise the Board of Governors regarding the minimum qualifications for faculty and administrators, and to conduct and to otherwise assist in the review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators. (§ 87357(a)(1) and (a)(2).) The claimant argues that these activities are mandated by the state and emphasizes the part of the statute regarding the Board of Governors relying *primarily* on the advice and judgment of the statewide academic senate and other organizations. Claimant states: "[i]t cannot be said that the Board will not

[28] Sections 53400-53420 identify the minimum qualifications for faculty and educational administrators and (except for §§ 53411 & 53413) are discussed further in this analysis. Claimant did not request reimbursement for determining the minimum qualifications for faculty and administrators hired under sections 53411 and 53413, so the Commission makes no findings on those regulations. Section 53407 of the regulations incorporates the list of disciplines published by the Chancellor's Office for those disciplines that require a master's degree, disciplines in which a master's degree is not generally expected or available, but which require a bachelor's degree; and disciplines in which the master's degree is not generally available.

consult with a wide range of community college districts. When it does so, the costs of those district activities shall be reimbursable." As for the review process, claimant submits that the section "clearly requires community college districts to 'conduct or otherwise assist' in the review." Claimant emphasizes the factors cited in *City of Sacramento v. State of California* regarding the "legal and practical consequences of nonparticipation, noncompliance or withdrawal."[29] According to claimant, "when community college districts are 'asked to participate' by the Chancellor or the Board of Governors, the 'legal and practical consequences of nonparticipation' must be seriously considered."

The Chancellor's Office states that community college districts are not required to perform these activities. Any claimant asked to participate has the option to decline. The Chancellor's Office cites the *Kern High School Dist.*[30] case for authority that no mandate exists where a district voluntarily participates in a program.

The Commission finds that section 87357(a) does not impose any state-mandated duties on community college districts. The requirement in section 87357(a)(1) is on the state Board of Governors to consult with the academic senate, or a statewide organization of administrators, or apprenticeship teaching faculty and labor organization representatives. In addition, there is no requirement in subdivision (a)(2) for districts' "faculty, administrators, students and trustees" to participate in the review process.

Moreover, there is no evidence that community college districts are practically compelled to perform these activities; i.e. that "certain and severe penalties such as double taxation or other draconian consequences" will occur if a district does not advise the Board of Governors regarding the minimum qualifications for faculty, or does not assist in the review of the minimum qualifications.[31]

Accordingly, the Commission finds that sections 87356(a) (Stats. 1993, ch. 506), and 87357(a) (Stats. 1988, ch. 973, Stats. 1990, ch. 1302), do not impose state-mandated duties on community college districts.

According to section 87357(b), the Board of Governors is required to develop a working definition of "discipline" and prepare and maintain a list of disciplines that are reasonably related to each other. The Board of Governors does this "relying primarily upon the advice and judgment of the statewide academic senate" which, in turn, is required to "consult with appropriate state-wide organizations representing administrators and faculty collective bargaining agents."

The Commission finds that section 87357(b) (Stats. 1988, ch. 973, Stats. 1990, ch. 1302), is not a mandate on a community college district. Regarding consultation, nothing in the law indicates that community college district faculty are required to participate on the academic senate, or that the academic senate's participation in consultation is anything but voluntary, so any consultation between it and the Board of Governors does not require an activity on the part of community college districts.

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[29] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76.

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

[31] *Id.* at page 751.

c) Review of community college districts' application of minimum qualifications

Section 87358 states: "The board of governors shall periodically designate a team of community college faculty, administrators, and trustees to review each community college district's application of minimum qualifications to faculty and administrators."

Claimant requests reimbursement as follows: "Pursuant to Education Code Section 87358, participating, as designated by the board of governors, in the review of each community college district's application of minimum qualifications to faculty and administrators."

The Chancellor's Office, in its March 2004 comments on the test claim, states that claimant's participation in the review is not required. "At most, the section authorizes the Board of Governors to require Claimant to demonstrate that it has been properly applying minimum qualification standards when it hires its academic employees." According to the Chancellor's Office, it has no record that the Board of Governors has ever conducted a review of claimant with respect to this issue, and further:

> Claimant has not alleged that any of its faculty, administrators, or trustees have ever participated in the review of any other district's use of minimum qualifications under this section. Even if Claimant made that allegation, it cannot demonstrate that the participation was anything but voluntary.

The Commission finds that section 87358 does not impose a state-mandated program on community college districts. The statute requires the state Board of Governors to "periodically designate a team of community college faculty, administrators, and trustees to review each … district's application of minimum qualifications." (Emphasis added.) Being designated does not mandate the district's participation. Any designated faculty, administrators, or trustees may refuse to participate in a review team, and there is nothing in the law or the record that indicates that community college districts are legally or practically compelled to participate in the review of its minimum qualifications for employment. Thus, the Commission finds that section 87358 (Stats. 1988, ch. 973) is not mandated by the state.

2. Some of the Requirements Imposed on Community College Districts for Determining the Minimum Qualifications for Faculty and Educational Administrators Mandate a New Program or Higher Level of Service.

a) Determining the minimum qualifications of applicants for faculty and educational administrator positions

Sections 87359(a) and 53430 (a) provide that no one may be hired to serve as a community college faculty or educational administrator unless the governing board of the community college district determines that the applicant possesses qualifications that are at least equivalent to the minimum qualifications required pursuant to section 87356 and the implementing title 5 regulations. The minimum qualifications have been adopted as regulations pursuant to section 87356(a) for the following positions: faculty member teaching credit instruction; a faculty members teaching noncredit instruction; librarian; counselor; educational administrator; extended opportunity programs and services worker; disabled students program and services worker; apprenticeship instructor; and supervisor of health. Sections 53410 through 53420 set forth the minimum qualifications for these positions, and generally specify the educational degrees, professional licenses and certificates, and work experience required for each position. Claimant has requested reimbursement for determining the minimum qualifications for all the

positions in these regulations except sections 53411 (minimum qualifications for health services professionals) and 53413 (minimum qualification for apprenticeship instructors), so the Commission makes no finding on those sections.

Section 53407 incorporates the list of disciplines published by the Chancellor's Office (as required by Ed. Code, § 87357(b)) for those disciplines that require a master's degree; disciplines in which a master's degree is not generally expected or available, but which require a bachelor's degree; and disciplines in which the master's degree is not generally available. And section 53406 requires that all degrees and units used to satisfy minimum qualifications are from accredited institutions,[32] unless otherwise specified in the regulations.

Section 87359(a) and section 53430(a) further require that the criteria used by the community college governing board's action in making the employment determination "shall be reflected in the governing board's action to employ the individual."

These requirements do not apply to positions relating to community service or contract classes that do not award college credit and are not supported by state apportionment. Contract classes that do award college credit are subject to these provisions, even if they are not supported by state apportionment.[33]

The claimant requests reimbursement to determine whether applicants for college faculty or educational administrators have qualifications that are at least equivalent to the minimum conditions specified.

The Chancellor's Office states that, "the shift from the credentials system to the minimum qualifications system represented new obligations for districts …" but also asserts that claimant has already been reimbursed for the activities.

Section 87359(a) and section 53430(a) require community college districts to determine whether an applicant for a faculty or educational administrator position listed below possesses qualifications that are at least equivalent to the minimum qualifications identified in the regulations:

- Extended Opportunity Programs and Services Professionals (§ 53402);
- Instructors of credit courses, counselors and librarians (§ 53410);
- Instructors of noncredit courses (§ 53412);
- Disabled Students Programs and Services Employees (§ 53414);
- Learning assistance or learning skills coordinators or instructors and tutoring coordinators (§ 53415);
- Work experience instructors or coordinators (§ 53416); and

[32] "Accredited institution," for purposes of the test claim regulations, is defined in section 53406 as: "a postsecondary institution accredited by an accreditation agency recognized by either the U.S. Department of Education or the Council on Post-secondary Accreditation. It shall not mean an institution 'approved' by the California Department of Education or by the California Council for Private Postsecondary and Vocational Education."

[33] California Code of Regulations, title 5, section 53401.

- Educational administrators (§ 53420), as applicable.

In addition, community college districts are required to determine whether the applicant possesses the following when required for the position:

- Professional licenses as alternative qualification (§ 53410.1);
- Accredited degrees and units (§ 53406);
- Discipline lists (§ 53407); and
- Licensed or certificated occupations (§ 53417).

The criteria used in making the employment determination are required to be reflected in the district's action to employ the faculty member or administrator.

Except as provided below with respect to determining the minimum qualifications for faculty and educational administrator positions for the Disabled Students Programs and Services program (DSPS), the Extended Opportunity Programs and Services program (EOPS), and noncredit courses, the Commission finds that the activities required by section 87359(a) and section 53430(a) mandate a new program or higher level of service.

Although the plain language of the statute and regulation prohibits the hiring of faculty or educational administrators unless the governing board determines the applicant possesses the minimum qualifications, when read in the context of the entire statutory and regulatory scheme, community college districts have an affirmative duty to determine the minimum qualifications of an applicant for these positions before employing the individual. Section 70902(b)(4) requires the governing board of each community college district to "employ and assign all personnel not inconsistent with the minimum standards adopted by the board of governors." Moreover, the criteria used in making the employment determination must be reflected in the district's action. All action of the community college governing board must be open and public and all votes shall be recorded.[34]

The Commission further finds that the required activities constitute a new program or higher level of service. Prior to the 1988 Reform Act and its title 5 regulations, the Chancellor's Office assessed a person's qualifications and issued a credential to become a faculty member or administrator at a community college.[35] The determination of minimum qualifications has now been shifted to community college districts.

The California Supreme Court has held that a state-mandated new program or higher level of service results from the state having control of a program that was shifted to local governments or school districts:

> Whether the shifting of costs is accomplished by compelling local governments to pay the costs of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which

[34] Education Code section 71021 and 71022.

[35] Chancellor of the California Community Colleges, comments filed March 2004, p. 11. See also former California Code of Regulations, title 5, section 52030 et seq., Register 83, No. 29 (July 16, 1983) page 628.15.

> was funded entirely by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6 of that article.[36]

These activities are uniquely imposed on community college districts and are intended to provide an increased level of service to the public, so the Commission finds that they constitute a program within the meaning of article XIII B, section 6. Statutes 1988, chapter 973, section 4(n), states that it "a general purpose of this act to improve quality education . . . ."[37] Subdivision (q) further states that the focus of the minimum qualifications program is to help the community colleges ensure they will select the faculty and administrators who are competent to work effectively at the college level, and to ensure that the minimum qualifications for faculty are the same except where clearly unreasonable or impractical.

However, determining that an applicant meets the minimum qualifications for a faculty or educational administrator position in the Disabled Students Programs and Services (DSPS, § 53414) and in the Extended Opportunity Programs and Services (EOPS), and reflecting the criteria used in the action to employ an applicant for positions in these programs are not mandated by the state. The DSPS and EOPS programs have been the subject of prior test claims, both of which were denied by the Commission on the ground that community college districts were not mandated by the state to participate in these programs. (CSM 02-TC-22, 02-TC-29.)

The DSPS program requires that as a condition of receiving funds, community college districts are required to perform accounting, reporting, and administrative activities that go beyond the federal requirements of the Americans with Disabilities Act and the Rehabilitation Act. Section 84850(d) states:

> *As a condition of receiving funds pursuant to this section,* each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require. (Emphasis added.)

Section 56000 implementing the DSPS program similarly provides:

> This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code sections 67310-12 and 84850. *Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter.* (Emphasis added.)

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[36] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 836.

[37] See also, Statutes 1988, chapter 973, section 70(b)(1), which states the following: "It is the intent of the Legislature that those changes [referring to Phase I changes], combined in proper sequence with the professional improvement of faculty, will improve the overall quality of education within the system."

The direct costs incurred under the DSPS program, including the salaries of DSPS faculty and educational administrators are funded through the DSPS program.[38]

Similarly, the EOPS program provides academic and financial support to community college students whose educational and socioeconomic backgrounds might otherwise prevent them from successfully attending college. The activities required of the program are triggered by a community college district's decision to establish an EOPS program and to request and accept state funding. Section 69649 states:

> (a) [t]he governing board of a community college district may, with the approval of the board, establish an extended opportunity program. Except as provided in subdivision (b), *in order to be eligible to receive state funding*, the program shall meet the minimum standards established pursuant to subdivision (b) of section 69648.

The costs incurred under the EOPS program, including the salaries of EOPS faculty and educational administrators are funded through the EOPS program.[39]

Pursuant to the court's holding in *Kern High School Dist*., activities performed as a condition of the receipt of funding are not mandated by the state.[40] With respect to optional funded programs like the DSPS and EOPS programs, the court reasoned as follows:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the . . . requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, on balance, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.[41]

In comments on the draft staff analysis, claimant states that the DSPS and EOPS programs are improperly excluded and that "program funds are for providing program services to the students (e.g., funding faculty positions) and not for the administrative process of evaluating faculty applicants for those positions." Claimant further states:

> This is not a *Kern* precursor optional program followed by a mandate conditioned on participating in the precursor program. The mandate at issue is limited to the evaluation of faculty and other staff applicants and is not contingent on the funding status of the courses to be instructed. The DSA inappropriately extends the perceived discretionary status of the courses to the scope of subsequent and

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[38] California Code of Regulations, title 5, section 56064.

[39] California Code of Regulations, title 5, section 56295.

[40] *Kern High School Dist., supra*, 30 Cal.4th 727.

[41] *Id*. at page 753.

> independent mandate that is explicitly defined by incorporated regulations that enumerate the faculty and other positions to be included n the evaluation process.

The Commission disagrees. Since a community college district's participation in the DSPS and EOPS grant programs is optional and voluntary, the downstream activities of hiring faculty and administrators for these programs and determining the minimum qualifications for those positions are not mandated by the state.

Moreover, determining the minimum qualifications of an applicant for a faculty or educational administrator position in a noncredit course (Cal. Code Regs., tit. 5 § 53412) does not constitute a new program or higher level of service.

Adopted in 1970, former section 52600 listed the minimum qualifications for instructors of noncredit courses (or "classes for adults")[42] as follows:

> An applicant shall be eligible for a Certificate of Qualifications if the requirements of both of the following subdivisions are satisfied:
> (a) The applicant satisfies one of the following requirements.
> (1) The applicant has successfully completed four years of higher education with a major in a subject matter area.
> (2) The applicant has completed four years of occupational experience in a subject matter area.
> (b) *The district*, which maintains the community college which will employ the applicant, *certifies that the applicant has adequate training and experience* to teach the classes for which the applicant is to be employed.[43] (Emphasis added.)

And as former section 52602 of the regulations stated:

> A Certificate of Qualifications authorizes its holder to teach the noncredit classes named on the credential in a community college maintained by the district named on the credential document.[44]

This requirement for the district to certify the applicant carried forward into early versions of the test claim regulation that applies to instructors of noncredit courses. Section 53412,[45] operative November 30, 1990, required the same qualifications for instructors of noncredit courses as under prior law:

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[42] The statute that authorized this regulation is former Education Code section 87295, which states: "The board of governors shall, by regulation, establish minimum standards authorizing service for instructors of classes for adults and shall establish procedures for the issuance of appropriate certificates of qualification."

[43] Former California Code of Regulations, title 5, section 52600, Register 70, No. 20 (May 16, 1970), page 622.35, moved to former section 52275, Register 83, No. 29 (July 16, 1983) page 628.48.1.

[44] Former California Code of Regulations, title 5, section 52602, Register 70, No. 20 (May 16, 1970) page 622.35, moved to section 52277, Register 83, No. 29 (July 16, 1983) page 628.48.1.

[45] Added by Register 90, Nos. 48-50 (December 14, 1990) page 330.2, operative November 30, 1990.

(a) Successful completion of four years of higher education with a major in a discipline, or completion of four years of occupational experience in a discipline; and
(b) *Certification by the district* that the applicant has adequate training and experience to teach the classes for which he or she is to be employed. [Emphasis added.]

The district certification requirement was deleted effective June 26, 1992,[46] when section 53412 was amended to specify that "the minimum qualification for service as a faculty member teaching a noncredit course shall be the same as the minimum qualifications for credit instruction in the appropriate discipline." So under current law the minimum qualification to teach noncredit courses is a master's degree, except for the following courses that require a bachelor's degree in a specified discipline: interdisciplinary basic skills courses, basic skills courses in mathematics, reading and/or writing, citizenship, English as a second language, health and safety, home economics, courses intended for older adults, parent education, and a short-term vocational course.

Thus, under the pre-1992 regulation, a person could teach a noncredit course by completing four years of higher education with a major in the subject matter area, or four years of occupational experience in a subject matter area. Under current law, the applicant must have a master's degree, or in specified instances a bachelor's degree. (§ 53412.)

Although the minimum qualifications for the faculty of noncredit courses have changed since the test claim regulation, determining the minimum qualifications has not. There is nothing to indicate that determining the minimum qualification under current law is a higher level of service than granting certification to teach these courses under prior law. Each requires the community college to assess an applicant's qualifications. The state has never made this assessment for instructors of noncredit courses, so this activity was not shifted from the state to local districts.

Therefore, the Commission finds that determining the minimum qualifications of an applicant for a faculty or educational administrator position in a noncredit course (Cal. Code Regs., tit. 5 § 53412)[47] does not constitute a new program or higher level of service.

Accordingly, the Commission finds that section 87359(a) and section 53430(a) mandate a new program or higher level of service on community college districts for the following activities:

- Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.
- The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action.

[46] Register 92, No. 26 (June 16, 1992) page 329.

[47] Added by Register 90, No. 49 (Dec. 14, 1990) page 330.2, operative November 30, 1990; Register 91, No. 50 (July 19, 1991) page 332; Register 92, No. 26 (July 27, 1992) pages 328-329; Register 93, No. 42 (Nov. 4, 1993) pages 329-330.

Community college districts are *not* entitled to reimbursement for these activities when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), or noncredit courses. (Cal. Code Regs., tit. 5, § 53412.)

b) Development of the process, criteria, and standards for faculty determinations

Section 87359(b) addresses the development of the process, criteria, and standards for qualifications that are equivalent to the minimum qualifications established by the state. This subdivision provides:

- The process, criteria, and standards for reaching determinations regarding faculty [whose qualifications are equivalent to the minimum qualifications (see subds. (a) & (b))] shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board.
- The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed under the regulation's authority possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations.
- The process shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358.

Sections 53430(b) and (c) are the same as the requirements in section 87359(b).

The academic senates on each campus exist "[i]n order that the faculty may have a formal and effective procedure for participating in the formation and implementation of district policies on academic and professional matters."[48] Academic senates are created by a vote of the faculty. Once created, the governing board of the community college district is required to recognize the academic senate and authorize the faculty to: (1) fix and amend by vote of the full-time faculty the composition, structure, and procedures of the academic senate; and (2) "provide for the selection, in accordance with accepted democratic election procedures, the members of the academic senate."[49]

The Commission finds that the activities required by section 87359(b) and sections 53430(b) and (c) are mandated by the state, including as applied to noncredit course instructors, as there is no indication that they are excluded from the process, criteria, and standards referred to in the regulation and statute. The exception is for faculty and administrators employed under the DSPS and EOPS programs, for which developing the process, criteria, etc. is not mandated by the state. As indicated above, participation in the DSPS and EOPS programs is voluntary and the

[48] California Code of Regulations, title 5, sections 53200, 53201.

[49] California Code of Regulations, title 5, section 53202.

downstream activities of developing the hiring process and standards for these employees are not mandated by the state.

The Commission further finds that the bulleted activities are newly required of community college districts as they relate to the employment of all other faculty positions and provide a higher level of service to the public.

Thus, the Commission finds that section 87359(b) and sections 53430(b) and (c) mandate a new program or higher level of service for the following activities:

- The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty or administrators whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359(b); Stats. 1988, ch. 973, Stats. 1993, ch. 506, Cal. Code Regs, tit. 5, § 53430(b).)

- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359(b), Cal. Code Regs, tit. 5, § 53430(b).)

- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359(b), Cal. Code Regs, tit. 5, § 53430(c).)

- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359; Cal. Code Regs, tit. 5, § 53430.)

  Community college districts are *not* entitled to reimbursement for these activities when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.)

Section 87359(d) states that "[u]ntil a joint agreement is reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect." Similarly, subdivision (d) of section 53430 the title 5 regulation states: "[u]ntil a joint agreement is reached and approved pursuant to Subdivision (b), the district shall be bound by the minimum qualifications set forth in this Subchapter." Thus, until there is an agreement by the governing board and the academic senate on the process, criteria, and standards for the employment of faculty, the district cannot apply additional qualification standards to faculty applicants that go beyond the scope of the minimum conditions established by the regulations.

The Commission finds that this provision (§ 87359(c) & Cal. Code Regs., tit. 5, § 53430(d)) is not a state mandate because it does not require a community college activity. It merely requires using existing processes or the minimum qualifications regulations (already found above to be a

state-mandated new program or higher level of service) until agreement is reached with the academic senate on qualifications that are equivalent to them.

c) Develop hiring criteria

In establishing the hiring criteria for faculty and administrators, district governing boards shall, no later than July 1, 1990, develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360(a).)

No later than July 1, 1990, hiring criteria, policies, and procedures for new faculty members shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. (§ 87360(b).)

Until a joint agreement is reached and approved, the district process in existence on January 1, 1989 remains in effect. (§ 87360(b).)

The Commission finds that, based on the language in the statute, that these activities are a state mandate. Since they were not required under prior law, the Commission also finds that they are a new program or higher level of service for community college districts to do the following:

- No later than July 1, 1990, develop the hiring criteria for faculty and administrators that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360(a).)
- No later than July 1, 1990, develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360(b).)

d) Providing an affidavit that academic employees of the district possessed the minimum qualifications for the work they performed in the preceding 12 months

Section 87714 (as added by Stats. 1981, ch. 470, and amended by Stats. 1990, ch. 1302) states:

> The chief executive officer of each community college district shall, at times as required by the board of governors, provide an affidavit that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.

Claimant pled the following activity based on this section: "providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed."

In comments filed in March 2004, the Chancellor's Office states that this section stated as early as 1976 (Stats. 1976, ch. 1010) the following:

> Each general superintendent of community colleges shall make an annual report of the schools under his jurisdiction to the county superintendent of schools on forms furnished by the board of governors which report shall include an affidavit that all employers in positions requiring certification qualifications were properly certificated for the work performed.

The Chancellor's office also states that the obligation to ensure that all academic employees were qualified has existed since 1959. Section 13566 (Stats. 1959 chs. 2 & 458) required district superintendents of schools to annually report that all employees in positions requiring certification qualification were properly certificated for the work performed. According to the Chancellor's comments: "Because community college districts grew out of K-12 districts, the terminology has changed somewhat since 1959, but the underlying obligation has been in place."

The Chancellor's Office also states that duties to be performed by the superintendents of each community college district were added by Statutes 1963, chapter 629. Former section 939 (later former § 72413) required the chief executive officer to determine that employees who require certification have valid certificated documents.

The claimant's rebuttal comments state that former section 13566 (recodified as § 87714 by Stats. 1976, ch. 1010) required the report, including the specified affidavit, to be made to the county superintendent of schools, while the 1981 version required the report to be made to the Board of Governors. Therefore, according to the claimant, section 87714 requires a new program or higher level of service. Claimant also states that the Chancellor's reference to former section 939 is not relevant because it requires only a determination, but not a report or affidavit.

The plain language of the statute requires providing the affidavit "at times required by the board of governors." Whether an affidavit has been requested or not, the statute authorizes the state Board of Governors to require one from the district in the future. Therefore, the Commission finds that section 87714 (Stats. 1981, ch. 470, Stats. 1990, ch. 1302)[50] is a state mandate on community college districts to, at times as required by the Board of Governors, provide an affidavit that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.

The Commission also finds, however, that section 87714 (Stats. 1981, ch. 470) is not a new program or higher level of service. Former section 87714 (Stats. 1976, ch. 1010) also required an affidavit. Even though before 1981, the report and affidavit were submitted to the county superintendent of schools, submitting the same information and affidavit to the Chancellor's Office is not a new program or higher level of service (the report requirement was deleted in the 1981 version). In fact, this activity was also part of the 1959 Education Code (Stats. 1959, ch. 458). Therefore, the Commission finds that section 87714 (Stats. 1981, ch. 470, Stats. 1990, ch. 1302) is not a new program or higher level of service.

In comments on the draft staff analysis, claimant states that when determining whether an activity constitutes a new program or higher level of service, the comparison needs to be between the statutes pled on the effective date of filing (here, July 1, 2001), with the law as it existed on December 31, 1974. The claimant is wrong. The California Supreme Court has repeatedly stated that to determine whether a required activity is new, thus imposing a new program or higher level of service, the test claim statute or regulation is compared to the legal requirements

[50] The 1981 version of 87714 (Stats. 1981, ch. 470) required the same activity as the current version: "The chief executive officer of each community college district shall, at times as required by the county superintendent of schools, and at least annually, provide an affidavit that all employees in positions requiring certifications were properly certificated for the work performed."

in effect immediately before its enactment.[51] Using this test, the requirement in section 87714 is not a new program or higher level of service.

e) <u>Authority to continue to employ credentialed academic employees qualified at time of initial hire</u>.

Section 53403 states:

> Notwithstanding changes that may be made to the minimum qualifications established by this division, or to the implementing discipline lists adopted by the Board of Governors, [in § 53407] the governing board of a community college may continue to employ a person to teach in a discipline or render a service subject to minimum qualifications, if he or she, at the time of initial hire by the district, was qualified to teach in that discipline or render that service under the minimum qualifications or disciplines lists then in effect.
>
> Every person authorized to serve under a credential shall retain the right to serve under the terms of that credential, and, for that purpose, shall be deemed to possess the minimum qualifications specified for discipline or service covered by the credential until the expiration of that credential. [52]

Claimant pled the activity of establishing and implementing policies to recognize faculty who were qualified to teach in their respective disciplines under the minimum qualifications when they were employed.

The Chancellor's Office states that this section merely permits districts to "grandparent" employees in under the minimum qualifications or faculty service areas in effect when the employees were hired, even if those qualifications or faculty service areas later changed. The Chancellor's Office asserts that there is no mandate involved.

Claimant's rebuttal comments state: "While admitting the 'grandfathering' provision, [the Chancellor's Office] does not describe who, how or when this should be done. The test claim merely recognizes the need to establish and implement policies that allow implementation of the 'grandfather' provision."

The Commission finds that section 53403 is not a state-mandated new program or higher level of service. The section's plain language authorizes but does not require community college districts to retain employees who were hired before the establishment of the minimum qualifications, and deems those employees to possess the minimum qualifications, until the expiration of their credentials. It does not require the community college district to assess the qualifications of employees at the time the regulation was adopted. Because section 53403[53] does not require community college districts to engage in an activity, the Commission finds that this section is not

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[51] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835-836.

[52] Education Code section 87355, although not a test claim statute, requires the board of governors to adopt this regulation.

[53] Register 92, No. 26 (June 26, 1992) operative July 27, 1992, page 328, amended by Register 93, No. 42 (Oct. 5, 1993) operative November 4, 1993, page 328.

a state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

B. Faculty Evaluations

The claimant pled section 87663 as amended by Statutes 1988, chapter 973 and Statutes 1990, chapter 1302.[54] The 1988 and 1990 amendments made the following changes to subdivisions (a) and (b) regarding regular[55] and temporary[56] employees (underlines indicate additions; strikeouts indicate deletions):

> (a) Contract [or probationary] employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every ~~two~~ three academic years. Temporary employees shall be evaluated within the first year of employment. Thereafter, evaluation shall be at least once every six regular semesters, or once every nine regular quarters, as applicable.
>
> (b) Whenever an evaluation is required of a ~~certificated employee~~ faculty member by a community college district, the evaluation shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district.

Subdivisions (c) through (i) were added to section 87663 in 1988 (Stats. 1988, ch. 973, § 51) as follows:

> (c) Evaluations shall include, but not be limited to, a peer review process.
>
> (d) The peer review process shall be on a departmental or divisional basis, and shall address the forthcoming demographics of California, and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching.
>
> (e) The Legislature recognizes that faculty evaluation procedures may be negotiated as part of the collective bargaining process.
>
> (f) In those districts where faculty evaluation procedures are collectively bargained, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures.
>
> (g) It is the intent of the Legislature that faculty evaluation include, to the extent practicable, student evaluation.

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[54] The 1990 amendment changed "certificated employee" in subdivision (b) to "faculty member."

[55] "A 'regular' employee is . . . one who has achieved tenure." (§ 87609.)

[56] Temporary employees are defined several ways. They are employees who: (1) may be used to fill temporary vacancies of regular employees (§ 87478); (2) serve during the first three months of a school term to instruct temporary classes or perform other duties (§ 87480); (3) fill needs due to spikes in enrollment (§ 87482); or (4) teach not more than 67 percent of the hours per week of a full-time assignment for regular employees having similar duties (§ 87482.5).

(h) A probationary faculty member[57] shall be accorded the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.

(i) Governing boards shall establish and disseminate written evaluation procedures for administrators. It is the intent of the Legislature that evaluation of administrators include, to the extent possible, faculty evaluation.

Section 70(d) of the 1988 statute further states that "Sections 51 to 56" of the bill shall be implemented and "be mandatory" only if the state Board of Governors certifies that adequate funding has been provided. At its September 1989 meeting, the state Board of Governors certified that adequate funding had been provided and, thus, community college districts were required to implement section 87663 as of that date.[58]

In addition, section 53130 requires that "[t]he governing board of a community college district shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties."

Claimant requests reimbursement for the following activities:

Pursuant to Education Code Section 87663, subdivisions (c) and (d), conducting evaluations of faculty members of a community college district using a peer review process on a departmental or divisional basis, which shall address the forthcoming demographics of California, and the principles of affirmative action.

Pursuant to subdivision (e), when negotiated as part of the collective bargaining process, conducting evaluations of faculty members of a community college district pursuant to the terms of that agreement.

Pursuant to subdivision (f), in those districts where faculty evaluation procedures are collectively bargained, consulting with the faculty's exclusive representative prior to engaging in collective bargaining regarding those procedures.

Pursuant to subdivision (g), conducting evaluations of faculty members of a community college district to the extent practicable using student evaluations.

Pursuant to subdivision (h), evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative.

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[57] Probationary faculty members are contract employees who are on a tenure track. Temporary employees are generally not on a tenure track, except as provided in section 87478.

[58] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

> Pursuant to subdivision (i), evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation.
>
> Pursuant to title 5, California Code of Regulations, Section 53130, to adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.

The Chancellor's Office, in its March 2004 comments, asserts that: (1) subdivision (f) requires the exclusive representative to consult with the academic senate prior to bargaining, but contains no district obligations; (2) statements of legislative intent in subdivision (g) regarding faculty evaluations including student evaluations if practicable are not a legal mandate; (3) the obligation of districts to provide for the evaluation of faculty and administrators preceded January 1, 1975; and (4) only districts that have chosen to collectively bargain their evaluation procedures are affected by subdivision (e)'s requirement to conduct evaluation pursuant to an agreement. The Chancellor cites *Kern High School Dist.*[59] for the proposition that if the district elects to do something, any downstream activity is not a reimbursable mandate. Moreover, the Chancellor's Office states that if the bargained evaluation procedures were in place before the 1988 amendments (Stats. 1988, ch. 973) the claimant has not performed a new program or higher level of service. And if the claimant has been reimbursed under the collective bargaining mandate, reimbursement under this statute would be double recovery.

Claimant, in the April 2004 rebuttal comments, states:

> Even if there is a collective bargaining agreement, it may, or may not, encompass faculty evaluation procedures. The inclusion of subdivision (e) in the test claim will allow the parameters and guidelines to provide for reimbursement for these faculty evaluation procedures, with the exception of if, or when, they are part of the district's collective bargaining agreement.

Claimant also asserts that the requirements of section 87663 have been greatly expanded since 1975, especially since the 1988 amendments.

The Commission finds, based on the plain language of subdivision (a), that it is a state mandate to evaluate a regular employee once every three academic years, and to evaluate temporary employees within the first year of employment. Thereafter, evaluation for temporary employees shall be at least once every six regular semesters, or once every nine regular quarters, as applicable. The Commission also finds that, based on the plain language in subdivision (a), evaluation of temporary employees is a state mandate, and also a new program or higher level of service because it was not required under prior law.

However, evaluating regular employees every three years is less frequent than under prior law, which called for evaluation once every two academic years. This is not a higher level of service. Therefore, the Commission finds that this amendment in subdivision (a) of section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) on evaluating regular employees is not a new program or higher level of service.

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[59] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

The Commission also finds that the amendment to section 87663(b), made by Statutes 1990, chapter 1302, does not impose a state-mandated new program or higher level of service. This amendment substituted "faculty member" for "certificated employee" but imposes no state mandates on districts.

The Commission finds that it is a state-mandated new program or higher level of service for an evaluation to include a peer review process as specified by subdivision (c), and that the peer review process conform to the requirements of subdivision (d): that it be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and "for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching."

The Commission further finds that sections 87663(e) and (f) do not impose any state-mandated duties on community college districts. Subdivision (e) is legislative recognition that "faculty evaluation procedures may be negotiated as part of the collective bargaining process." Subdivision (f) requires, in districts where faculty evaluation procedures are collectively bargained, "the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures." In comments on the draft staff analysis, claimant states that subdivision (f) creates a mandate:

> Faculty evaluation procedures are within the scope of matters that can be collectively bargained according to the Rodda Act (citation omitted). Districts are required to collectively bargain and that mandate has been reimbursed for about 35 years. The Rodda Act [i.e., EERA] process involves district employees operating within the scope of their compensated activities. Now, these employees are required by subdivision (f) to consult with members of the academic senate who are also operating within their compensated activities. The district incurs payroll and related costs for these activities. Since the underlying collective bargaining process is an approved mandate, and subdivision (f) independently requires the consultation, it is a new program or higher level of service subject to reimbursement.

Faculty evaluation procedures are not required to be collectively bargained. They are included in the "terms and conditions of employment" (Gov. Code, § 3543.2 (a)) that may be bargained, but there is no legal requirement to collectively bargain them. Doing so is discretionary on the part of the district, so this activity is not mandated by the state.

Subdivision (h) of section 87663 states:

> A probationary faculty member shall be accorded the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.

Because this section entitles the probationary faculty member to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process, and the procedures are required to ensure good faith treatment of the probationary faculty

member, the Commission finds that subdivision (h) of section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) is a state mandate.

The Commission further finds that section 87663(h) imposes a new program or higher level of service. Under section 87602, a contract employee is a probationary employee. Under prior law, contract employees are evaluated at least once each academic year. (§ 87663, subd. (a).) Since at least 1971, districts have been required to evaluate certificated employees (i.e., faculty) "in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district."[60] Also since 1971, districts have been required to adopt rules and regulations in consultation with faculty "establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its certificated employees to meet in the performance of their duties." The procedures and standards are to be uniform for all contract employees with similar general duties and responsibilities, and uniform for regular employees of the district with similar general duties and responsibilities.[61]

However, under prior law, the district was not required to develop "evaluation procedures locally defined through the collective bargaining process" for probationary employees. Therefore, the Commission finds that section 87663(h) is a new program or higher level of service to develop evaluation procedures that are collectively bargained for probationary employees where the faculty has chosen to elect an exclusive representative.

Two phrases in sections 87663(g) and (i) begin with the phrase "It is the intent of the Legislature…" Subdivision (g) declares legislative intent that faculty evaluations include, to the extent practicable, student evaluation. Subdivision (i) declares legislative intent that evaluations of administrators include, to the extent practicable, faculty evaluation. Courts have held that statements of legislative intent do not give rise to a mandatory duty.[62] Therefore, the Commission finds that as declarations of legislative intent, neither subdivisions (g) nor (i) of section 87663 are state mandates.

Subdivision (i) also states: "Governing boards shall establish and disseminate written evaluation procedures for administrators." The Commission finds that this provision is a state-mandated new program or higher level of service to establish and disseminate written evaluation procedures for administrators.

Finally, section 53130 states that the district governing board "shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties." The Chancellor's Office argues that "the requirements that currently appear in section 53130 have existed without lapse since before January 1, 1975 and cannot be claimed for reimbursement under this process."

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[60] Former Education Code section 13481 (Stats. 1971, ch. 1654), Education Code section 87663(b) (Stats. 1976, ch. 1010)

[61] Former Education Code section 13481.05 (Stats. 1971, ch. 1654). Education Code section 87664 (Stats. 1976, ch. 1010, Stats 1990, ch. 1302).

[62] *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 633-634.

Section 53150 was added to the title 5 regulations in 1991.[63] In 1971, however, section 13481.05 (Stats. 1971, ch. 1653) was enacted to provide that:

> The governing board of each district in consultation with the faculty shall adopt rules and regulations establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its certificated employees to meet in the performance of their duties. Such procedures and standards shall be uniform for all contract employees and shall be uniform for all regular employees of the district.

Section 13481.05 was renumbered to section 87664 in the 1976 Education Code and has not been pled in this test claim.

Even though adopting rules and regulations establishing the specific procedures for evaluating contract and regular employees was in prior law, new rules and regulations must be adopted due to the amendments to section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) that are discussed above. For example, prior law did not require a peer review process for faculty evaluations and was limited to adopting rules and regulations for the evaluation of contract and regular employees. Under section 53130, rules and regulations have to be adopted for "each academic employee."

Therefore, the Commission finds that section 53130 imposes a state-mandated new program or higher level of service on community college districts to adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties.

In sum, the Commission finds that section 87663 (Stats. 1988, ch. 973, Stats, 1990, ch. 1302) imposes a state-mandated new program or higher level of service on community college districts to do as follows:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semesters or once every nine regular quarters thereafter (§ 87663(a).).
- Include a peer review process in faculty evaluations, and for the peer review process to be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching (§ 87663(c) & (d)).
- Develop "evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative" for probationary faculty (§ 87663(h)).

[63] Register 91, No. 25, effective April 5, 1991.

- Establish and disseminate written evaluation procedures for administrators. (§ 87663(i).).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. (Cal. Code Regs., tit. 5, § 53150).

Community college districts are *not* entitled to reimbursement for these evaluation activities for faculty or administrators employed in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. & 53414), and Extended Opportunity Programs and Services. (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.)

C. Tenure Grievances, Arbitration and Judicial Review

Claimant pled sections 87610.1 and 87611, added by Statutes 1988, chapter 973. Section 87610.1 provides an alternative arbitration grievance process for a probationary or contract faculty employee[64] to challenge a district's decision not to grant tenure or reappoint the employee as a contract employee for the following academic year under specified situations. The alternative process is allowed only in those community college districts where tenure evaluation procedures are collectively bargained and the grievance arbitration procedures are in the collective bargaining agreement. Pursuant to section 87611, the decision reached in the grievance arbitration proceeding is subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

If there is no contractual grievance procedure resulting in arbitration, tenure grievances shall proceed under existing law pursuant to section 87740. Section 87740 provides for a hearing under the Administrative Procedure Act conducted by an administrative law judge who prepares a proposed (nonbinding) decision containing a determination as to the sufficiency of the cause and a recommendation as to disposition. The governing board makes the final determination. Section 87740 has been in law since before 1975 (Stats. 1965, ch. 1110, as former § 13443). The claimant also pled section 87740 as amended in 1995.

1. Overview of Tenure Grievance Law

The authority to grant tenure or reappoint a faculty employee for another year is addressed in sections 87600 et seq. Generally, all district academic employees are either contract employees, regular employees, or temporary employees. (§ 87604.) A contract employee is a probationary employee and a regular or tenured employee is a permanent employee. (§ 87602.) A contract employee is an employee of the district who is employed on the basis of a contract in accordance with the provisions of sections 87605 or 87608(b). (§ 87601.)

For the first academic year of employment with the district, each faculty member must be employed by contract. (§ 87605.) At the completion of the faculty member's first academic year, the district has the discretion to decide whether or not to contract with the faculty member for the following academic year, or to employ the contract employee as a regular, tenured

[64] Education Code section 87600 limits applicability of this test claim statute to faculty, not including administrators. (§ 87603.)

employee for all subsequent academic years. The decision of the district is not subject to judicial review, except as expressly provided in sections 87610.1 and 87611. (§ 87608.)

The district has the same discretion following completion of the faculty member's second academic year, except a renewal contract may be for the "following two academic years." (§ 87608.5.) If a contract employee is working under the second contract, the governing board, at its discretion and not subject to judicial review except as expressly provided in sections 87610.1 and 87611, shall elect one of the following alternatives: (a) not enter into a contract for the following academic year; (b) enter into a contract for the following two academic years; or (c) employ the contract employee as a regular, tenured employee for all subsequent academic years. (§ 87608.5.)

If a contract employee is employed under his or her third consecutive contract entered into pursuant to section 87608.5, the governing board shall either employ the probationary employee as a tenured employee for all subsequent academic years, or not grant this status and terminate the employee. (§ 87609.)[65]

Before the district can exercise discretion regarding continued employment of a contract employee, the district must evaluate the employee in accordance with the evaluation standards and procedures established pursuant to section 87660 et seq. (§ 87607.) In addition, the governing board must receive the most recent evaluations, recommendation of the superintendent of the district, and the recommendation of the president of the community college before the district exercises its discretion regarding the continued employment of a faculty member. The evaluations and recommendations are considered in a lawful meeting of the board. (§ 87607.) The governing board shall give written notice and the reasons for its decision regarding the first year and second year contract employees on or before March 15 of the academic year by registered or certified mail. Failure to give notice shall be deemed an extension of the existing contract.

For employees under their third consecutive contract for whom the board must decide to either grant tenure or not employ pursuant to section 87609, the board is required to give written notice of its decision and the reasons therefor on or before March 15 by registered or certified mail. Failure to give notice shall be deemed a decision to employ the faculty member as a tenured employee for all subsequent academic years. (§ 87610.)

As indicated above, when the contract (or probationary) employee objects to the governing board's decision to not grant tenure or not reappoint the employee to another contract year pursuant to sections 87608, 87608.5, and 87609, the governing board's decision may be reviewed in accordance with section 87610.1. That statute, added by the 1988 Reform Act, states in relevant part the following:

(a) In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining on these procedures.

(b) Allegations that the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated,

[65] *McGuire v. Governing Board, supra,* 161 Cal.App.3d 871, 874.

misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. Allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740.

"Arbitration" as used in this section, refers to advisory arbitration, as well as final and binding arbitration.

(c) Any grievance brought pursuant to subdivision (b) may be filed by an employee on his or her behalf, or by the exclusive bargaining representative on behalf of an employee or group of employees in accordance with [Gov. Code, § 3450 et seq.]. The exclusive representative shall have no duty of fair representation with respect to taking any of these grievances to arbitration, and the employee shall be entitled to pursue a matter to arbitration with or without the representation by the exclusive representative. However, if a case proceeds to arbitration without representation by the exclusive representative, the resulting decision shall not be considered a precedent for purposes of interpreting tenure procedures and policies, or the collective bargaining agreement, but instead shall affect only the result in that particular case. When arbitration is not initiated by the exclusive representative, the district shall require the employee submitting the grievance to file with the arbitrator or another appropriate party designed in the collective bargaining agreement, adequate security to pay the employee's share of the cost of arbitration.

(d) The arbitrator shall be without power to grant tenure, except for failure to give notice… The arbitrator may issue an appropriate make-whole remedy, which may include, but need not be limited to, backpay, and benefits, reemployment in a probationary position, and reconsideration. Procedures for reconsideration of decisions not to grant tenure shall be agreed to by the governing board and the exclusive representative of faculty pursuant to [Gov. Code 3450 et seq.].

Thus, in those community college districts where tenure evaluation procedures are collectively bargained, and there is a contractual grievance procedure resulting in arbitration, the employee can seek review before the arbitrator on the following grounds:

- With respect to a decision by the governing board to not grant tenure, the employee can allege that the governing board either made a decision that was unreasonable to a reasonable person – or the decision to not grant tenure violated, misinterpreted, or misapplied the board's policies and procedures concerning the evaluation of the employee.
- With respect to the decision to not reappoint the contract employee, the employee can allege that the governing board violated, misinterpreted, or misapplied the board's policies and procedures concerning the evaluation of the employee.

Pursuant to section 87611, the arbitrator's decision is subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to a hearing in accordance with section 87740 before an administrative law judge.

2. The Tenure Grievance Arbitration Procedure (§§ 87610.1 and 87611) does not Impose a State Mandate

Claimant pled the following activities regarding section 87610.1:

> In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, consulting with the faculty's exclusive representative prior to engaging in collective bargaining on these procedures (§ 87610.1(a)).
>
> Participating in arbitration procedures in response to grievance allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).
>
> Participating in arbitration procedures in response to grievance allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).
>
> Complying with an arbitrator's make-whole remedies, which may include, but need not be limited to, backpay and benefits, reemployment in a probationary position, and reconsideration (§ 87610.1(d)).

The claimant also requests reimbursement based on section 87611 for "the legal cost of appearing in a court or before any other hearing panel when appealing, or in response to a petition appealing, a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1."

The Chancellor's Office March 2004 comments state that subdivision (a) requires the faculty exclusive representatives, not districts, to consult with the academic senate prior to collective bargaining, and therefore "includes no directives to districts." The Chancellor's Office also states:

> Subdivision (b) provides an optional mechanism for addressing decisions to discontinue the service of probationary faculty. Prior to the addition of section 87610.1, districts were required to follow section 87740 when they decided to terminate the probationary period of new faculty members. . . . Section 87610.1 represents an alternative to the provisions of section 87740. Districts are never required to proceed under section 87610.1. As the section indicates "If there is no contractual grievance procedure resulting in arbitration, these allegations [to challenge a decision not to continue a probationary faculty member] shall proceed to hearing in accordance with Section 87740." If districts choose to collectively bargain a grievance procedure that results in arbitration, section 87610.1 applies; otherwise, districts continue to follow section 87740. Because the decision to

> come under section 87610.1 is voluntary, the provisions of section 87610.1 cannot be the basis of a claim. (Emphasis in original.)

The Chancellor's Office also states the following regarding the remedies an arbitrator may impose in section 87610.1(d):

> If the District improperly attempts to end the employment of a probationary employee, it will be responsible for making the employee whole, including back pay and benefits in the proper case. . . . Nothing mandates that Claimant take improper action against an employee, so the State is not responsible for the Claimant's conduct in this regard.

In addition, the Chancellor's Office comments on section 87611's limited judicial review of an administrative decision under section 1094.5 of the Code of Civil Procedure, which focuses on whether or not the administrative body acted within its jurisdiction, whether there was a fair trial, or whether there was an abuse of discretion in the administrative agency's findings or conclusion. According to the Chancellor's Office, a claimant is not required to proceed under section 87610.1, and section 87611 makes no mention of any costs. Rather, it "merely indicates that arbitration decisions regarding the release of a probationary faculty member can be judicially reviewed pursuant to section 1094.5 of the Code of Civil Procedure." The Chancellor's Office also points out that "judicial review under section 1094.5 has long been available for review of community college decisions concerning probationary employees," citing *Steward v. San Mateo Junior Collect Dist. et al.* (1974) 37 Cal.App.3d 345.

According to claimant's rebuttal comments, there are a new group of allegations in section 87610.1(b) that are now required to be procedurally addressed as grievances. These allegations are that "the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees." Also, "allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances."

The Commission finds that section 87610.1 and any resulting litigation following arbitration pursuant to section 87611 do not impose state-mandated duties on community college districts. The alternative arbitration procedures provided by sections 87610.1 and 87611 only apply to "those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code [the Educational Employment Relations Act, or "EERA"]…." (§ 87610.1(a).) Section 87610.1 also provides for the original hearing alternative, which has been in place since at least 1965: "If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740." (§ 87610.1(b), and former §§ 13343, 13346.25, and 13346.32.)

Courts have construed the term "mandate" according to its commonly understood meaning as an "order" or "command."[66] Government Code section 17514 defines "[c]osts mandated by the

[66] See *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174 (stating that "[w]e understand the use of 'mandates' in the ordinary sense of 'orders' or 'commands'").

state" to mean "any increased costs which a local agency or school district is *required* to incur…" (emphasis added).[67] This narrow construction of "mandate" is consistent with the analysis adopted by the court in *City of Merced v. State of California*.[68] In that case, the City of Merced sought reimbursement from the state for costs incurred as a result of a statutory requirement that when a city or county chooses to exercise its power of eminent domain it must compensate for business goodwill. The court rejected the City's argument that business goodwill compensation amounted to a reimbursable state mandate, finding that "the Legislature intended for payment of goodwill to be discretionary."[69] The court proceeded to clarify its conclusion by reasoning that:

> [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. (Emphasis added.)

City of Merced has been followed and interpreted by the California Supreme Court to stand for the proposition that activities pursued voluntarily at the discretion of a local government entity, without any legal compulsion to do so, "do not trigger a state mandate and hence do not require reimbursement of funds."[70] In *Kern High School District*, the California Supreme Court analogized the analysis of *City of Merced* to the facts before it, stating:

> [I]f a school district elects to participate in or continue participation in any underlying *voluntary* education-related program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[71]

The California Supreme Court has stated, "The proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[72] This means the focus is on the local government's initial decision to participate in the underlying program. Accordingly, where decision-making authority is reserved to a local government that chooses to participate in a voluntary underlying program, the Legislature may issue guidelines directing the entity's consequent conduct concerning that program. Any resulting "downstream" requirements with which the local government must comply are not reimbursable state mandates. This is consistent with the decisions in *City of Merced* and *Kern High School District*.[73]

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[67] Government Code section 17514.

[68] *City of Merced v. State of California* (*City of Merced*) (1984) 153 Cal.App.3d 777.

[69] *Id*. at page 783.

[70] *Kern High School Dist*., *supra*, 30 Cal.4th 727, 742.

[71] *Id.* at page 743.

[72] *Ibid*.

[73] *Ibid.*

Section 87610.1 provides an alternative arbitration procedure for processing a probationary employee's challenge to a district's decision not to grant tenure or reappoint the employee. Before the enactment of section 87610.1, an affected employee could proceed according to the procedures outlined in section 87740 by requesting that a hearing be held to determine whether there was cause for denying tenure or reappointment.

With the enactment of section 87610.1, the hearing recourse in section 87740 is left intact for employees in districts without collective bargaining provisions. But an employee challenging that same decision of the district will have recourse pursuant to the terms of a collective bargaining agreement, *if* a collective bargaining agreement is in place in that district and provides for arbitration of grievances. The issue is whether the collective bargaining route imposes a state-mandated activity.

In the context of collective bargaining, the EERA imposes on a community college district the obligation "to meet and negotiate" in good faith with the exclusive representative of a faculty bargaining unit "upon request with regard to matters within the scope of representation."[74] Falling within this scope are, "procedures for processing grievances" culminating in arbitration.[75]

Section 87610.1(b) provides that, in districts where a collective bargaining agreement is in place, allegations that a community college district wrongfully denied tenure or reappointment to a probationary employee "shall be classified and procedurally addressed as grievances."[76] The EERA recognizes the right of employees to file grievances,[77] and grievance procedures are within the scope of representation under the EERA,[78] resulting in a duty on the community college district to "meet and negotiate" over such procedures.[79] While there is a requirement under the EERA that the district exercise good faith in negotiating with the employee organization's exclusive representative, there is no requirement for the district to ultimately reach agreement with the exclusive representative. Any agreement reached pursuant to negotiations between a community college district and an employee organization's exclusive representative must be entered into voluntarily.

Claimant, in comments on the draft staff analysis, argues as follows:

> To characterize the district's duty to implement a collective bargaining contract as voluntary is to deny the mandate for good faith bargaining and the binding effect of such agreements under contract law. Further, the grievance process is not voluntary, but it is a mandatory provision of the Rodda Act [i.e., EERA] without any limitation on the scope of the subject matter of the grievance. Further, Government Code Section 3543, subdivision (b), includes the requirement that the grievance be 'adjusted.' Thus, the legal requirement is for more than just a

[74] Government Code section 3543.5(c) declares it to be unlawful for a public school employer to "[r]efuse to meet or negotiate in good faith with an exclusive representative."

[75] Government Code section 3543.2(a).

[76] Education Code section 87610.1(b).

[77] Government Code section 3543(b).

[78] Government Code section 3543.2(a).

[79] Government Code section 3543.3.

process, but includes a resolution. The grievance process from start to finish is not voluntary.

The Commission disagrees. A community college district is not legally required to agree to participate in any programs or procedures entered into as a result of its obligation to engage in the collective bargaining process. A community college district and an employee organization *may* agree to certain procedures for processing grievances, and the parties *may* agree that such procedures should culminate in arbitration. However, the law provides the parties a choice to resolve the issues through the existing procedures in section 87740 or through the alternative arbitration procedures in section 87610.1. The district's decision to enter into an agreement containing a grievance arbitration clause triggers the potential costs incurred by the district under the test claim statutes. Thus, as the term "mandate" has been narrowly construed by the courts, it follows that the costs incurred by a community college district to process tenure or reappointment denial grievances under section 87610.1 and to participate in the litigation of grievances post arbitration pursuant to section 87611 are not mandated by the state.

In addition, there is no evidence that the community college district faces practical compulsion to comply with sections 87610.1 and 87611. The California Supreme Court described practical compulsion as "for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program…"[80] There is nothing in the record or in the statutes that demonstrate a substantial penalty for failure to adopt the arbitration process in section 87610.1 for tenure grievances. Thus, community colleges are not practically compelled to comply with sections 87610.1 and 87611.

Moreover, although section 87611 provides for judicial review of an arbitrator's decision made under section 87610.1 by writ of mandate, a writ of mandate was available for grievances and tenure hearings prior to the enactment of these sections.[81] Thus, district participation in judicial proceedings is not a new program or higher level of service.

Claimant also pled the activity of "complying with the arbitrator's make-whole remedies" pursuant to section 87610.1(d). The Commission finds that compliance with the remedies determined by the arbitrator is not a state mandate because the remedies would come from the arbitrator rather than the state. Moreover, the community college chose to be subject to the arbitrator under the section 87610.1 process in the first place.

In the absence of either legal or practical compulsion to use the arbitration process in section 87610.1, the Commission finds that sections 87610.1 and 87611 (Stats. 1988, ch. 973, Stats. 2000, ch. 124) do not impose a state-mandated new program or higher level of service under article XIII B, section 6.

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

[81] In *McGuire v. Governing Board, supra,* 161 Cal.App.3d 871, a temporary employee sued for tenure using a writ of mandate, but the court denied tenure, holding that his tutorial duties did not rise to the level of classroom teaching. In *Steward v. San Mateo Junior Collect Dist. et al.* (1974) 37 Cal.App.3d 345, the court upheld a lower court mandamus proceeding finding that the dismissal of a probationary junior college teacher was invalid.

3. Education Code Section 87610.1(b) Triggers Notice and Hearing Procedures Under Section 87740 for a New Grievance Asserted by Probationary Employees and Mandates a New Program or Higher Level of Service as Specified.

As indicated above, if there is no contractual grievance procedure resulting in arbitration, section 86710.1(b) requires the tenure grievance allegations to proceed in accordance with section 87740 before an administrative law judge. Section 87740 describes notice and hearing procedures for community college districts "before an employee is given notice that his or her services will not be required for the ensuing year."

Section 87740 (as last amended by Statutes 1995, chapter 758) provides for an administrative hearing process that follows the Administrative Procedure Act, but with the following modifications:

> In the event there is no contractual grievance procedure resulting in arbitration pursuant to Education Code Sections 87610.1(b) conducting the hearing and making a decision in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code [i.e., the Administrative Procedure Act] and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:
>
> The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.
>
> The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefore within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.
>
> The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the faculty. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds. (§ 87740, subd. (c).)

The Chancellor's Office argues that section 87740's procedures have been required (as former section 13443) since 1965, and are therefore not subject to reimbursement under article XIII B, section 6.

Claimant's rebuttal comments assert that a section 87740 hearing is now triggered by section 87610.1(b) the tenure grievance procedure discussed above, for denying tenure or reappointing probationary employees and is therefore reimbursable. Claimant reasserts this argument in comments on the draft staff analysis, emphasizing that it is a new program or higher level of service for districts to hold hearings regarding two new grievances:

> Allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)
>
> Allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

As a preliminary matter, section 87740, as amended by Statutes 1995, chapter 758, made only technical, nonsubstantive changes and, thus, does not itself mandate any new duties. (Stats. 1985, ch. 324, Stats. 1976, ch. 1010).[82]

Section 87610.1(b) as added in 1988, however, requires an administrative hearing pursuant to section 87740 for the two grievances described above in the event the parties do not agree to submit the issues to arbitration.

Under prior law, an employee was a contract employee on probation for the first two years of employment. (Former Ed. Code, §§ 13346.20-13346.25, Stats. 1971, ch. 1654, now Ed. Code, § 87609-87609.) After the second year of probation, the district had to either grant the employee tenure or terminate the employee.[83] If an employee was terminated, he or she had a right to a hearing, as follows:

> If the contract employee objects to the decision of the governing board made pursuant to Section 87609 [decision not to reemploy after second year of probation], he may request a hearing. The hearing shall be requested and conducted, and the proposed decision shall be prepared, in accordance with the provisions of Section 87740. (Former Ed. Code, § 87611, Stats. 1976, ch. 1010, former Ed. Code, § 13346.32, Stats. 1971, ch. 1654.)

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[82] For example, it added to subdivision (a): "No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year …" In subdivision (b), the word "must" was twice replaced by the word "shall" as follows: "A request for hearing shall be in writing and shall be delivered to the person who sent the notice …" In subdivision (c)(1), the word "in" was removed as follows: ". . . he or she shall be notified of this five-day period for filing ~~in~~ the accusation." In subdivision (c)(3), the word "schools" was replaced by the word "colleges" and edited the last sentence as follows: "The board may adopt, from time to time, ~~such~~ rules and procedures not inconsistent with ~~the provisions of~~ this section that may be necessary to effectuate this section. In subdivision (d), the words "school" and "schools" were replaced with the words "college" and "colleges." Subdivision (f) was amended as follows:

> If a governing board notifies a contract employee that his or her services will not be required for the ensuing year, the board ~~shall~~, within 10 days after delivery to it of the employee's written request, shall provide him or her with a statement of its reasons for not reemploying him or her for the ensuing ~~school~~ college year.

In subdivision (h), "In the event that" was changed to "if" and in subdivision (i) "which" was changed to "that."

[83] *McGuire v. Governing Board*, *supra,* 161 Cal.App.3d 871, 874.)

Therefore, the Commission finds that providing a hearing after a negative decision to grant tenure is not a new program or higher level of service, since prior law also afforded that right to an employee denied tenure.

The former statutes, however, contain no right to a hearing for probationary employees regarding reappointment to probationary status (subsequent contracts) in their first year of employment pursuant to section 87608. In fact, one court recognized that since 1971 (Stats. 1971, ch. 1654) a first-year employee was not entitled to a hearing in these cases.[84] In sum, before the 1988 Reform Act, the right to a hearing was accorded only to review tenure decisions for a probationary employee in his or her final year of probation, but not for reappointment of probationary employees to a subsequent year or two of probation.

Thus, the Commission finds that section 87610.1(b) (Stats. 1988, ch. 973, Stats. 2000, ch. 124) is a new program or higher level of service for districts to hold hearings under section 87740 regarding:

- Allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

Community college districts are *not* entitled to reimbursement for these hearing activities when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

D. Faculty Service Areas

Claimant pled sections 87743.2, 87743.3, 87743.3, and 87743.5, as added by Statutes 1988, chapter 973. These sections require community college districts to establish "faculty service areas" by July 1, 1990 (§ 87743.2). A faculty service area (FSA) is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." (§ 87743.1.)

As a preliminary matter, section 70(d) of the 1988 statute states that "Sections 51 to 56" of the bill shall be implemented and "be mandatory" only if the state Board of Governors certifies that adequate funding has been provided. The faculty service area statutes were added by sections 52 through 56 and, thus, they are subject to the condition identified in section 70.

At its September 1989 meeting, the state Board of Governors certified that adequate funding had been provided and, thus, community college districts were required to implement sections 87743.2, 87743.3, 87743.3, and 87743.5 as of that date.[85] The analysis continues to determine which activities impose a state-mandated new program or higher level of service on community college districts.

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[84] *Anderson v. San Mateo Community College Dist.* (1978) 87 Cal.App.3d 441, 446.

[85] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

1. Establish FSAs and Competency Criteria for Faculty Members

Establishing FSAs is within the scope of negotiation under the Educational Employment Relations Act (EERA), and the exclusive representative is required to consult with the academic senate in developing its proposals. (§ 87743.2.) Districts are also required to establish competency criteria for faculty members in order to determine competency to serve in an FSA by July 1, 1990, with the development, meeting and negotiating to take place according to the EERA. (§ 87743.5.)

Claimant pled the following activities:

> Establishing and updating faculty service areas, within the scope of meeting and negotiating pursuant to Section 3543.2 of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals. (§ 87743.2.)
>
> Establishing and updating competency criteria for faculty members employed by the district within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code. (§ 87743.5.)

The Chancellor's Office states that there is no express updating requirement in section 87743.2, only that the FSAs be established by July 1, 1990.

The Commission finds that the plain language of sections 87743.2 and 87743.5 (Stats. 1988, ch. 973) impose the following new requirements on community college districts, which constitute state mandates:

- Not later than July 1, 1990, each community college district shall establish faculty service areas. The establishment of faculty service areas is subject to the collective bargaining process in Government Code section 3543.2. (§ 87743.2.)
- Not later than July 1, 1990, each community college shall establish competency criteria for faculty members employed by the district. The establishment of competency criteria for faculty members is subject to the collective bargaining process in Government Code section 3543. (§ 87743.5.)

The Commission also finds that sections 87743.2 and 87743.5, as added by Statutes 1988, chapter 973, mandate a new program or higher level of service, since they were not required under prior law.

2. Qualifying for FSAs

Under section 87743.3, each faculty member is required to quality for one or more FSAs at the time of initial employment, and may apply for more FSAs if he or she is qualified. Any disputes due to denial of FSA applications are treated as grievances. Section 87743.3 states the following:

> Each faculty member shall qualify for one or more faculty service areas at the time of initial employment. A faculty member shall be eligible for qualification in any faculty service area in which the faculty member has met both minimum qualifications pursuant to Section 87356 and district competency standards. After initial employment, a faculty member may apply to the district to add faculty service areas for which the faculty member qualifies. The application shall be

> received by the district on or before February 15 in order to be considered in any proceeding pursuant to Section 87743 [reduction in the number of employees due to declined average daily attendance] during the academic year in which the application is received. Any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area shall be classified and procedurally addressed as a grievance. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board.

Claimant pled the following activities:

> Receiving and determining faculty applications to add faculty service areas for which the faculty member qualifies.
>
> Classifying and procedurally addressing any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board. (§ 87743.3.)

The Commission finds, based on the plain language of the statute, that section 87743.3 (Stats. 1988, ch. 973) imposes a state mandate on community college districts to receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. The Commission also finds that this activity is a new program or higher level of service because it was not required before Statutes 1988, chapter 973 was enacted.

The last two sentences of section 87743.3 state:

> Any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area shall be classified and procedurally addressed as a grievance. If the district has no grievance procedure, fair and equitable procedures for the resolution of the dispute shall be developed by the academic senate and representatives of the governing board.

The Commission finds that, based on its plain language, section 87743.3 (Stats. 1988, ch. 973) imposes a state-mandated new program or higher level of service on community college districts to procedurally address as a grievance, or to use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area.

3. Maintain FSA Records

Districts are also required to maintain permanent records of faculty members' FSAs in the faculty members' personnel files as follows:

> Each district shall maintain a permanent record for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to the district competency standards. The records shall be contained in the faculty member's personnel file. (§ 87743.4.)

Claimant argued that this constitutes a state mandate.

The Commission finds that, based on the plain language of section 87743.4 (Stats. 1988, ch. 973), it is a state mandate for districts to maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. This is also a new program or higher level of service, since it was not required under prior law.

As discussed above, because they are voluntary programs, community college districts are *not* entitled to reimbursement for any FSA activities for faculty or educational administrators employed the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

In comments on the draft staff analysis, the claimant states that faculty or administrators in DSPS or EOPS should not be excluded, stating:

> The mandate at issue here is limited to the evaluation of faculty service area placement and is not contingent on the funding status of the courses to be instructed. The DSA inappropriately extends the perceived discretionary status of these courses to the scope of a subsequent and independent mandate that is explicitly defined in Section 87743.2 et seq.

The Commission disagrees. Because the DSPS and EOPS programs are discretionary, evaluating faculty applicants for faculty service area placement is also discretionary and not mandated by the state.

Issue 2: Do the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the test claim statutes and regulations impose costs mandated by the state,[86] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. 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.

Government Code section 17564 states that no test claim or reimbursement claim shall be made, nor shall any payment be made, unless claims exceed $1,000.

The test claim includes declarations that claimant will incur costs estimated to exceed $1,000 to implement the test claim statutes and regulations. (Exhibit 1 to test claim, page 12.)

[86] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835; Government Code section 17514.

A. Activities Required by Phase I of the 1988 Reform Act (Phase I of Transitional Program Improvement) to be Completed by July 1, 1990 do not Impose Costs Mandated by the State

The following mandated activities were required to be completed by July 1, 1990:

- Develop hiring criteria for faculty and administrators that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360, subd. (a).)
- Develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360, subd. (b).)
- Establish faculty service areas, subject to the collective bargaining process in Government Code section 3543.2. (§ 87743.2.)
- Establish competency criteria for faculty members employed by the district, subject to the collective bargaining process in Government Code section 3543. (§ 87743.5.)

The period of reimbursement for this claim begins July 1, 2001, eleven years after these activities were required to be completed.[87] There is no evidence in the record that the claimant or any community college district incurred costs for these activities during the period of reimbursement.

Moreover, pursuant to the plain language of the statutes, these activities are one-time activities. Based on certification by the Board of Governors, these activities have been "adequately funded." Section 70(d) of the 1988 test claim statute placed these activities within Phase I of the program and required that these activities be implemented only upon certification by the Board of Governors that adequate funding has been provided. "Adequate funding" is defined as "those moneys required to provide an increased quality of instruction and programs, and to carry out applicable mandates of this act, within the California Community Colleges." Section 70(d) further states that "[b]ased on estimates provided by the board of governors and exhaustive review of the community colleges' operations by the Joint Committee for the Review of the Master Plan for Higher Education, the Legislature finds and declares that its estimate of this funding amount is seventy million dollars ($70,000,000)." At its September 1989 meeting, the Board of Governors certified that adequate funding has been provided to community college districts for completion of these one-time activities.[88]

Accordingly, the activities required by sections 87360, 87743.2, and 87743.5 do not impose increased costs mandated by the state within the meaning of Government Code section 17514.

B. The Remaining Activities Do Not Impose Costs Mandated by the State

The remaining activities mandated by the state require community college districts to:

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[87] The test claim was filed June 13, 2003, so reimbursement is only available starting in the 2001-2002 fiscal year pursuant to Government Code section 17557, subdivision (e).

[88] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

1. Determine the Minimum Qualifications of Applicants for Faculty and Educational Administrator Positions as follows (§ 87359, subd. (a), as added by Stats. 1988, ch. 973; Cal. Code Regs, tit. 5, § 53430, subd. (a).):
   - Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.
   - The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action. (§ 53430, subd. (a).)

   Community college districts are *not* entitled to reimbursement for these activities above when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), and noncredit courses (Cal. Code Regs., tit. 5, § 53412).

2. Develop Process, Criteria, and Standards for Determinations on Faculty (§ 87359(b), Stats. 1988, ch. 973; Stats. 1993, ch. 506; Cal. Code Regs, tit. 5, § 53430(b) & (c).):
   - The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359, subd. (a); Cal. Code Regs, tit. 5, § 53430(b).)
   - The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359(a), Cal. Code Regs, tit. 5, § 53430(b).)
   - The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359(a), Cal. Code Regs, tit. 5, § 53430(c).)
   - The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359(a); Cal. Code Regs, tit. 5, § 53430(b).)

Community college districts are *not* entitled to reimbursement for the activities listed above when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

3. Faculty Evaluations:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semester or once every nine regular quarters thereafter. (§ 87663 subd. (a), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Include a peer review process in evaluations of academic employees, on a departmental or divisional basis, that addresses the forthcoming demographics of California and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching. (§ 87663, subds. (c)and (d), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Develop "evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative" for probationary faculty. (§ 87663, subd. (h).)
- Establish and disseminate written evaluation procedures for administrators (§ 87663, subd. (i), Stats. 1988, ch. 973, Stats. 1990, ch. 1302).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150.)[89]

Community college districts are *not* entitled to reimbursement for these evaluations activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

4. Hearings on Reappointing Probationary Employees

To hold hearings pursuant to section 87740 regarding:

- Allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1, subd. (b).)

Community college districts are *not* entitled to reimbursement for these hearing activities when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

[89] California Code of Regulations, title 5, section 53130, Register 91, No. 23 (June 7, 1991). A new article heading was added by Register 93, No. 25 (June 18, 1993). Editorial correction of the history was made by Register 95, No. 19 (March 19, 1995).

5. Faculty Service Areas:

- Receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. (§ 87743.3, Stats. 1988, ch. 973.)
- Procedurally address as a grievance, or use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. (§ 87743.3, Stats. 1988, ch. 973.)
- Maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possess the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4, Stats. 1988, ch. 973.)

Community college districts are *not* entitled to reimbursement for these FSA activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

The next question is whether funding in an amount sufficient to fund the costs of these mandated activities has been provided to community college districts. If so, the activities would not impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556. Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The 1988 Reform Act included the following legislative intent regarding funding its reforms:

> The Legislature finds and declares that the reforms enacted through this act form a mutually dependent and related set of provisions. While some few provisions could be enacted independently, other sections of this act depend upon adequate support for the programs of the community colleges. There is a direct linkage between those sections of this act which constitute the further professionalization of the faculty and the moneys required to enhance the programs of the community colleges for "transitional program improvement," as specified in Section 84755 of the Education Code.
>
> For instance, the elimination of credentials must be accompanied by the establishment of minimum qualifications by the board of governors. Minimum qualifications in turn must be implemented by districts through the establishment of faculty service areas, competency criteria, and various waiver processes. The extension of the tenure probationary period to four years as well as the revisions

> to layoff procedures also depend upon faculty service areas and competency criteria. Similarly, because so many of the reforms call for faculty involvement in the determination and implementation of policy, and because the quality, quantity, and composition of full-time faculty have the most immediate and direct impact on the quality of instruction, overall reform cannot succeed without sufficient members of full-time faculty with sufficient opportunities for continued staff development, and with sufficient opportunity for participation in institutional governance.
>
> The Legislature further finds that, absent resources to reimburse the state-mandated costs of this act, new full-time faculty to replace part-time faculty, and expanded programs for staff development, the viability or success, or both, of many of the reforms in this act will be jeopardized. The Legislature recognizes that due to unanticipated fiscal conditions the State cannot immediately fund all of the reforms contained in this act. The Legislature also recognizes, however, that if minimal funding is not soon provided that it would be inappropriate to proceed with many reforms.[90]

The 1988 Reform Act also added section 84755, as mentioned in the first paragraph of the legislative intent language quoted above. Section 84755 provides funding guidance for the minimum qualifications, evaluation, tenure grievance, and faculty service area mandates imposed on community college districts. It reads in part:

> (a) The Legislature finds and declares that program-based funding, once implemented, will more adequately and accountably fund the costs of providing quality community college education**.** Given that program-based funding will not be implemented until fiscal year 1991-92, given that community colleges will be entering a period of major reform and incurrence of new state mandates commencing in January 1989, and given that community colleges will be entering this period of reform having lost purchasing power since the 1977-78 fiscal year, the Legislature recognizes the need to create a transitional funding mechanism for program improvement and mandate funding that can operate until program-based funding is implemented.
> (b) For the purpose of improving the quality of community college educational programs and services, for the purpose of reimbursing state-mandated local program costs imposed by this act, and for the purposes of initially implementing specified reforms, the board of governors shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year [originally: generated in the 1987-88 fiscal year]. However, this amount shall be increased or decreased to provide for equalization in a manner determined by the board of governors, consistent with Sections 84703 to 84705, inclusive.
> Each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms and make authorized program and service improvements as follows:

[90] Statutes 1988, chapter 973, section 70(a).

[¶]…[¶]
(2) Applying minimum qualifications to all newly hired faculty and administrators, including candidates for these positions as required by Section 87356.
(3) Developing and administering a process for waiver of minimum qualifications as required by Section 87359.
(4) Establishing and applying local hiring criteria as required by Section 87360.
(5) Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive.
(6) Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663.
(7) Establishing and applying new processes for tenure evaluation required by Section 87610.1.
(8) Establishing and applying the tenure denial grievance procedure required by Section 87610.1. . . . .

[¶]…[¶]
(c) Except as provided by Section 87482.6,[91] and except as necessary to reimburse the costs of new state mandates, district governing boards shall have full authority to expend program improvement allocations for any or all of the authorized purposes specified in subdivision (b). (Emphasis added.)

Because program-based funding was not to be implemented until fiscal year 1991-1992,[92] the Legislature intended that program-improvement funding for the 1988 Reform Act be implemented in two phases of "transitional program improvement."[93] Phase I includes the remaining mandated activities in numbers 2 -6 above. (§ 84755 (b)(2)-(b)(6).) The Legislature stated its intent "that moneys appropriated during Phase I fully fund any state-mandates created pursuant to this section" and required each community college district to use its allocation to initially reimburse state-mandated local program costs.[94] Phase II includes number 8 above (§ 84755 (b)(8).) The Legislature further stated its intent "that moneys appropriated during Phase II fully fund any state-mandate created pursuant to this section."[95] After the districts used the funds to reimburse the costs of the new state mandates, the districts had authority to use the program improvement allocations as they saw fit to pay for the program.

The certification that the districts had received adequate Phase I funding was adopted by the Board of Governors at its September 14-15, 1989 meeting.[96] Similarly, the Phase II adequate

[91] Section 87482.6 concerns districts with less than 75% of credit instruction taught by full-time instructors.

[92] Education Code Section 84755(a).

[93] Statutes 1988, chapter 973, section 70(b).

[94] Statutes 1988, chapter 973, section 70(b)(1).

[95] Statutes 1988, chapter 973, section 70(b)(2).

[96] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

funding certification was provided in November 1990.[97] Thus, the costs of the state-mandated activities were fully funded with the program improvement funding until fiscal year 1991-1992. Claimant, in comments on the draft staff analysis, disagrees that the certification means that the activities were fully funded until 1991-1992. This does not matter, however, because the reimbursement period for this claim begins in fiscal year 2001-2002.

After program improvement funding ended in fiscal year 1991-1992, funding for the mandated activities was appropriated through program-based funding.[98] (§ 84755(a).) Before the funding could be appropriated as part of a district's base budget, however, each community college district was required to submit a plan to the Board of Governors for review and approval. The plan had to show that the district's use of the funding is consistent with the requirements of section 84755. One of the requirements of section 84755 is that "each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms and make authorized program and service improvements." (§ 84755(b).) Section 84755(d) states the following:

> As required by the board of governors, the governing board of each community college district shall submit to the board of governors a plan for using the resources allocated pursuant to this section. The board of governors shall review each plan to ensure that proposed expenditures are consistent with the listing of authorized expenditures provided in this section, and the board of governors shall approve all plans to the full extent that expenditures are authorized by this section. To the extent that a community college district expends its program improvement allocation consistent with its plan, the board of governors shall include the district's allocation as part of the district's base budget for subsequent years.

Thus, by law the district's plan for using funds appropriated for its base budget must be consistent with section 84755, subdivision (b), including the requirement for districts to first use their allocations to specifically fund the costs of the following mandated activities:

- Applying minimum qualifications to all newly hired faculty and administrators including candidates for these positions as required by Section 87356 (§ 84755, subd. (b)(2));
- Developing and administering a process for waiver of minimum qualifications as required by Section 87359 (§ 84755, subd. (b)(3));
- Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive (§ 84755, subd. (b)(5));
- Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663 (§ 84755, subd. (b)(6)); and

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[97] Board of Governors, California Community Colleges, Board Certification Regarding Adequate Funding for Phase II of AB 1725. (Agenda Item 14) November 8-9, 1990. The tenure grievance procedure (or more specifically, granting a hearing to a probationary employee who is denied further probation after the first year of employment) is part of Phase II.

[98] Program-based funding was initially included in Education Code section 84750 (Stats. 1988, ch. 973) and superseded by Education Code section 84750.5 (Stats. 2006, ch. 631).

- Establishing and applying the tenure denial grievance procedure required by section 87610.1. (§ 84755, subd. (b)(8).) As discussed above, section 86610.1(b) mandates a new program or higher level of service to grant a hearing pursuant to section 87440 resulting from allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees.

The base funding for community college districts has been appropriated in line item 6870-101-0001 of the state budget acts. In every budget act from 2001 until 2010, the Legislature has appropriated between $2.1 and $3.9 billion for "local assistance" for community colleges.[99]

The Chancellor's Office, in its comments on the test claim, asserts that this program was funded originally, as stated in the legislative intent language above, and was built into the base for the community college districts.

Claimant disagrees that funding has been adequate and asserts that section 87455(b) states that the Board of Governors "shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year," but only after the amount is "increased or decreased to provide for equalization." According to claimant, this effectively negates any concept of cost reimbursement, which is the actual cost of the increased level of reimbursement. Claimant reiterates this argument in comments on the draft staff analysis, stating that the funding formula, as a matter of law, cannot be presumed to be sufficient.

Claimant also states that offsetting revenues in the 1988 Reform Act (Stats. 1988, ch. 973) did not provide for offsetting savings to local agencies or school districts which result in no net costs or include additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund it, in accordance with Government Code section 17556(e). According to claimant, later provided funding is a question of fact subject to the Commission's determination. The claimant argues that there is no evidence in the record that the base funding provided in the budget acts is sufficient to cover the costs of the mandated activities and that since the claimant has alleged $1,000 in costs for this test claim, it has met its burden of proof. Included in the test claim is a declaration estimating costs incurred in the amount of $1,000 to comply with all the test claim statutes and regulations. The declaration was prepared by Tom Donner, the Executive Vice President of Business and Administration for Santa Monica Community College District. With respect to alleged costs, the declaration states the following:

> It is estimated that the Santa Monica Community College District incurred more than $1,000 in staffing and other costs in excess of any funding provided to community college districts and the state for the period from July 1, 2001,

[99] Statutes 2001, chapter 106, 6870-101-0001, $2.6 billion; Statutes 2002, chapter 379, 6870-101-0001, $2.65 billion; Statutes 2003, chapter 157, 6870-101-0001, $2.18 billion; Statutes 2004, chapter 208, 6870-101-0001, $2.78 billion; Statutes 2005, chapters 38, 39, 6870-101-0001, $3.15 billion; Statutes 2006, chapter 47, 48, 6870-101-0001, $3.76 billion; Statutes 2007, chapters 171, 172, 6870-101-0001, $3.8 billion; Statutes 2008, chapters 268, 269, 6870-101-0001, $3.98 billion; Statutes 2009, chapter 1 (4th Ex. Sess.) 6870-101-0001, $3.1 billion; Statutes 2010, chapter 712, 6870-101-0001, $3.1 billion.

through June 30, 2002 to implement these new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.[100]

Claimant states that any revenue received by the districts are merely offsets to be identified in parameters and guidelines and do not preclude reimbursement.

Claimant submitted further argument and evidence on July 20, 2011, including 11 exhibits from meetings or reports of the Board of Governors of the California Community Colleges between 1989 and 1992, and letters from the Chancellor's Office to the claimant approving claimant's plan submitted to comply with 84755. Claimant argues that the allocation method used by the Board of Governors for the money appropriated pursuant to section 84755 is based on ADA and not on actual costs mandated by the state, and is equalized to help smaller districts in a manner inconsistent with mandate reimbursement.[101] Claimant's Exhibits A-D concern program-improvement funding, which ended in 1991-1992 and was replaced by program-based funding. Claimant also included the following exhibits regarding program-based funding:

- In Exhibit E (Board of Governors agenda for March 14-15, 1991) claimant emphasizes the differences between program–based funding (in which funding is provided for five specified areas: instruction, instructional services, student services, maintenance and operations, and institutional support) and mandate reimbursement, which is based on actual costs.
- In Exhibit F (Board of Governors "Funding Gap Study" Mar. 12-13, 1992), claimant asserts that because there is a funding gap, in that the state underfunds community colleges, doubt is cast on the conclusion that the local assistance allocations since 2001 met the requirement in Gov. Code 17556(e).
- Exhibits H and I are April 1991 objections to a regulation proposed by the Board of Governors (Cal. Code Regs., tit. 5, § 51025) that requires districts to have 75 percent of courses taught by full-time faculty. Claimant argues that most of the money going to program-improvement funding was used for equalization or to increase the ratio of full-time faculty to comply with this regulation rather than funding the mandates.

The Commission disagrees with the claimant's arguments in this case. It is a general principle of law that the party bringing the claim has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim.[102] This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. By statute, only the local agency or school district may bring a claim, and the local entity must present and prove that it has incurred increased costs mandated by the state pursuant to Government Code section 17514 and is therefore entitled to reimbursement.

In many cases, a declaration from the claimant that alleges that the claimant has incurred an estimate of $1,000 in costs to pay for the program satisfies the claimant's burden of proving it

[100] Exhibit A, page 68, 79.

[101] Exhibits A and B attached to the claimants July 20, 2011 filing are agenda items for the meetings of the Board of Governors on July 13-14, 1989 and Sept. 14-15, 1989.

[102] Evidence Code section 500.

has incurred increased costs mandated by the state pursuant to Government Code section 17514. This is true, for example, when legislation mandates a new program or higher level of service, but does not appropriate any funding with the new requirements. It may also be true when the Legislature appropriates general funding for a block of programs, one of which is the test claim program, but does not establish a priority use of the funding. In this second example, local government has discretion to use the funding for any of the programs identified, and offsetting revenue may only be identified and deducted from the claim if a claimant has used the funds for the mandated program.

Here, however, there is enough evidence to show the relevance of Government Code section 17556(e); a significant amount of money has been appropriated every fiscal year to community college districts that was specifically intended by the state to fund the costs of the mandated activities. Funding between $2.1 and $3.9 billion has been specifically appropriated to community college districts in the budget acts for allocation to the districts' through their base funding appropriation between 2001 and 2010. Pursuant to sections 84755(b) and (d), the state has directed that these appropriations must be *first* used to pay for the costs of the mandated activities identified above before a community college can exercise its discretion to use the funding for other authorized purposes. Claimant has disputed neither the amount of appropriations to community colleges for "local assistance" nor the requirement in section 84755 to "use its allocation to initially reimburse state-mandated local program costs" and that the district's plan for using its allocation "be consistent with the listing of authorized expenditures provided in this section."

Although claimant has submitted evidence in the record[103] showing that the claimant's plan for expenditures prepared in accordance with section 84755(d) was, in fact, approved, there is no evidence in the record of the amount of funding actually allocated to the claimant during the period of reimbursement; or that the funding allocated to the claimant was sufficient to cover the costs of the mandated activities. However, it may be presumed that the official duties required of state and local officials by section 84755(d) have been regularly performed.[104] Thus, it is presumed that the Board of Governors complied with section 84755(d) before approving the plans and including the district's allocation as part of the district's base budget by ensuring that the proposed expenditures are consistent with the authorized expenditures in section 84755, including the requirement to pay for the mandated activities first. And it is presumed that the districts, after receiving the yearly base-funding allocation, paid for the mandated activities first. There is no evidence in this case that the state and local community college districts failed to comply with these requirements.

The cost issue in this case is similar to what occurred in the *Kern High School District* case.[105] *Kern High School Dist.* addressed legislation requiring school site councils to comply with

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[103] In its July 20, 2011 filing, claimant submits letters from the Chancellor's Office to the claimant approving its program-improvement plans for phase I (Exhibit J, letter dated March 14, 1990) and phase II (Exhibit K, letter dated March 1, 1991). Both letters say that the plan submitted was "found to be consistent with the listing of authorized expenditures in Education Code, section 84755."

[104] Evidence Code section 664.

[105] *Kern High School Dist., supra*, 30 Cal.4th 727, 746-747.

modified open meeting act requirements, including posting a notice and an agenda of their meetings. School site councils were created by several state and federal programs that included funding for "reasonable district administrative expenses."[106] The school site councils test claim was filed with the Commission in 1994. For the Commission to take jurisdiction of the test claim filing, the claimant was required to estimate costs of at least $200 pursuant to the former Government Code section 17564 and section 1183 of the Commission's regulations. Based on the statutory schemes that created the school site councils, the court noted that the program funding available for the programs was often substantial – "for example, on a statewide basis, funding provided by the state for school improvement programs [citations omitted] for the 1998-1999 fiscal year totaled approximately $394 million. (Cal.Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)"[107] In addition, the statutes allowed school districts to use the program funding for "administrative expenses," but did not establish a priority use of the funds. Despite the allegations by the claimant of increased costs mandated by the state, the court still denied the claim as follows:

> Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, we nevertheless conclude that under the circumstances here presented, the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda related expenses.
>
> We note that, based upon the evaluations made by the Commission, the costs associated with the notice and agenda requirements at issue in this case appear rather modest.
>
> > FN 16 Costs of compliance with the notice and agenda requirements have been estimated as amounting to approximately $90 per meeting for the 1994-1995 fiscal year, and incrementally larger amounts in subsequent years, up to $106 per meeting for the 2000-2001 fiscal year, for each committee or advisory council. . . . Under these formulae, a district that has 10 schools, each with one council or advisory committee that meets 10 times a year, would be forced to incur approximately $9,000 to $10,000 in costs to comply with statutory notice and agenda requirements. Presumably, such costs are minimal relative to the funds allocated by the state to the school districts under these programs. . . .
>
> And, even more significantly, we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of the underlying funded program to pay the associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. (See Ed. Code, § 52168, subd. (b) ["School districts may claim funds appropriated for purposes of this

[106] *Id.* at page 747.

[107] *Id.* at page. 732.

> article for expenditures in, but not limited to, the following categories: [¶ … [¶ (6) Reasonable district administrative expenses. …"].) We believe it is plain that the costs of complying with program-related notice and agenda requirements qualify as "[r]easonable district administrative expenses."[108]

The facts here are even more compelling than *Kern*. Here, community college districts are required by law to use the allocations received to *first* pay for the mandated activities before the funding may be spent on other authorized expenses. The declaration filed by the claimant in this case estimating increased costs of $1,000, while satisfying the test claim filing requirements when the claim was filed in 2003 and giving the Commission jurisdiction to determine the claim,[109] is not enough to show that the claimant actually incurred increased costs mandated by the state above and beyond the significant funding specifically appropriated by the state to first pay for the mandated activities. As indicated by the court in *County of Sonoma v. Commission on State Mandates*, a showing of actual increased costs is required.

> Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in *increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with "costs" incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas. "*No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes*." [Citation omitted]. (Emphasis added.)[110]

Accordingly, the Commission finds that there is no substantial evidence in the record to support a finding that the claimant has incurred costs mandated by the state pursuant to Government Code section 17514.

Claimant's late filing does not alter this conclusion. All of claimant's exhibits are dated long before the period of reimbursement (the most recent being Exhibit G, July 9-10, 1992) and do not show that claimant has incurred increased costs mandated by the state. Also, Exhibits A-D

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[108] *Id.* at pages 746-747.

[109] This test claim was filed on June 13, 2003. Effective April 21, 2003, former section 1183 of the Commission's regulations required all test claims to include "a statement that actual and/*or estimated costs* which result from the alleged mandate exceed one thousand dollars ($1,000)." (Emphasis added.)

In 2004, Government Code section 17553 was amended to require all test claims to include information showing "the *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate," and "the actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed. (Stats. 2004, ch. 890 (AB 2856); emphasis added.)

[110] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284.

relate to program-improvement funding, which was replaced by program based funding in fiscal year 1991-1992, and are therefore not relevant to the period of reimbursement for this claim. (§ 84755 (a).)

Claimant raises the issue of equalization funding, arguing that it is inconsistent with mandate reimbursement. Equalization (giving smaller districts more funds) is required by section 84755(b), but it does not mean that districts did not get enough funds to pay for the mandated costs. Equalization funding does not change the requirement in section 84755(b) & (d) that mandates be funded first, that there are large amounts in the annual budget allocated for local assistance to community college districts, and that there is no substantial evidence that claimant has incurred costs mandated by the state pursuant to Government Code section 17514.

Regarding Exhibit E (Board of Governors agenda for March 14-15, 1991), claimant emphasizes the differences between program–based funding (in which funding is provided for five specified areas: instruction, instructional services, student services, maintenance and operations, and institutional support) and mandate reimbursement, which is based on actual costs. Claimant does not, however, cite the statement in Exhibit E that program-based funding is a revenue-allocation method and not an expenditure model, and that districts are not required to spend funds in the five listed categories. Thus, other than the requirements in 84755 that require state mandates to be funded first[111] districts are free to spend allocations as they see fit.

As to the funding gap study in Exhibit F, the gap applies to all activities of the community colleges, but the activities in section 84755(b) apply only to the mandated activities. Exhibit F, however, does not show that the claimant has incurred increased costs for the mandated activities in this claim.

As to Exhibits H and I (District response to adoption of Cal.Code Regs, tit. 5, § 51025), section 51025 of the title 5 regulations is not part of the test claim, and there is no evidence that compliance with it consumes all the program-based funding for districts. That districts objected to section 51025 does not change the priority in section 84755 that mandates be funded first. Exhibits H and I do not show that the claimant has incurred increased costs for the mandated activities in this claim.

[111] Section 84755(c) states that "[e]xcept as provided in Section 87482.6, and except as necessary to reimburse the costs of the new state mandates, district governing boards shall have full authority to expend *program improvement allocations* for any or all of the authorized purposes specified in subdivision (b)." (Emphasis added.) Section 87482.6(a) provides that until program-based funding is implemented by a standard adopted by the Board of Governors that establishes the appropriate percentage of hours of credit instruction that should be taught by full-time instructors, the Legislature "wishes to recognize and make efforts to address longstanding policy of the board of governors that at least 75 percent of the hours of credit instruction . . . should be taught by full-time instructors." The remaining provisions of section 87482.6 lay out the percentage of *program improvement funding* to be spent on achieving greater full-time instruction. Section 87482.6 deals with primarily with program-improvement funding, which ended in 1991-1992, it is not relevant to the issue of costs during the period of reimbursement.

Despite claimant's July 20, 2011 submission, the Commission finds that there is no substantial evidence in the record to support a finding that the claimant has incurred costs mandated by the state pursuant to Government Code section 17514. [112]

CONCLUSION

For the foregoing reasons, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514.

[112] As a final note, the claimant's comments on the draft staff analysis states the following:

> It has been nine years since the test claim was accepted for filing and 22 years since the programs were implemented. The Commission has never requested this information [regarding the funding] from either the test claimant or the relevant state agency. The lack of evidence that is not required as part of the test claiming [sic] filing and was never requested is not a reasonable basis to make a finding of law that the program funding is sufficient.

When the draft staff analysis was issued, the transmittal letter issued by Commission staff did request the information. The letter stated the following:

> As noted in the analysis, Commission staff concludes that the activities that constitute a new program or higher level of service are already funded through the Board of Governor's base budget appropriations. We seek comments on this finding.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 15271, 15272, 15274, 15276, 15278, 15280, 15282, 15284, 15301, 15302, 15303, 15320, 15321, 15322, 15323, 15324, 15325, 15326, 15327, 15336, 15340, 15341, 15342, 15343, 15346, 15347, 15349, 15349.1, 15350, 15351, 15352, 15354, 15355, 15359.2, 15359.3, 15380, 15381, 15384, 15390, 15391, 17006, 17008.3, 17009, 17009.5, 17014, 17015, 17016, 17017, 17017.2, 17017.5, 17017.6, 17017.7, 17017.9, 17018, 17018.5, 17018.7, 17019.3, 17019.5, 17020, 17021.3, 17022, 17022.7, 17024, 17025, 17029, 17029.5, 17030, 17030.5, 17031, 17032, 17032.3, 17032.5, 17036, 17038, 17040, 17040.1, 17040.2, 17040.3, 17040.6, 17040.7, 17040.8, 17041.1, 17041.2, 17041.8, 17042.7, 17042.9, 17047, 17047.5, 17049, 17056, 17059, 17059.1, 17061, 17062, 17063, 17064, 17065, 17066, 17070.33, 17070.50, 17070.51, 17070.60, 17070.63, 17070.70, 17070.71, 17070.75, 17070.77, 17070.80, 17070.90, 17070.95, 17070.97, 17070.98, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.46, 17071.75, 17072.10, 17072.12, 17072.13, 17072.20, 17072.33, 17072.35, 17073.10, 17074.10, 17074.15, 17074.16, 17074.20, 17074.25, 17074.26, 17074.30, 17074.50, 17074.52, 17074.54, 17074.56, 17075.10, 17075.15, 17076.10, 17076.11, 17077.10, 17077.30, 17077.35, 17077.40, 17077.42, 17077.45, 17078.18, 17078.20, 17078.22, 17078.24, 17078.25, 17088.3, 17088.5, 17088.7, 17089, 17089.2, 17090, 17092, 17096, 17110, 17111, 17150, 17180, 17183.5, 17193.5, 17194, 17199.1, 17199.4, 17210, 17210.1, 17211, 17212, 17212.5, 17213, 17213.1, 17213.2, 17251, 17315, 39003, 39120 and 100620 as added or amended by Statutes 1976, Chapter 557; Statutes 1977, Chapter 242; Statutes 1978, Chapter 362; Statutes 1982,

Case Nos.: 02-TC-30, 02-TC-43 and 09-TC-01

School Facilities Funding Requirements

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

(*Adopted on March 24, 2011*)

Chapter 735; Statutes 1990, Chapter 1602; Statutes 1991, Chapter 1183, Statutes 1996, Chapter 277; Statutes 1997, Chapters 513, 893, and 940; Statutes 1998, Chapters 407, 485, 691, 741, 848, 941, 957, and 1076; Statutes 1999, Chapters 133, 709, 858, 992 and 1002; Statutes 2000, Chapters 44, 193, 443, 530, 590, and 753; Statutes 2001, Chapters 132, 159, 194, 422, 647, 725, 734 and 972; and Statutes 2002, Chapters 33, 199, 935, 1075, and 1168

Health and Safety Code Sections 25358.1 and 25358.7.1 as added by Statutes 1999, Chapter 23

Public Resources Code sections 21151.4 and 21151.8 as amended by Statutes 2003, Chapter 668; Statutes 2004, Chapter 689; Statutes 2007, Chapter 130: and Statutes 2008, Chapter 148

California Code of Regulations, Title 2, Sections 1859.20, 1859.21, 1859.22, 1859.30, 1859.31, 1859.32, 1859.33, 1859.35, 1859.40, 1859.41, 1859.50, 1859.60, 1859.70, 1859.72, 1859.74.1, 1859.75, 1859.75.1, 1859.76, 1859.77.1, 1859.77.2, 1859.79, 1859.79.2, 1859.79.3, 1859.81, 1859.81.1, 1859.82, 1859.90, 1859.100, 1859.102, 1859.104, 1859.104.1, 1859.104.2, 1859.104.3, 1859.105, 1859.105.1, 1859.106, 1859.107, 1862.52, 1862.53, 1865.3, 1865.8, 1865.32.5, 1865.33, 1865.39, 1865.42, 1865.43, 1865.50, 1865.70 as added or amended by Registers 78-05, 79-34, 80-12, 80-26, 81-19, 84-51, 86-44, 98-49, 98-52, 99-11, 99-14, 99-29, 99-31, 99-41, 99-52, 2000-02, 2000-11, 2000-26, 2000-29, 2000-37, 2000-52, 2001-01, 2001-24, 2001-30, 2001-33, 2001-51, 2002-15, 2002-18, 2002-33, 2002-37, 2002-38, 2002-40, 2002-45, 2003-03, 2003-06, 2003-07, 2003-08, 2003-09, 2003-18, 2003-24

The Substantial Progress and Expenditure Audit Guide of May 2003; The School Facility Program Guidebook of January 2003; The State Relocatable Classroom Program Handbook of January 2003; and The Lease-Purchase Applicant Handbook of April 1998

Filed on June 4, 2003 by

Clovis Unified School District, Claimant

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on March 24, 2011. Mr. Art Palkowitz represented the claimant, Clovis Unified School District and Ms. Donna Ferebee represented the Department of Finance.

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 the staff analysis to deny this test claim at the hearing by a vote of 4-2 with one member abstaining.

Summary of Findings

The Commission finds that the test claim statutes, regulations and alleged executive orders do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

1. Education Code sections 39003 and 39120 were repealed in 1993, prior to the beginning of the potential reimbursement period for this test claim and thus cannot be reimbursable.
2. The Commission does not have jurisdiction over Education Code section 17213.1, as added by Statutes of 1999, chapter 1002 (SB 62), because this statute was the subject of a final decision of the Commission, Acquisition of Agricultural Land for a School Site (98-TC-04 and 01-TC-03).
3. Health and Safety Code section 25358.1, as added by Statutes 1999, chapter 23 (SB 47) does not impose a "program" and thus is not subject to reimbursement under article XIII B, section 6 of the California Constitution.
4. The Substantial Progress and Expenditure Audit Guide of May 2003, the School Facility Program Guidebook of January 2003, the State Relocatable Classroom Program Handbook of January 2003, and the Lease-Purchase Applicant Handbook of April 1988 are not executive orders subject to Article XIII B, section 6.
5. Health and Safety Code section 25358.7.1, as added by Statutes 1999, chapter 23 (SB 47), imposes requirements on DTSC, not school districts.
6. The statutes below, which generally require compliance school facility funding requirements, do not mandate school districts to perform any activities because:
    a) School districts are not legally compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.
    b) There is no evidence in the record to support a finding that school districts are practically compelled to: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, request and accept SFP funding, issue local bonds, or opt to participate in other state programs to further such projects, which would trigger the requirement to comply with SFFRs contained in the test claim statutes and regulations.

Education Code Sections 15271, 15272, 15274, 15276, 15278, 15280, 15282, 15284, 15301, 15302, 15303, 15320, 15321, 15322, 15323, 15324, 15325, 15326, 15327, 15336, 15340, 15341, 15342,

15343, 15346, 15347, 15349, 15349.1, 15350, 15351, 15352, 15354, 15355, 15359.2, 15359.3, 15380, 15381, 15384, 15390, 15391, 17006, 17008.3, 17009, 17009.5, 17014, 17015, 17016, 17017, 17017.2, 17017.5, 17017.6, 17017.7, 17017.9, 17018, 17018.5, 17018.7, 17019.3, 17019.5, 17020, 17021.3, 17022, 17022.7, 17024, 17025, 17029, 17029.5, 17030, 17030.5, 17031, 17032, 17032.3, 17032.5, 17036, 17038, 17040, 17040.1, 17040.2, 17040.3, 17040.6, 17040.7, 17040.8, 17041.1, 17041.2, 17041.8, 17042.7, 17042.9, 17047, 17047.5, 17049, 17056, 17059, 17059.1, 17061, 17062, 17063, 17064, 17065, 17066, 17070.33, 17070.50, 17070.51, 17070.60, 17070.63, 17070.70, 17070.71, 17070.75, 17070.77, 17070.80, 17070.90, 17070.95, 17070.97, 17070.98, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.46, 17071.75, 17072.10, 17072.12, 17072.13, 17072.20, 17072.33, 17072.35, 17073.10, 17074.10, 17074.15, 17074.16, 17074.20, 17074.25, 17074.26, 17074.30, 17074.50, 17074.52, 17074.54, 17074.56, 17075.10, 17075.15, 17076.10, 17076.11, 17077.10, 17077.30, 17077.35, 17077.40, 17077.42, 17077.45, 17078.18, 17078.20, 17078.22, 17078.24, 17078.25, 17088.3, 17088.5, 17088.7, 17089, 17089.2, 17090, 17092, 17096, 17110, 17111, 17150, 17180, 17183.5, 17193.5, 17194, 17199.1, 17199.4, 17210, 17210.1, 17211, 17212, 17212.5, 17213, 17213.1, 17213.2, 17251, 17315, and 100620 as added or amended by Statutes 1976, Chapter 557; Statutes 1977, Chapter 242; Statutes 1978, Chapter 362; Statutes 1982, Chapter 735; Statutes 1990, Chapter 1602; Statutes 1991, Chapter 1183, Statutes 1996, Chapter 277; Statutes 1997, Chapters 513, 893, and 940; Statutes 1998, Chapters 407, 485, 691, 741, 848, 941, 957, and 1076; Statutes 1999, Chapters 133, 709, 858, 992; Statutes 2000, Chapters 44, 193, 443, 530, 590, and 753; Statutes 2001, Chapters 132, 159, 194, 422, 647, 725, 734 and 972; and Statutes, 2002, Chapters 33, 199, 935, 1075, and 1168

Public Resources Code sections 21151.4 and 21151.8 as amended by Statutes 2003, Chapter 668; Statutes 2004, Chapter 689; Statutes 2007, Chapter 130: and Statutes 2008, Chapter 148

California Code of Regulations, Title 2, Sections 1859.20, 1859.21, 1859.22, 1859.30, 1859.31, 1859.32, 1859.33, 1859.35, 1859.40, 1859.41, 1859.50, 1859.60, 1859.70, 1859.72, 1859.74.1, 1859.75, 1859.75.1, 1859.76, 1859.77.1, 1859.77.2, 1859.79, 1859.79.2, 1859.79.3, 1859.81, 1859.81.1, 1859.82, 1859.90, 1859.100, 1859.102, 1859.104, 1859.104.1, 1859.104.2, 1859.104.3, 1859.105, 1859.105.1, 1859.106, 1859.107, 1862.52, 1862.53, 1865.3, 1865.8, 1865.32.5, 1865.33, 1865.39, 1865.42, 1865.43, 1865.50, 1865.70

COMMISSION FINDINGS

I. Background

This test claim addresses the activities required of school districts to comply with school facilities funding requirements (SFFRs). If a school district makes a decision to build or modernize a school, it must determine how to fund that construction. Generally, a school can seek grant funding from the state through the State School Facility Program (SFP), which is funded through state bonds and/or it may issue local bonds pursuant to one of several local bond acts. Usually, but not always, schools rely on a combination of state and local bond funding for facilities.

If a school district decides to issue local bonds, it must comply with the public disclosure and other accountability requirements contained within the act under which the district decides to issue bonds, some of which were required by the statewide bond initiatives specifying the voting requirements for the issuance of local bonds. If a school district decides to seek state bond funding through the SFP (i.e. grant funding), the district must comply with various planning, environmental, building safety, labor, public participation/disclosure and bond funding accountability requirements as a condition of receipt of that funding which includes preparation of hazardous materials assessments (HMA) and performing many of the other activities pled in this consolidated test claim.

HMAs are conducted to provide basic information for determining if there has been a release or there is a threatened release of a hazardous material or if there may be a naturally occurring hazardous material present at the site which may pose a risk to human health or the environment. A Phase I Assessment must be prepared to identify the potential for hazardous material release or the presence of naturally occurring hazardous materials. If such a potential is found then a Preliminary Endangerment Assessment (PEA) is required to evaluate the threat posed to public health or the environment. The California Education Code requires DTSC to review Phase I Assessments and PEAs, and to make a determination about the need for further action or remediation.[1] School districts may elect to proceed directly to a PEA without having first completed a Phase I Assessment which can reduce costs when there is a known hazardous material present.[2]

There are two other programs pled in this test claim that do not fit neatly into the state funding or local bond funding categories:

- The State Relocatable Classroom Law of 1979 under which claimant alleges costs for activities related to the lease of portable classrooms from the State; and
- The California School Finance Authority Act, under which a school district may borrow funds from the state which are generally repaid with future Proposition 98 funds.

In order to determine whether the activities to which claimant's alleged costs are connected constitute state-mandated local programs or higher levels of service subject to reimbursement under article XIII B section 6 of the California Constitution, it is helpful to have an understanding of the history of school facility financing in California and the various programs under which costs are being claimed.

A. A Brief History of the Role of the State in School Facility Finance[3]

Prior to 1976, school facilities were funded entirely by local tax revenues with the assistance of state loans and land grants and private donations. From the early days of California statehood until 1933, state involvement in school facility finance was restricted to providing land grants to local communities for the purpose of establishing public schools. The California Constitution set aside large tracts of public land for the creation of public schools and required that every district in the state operate a public school for at least three months a year. The construction and renovation of these schools was financed entirely with local tax revenue. In fact, in the late 1960's over 90 percent of public school funding came from local property taxes, supplemented by the State School Fund.[4]

The Long Beach earthquake struck just hours after classes ended on March 10, 1933 "and caused numerous school buildings in Long Beach and surrounding communities to collapse which provoked 'public outcry over the vulnerability of school building to earthquake-related damage.' In response,

[1] Education Code section 17213.2.

[2] Education Code section 17213.1.

[3] In addition to the citations to specific sources, this overview draws extensively from the history of California school facility finance provided by two reports: *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).

[4] *County of Sonoma v. Commission on State Mandates*, "*County of Sonoma*" (2000), 84 Cal.App.4th 1264, 1271. (Citing *Serrano v. Priest* (1971) 5 Cal. 3d 584, 591 & fn. 2 (*Serrano I*.))

the state Legislature passed the Field Act on April 10th 1933." [5] The Act mandated the Division of the State Architect (DSA) to develop earthquake-resistant design and construction for all public schools in the state. It also required architects, engineers and inspectors to file reports verifying that schools were in compliance with the provisions of the Field Act.[6] Thus, state involvement in school construction and renovation began with state oversight of construction design and mandatory construction inspections. Although the Field Act has been amended over time, the basic requirements of the Act have been continuously in place.

The State Allocation Board was created in 1947, and was directed by the state Legislature to allocate state funds for school construction and renovation. Originally, the funds allocated were loans to the local districts. Beginning in the 1970's, however, school facility finance began to evolve from a locally-financed system to a system best described as a partnership between local school districts and the state. First, in 1971, the disparity created by reliance on the value of a district's real estate was found to impermissibly discriminate in *Serrano I*.[7] After *Serrano I*, the state increased the amount of state aid to schools and tied limitations to inflation adjustments such that schools with lower local revenues received higher upward inflation adjustments. At this point, "…financial responsibility was still primarily with local government, with the state supplying aid in an attempt to remedy the deficiencies identified by the court"[8] in *Serrano I*.

In 1976, in *Serrano II*[9] the court determined that the Legislature's actions to remedy the inequities were insufficient and that the school finance system "impermissibly 'renders the educational opportunity available to the students of this state a function of the taxable wealth [per pupil] of the districts in which they live."[10] The Legislature then passed further legislation, AB 65, (Stats. 1977, ch. 894) which would have back-filled poorer districts' revenues with state assistance, if actual revenues fell below a scheduled amount and would also transfer some revenues from high to low wealth districts. School finance though, even under this scheme, would have remained a jointly funded system, with the majority of funds coming from local property tax revenues. However, before AB 65 could take effect, the voters enacted Proposition 13 in 1978, which fundamentally altered the ability of local governments to raise funds through local property tax revenues.

Between 1970 and 1982, student enrollment in California's public schools was declining and hence there was little demand for state funds. However, Proposition 13 eliminated the ability of local school districts to levy additional special property taxes to pay off their facility indebtedness and capped the ad valorem tax rate on real property at one percent of its value, thereby reducing the income from property taxes to such an extent that it virtually eliminated this source as a means for lease payments. Proposition 13 also prohibited the electorate of a school district from authorizing a tax over-ride to pay debt service on bonds for the purpose of constructing needed school facilities.

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[5] Brunner, *supra*, p. 4, citing Heumann, Leslie, *Preliminary Historic Resources Survey of the Los Angeles Unified School District: Historic Context Statement*, prepared for the Los Angeles Unified School District Facilities Services Division by Science Applications International Corporation, Los Angeles, CA, March 2002, p. 9.

[6] Brunner, *supra*, p. 4.

[7] *Serrano I, Ibid*.

[8] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1271.

[9] *Serrano v. Priest (1976)* 18 Cal.3d 728 (*Serrano II*).

[10] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1271, (citing *Serrano II*).

The enactment of the Leroy Greene State School Building Lease-Purchase Law in 1976[11] marked the beginning of the transition from state loan to state grant funding of school facilities. However, in June of 1976 the voters rejected the bond initiative that was necessary to fund the Lease Purchase Program. Because of declining enrollment, the lack of funding did not pose a problem for most school districts for several years.[12] Eventually, however, the Legislature and the voters provided funding for the lease-purchase program through several bond initiatives and also provided school districts with authority to raise local funds though the Mello-Roos Community Facilities District Act and the imposition of developer fees, neither of which have been pled in this test claim. The Lease-Purchase Law significantly altered the state's role in how school facilities construction was financed. This law established a state fund to provide loans to school districts for reconstruction, modernization, and replacement of school facilities that were more than 30 years old. The state held title to the schools until the loans were paid off. Over the course of the 1980s and 1990s there were several amendments to the Act that reduced the obligation of school districts to pay for facilities funding and beginning the transition from a loan program to a grant program.

B. An Overview of the Programs Pled

1. Leroy F. Greene School State School Building Lease-Purchase Law School Facility Program/Leroy F. Greene School Facilities Act Overview[13]

As discussed above the Leroy Greene State School Building Lease-Purchase Law was enacted in 1976.[14] 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). [15] The same bill that enacted The Leroy F. Greene School Facilities Act of 1998 substantially

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[11] Education Code Sections 17700- 17766, Statutes 1976, chapter 1010.

[12] Brunner, *supra*, p. *6.*

[13] Specifically Education Code sections 17006, 17008.3, 17009, 17009.5, 17014, 17015, 17016, 17017, 17017.2, 17017.5, 17017.6, 17017.7, 17017.9, 17018, 17018.5, 17018.7, 17019.3, 17019.5, 17020, 17021.3, 17022, 17022.7, 17024, 17025, 17029, 17029.5, 17030, 17030.5, 17031, 17032, 17032.3, 17032.5, 17036,17038, 17040, 17040.1, 17040.2, 17040.3, 17047, 17047.5, 17049, 17056, 17059, 17059.1, 17061, 17062, 17063, 1706417065, 17066, 17070.33, 17070.50, 17070.51, 17070.60, 17070.63, 17070.70, 17070.71, 17070.75, 17070.77, 17070.80, 17070.90, 17070.95, 17070.97, 17070.98, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.46, 17071.75, 17072.10, 17072.12, 17072.13, 17072.20, 17072.33, 17072.35, 17073.10, 17074.10, 17074.15, 17074.16, 17074.20, 17074.25, 17074.26, 17074.30, 17074.50, 17074.52, 17074.54, 17074.56, 17075.10, 17075.15, 17076.10, 17076.11, 17077.10, 17077.30, 17077.35, 17077.40, 17077.42, 17077.45, 17078.18, 17078.20, 17078.22, 17078.24, 17078.25 and 100620 and California Code of Regulations, Title 2, Sections 1859.20, 1859.21, 1859.22, 1859.30, 1859.31, 1859.32, 1859.33, 1859.35, 1859.40, 1859.41, 1859.50, 1859.60, 1859.70, 1859.72, 1859.74.1, 1859.75, 1859.75.1, 1859.76, 1859.77.1, 1859.77.2, 1859.79, 1859.79.2, 1859.79.3, 1859.81, 1859.81.1, 1859.82, 1859.90, 1859.100, 1859.102, 1859.104, 1859.104.1, 1859.104.2, 1859.104.3, 1859.105, 1859.105.1, 1859.106, 1859.107, 1862.52, 1862.53, 1865.3, 1865.8, 1865.32.5, 1865.33, 1865.39, 1865.42, 1865.43, 1865.50 and 1865.70.

[14] Note that effective November 4, 1998, with the exception of the funding joint use facilities pursuant to Education Code section 17052, all school construction projects approved or funded by the SAB must be approved pursuant to Chapter 12.5 (i.e. Education Code sections 17070.10 *et seq*.)

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

amended the Leroy Greene State School Building Lease-Purchase Law to create one SFP. Proposition 1A, the Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998, which provided funding for the SFP was approved by the voters on November 3, 1998.

The SFP provides funding grants for school districts to acquire school sites, construct new school facilities, or modernize existing school facilities. The two major funding types available are "new construction" and "modernization." The new construction grant provides funding on a 50/50 state and local match basis. 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 including the requirement to prepare a hazardous materials assessment (HMA) pursuant to Education Code, Title 1, Division 1, Part 10.5 and related statutes.

In order to obtain funding under the SFP, school districts must obtain approval from a number of state agencies. These include the State Allocation Board (SAB), the Office of Public School Construction (OPSC), the Division of the State Architect of the Department of General Services, the School Facilities Planning Division of DOE, DTSC, and the Department of Industrial Relations.

SAB is responsible for approving all state apportionments for new school construction and modernization projects. The OPSC is the administrative arm of the SAB. Its primary responsibilities include: allocating state funds for projects approved by the SAB, reviewing eligibility and funding applications, and providing information and assistance to school districts. The Division of the State Architect has been involved in the process of school construction since the Field Act was first passed in 1933. The primary responsibility of the Division of the State Architect is to review and approve construction plans and to ensure those plans are in compliance with the Field Act. Division of the State Architect approval is required for all new school construction and modernization projects.

The primary role of the School Facilities Planning Division is to approve school district site and construction plans. The School Facilities Planning Division reviews the "educational adequacy" of proposed projects to ensure they meet the needs of students and teachers. The School Facilities Planning Division also works with DTSC to review any potential environmental hazards associated with a project. The final agency involved in the process is Department of Industrial Relations. The primary responsibility of this agency is to ensure that school districts are in compliance with labor laws relating to contractors and employers. Before any funding from the SFP is released to a school district, the district must obtain certification that its Labor Compliance Program has been approved by Department of Industrial Relations.

The process of obtaining state funding through SFP is divided into two steps: an application for eligibility and an application for funding. Applications for eligibility are reviewed by the OPSC and then presented to the SAB at one of their monthly meetings for approval. Upon receiving approval from the SAB, a district may request funding by submitting a funding application to the OPSC. The funding application must include supporting documentation that shows that the district's plans for construction have been approved by the Division of the State Architect and the School Facilities Planning Division. The completed funding application is reviewed by the OPSC and then submitted to the SAB for a funding apportionment. Funds apportioned by the SAB are released once the district has provided evidence that it has secured funding for required local matching funds (generally 50 percent of new school construction projects costs and 40 percent of modernization project costs), and evidence that it has entered into a binding contract for at least 50 percent of the proposed construction project. According to the OPSC, most funding applications can now be reviewed and receive final approval from the SAB within 60 to 90 days.

a) Establishing Eligibility

To obtain state funding for new school construction projects, districts must first demonstrate that existing seating capacity is insufficient to house existing students or anticipated students using a five-year projection of enrollment. Districts may establish eligibility on a district-wide basis or, if only some areas within the district are facing capacity constraints, on a High School Attendance Area basis.

The eligibility application for modernization projects consists of a single form, SAB 50-03. To qualify for funding, a school building must be at least 25 years old or, in the case of a portable classroom, at least 20 years old. In addition, districts may submit applications for modernization projects on a site by site basis, rather than the district or School Attendance Area-wide basis used for new school construction eligibility.

b) Applying for Funding

New school construction projects are funded by the state on a per-pupil basis. Site acquisition and development grants are made on a 50/50 state and local matching basis. The amount of the grant is determined by multiplying the number of unhoused students (determined in the eligibility phase), by a per-pupil grant that is adjusted annually by the SAB to account for changes in construction costs. As of January 1, 2010, the per-pupil grant amounts for new school construction are as follows:

Elementary $8,738
Middle $9,241
High $11,757
Special Day Class – Severe $24,550
Special Day Class – Non-Severe $16,418[16]

Supplemental grants are also available to fund special project needs. The most common supplemental grants are site acquisition grants and site development grants, which respectively cover costs associated with purchasing a site and preparing a site for construction. There are also supplemental grants for meeting fire code, energy efficiency, and special education requirements as well as for multi-level construction, project assistance, replacement with multi-story construction, grants for certain geographic locations, small size projects, new school projects, and urban locations.

The funding application for new school construction consists of a single form, SAB 50-04. While the form itself is relatively simple, districts must also file with their application a number of supporting documents. These include: (1) an appraisal, escrow closing statement or court order and a CDE site approval letter if the project involves site acquisition; (2) DSA approval of construction plans; (3) CDE approval of final plans; and, (4) a set of district certifications that include (among other things) the establishment of a restricted maintenance account, certification that the district will fund its share of the project, and certification that the district's Labor Compliance Program has been approved by the Department of Industrial Relations.

School districts that receive state funding for new construction or modernization projects under the SFP are required to establish a restricted maintenance account to ensure that projects are kept in good repair. For a period of 20 years, districts that receive SFP funding are required to deposit no less than three percent of their general fund budget annually into the restricted maintenance account.[17] Small

[16] State Allocation Board, Annual Adjustment to School Facility Program Grants, State Allocation Board Meeting, January 27, 2010.

[17] Education Code section 17070.75.

districts may deposit less than three percent into the account if they can demonstrate an ability to maintain their facilities using a smaller amount of money.[18]

Modernization projects are also funded by the state on a per-pupil basis. The amount of the grant is determined by multiplying the number of students to be housed in a modernized building by a per-pupil grant that is adjusted annually by the SAB to account for changes in construction costs. As of January 27, 2010, the per-pupil grant amounts for modernization projects are as follows:

Elementary $3,738
Middle $3,520
High $4, 607
Special Day Class – Severe $10,600
Special Day Class – Non-Severe $7,092[19]

The funding application process for modernization projects is very similar to the process for new school construction. The application process consists of a single form, SAB 50-04, and a set of supporting documents that ensure the district has obtained DSA and CDE approval for its construction plans and obtained the requisite certifications. These certifications include: the establishment of a restricted maintenance account, verification that the building to be modernized was not previously modernized under the old Lease-Purchase Program, evidence that the district has obtained funding to meet its required 40 percent match for project costs, and approval from the Department of Industrial Relations for the district's Labor Compliance Program.

c) Financial Hardship

School districts unable to contribute some or all of the local matching funds required for new school construction and modernization projects may apply to the OPSC for financial hardship status.[20] If financial hardship status is granted, districts can receive up to 100 percent state funding for eligible new school construction and modernization projects. Districts seeking financial assistance must have their financial hardship status approved prior to submitting an application with the OPSC for funding. To qualify for financial hardship funding, a district must demonstrate the following: (1) it is levying developer fees up to the maximum amount allowed by law; (2) it has made every reasonable effort to raise local revenue to fund a project; and, (3) evidence of financial inability to contribute the required local matching funds.[21]

2. The Strict Accountability in Local School Construction Bonds Act of 2000[22]

The Strict Accountability in Local School Construction Bonds Act of 2000 was enacted as an alternative to issuing bonds pursuant to Education Code section 15120 *et seq*. or 15300 *et seq*. and was made operative contingent upon the passage of Proposition 39, which was approved at the November 2000 election. The Act allows for a reduced vote requirement of 55 percent (instead of two-thirds) for

[18] *Id.*

[19] State Allocation Board, Annual Adjustment to School Facility Program Grants, State Allocation Board Meeting, January 27, 2010.

[20] Education Code section 17075.10.

[21] *Ibid*.

[22] Specifically, Education Code sections 15271, 15272, 15274, 15276, 15278, 15280, 15282 and 15284.

approving a school district bond measure and imposes additional requirements on districts that issue bonds using the 55 percent vote. Specifically it:

- Provides that the governing board of a school district may, by a two-thirds vote of the board, place a school bonds measure on the ballot that only requires a vote of 55 percent of the electorate to authorize the bonds;[23]
- Provides that the 55 percent bond elections can only be at regularly scheduled state and local elections and statewide special elections;[24]
- Specifies that the governing board may not, regardless of the number of votes cast in favor of the bond, subsequently proceed exclusively under the code that governs bonds authorized by a 66 percent vote;[25]
- Specifies that the total amount of bonds issued pursuant to 55 percent bonds shall not exceed 1.25 percent of the taxable property of the district and that the tax rate shall not exceed $30 per $100,000 of taxable property;[26]
- Provides that notwithstanding the general restriction to 1.25 percent of the taxable property of the district, any unified school district may issue 55 percent bonds not to exceed 2.5 percent of the taxable property of the district, not to exceed a tax rate of sixty dollars ($60) per one hundred thousand dollars ($100,000) of taxable property;[27]
- Specifies that a county board of education may not order an election to determine whether 55 percent bonds may be issued under this article to raise funds for a county office of education;[28]
- Provides that the 55 percent ballot shall also be printed with a statement that the board will appoint a "citizens' oversight committee" and conduct annual independent audits to assure that funds are spent only on school and classroom improvements and for no other purposes;[29]
- Specifies that if the bonds are approved by the voters, the governing board of the school district shall establish and appoint members to the independent citizens' oversight committee within 60 days of the date that the governing board enters the election results on its minutes;[30]
- Specifies that the purpose of the citizens' oversight committee shall be to inform the public concerning the expenditure of bond revenues and be active guardians of the public trust in ensuring the prudent expenditure of taxpayers' money for school construction. They shall ensure that no funds are used for any teacher or administrative salaries or other school operating expenses. In addition, the Act authorizes the committee to engage in any of the following activities:

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[23] Education Code section 15266.

[24] *Ibid*.

[25] *Ibid*.

[26] Education Code section 15268.

[27] Education Code section 15270.

[28] Education Code section 15276.

[29] Education Code section 15272.

[30] Education Code section 15278.

a) Receive and review copies of the annual, independent performance and financial audits required by the law authorizing 55 percent bonds;

b) Inspect school facilities and grounds to ensure that bond revenues are expended in compliance with law;

c) Receive and review copies of any deferred maintenance proposals or plans developed by a school district;

d) Review efforts by the school district to maximize bond revenues by implementing cost-saving measures;[31]

- Specifies that the governing board of the district shall, without expending bond funds, provide the citizens' oversight committee with technical assistance and shall provide administrative assistance in furtherance of its purpose and sufficient resources to publicize the conclusions of the citizens' oversight committee;[32]
- Specifies that: a) all committee proceedings shall be open to the public and notice to the public shall be provided in the same manner as the proceedings of the governing board; b) the committee shall issue regular reports on the results of its activities; c) a report shall be issued at least once a year; and d) minutes of the proceedings of the committee and all documents received and reports issued shall be a matter of public record and be made available on the website maintained by the governing board;[33]
- Specifies that the citizens' oversight committee shall consist of at least seven members, as specified, to serve for a term of two years without compensation and for no more than two consecutive terms;[34]
- Specifies that no employee or official of the district or vendor, contractor, or consultant of the district shall be appointed to the citizens' oversight committee,[35] and
- Provides for a cause of action for waste or misuse of bond funds. Provides for attorney fees. Establishes a law enforcement priority for investigation and prosecution for waste or misuse of bond funds.[36]

3. The Issuance of Bonds by School Facility Improvement Districts

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. Both the county board of supervisors and the school district must approve the formation of the district. If the county board of supervisors for the county in which the district is located adopts Part 10, Chapter 2 of the Education Code relating to the establishment of school facilities improvement districts,[37] and the governing board of a school district chooses to

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[31] *Ibid*.

[32] Education Code section 15280.

[33] *Ibid*.

[34] Education Code section 15282.

[35] *Ibid*.

[36] Education Code section 15284.

[37] See Education Code section 15303.

exercise the authority to establish a school facilities improvement district, the district is required to comply with the requirements imposed by Part 10, Chapter 2 of the Education Code. The decision to establish a school facilities improvement district triggers: necessary findings and filing requirements, noticing and hearing requirements and the requirement to adopt a resolution to form the district.[38] With the exception of any activities relating to the initial approval of the county board of supervisors to establish the school facilities improvement district, the resulting requirements are imposed on the school district.

The school facilities improvement district may only issue bonds for specified purposes, which generally include purchasing real property for school facilities, building new school facilities or making improvements to existing school facilities.[39] There are also limitations imposed on the amount of bonds that may be issued based on the taxable property in the district and the amount of indebtedness and there is a process set out in statute for how to assess those limits.[40] If the school facilities improvement district places a bond measure on the ballot, it must abide by the requirements for holding a bond election including the specific information required to be included in the proposition statement and the certification of election results.[41]

If the voters approve the bond measure, the board of supervisors of the county in which the school facilities improvement district is located shall offer the bonds for sale.[42] Education Code sections 15351-15422 generally provide the requirements for the issuance and sale of the bonds, the required form of the bonds, cancellation of unsold bonds, the purchase of bonds by issuing school districts, method of bond payment, and tax for payment of bonds.

Education Code section 15335 provides a process for commencement of an action to determine the validity of bonds and the ordering of the improvement or acquisition. A school facilities improvement district that chooses to issue bonds is required to report the amount of the bond issue, indebtedness, the percentage of qualified electors who voted, and the results of the election with the percentage of votes cast for and against the proposition.[43]

4. The State Relocatable Classroom Law of 1979[44]

The State Relocatable Classroom Law of 1979 requires the State Allocation Board (SAB) to lease portable classrooms to qualifying school districts and county superintendents of schools, as specified. It also authorizes any qualifying school district, or a joint power of one or more school districts or county superintendents of schools, to purchase portable classrooms, as specified. Specifically:

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[38] See Education Code sections 15320, 15321, 15322, 15323, 15324, 15325, 15326 and 15327.

[39] Education Code section 15302.

[40] See Education Code sections 15330, 15331, 15332, 15333, 15334 and 15334.5.

[41] See Education Code sections 15340 - 15349.2.

[42] Education Code section 15350. Note that pursuant to Education Code section 15303, a resolution by this same board of supervisors is required to make this chapter applicable in the county.

[43] Education Code section 15336.

[44] Specifically, Education Code sections 17088.3, 17088.5, 17088.7, 17089, 17089.2, 17090, 17092, and 17096.

- Education Code section 17088.3 provides the requirements for a district to qualify for a lease.
- Education Code section 17088.5 authorizes the SAB to empower a lessee as an agent of the Board and to authorize a district or superintendent to purchase portable classrooms, subject to specified conditions, when funds are unavailable to the SAB.
- Education Code section 17088.7 outlines the eligibility, costs and procedures for purchasing and leasing portable classrooms.
- Education Code section 17089 provides a range of costs for leasing a portable classroom and requires that the lessee undertake (and bear the costs of) all necessary maintenance, repairs, renewal, and replacement to ensure that it is at all times kept in good repair, working order and condition.
- Education Code section 17089.2 authorizes a district or county superintendent to purchase a portable classroom that it is leasing from the SAB for the price that SAB paid for it, less the amount of rent already paid.
- Education Code section 17090 requires lessees to insure (in an amount that the SAB deems necessary to protect the interest of the state) any leased portable classroom at their own expense for the benefit of the state, payable to the SAB for the State School Building Aid Fund.
- Education Code section 17092 restricts eligibility for portable classrooms to those districts that demonstrate to the SAB that they have no bond funds available to purchase classroom facilities except that where a district or county superintendent has received approval for a project that includes a justified number of new teaching stations, it is eligible for at least the same number of portable classrooms as approved new teaching stations. Section 17092 exempts leases and subleases for licensed child care programs or any recreation or enrichment activities or programs for school age children.
- Education Code section 17096 requires that leases of portable classrooms must require a telephone installed in each portable classroom at the time of installation of the portable classroom.

5. Issuance of School District Revenue Bonds Pursuant to Part 10, Chapter 15 of the Education Code[45]

Education Code sections 17110 and 17111 authorize school districts to issue revenue bonds to finance joint occupancy facilities (i.e. properties jointly occupied by a school district and a private entity) and to contract with any person, firm, partnership, joint venture, or other private entity for the purposes of issuing the bonds or renting or leasing the facilities. Proceeds from the rental and lease of the facilities are required to be used by the district to repay the revenue bonds.

6. Public Disclosure of Non-Voter-Approved Debt[46]

Education Code section 17150, subdivision (a) requires a district that approves the issuance of revenue bonds or enters into an agreement for financing school construction, pursuant to Chapter 18 (commencing with section 17170), to notify the county superintendent of schools and the county auditor. The superintendent of the schools district is required to provide the repayment schedule for the debt and evidence of the school's ability to repay the debt to the county auditor, the county

[45] Specifically, Education Code sections 17110 and 17111.

[46] Specifically, Education Code section 17150.

superintendent and the public. Subdivision (b) provides nearly identical requirements for a county board of education (except that notice is given to the governing board rather than the county auditor). The county auditor and the county superintendent may publicly comment on the repayment capability issue within 15 days of receipt of the information.

7. California School Finance Authority Act, Part 10, Chapter 18 of the Education Code[47]

The California School Finance Authority Act provides for the powers of the California School Finance Authority (CSFA).[48] CSFA consists of the following three members: the State Treasurer who serves as chair, the Superintendent of Public Instruction, and the Director of DOF.

CSFA oversees the statewide system for the sale of revenue bonds to reconstruct, remodel or replace existing school buildings, and to acquire new school sites and buildings to be made available to public school districts, charter schools, and community colleges, and to provide access to financing for working capital and capital improvements. The bond funding provided to public school districts though this program is sort of a hybrid in that the state issues the bonds but the funding is loaned to school districts (rather than granted) and is generally repaid with school district's Proposition 98 funds. In recent times, very little public school construction has been funding though CSFA.[49] Rather, CSFA has been primarily providing funding to charter schools and community colleges.[50]

Only financially feasible projects are intended to be funded by the CSFA and a school district may take into account all of its funds, and may base future projections upon historical experience or reasonable expectations, or a combination thereof in demonstrating feasibility.[51] The Controller is authorized, upon receipt of a deficiency notice from any school district or county office of education, to make specified apportionments to trustees. However, public credit providers may impose certain requirements on schools districts as a condition of providing credit enhancement for bonds, notes, certificates of participation, or other evidence of indebtedness of the district.[52] Specifically, the public credit provider can require a credit enhancement agreement that requires the Controller to allocate the apportionments to a public credit provider rather than the trustee.[53] If a district votes to participate under Education Code section 17193.5, it is required to provide a notice to the Controller that includes a schedule for the repayment of principal and interest on the bonds, notes, certificates of participation, or other evidence of indebtedness, and to identify the public credit provider that provided credit enhancement not later than the date of issuance of the bonds.

CSFA may authorize a participating school district to act as its agent in the performance of acts specifically approved by the authority, and all acts required under Article 3 (commencing with Section 17280) of Chapter 3 of Part 10.5.[54] CSFA is also authorized to purchase the rights and possibilities[55]

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[47] Specifically, Education Code sections 17180, 17183.5, 17193.5, 1794, 17199.1, and 17199.4.

[48] Education Code section 17180.

[49] See the 2009-2010 State Budget, item 0985.

[50] *Ibid*.

[51] Education Code section 17183.5.

[52] *Ibid.*

[53] *Ibid.*

[54] Education Code section 17194.

[55] A "possibility" is a contingent interest in real or personal estate.

regarding funding for school facilities approved by the SAB pursuant to the Leroy F. Greene School Facilities Act of 1998, including amounts apportioned and funded and amounts approved but not yet funded.[56] However, the authorization of the CSFA is limited to making or purchasing those secured or unsecured loans or to purchasing those rights and possibilities to those loans and rights and possibilities regarding the state's share of funding, for school facilities provided under the Greene Act.[57] There is also a limit to amounts approved and funded or amounts approved but not yet funded from proceeds of state bonds already authorized by the electors but not yet issued.[58]

8. Hazardous Material Assessment (HMA) and Related Statutes Overview[59]

HMAs are conducted to provide basic information for determining if there has been a release or there is a threatened release of a hazardous material or if there may be a naturally occurring hazardous material present at the site which may pose a risk to human health or the environment. All proposed school sites which will receive state funding for acquisition or construction are required to go through a comprehensive environmental review and cleanup process under DTSC oversight.[60]

A Phase I Assessment must be prepared to identify the potential for hazardous material release or the presence of naturally occurring hazardous materials. If such a potential is found then a PEA is required to evaluate the threat posed to public health or the environment. The California Education Code requires DTSC to review Phase I Assessments and PEAs, and to make a determination about the need for further action or remediation.[61] School districts may elect to proceed directly to a PEA without having first completed a Phase I Assessment which can reduce costs when there is a known hazardous material present.[62]

School districts are eligible for reimbursement from the state for 50 percent of the cost of the Phase I Assessment and PEA and 50 percent of the response costs for removal of hazardous waste or other remedial action in connection with hazardous substances at that site. Reimbursement is capped at 50 percent of 1½ times the appraised value of the uncontaminated site (higher in instances of extreme need). Districts that qualify for financial hardship status may obtain funding for up to 100 percent of the cost of the evaluation of hazardous materials and the response costs at a site, subject to the appraised-value cap.[63]

a) Phase I Assessments

When a school district finds a site that it believes may be suitable for a new school or decides to make an addition to an existing school that would increase student capacity by 25 percent or more, it must prepare a Phase I Assessment. A Phase I Assessment is a historical search of records to evaluate past

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[56] Education Code section 17199.1.

[57] *Ibid.*

[58] *Ibid.*

[59] Specifically, Education Code sections 17210, 17210.1, 17211, 17212, 17212.5, 17213, 17213.1, 17213.2; Health and Safety Code sections 25358.7, 25358.7.1 and Public Resources Code section 21151.4 and 21151.8.

[60] See Public Resources Code sections 21000 *et seq.* and Education Code sections 17210 *et seq.*

[61] Education Code section 17213.2.

[62] Education Code section 17213.1.

[63] Education Code section 17213.1, subdivision (b).

site uses and identify "recognized environmental conditions" at the prospective school site.[64] The environmental assessor reviews records to determine if the property may pose any risk of exposures to hazardous materials (such as pesticides, metals, minerals, gases, radioactive elements, PCBs, petroleum-related chemicals, or unexploded ordnances) utilizing the American Society for Testing and Materials Standard E1527-05, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process. The Phase I Assessment includes a site map (showing site boundaries and figures), a description of land uses (past, current and future), and an evaluation of all sources for the potential release or presence of hazardous material (including naturally occurring hazardous material). The school district submits this assessment for DTSC review, comment, and approval, along with a fee. DTSC provides comments and makes a determination within 30 days. If there is no potential contamination, DTSC will issue a "No Further Action" determination, and the HMA process is complete.[65] A completed Phase I Assessment is generally not made available for a period of public review and comment.

Section 21083 of the Public Resource Code exempts from the Phase I Assessment requirement any addition to a school that is minor under the CEQA Guidelines. California Code of Regulations, title 14, section 15314 defines “minor” as any project that does not increase original student capacity by more than 25 percent or ten classrooms, whichever is less. Portable classrooms, including when intended for permanent use, are included in this exemption.

b) Preliminary Endangerment Assessments

If the Phase I Assessment reveals potential contamination, DTSC will issue a determination of "Preliminary Endangerment Assessment (PEA) Required" (also known as a Phase II). Before starting a PEA, the school district will enter into an Environmental Oversight Agreement to follow DTSC's direction for site investigation, and to pay DTSC's projected oversight costs.[66] The school district's environmental assessor will conduct an investigation, and prepare a PEA, including environmental sampling and analysis data, and a risk assessment. The PEA must be made available for public review and comment before it is finalized.[67] This may be done as a part of the Environmental Impact Report (EIR) comment period required pursuant to CEQA or separately, at the discretion of the school district.[68] DTSC approves or disapproves the PEA within 30 days after the close of the public comment period for the PEA, or within 30 days of the school district's approval of the EIR for the school site.[69] If the PEA identifies no significant health or environmental risks, the district will receive a "No Further Action" determination from DTSC.[70]

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[64] Education Code section 17210.

[65] Education Code section 17213.1, subdivision, (a)(2).

[66] See generally Education Code sections 17210, subdivision (b) and 17213.1, subdivision (a)(4)(B).

[67] Education Code section 17213.1, subdivision, (a)(6).

[68] *Ibid*.

[69] *Ibid*.

[70] Education Code section 17213.1, subdivision, (a)(9).

c) CEQA[71]

CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions that can be found in CEQA and the CEQA regulations. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (EIR). If the EIR includes findings of significant environmental impacts, CEQA imposes a substantive requirement to adopt feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project.[72] The purposes of CEQA are to:

- inform decision makers and the public about project impacts;
- identify ways to avoid or significantly reduce environmental damage;
- prevent environmental damage by requiring feasible alternatives or mitigation measures;
- disclose to the public reasons why an agency approved a project if significant environmental effects are involved;
- involve public agencies in the process; and,
- increase public participation in the environmental review and the planning processes.[73]

The EIR requirement, which effectively accomplishes the above purposes, is "the heart of CEQA."[74]

Public Resources Code sections 21151.4 prohibits approval of a ND or EIR for a project within ¼ mile of a school, which might reasonably be anticipated to emit hazardous or acutely hazardous air emissions, or which would handle an acutely hazardous material or a mixture containing acutely hazardous material in a quantity equal to or greater than a specified quantity, which may pose a health or safety hazard to persons who would attend or would be employed at the school, unless:

(a) The lead agency preparing the EIR or ND has consulted with the school district having jurisdiction regarding the potential impact of the project on the school, and

(b) The school district has been given written notification of the project not less than 30 days prior to the proposed approval of the EIR or ND.

The Legislature enacted Public Resources Code section 21151.4 and related code sections because of:

> …. incidents of health threats and nuisances at schoolsites throughout the state causing children to evacuate schools, report ill, and require medical attention. These incidents

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[71] On September 30, 2010, the Commission adopted a Statement of Decision (03-TC-17) denying reimbursement to school districts for the majority of the statutory and regulatory sections that make up CEQA because the requirement to comply with CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project. However, the two CEQA code sections pled in this test claim, Public Resources Code sections 21151.4 and 21151.8, were not pled in 03-tc-17.

[72] Public Resources Code section 21002.

[73] Public Resources Code section 21002, California Code of Regulations, title 14, section 15002.

[74] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795.

have been caused in large part by the inappropriate siting of schools and certain facilities with the potential for routine and accidental releases of hazardous and acutely hazardous air emissions.[75]

Section 21151.8 prohibits certification of an EIR or approval of an ND for a project involving the purchase of a schoolsite or the construction of a new elementary or secondary school by a school district unless:

(a) The EIR or ND includes an analysis of whether the proposed site is or was a hazardous waste or solid waste disposal site, is a hazardous substance release site, or contains pipelines carrying hazardous substances, acutely hazardous materials, or hazardous wastes and if so, provides an analysis of the hazardous substances on the site. The district must also make certain findings on the hazardous substances before approving the acquisition.

(b) The district consults with the local air pollution district to ascertain whether any facilities within a quarter mile of a proposed site might emit hazardous materials, substances or waste. Facilities that must be considered include, but are not limited to: freeways, busy traffic corridors, railyards, and large agricultural facilities.[76]

d) Hazardous Substance Account Act

The Hazardous Substance Account Act (HSAA) which includes Health and Safety Code sections 25358.1 and 25358.7.1 as added by Statutes 1999, chapter 23, is California's equivalent to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA, (commonly known as "Superfund"). HSAA is a 1980 law passed to address the cleanup of abandoned toxic waste sites. DTSC administers CERCLA, which is implemented in California through HSAA and related regulations. HSAA assigns liability for each site, funds the cleanup of that site from a fund created from taxes and fines levied on the site's polluters, and imposes requirements on affected property owners and potentially responsible parties and a number of related requirements on state agencies. Specifically, Health and Safety Code section 25358.1 imposes disclosure requirements on "any potentially responsible party, or any person who has, or may have, acquired information relevant to [specified hazardous substance release related questions] in the course of a commercial, ownership, or contractual relationship with any potentially responsible party."

Additionally, owners of nonresidential property must provide information to buyers, lessees or renters regarding hazardous substances that have or may have been released on the property. Failure to provide such information subjects owners to penalties. HSAA further provides that owners are responsible for the cleanup of such sites, and the removal of toxic substances, where possible. Health and Safety Code section 25358.7.1 allows the affected community to form a community advisory group "to review any response action and comment on the response action to be conducted in that community." It also requires DTSC (or the regional water quality control board in some instances) to regularly communicate, and confer as appropriate, with the community advisory committee.

[75] Statutes 1988, chapter 1589 (SB 3205), section 1.

[76] Note that these requirements are identical to the requirements of former Education Code section 39003, which was repealed by Statutes 1996, chapter 277 (SB 1572), which was an omnibus bill that reorganized the Education Code.

e) State Site Standards and Certificates of Compliance[77]

Education Code section 17251 requires the Department of Education (DOE) to:

- Advise any school district, upon request, on the acquisition of new schoolsites and give the governing board in writing a list of the recommended locations in the order of their merit considering educational, environmental, and planning and zoning issues. The district may purchase a site deemed unsuitable for school purposes by DOE after reviewing DOE's report on proposed sites at a public hearing. The DOE is required to charge the school district a reasonable fee for each schoolsite reviewed not to exceed the actual administrative costs incurred for that purpose.
- Develop standards for use by a school district in the selection of schoolsites and investigate complaints of noncompliance with site selection standards. DOE is required to notify the school district of the results of the investigation and if the notification is received prior to the acquisition of the site, the governing board is required to discuss the findings of the investigation in a public hearing.
- Establish standards for use by school districts to ensure that the design and construction of school facilities are educationally appropriate and promote school safety.
- Upon the request of any school district, review plans and specifications for school buildings in the district. DOE is required to charge school districts, for the review of plans and specifications, a reasonable fee not to exceed the actual administrative costs incurred for that purpose.
- Upon the request of any school district, survey the building needs of the district, advise and suggest plans for financing a building program to meet the needs. DOE is required to charge the district, for the cost of the survey, a reasonable fee not to exceed the actual administrative costs incurred for that purpose.
- Provide information relating to the impact or potential impact upon any schoolsite of hazardous substances, solid waste, safety, or hazardous air emissions, and other information as DOE may deem appropriate.

Education Code section 17315 requires the Department of General Services (DGS) to issue a certificate of compliance only after a school building constructed in accordance with plans and specifications approved by DGS is completed, the CEQA notice of completion is filed, and all final verified reports and all testing and inspection documents, as required by Education Code sections 17280-17317 and related regulations, are submitted to and on file with DGS, and all required fees paid by the school district. It also makes provisions for the issuance of a certificate of compliance where a final verified report is missing due to the incapacitating illness, death, or the default of any persons required to file such reports. The costs incurred by DGS in connection with this section are required to be paid by the school district. The actual costs to perform the examinations, tests and inspections are designated by section 17315 as an appropriate cost of the project to be paid from the building funds of the district.

[77] Specifically Education Code sections 17251 and 17315.

II. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant generally alleges that all of the activities it must perform to receive state funding or to issue local bonds for school facility projects (i.e. new building, modernization and renovation), including the requirement to pay a local share of costs, are new and reimbursable under article XIII B, section 6 of the California Constitution. In essence, claimant is alleging that the state is legally required to provide 100 percent of funding for all school facility project related costs, including all of the environmental compliance, accountability and public notice requirements for the issuance of local bonds and other related costs pled in this consolidated test claim.

In *School Facilities Financing Requirements* (02-TC-30), claimant alleges reimbursable state-mandated costs to school districts "[f]or programs, policies and procedures that school districts must comply with in order to receive state funded bond money for new construction, renovation and modernization projects. In *Hazardous Materials Assessments* (02-TC-43) claimant alleges reimbursable state-mandated costs for school districts to perform hazardous materials assessments (HMAs) and related activities. In particular, claimant alleges state-mandated costs for the performance of activities related to:

1. Receipt of State Grants

- The receipt of state funds for new construction or modernization of school facilities pursuant to the Leroy F. Greene School Facilities Act of 1998, Part 10, chapter 12 of the Education Code, or the Kindergarten-University Public Education Facilities Bond Act of 2002, Part 68.1, Chapter 2;[78]
- The requirement to prepare HMAs pursuant to Education Code, Title 1, Division 1, Part 10.5 and related statutes under specified circumstances;[79]
- Compliance with state site standards and obtaining a certificate of compliance with Department of General Services (DGS) approved plans and specifications;[80]

[78] Specifically, Education Code sections 17006, 17008.3, 17009, 17009.5, 17014, 17015, 17016, 17017, 17017.2, 17017.5, 17017.6, 17017.7, 17017.9, 17018, 17018.5, 17018.7, 17019.3, 17019.5, 17020, 17021.3, 17022, 17022.7, 17024, 17025, 17029, 17029.5, 17030, 17030.5, 17031, 17032, 17032.3, 17032.5, 17036,17038, 17040, 17040.1, 17040.2, 17040.3, 17047, 17047.5, 17049, 17056, 17059, 17059.1, 17061, 17062, 17063, 1706417065, 17066, 17070.33, 17070.50, 17070.51, 17070.60, 17070.63, 17070.70, 17070.71, 17070.75, 17070.77, 17070.80, 17070.90, 17070.95, 17070.97, 17070.98, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.46, 17071.75, 17072.10, 17072.12, 17072.13, 17072.20, 17072.33, 17072.35, 17073.10, 17074.10, 17074.15, 17074.16, 17074.20, 17074.25, 17074.26, 17074.30, 17074.50, 17074.52, 17074.54, 17074.56, 17075.10, 17075.15, 17076.10, 17076.11, 17077.10, 17077.30, 17077.35, 17077.40, 17077.42, 17077.45, 17078.18, 17078.20, 17078.22, 17078.24, 17078.25 and 100620.

[79] Specifically, Education Code sections 17210, 17210.1, 17211, 17212, 17212.5, 17213, 17213.1, and 17213.2; Health and Safety Code sections 25358.7 and 25358.7.1; and Public Resources Code sections 21151.4 and 21151.8.

[80] Specifically, compliance with Education Code sections 17251 and 17315.

2. Issuance of Local Bonds

- The issuance of local school construction bonds pursuant to the Strict Accountability in Local School Construction Bonds Act of 2000, Part 10, Chapter 1.5 of the Education Code;[81]
- The issuance of local school construction bonds by school facilities improvement districts pursuant to Part 10, Chapter 2 of the Education Code;[82]
- The issuance of district revenue bonds by school districts pursuant to Part 10, Chapter 15 of the Education Code;[83]
- The public disclosure of non-voter-approved debt pursuant to Part 10, Chapter 16 of the Education Code;[84]

3. Participation in Other State Programs

- The lease of portable classrooms from the SAB pursuant to the Emergency School (State Relocatable) Classroom Law of 1979, Part 10, Chapter 14 of the Education Code;[85]and,
- California School Finance Authority Act, Part 10, Chapter 18 of the Education Code.[86]

More specifically, in *Hazardous Materials Assessments* (02-TC-43) claimant alleges reimbursable state-mandated costs to school districts for the following HMA related activities:

A. Developing and implementing policies and procedures, and periodically revising those policies and procedures, and compliance with all requirements relative to the discovery and removal of hazardous materials at proposed schoolsites pursuant to Article 1 of Chapter 1, commencing with Education Code section 17210 and related sections;[87]

B. Funding 50 percent, or more, of the cost of the evaluation of hazardous materials at a site to be acquired by a school district and 50 percent, or more, of the other response action costs for the removal of hazardous waste or solid waste, the removal of hazardous substances, or other response action in connection with hazardous substances at proposed schoolsites pursuant to Education Code section 17072.13, subdivision (a);[88]

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[81] Specifically, Education Code sections 15271, 15272, 15274, 15276, 15278, 15280, 15282, and 15284.

[82] Specifically, Education Code sections 15301, 15302, 15303, 15320, 15321, 15322, 15323, 15324, 15325, 15326, 15327, 15336, 15340, 15341, 15342, 15343, 15346, 15347, 15349, 15349.1, 15350, 15351, 15352, 15354, 15355, 15359.2, 15359.3, 15380, 15381, 15384, 15390, and 15391.

[83] Specifically, Education Code sections 17110 and 17111.

[84] Specifically, Education Code section 17150.

[85] Specifically, Education Code sections 17088.3, 17088.5, 17088.7, 17089, 17089.2, 17090, 17092, and 17096.

[86] Specifically, Education Code sections 17180, 17183.5, 17193.5, 17194, 17199.1, and 17199.4.

[87] Note that there is no reference to policies and procedures in this portion of the code, though a district may certainly find it helpful to have policies and procedures in place.

[88] Note that based on a plain meaning reading of Education Code Section 17072.13, subdivision (a), it is the State Allocation Board (i.e. the state), not the school district that provides 50 percent or more (up

C. For school districts eligible for financial hardship assistance pursuant to Article 8 (commencing with Section 17075.10), funding the balance of the cost of the evaluation of hazardous materials at a site to be acquired by a school district and for the other response action costs for the site not funded by the State Allocation Board pursuant to Education Code section 17072.13, subdivision (b);

D. Focusing on the risks to children's health posed by a hazardous materials release or threatened release, or the presence of naturally occurring hazardous materials, when conducting risk assessments at prospective schoolsites pursuant to Education Code section 17210.1, subdivision (a)(3);

E. When taking response actions pursuant to the article to be, at a minimum, protective of children's health, with an ample margin of safety, pursuant to Education Code section 17210.1, subdivision (a)(4);

F. Providing a notice to residents in the immediate area prior to the commencement of work on a PEA utilizing a format developed by DTSC, pursuant to Education Code section 17210.1, subdivision (b);

G. Evaluating the real property for a new schoolsite, or an addition to an existing schoolsite, at a public hearing pursuant to Education Code Section 17211, using site selection standards established by DOE (DOE) pursuant to Section 17251, subdivision (b), prior to commencing the acquisition of that real property;

H. Prior to acquiring any site on which it proposes to construct any school building, investigating the site, or sites, under consideration by competent personnel to ensure that the final site selection is determined by an evaluation of all factors affecting the public interest and is not limited to selection on the basis of raw land cost only pursuant to Education Code section 17212 and including location of the site with respect to population, transportation, water supply, waste disposal facilities, utilities, traffic hazards, surface drainage conditions, and other factors affecting the operating costs, as well as the initial costs, of the total project;

I. If the prospective schoolsite is located within the boundaries of any special studies zone, or within an area designated as geologically hazardous in the safety element of the local general plan as provided in Government Code Section 65302, subdivision (g), including any geological and soil engineering studies by competent personnel needed to provide an assessment of the nature of the site and potential for earthquake or other geologic hazard damage in the investigation pursuant to Education Code section 17212;

J. Making geological and soil engineering studies, as described in Section 17212, for the reconstruction, or alteration of, or addition to, any school building for work which alters structural elements if the estimated cost exceeds $25,000, or as increased according to a construction costs inflation index recognized by DGS pursuant to Education Code section 17212.5;

K. Making geological and soil engineering studies, as described in Section 17212, when required by DGS for the construction or alteration of any school building on a site located outside of the boundaries of any special studies zone pursuant to Education Code section 17212.5;

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to 100 percent for hardship) of the funding. The school district may be required to provide up to 50 percent of these costs, if it is not a hardship district.

L. Submitting to DGS and DOE a copy of the report of each investigation conducted pursuant to Article 3 (commencing with Section 17280) as required by Education Code section 17212.5;

M. Verifying, prior to approval of a project, that the lead agency, as defined in section 21067 of the Public Resources Code, has determined that the property purchased or to be built upon is not any of the following:

1. The site of a current or former hazardous waste disposal site or solid waste disposal site unless, if the site was a former solid waste disposal site, the governing board of the school district concludes that the wastes have been removed;

2. A hazardous substance release site identified by the State Department of Health Services in a current list adopted pursuant to Section 25356 for removal or remedial action pursuant to Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code;

3. A site which contains one or more pipelines, situated underground or aboveground, which carries hazardous substances, acutely hazardous materials, or hazardous wastes, unless the pipeline is a natural gas line which is used only to supply natural gas to that school or neighborhood pursuant to Education Code section 17213, subdivision (a);

N. Verifying, prior to approval of a project, that the lead agency, as defined in section 21067 of the Public Resources Code, has consulted with the administering agency in which the proposed schoolsite is located and with any air pollution control district or air quality management district having jurisdiction in the area, to identify facilities within one fourth of a mile of the proposed schoolsite which might reasonably be anticipated to emit hazardous air emissions, or to handle hazardous or acutely hazardous materials, substances, or waste and has included a list of the locations for which information was sought pursuant to Education Code section 17213, subdivision (b);

O. Prior to approval of a project, making one of the following written findings:

1. Consultation identified none of the facilities specified in subdivision (b).

2. The facilities specified in subdivision (b) exist, but one of the following conditions applies:

a. The health risks from the facilities do not and will not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the school.

b. The governing board finds that corrective measures required under an existing order by another jurisdiction which has jurisdiction over the facilities will, before the school is occupied, result in the mitigation of all chronic or accidental hazardous air emissions to levels that do not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school. If the governing board makes this finding, the governing board shall also make a subsequent finding, prior to the occupancy of the school, that the emissions have been mitigated to these levels pursuant to Education Code section 17213, subdivision (b).

P. Pursuant to Education Code section 17213.1, subdivision (a), prior to acquiring a schoolsite, contracting with an environmental assessor to supervise the preparation of, and sign, a Phase I Assessment of the proposed schoolsite unless the governing board decides to proceed directly to a PEA. The Phase I Assessment shall contain one of the following recommendations:

1. A further investigation of the site is not required; or,
2. A PEA is needed, including sampling or testing;

Q. Pursuant to Education Code section 17213.1, subdivision (a)(2), if the Phase I Assessment concludes that further investigation of the site is not required, submitting the signed assessment, proof that the environmental assessor meets the qualifications specified in subdivision (b) of section 17210, and the required fee to DTSC;

R. If DTSC determines that the Phase I Assessment is not complete, or disapproves the Phase I Assessment, taking actions necessary to secure the approval of the Phase I Assessment, elect to conduct a PEA, or electing not to pursue the acquisition or the construction project pursuant to Education Code section 17213.1, subdivision (a)(3);

S. If DTSC concludes, after its review of a Phase I Assessment pursuant to this section that a PEA is needed (or when a district elects to forego a Phase I Assessment and proceed directly to a PEA), submitting to the DOE the Phase I Assessment and requested additional information, if any, that was reviewed by DTSC Pursuant to Education Code section 17213.1, subdivision (a)(4)(A);

T. If the Phase I Assessment concludes that a PEA is needed, or if DTSC concludes after it reviews a Phase I Assessment pursuant to this section that a PEA is needed, contracting with an environmental assessor to supervise the preparation of, and sign, a PEA of the proposed schoolsite and entering into an agreement with DTSC to oversee the preparation of the PEA or electing not to pursue the acquisition or construction project pursuant to Education Code section 17213.1, subdivision (a)(4)(B). The PEA shall contain one of the following conclusions:

1. A further investigation of the site is not required; or
2. A release of hazardous materials has occurred, and if so, the extent of the release, that there is the threat of a release of hazardous materials, or that a naturally occurring hazardous material is present, or any combination thereof;

U. Submitting the PEA to DTSC for its review and approval and to DOE for its files pursuant to Education Code section 17213.1, subdivision (a)(5);

V. At the same time a school district submits a PEA to DTSC, publishing a notice that the assessment has been submitted to the department in a local newspaper of general circulation, and posting the notice in a prominent manner at the proposed schoolsite that is the subject of that notice pursuant to Education Code section 17213.1, subdivision (a)(6). The notice shall state the school district's determination to make the PEA available for public review and comment;

W. Complying with the public participation requirements of sections 25358.7 and 25358.7.1 of the Health and Safety Code and other applicable provisions of the state act with respect to those response actions only if further response actions beyond a PEA are required and the district determines that it will proceed with the acquisition or construction project pursuant to Education Code section 17213.1, subdivision (a)(7);

X. If DTSC disapproves the PEA, taking actions necessary to secure the approval of DTSC of the PEA or electing not to pursue the acquisition or construction project pursuant to Education Code section 17213.1, subdivision (a)(8);

Y. If the PEA determines that a further investigation of the site is not required and DTSC approves this determination, then proceeding with the acquisition or construction project pursuant to Education Code section 17213.1, subdivision (a)(9);

Z. If the PEA determines that a release of hazardous material has occurred, that there is the threat of a release of hazardous materials, that a naturally occurring hazardous material is present, or any combination thereof, that requires further investigation, and DTSC approves this determination, either electing not to pursue the acquisition or construction project, or, electing to pursue the acquisition or construction project pursuant to Education Code section 17213.1, subdivision (a)(10). If electing to pursue the acquisition, doing all of the following:

1. Preparing a financial analysis that estimates the cost of response action that will be required at the proposed schoolsite;
2. Assessing the benefits that accrue from using the proposed schoolsite when compared to the use of alternative schoolsites, if any;
3. Obtaining the approval of DOE that the proposed schoolsite meets the schoolsite selection standards adopted by DOE pursuant to subdivision (b) of section 17251;
4. Evaluating the suitability of the proposed schoolsite in light of the recommended alternative schoolsite locations in order of merit if the school district has requested the assistance of DOE, based upon the standards of DOE, pursuant to subdivision (a) of section 17251;

AA. Reimbursing DTSC for all of the department's response costs pursuant to Education Code section 17213.1, subdivision (a)(11);

BB. If a PEA prepared pursuant to section 17213.1 discloses the presence of a hazardous materials release, or threatened release, or the presence of naturally occurring hazardous materials, at a proposed schoolsite at concentrations that could pose a significant risk to children or adults, and the school district owns the proposed schoolsite, entering into an agreement with DTSC to oversee response action at the site and taking response action pursuant to the requirements of the state act as may be required by DTSC pursuant to Education Code section 17213.2, subdivision (a);

CC. If at any time during the response action the school district determines that there has been a significant increase in the estimated cost of the response action, notifying DOE pursuant to Education Code section 17213.2, subdivision (c);

DD. Before occupying a school building following construction, obtaining from DTSC a certification that all response actions, except for operation and maintenance activities, necessary to ensure that hazardous materials at the schoolsite no longer pose a significant risk to children and adults at the schoolsite have been completed, and that the response action standards and objectives established in the final removal action work plan or remedial action plan have been met and are being maintained, pursuant to Education Code section 17213.2, subdivision (d)(2);

EE. If, at anytime during construction at a schoolsite, a previously unidentified release or threatened release of a hazardous material or the presence of a naturally occurring hazardous material is discovered:

1. Ceasing all construction activities at the sites;
2. Notifying DTSC, and taking actions required by subdivision (a) that are necessary to address the release or threatened release or the presence of any naturally occurring hazardous materials; and

3. Resuming construction only if DTSC:

    a. Determines that:

        i. The construction will not interfere with any response action necessary to address the hazardous material release or threatened release or the presence of a naturally occurring hazardous material; and

        ii. The site conditions will not pose a significant threat to the health and safety of workers involved in the construction of the schoolsite; and

    b. Certifies that the nature and extent of the release, threatened release, or presence of a naturally occurring hazardous material have been fully characterized.[89]

FF. Reimbursing DTSC for all response costs incurred by the department pursuant to Education Code section 17213.2, subdivision (h);

GG. Reimbursing DOE for fees incurred and charged for advising the governing board on the acquisition of new schoolsites and, after a review of available plots, giving the governing board, in writing, a list of the recommended locations in the order of their merit, considering especially the matters of educational merit, safety, reduction of traffic hazards, and conformity to the land use element in the general plan of the city, county, or city and county having jurisdiction pursuant to Education Code section 17251, subdivision (a);

HH. Complying with standards developed by DOE to be used in the selection of schoolsites, in accordance with the objectives set forth in Education Code section 17251subdivision (a), pursuant to Education Code section 17251, subdivision (b). If notification is received prior to the acquisition of the site that the department has investigated complaints of noncompliance with site selection standards, discussing the findings of the investigation in a public hearing;

II. Complying with standards established by DOE for use by school districts to ensure that the design and construction of school facilities are educationally appropriate and promote school safety pursuant to Education Code section 17251, subdivision (c);

JJ. Reimbursing the DOE for the review of plans and specifications Pursuant to Education Code section 17251, subdivision (d);

KK. Reimbursing DOE for making a survey of the building needs of the district, advising the governing board concerning building needs, and suggesting plans for financing a building program to meet the needs pursuant to Education Code section 17251, subdivision (e);

LL. Filing the notice of completion, submitting all final verified reports and all testing and inspection documents, and paying all required fees when a school building is constructed in accordance with plans and specifications approved by DGS pursuant to Education Code section 17315, subdivision (a);

MM. When a school building constructed in accordance with approved plans and specifications is completed but final verified reports, as are required under section 39151, have not been submitted to DGS due to the incapacitating illness, death, or the default of any persons required to file such reports, requesting DGS to review all of the project records and make such examinations as it deems necessary to enable it to certify that the school building otherwise complies with the requirements of the article pursuant to Education Code section 17315,

[89] Education Code Section 17213.2, subdivision (e).

subdivision (b). When requested by the DGS making, reporting, and verifying any other tests and inspections which the department deems necessary to complete its examinations of the construction;

NN. Reimbursing the costs incurred by the DGS to perform the examinations, tests, and inspections required by the section pursuant to Education Code section 17315, subdivision (c).

In its amendment to the consolidated test claim (09-TC-01) claimant alleges the following statutes contain reimbursable mandates: Health and Safety Code sections 25358.7 and 25358.7.1,[90] Education Code sections 39003 and 39120,[91] Public Resources Code section 21151.4, section 17,[92] and, Public Resources Code section 21151.8, section 18.[93] Claimant doesn't specify what activities are reimbursable except that it cut and pastes all of the pled statutes into the "narrative" and "declaration" and then includes copies of the statutes as required by Commission's test claim form.[94]

Claimant disagrees with the argument put forth by DOF[95], DOE[96] and DTSC[97] that a school district's participation in the underlying programs at issue are elective or optional and neither a compulsory nor practically compelled. Claimant cites to the following to demonstrate that it is required to participate in the underlying programs:

1. *Butt v. State of California*, which discusses the duty of the Legislature to "provide for a system of common schools, by which a school be kept up and supported in each district."[98]

2. A report of the California Research Bureau which states in part that one challenge public schools face "[i]s the anticipated growth of nearly 2 million K-12 students during the next decade that will require many districts to build new schools to meet burgeoning

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[90] As amended by Statutes 1999, chapter 23 (SB 47). These sections generally require DTSC or the Regional Board, in response actions, to inform the public and establish community advisory groups.

[91] As added by Statutes 1991 (AB 928), chapter 1183. These sections were repealed by Statutes 1996, chapter 277 (SB 1562).

[92] As amended by Statutes 2004, chapter 689 (SB 945), Statutes 2008, chapter 148 (AB 2720).

[93] As amended by Statutes 2003, chapter 668 (SB 352), Statutes 2007, chapter 130 (AB 299), and Statutes 2008, chapter 148 (AB 2720). These sections link the CEQA process to the HMA process and require consultation with the school district for the siting of hazardous facilities within ¼ mile of a school.

[94] For an in depth description of what these statutes require, please see background above.

[95] DOF comments on 02-TC-43, p.1.

[96] DOE, comments on 02-TC-30, p. 1.

[97] DTSC, comments on 02-TC-43, *supra*, p.p. 1, 2, 3, 4, 8 and 9 and DTSC, rebuttal to claimant's response on 02-TC-43, *supra*, p.p. 2 and 3.

[98] Claimant, response to DOF comments and claimant, response to DTSC memorandum for 02-TC-43 and, *supra*, p. 2, citing *Butt v. State of California* (1992) 4 Cal. 4th 668, p. 680. Note that claimant makes the same arguments in its response to DOF comments on 02-TC-30, but for the ease of the reader, this analysis will cite to the response to DOF and DTSC comments for 02-TC-43.

student demand."[99] That report also discusses the shortfall of available funds to meet the need for public school construction and rehabilitation.

3. The March 2004 Proposition 55 ballot information pamphlet which discusses the "need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils."[100]

Claimant states that "a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate"[101] and discusses the case law regarding practical compulsion. Claimant concludes that "[i]n light of the finding that there is a need to construct new schools to house 1.1 million pupils and the need to modernize schools for an additional 1.1 million pupils, it is beyond the realm of practical reason to opportunistically argue that there is no state law or regulation which requires a school district to construct additional school facilities or acquire any site for the purpose of constructing a school building."[102]

Finally, claimant disagrees with DOF's position that Education Code Part 1, Chapter 6, Title 1, Division 1 provides schools with authority to impose development fees and therefore Government Code section 17556, subdivision (d) prohibits reimbursement for any state-mandated activities. Claimant argues: "Government Code section 17556(d) refers to 'service charges, fees or assessments.' Education Code 17620 refers to a 'fee, charge, dedication or other requirement.' They are not the same."[103] Claimant includes a discussion of the limitations on the purposes for which a "fee, charge or dedication" may be used (i.e. to fund the construction or reconstruction of school facilities but not for maintenance) pursuant to Education Code section 17620, subdivision (a)(1).

B. Department of Toxic Substances Control's Position

DTSC submitted comments on the test claim filing for 02-TC-43 (*Hazardous Materials Assessments*) on October 27, 2003 and a rebuttal to claimant's response to its October 27, 2003 comments on February 6, 2004.

1. School Districts are not Legally or Practically Compelled to Meet HMA Requirements

With regard to HMAs, DTSC states that "district participation in the underlying program is elective or optional."[104] Specifically, DTSC states that Education Code section 17210.1 "expressly addresses only sites for which 'school districts elect to receive state funds'" and "Education Code section 17213.1 also states, '[a]s a condition of receiving state funding' and clearly applies these requirements to districts

[99] Claimant, response to DOF comments, p. 3, citing Cohen, *supra*. Note however, that according to California Department of Education, Educational Demographics Unit, from school year 1999-2000 to 2008-2009, the most recent year for which there is data, actual enrollment went up only by 300,419 students, less than 1/6 of the projected number.

[100] *Id*, p. 3. Note that the claimant has taken this quote somewhat out of context in that it actually says "… *the districts have identified* the need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils." (Emphasis added.)

[101] *Id*, p. 4.

[102] *Id*, p. 7.

[103] Claimant, response to DOF comments on 02-TC-43, *supra*, p. 9.

[104] DTSC, comments on 2-TC-43, October 27, 2003, p.1 (citing *Kern*.)

seeking state funding of their projects."[105] DTSC states that "[t]he [claimant] also fails to mention that there is existing state funding for all or a part of the hazard assessment work under Education Code sections 17072.12 and 17072.13 that reduces the unfunded costs or invalidates their grounds for reimbursement as an unfunded mandate."[106] DTSC argues that the state-funded School Facilities Program conditions in this test claim are analogous to the state-funded educational programs at issue in *Kern*.[107] Specifically:

> The hazard assessments requirements are not rendered mandates because the state funds only a part of the total costs under Education Code sections 17072.1, 17213.13 and 17213.18. The [*Kern*] court noted, "[w]e reject the suggestion, implicit in claimants' argument that the state cannot legally provide school districts with funds for voluntary programs, and then effectively reduce that funding grant by requiring school districts to incur expenses in order to meet conditions of program participation." [108]

DTSC also argues that school districts are not practically compelled (using the phrase "compelled de facto") because though there may be no feasible alternative to participation in the state funding program for school construction projects where HMA costs are sizable, "districts may elect to stop pursuing such a high cost site at any time without compulsion or penalty."[109]

2. School Districts Have Sufficient Fee Authority to Fund Their Share of Costs and are Thus Disqualified for Reimbursement Under Government Code section 17556, subdivision (d).

DTSC argues, "school districts have authority to levy fees to fund their share of costs under Government Code section 17556, subdivision (d), and *Connell v. Superior Court* (1997) 59 Cal.App.4th 382." [110] DTSC points out that Government Code section 17556, subdivision (d), prohibits the Commission from determining costs are mandated by the state if it finds that the district "has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service."[111] DTSC refers to Education Code section 17620 (development fee), Government Code section 53311 (Mello-Roos fee), and Education Code section 15350 (school facilities improvement districts bond authority) for some examples of potential revenue sources for school districts.[112]

DTSC also argues that the state already routinely funds half of the HMA costs and funds up to 100 percent of the costs in cases of economic hardship under Education Code sections 17072.12, 17072.13 and 17072.18.[113]

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[105] *Id*, p. 3.

[106] *Ibid*.

[107] *Ibid*.

[108] *Id*, citing *Kern*, *supra*, 30 Cal. 4th 727, 754.

[109] DTSC, comments on 2-TC-43, *supra*, p. 4.

[110] DTSC, comments on 02-TC-43, *supra*, p. 1.

[111] *Id*, p. 4, citing *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382.

[112] *Id*, p. 5.

[113] DTSC, comments on 02-TC-43, *supra*, p. 5.

3. Jointly Funded Programs are Outside the Coverage of Section 6, Article XIII B of the California Constitution.

DTSC states, "jointly funded programs such as school funding are outside the coverage of Section 6, article XIII B of the California Constitution. . . under *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal. App.4th 1264 (*County of Sonoma*)."[114]

4. HMAs are Part of the School District's Continuing Duty to Provide Safe School Sites, Not a New Program or Higher Level of Service.

Finally, DTSC argues that the preparation of HMAs is a condition of funding and "compliance with these funding conditions fails to provide a new program or higher level of service to the public to qualify as a reimbursable state mandate under *County of Sonoma*."[115] DTSC argues that prior to 1975, the state did not fund site acquisition and investigation costs, so the state has not shifted state program costs to the districts.[116] Specifically, DTSC states:

> Here, the program at issue concerns school facility safety, an area that the state has long regulated to assure safety of school children in facilities for compulsory education. (Former Educ. Code § 39002; *Hall v. City of Taft* (1956) 47 Cal. 2nd 177, 185-186.) A mandate is a new program if the local entity had not been previously required to implement it. (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 at p. 1189 (*Los Angeles* 2003).) However, to qualify for reimbursement, the program must be one that the state previously funded in whole and would newly be funded solely by local tax revenues and not by other levies. (*Los Angeles* 2003, *supra*, 110 Cal. App.4th at 1193, citing *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal. App. 4th 1264 at p. 1289.)

DTSC states that HMAs do not provide a new service to the public. Instead, they require research and periodic evaluation at key decision points, such as the Phase I Assessment and PEA, to help inform public spending decisions to assure reasonable use of state school facility funds.[117] This increased level of information also protects against commitment to sites with unknown contamination levels. In addition, these processes assure that the site is reasonably safe for its intended use: occupancy by children for compulsory education. The situation here is similar to *County of Los Angeles v. Department of Industrial Relations* where the court found costs of complying with new elevator and earthquake safety standards were not reimbursable as state mandates because they provided no new or increased level of service to the public.[118]

C. Department of Education's Position

DOE states that the test claim statutes in 02-TC-30 (*School Facilities Funding Requirements*) do not impose a state-mandated program because each of the programs pled is but "one of various funding mechanisms available to school districts for the funding of facilities. School districts elect to

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[114] DTSC, comments on 02-TC-43, *supra*, p. 1.

[115] DTSC, comments on 02-TC-43, *supra*, p. 1.

[116] *Id*, p. 7.

[117] DTSC, comments on 02-TC-43, *supra*, p. 10.

[118] *Ibid.*

participate in [these programs] and any requirements regarding [these programs] are applicable only after districts elect to participate. . . ."[119]

D. Department of Finance's Position

1. School Facilities Funding Requirements

DOF states:

> Nothing in the statutes or regulations citied by the Claimant [] makes a school district's participation in the funding programs a compulsory activity. Instead, we conclude that a district's participation in any of the cited programs is voluntary and a result of the district's discretionary choice. We also note that 25 to 30 percent of California's nearly 1,100 K-12 school districts do not participate in the state-funded school facility programs, which demonstrates that the programs are not compulsory.[120]

DOF also cites to the relevant sections of each of the chapters under which the claimant is alleging reimbursable activities to demonstrate that there is no legal requirement for school districts to comply with the requirements pled unless they make the discretionary decision to:

- Order an election of whether to issue bonds under the Strict Accountability in Local School Construction Bonds Act of 2000;
- Form a school facilities improvement district and issue bonds under Education Code part 10, Chapter 2 (Bonds of School Facilities Improvement Districts);
- Enter into an agreement with the state to receive funds for the construction, reconstruction or replacement of school facilities from the SAB pursuant to the State School Building Lease-Purchase Law of 1976;
- Apply to receive an eligibility determination or funding for the construction, reconstruction or replacement of school facilities from the SAB pursuant to the Leroy F. Greene School Facilities Act of 1998;
- Adopt a resolution authorizing the district to file an application to lease portable classrooms from the SAB pursuant to the Emergency (State Relocatable) Classroom Law of 1979;
- Issue sale revenue bonds to finance construction of joint occupancy facilities necessary to relieve overcrowded schools pursuant to Education Code Part 10, Chapter 15 (School District Revenue Bonds);
- Approve the issuance of certificates of participation or revenue bonds or enter into any agreement for financing school construction (i.e. approve non-voter approved debt) which triggers public disclosure requirements pursuant to Education Code Part 10, Chapter 16; or
- Undertake, itself or through an agent, the financing or refinancing of a project or of working capital pursuant to Education Code Part 10, Chapter 18 (California School Finance Authority).[121]

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[119] DOE, comments on 02-TC-30, p. 1.

[120] DOF, comments on 02-TC-30, February 9, 2004, p. 1.

[121] *Id*, p.p. 1-4.

DOF notes that "when a school district elects to participate in a voluntary program, the "downstream" activities of the district do not constitute a state-mandated reimbursable program. In [*Kern*], the California Supreme Court confirmed the merits of the argument that where a local government entity voluntarily participates in a statutory program, the state may require the entity to comply with reasonable conditions without providing additional funds to reimburse the entity for the increased level of activity."[122]

DOF also notes that in the first 200 pages of the test claim it found "more than three-dozen misstatements" of the Education Code.[123] Specifically, DOF asserts that claimant inserted the word "shall" in its citations to statute where the statute actually says "may" thus "changing an otherwise permissive action of the board to an action that appears compulsory."[124]

Finally, DOF asserts that school districts have fee authority (i.e. development fees) for the purpose of funding the construction or reconstruction of school facilities.[125]

2. Hazardous Materials Assessments

DOF states that the school district's participation in the Leroy F. Greene School Facilities Act of 1998, School Facilities Program (SFP) (Educ. Code § 17070.10 *et seq*.) "is strictly voluntary and the result of elective action taken by the governing board of the district."[126] DOF argues the SFP requirements apply to discretionary, school district proposed, projects and school facilities construction projects. DOF cites to *Kern* for the proposition that "where a local government entity voluntarily participates in a statutory program, the state may require the entity to comply with reasonable conditions without providing additional funds to reimburse the entity for the increased level of activity."[127]

Moreover, with regard to HMAs, "Education Code section 17213.1 (b) states, 'The costs incurred by school districts when complying with this section are allowable costs for an applicant under Chapter 12.5, Part 10 and may be reimbursed in accordance with section 17072.13.'"[128]

Finally, DOF argues that "school districts have the authority to charge development fees to finance construction projects."[129] Specifically, DOF asserts that Education Code sections 17620-17626 "authorize school districts to levy fees against any construction within its district boundaries for the purpose of funding school construction."[130] DOF concludes with a discussion of the prohibition against finding a reimbursable mandate in a statute or executive order "if the affected local agencies have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order."[131]

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[122] DOF, comments on 02-TC-30, *supra*, p. 2.

[123] DOF, comments on 02-TC-30, *supra*, p. 4.

[124] *Ibid.*

[125] DOF, comments on 02-TC-30, *supra*, p. 4.

[126] DOF, comments on 02-TC-43, February 3, 2004, p. 1.

[127] *Id*, citing *Kern*, supra, 30 Cal.4th 727.

[128] DOF, comments on 02-TC-43, *supra*, p.1.

[129] DOF, comments on 02-TC-43, *supra*, p. 2.

[130] *Id*.

[131] *Id*.

III. Findings

The courts have found that article XIII B, section 6, of the California Constitution recognizes the state constitutional restrictions on the powers of local government to tax and spend. "Its 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."[132] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[133] In addition, the required activity or task must constitute a "new program," or it must create a "higher level of service" over the previously required level of service.[134]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, 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.[135] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[136] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[137] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[138]

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.[139] 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."[140]

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[132] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[133] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[134] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3rd 830, 835 *(Lucia Mar).*

[135] *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; see also *Lucia Mar, supra,*

[136] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[137] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[138] *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.

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

[140] *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.

This analysis addresses the following issues:

A. Does the Commission have jurisdiction over a statute that was the subject of a prior final decision of the Commission?

B. Are the remaining test claim statutes and alleged executive orders subject to Article XIII B, section 6 of the California Constitution?

   1. Are statutes that have been repealed prior to the beginning of the potential reimbursement period subject to reimbursement under Article XIII B, section 6 of the California Constitution?

   2. Are the Substantial Progress and Expenditure Audit Guide of May 2003, the School Facility Program Guidebook of January 2003, the State Relocatable Classroom Program Handbook of January 2003, and the Lease-Purchase Applicant Handbook of April 1998[141] executive orders subject to Article XIII B, section 6?

   3. Does Health and Safety Code section 25358.1 impose a program subject to Article XIII B, section 6 of the California Constitution?

   4. Does Health and Safety Code section 25358.7.1 impose any state-mandated duties on school districts?

   5. Are the activities required by the remaining test claim statutes and regulations state-mandated duties or are they downstream requirements of a discretionary decision of the school district?

A. The Commission does not have jurisdiction over Education Code section 17213.1, as added by Statutes of 1999, chapter 1002, because this statute was the subject of a final decision of the Commission, *Acquisition of Agricultural Land for a School Site* (98-TC-04 and 01-TC-03).

The Commission has adopted a prior test claim related to school facility finance requirements that made specific findings on one of the statutes pled in this test claim. This prior decision is a final, binding decision which is relevant to the issue of jurisdiction.

In *Acquisition of Agricultural Land for a School Site* (98-TC-04 and 01-TC-03), the Commission found that Education Code section 17213.1, as added by Statutes of 1999, chapter 1002, did not impose a reimbursable state mandate on school districts because "the procedures a school district must follow when it seeks state funding pursuant to the Leroy Greene School Facilities Act of 1998 (commencing with Educ. Code, § 17070.10) are not state-mandated because the school district is not required to request state funding under section 17213.1." [142]

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

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[141] Note that the "1988" version of this Handbook was actually included in the caption for claimant's test claim filing. However, because claimant attached the 1998 version of this Handbook to the test claim filing and staff could not locate a 1988 version of this Handbook, the Commission presumes that claimant intended to plead the 1998 version.

[142] *Acquisition of Agricultural Land for a School Site* (98-TC-04 and 01-TC-03), p. 14. Note that section 17213.1 was amended by Statutes 2000, chapter 443 (AB 2644) and Statutes 2002, chapter 935 (AB 14), which were also pled in this test claim and are not the subject of a final Commission decision. Therefore, those statutes are addressed below.

purposes of that test claim. "'Test claim' means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state."[143] Government Code, Title 2, division 4, Part 7 "establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies. . . ."

When 98-TC-04 was filed in 1999 and amended by 01-TC-03 in 2003, section 1182.2 of the Commission's regulations was in place and provided that "any person may submit comments in writing on any agenda item." Moreover, pursuant to the Bagley-Keene Open Meeting Act of 1967 and the Commission's regulations, claimant had the opportunity to attend and provide written or oral comments at the Commission hearing on *Acquisition of Agricultural Land for a School Site*. Government Code section 17500 explicitly states that the test claim procedure is designed to avoid a multiplicity of proceedings to address the same issue. Once a decision of the Commission becomes final and has not been set aside by a court pursuant to a petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5), it is not subject to collateral attack. Thus, claimant is bound by the findings in *Acquisition of Agricultural Land for a School Site* (98-TC-04 and 01-TC-03). The Commission may not address issues that were conclusively addressed in that test claim.

Therefore, the Commission finds the Commission does not have jurisdiction over Education Code section 17213.1, as added by Statutes of 1999, chapter 1002, because this statute was the subject of a final decision of the Commission, *Acquisition of Agricultural Land for a School Site* (98-TC-04 and 01-TC-03).

B. The Remaining Test Claim Statutes And Alleged Executive Orders Are Not Subject To Reimbursement Under Article XIII B, Section 6 of The California Constitution.

The courts have held that article XIII B, section 6 was not intended to entitle local agencies and school districts to reimbursement for all costs resulting from legislative enactments, but only those costs "mandated" by a new program or higher level of service imposed upon them by the state.[144] Thus, the issue is whether the test claim statutes impose a state-mandated activity on school districts.

For the test claim statutes or regulations to impose a state-mandated program, the language must order or command a school district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[145] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[146]

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[143] *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802.

[144] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835; *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 1816.

[145] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 727 hereinafter "*Kern"*.

[146] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

1. **Education Code sections 39003 and 39120 have been repealed since January 1, 1998, prior to the beginning of the potential reimbursement period for this test claim and thus cannot be reimbursable.**

Education Code sections 39003 and 39120 were repealed by Statutes1996, chapter 277 (S.B.1562), section 6, operative January 1, 1998. Because they have not been operative at any time during the reimbursement period which begins on July 1, 2002, they cannot be reimbursable.[147]

2. **The Audit Guides and Handbooks Claimed are not Executive Orders Subject to Article XIII B, Section 6.**

The Commission finds that the Substantial Progress and Expenditure Audit Guide of May 2003, the School Facility Program Guidebook of January 2003, the State Relocatable Classroom Program Handbook of January 2003, and the Lease-Purchase Applicant Handbook of April 1998 are not executive orders. 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.[148] Although the above-mentioned audit guide, guidebook and handbooks are issued by state agency directors who serve at the pleasure of the Governor, they do not impose an "order, plan, requirement, rule or regulation." Specifically:

- The Substantial Progress and Expenditure Audit Guide of May 2003 cites to specific legislative or regulatory authority for each requirement in the guide and thus does not impose an order, plan, requirement, rule or regulation.[149]
- The School Facility Program Guidebook of January 2003 was developed by the Office of Public School Construction (OPSC) to "assist school districts in apply for and obtaining 'grant' funds for the new construction and modernization of school facilities under the Leroy F. Greene School Faculties Act of 1998."[150] According to OPSC, "it is intended to provide an overview of the program for use by school district, parents, architects, the Legislature and other interested parties on how a school district becomes eligible for funding and applies for state funding."[151]
- The State Relocatable Classroom Program Handbook of January 2003 provides an overview of the program and then takes the reader step-by-step through the application process provided by statutes and regulations adopted pursuant to the Administrative Procedures Act.[152]
- The Lease-Purchase Applicant Handbook of April 1998 provides an overview of the program and then takes the reader step-by-step through the application process provided by statutes and regulations adopted pursuant to the Administrative Procedures Act.[153]

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[147] Government Code section 17557.

[148] Government Code section 17516.

[149] See generally, Office of Public School Construction, The Substantial Progress and Expenditure Audit Guide, 2003.

[150] Office of Public School Construction, School Facility Program Guidebook, 2003, p. 1.

[151] *Ibid*.

[152] See generally, Office of Public School Construction, The State Relocatable Classroom Program Handbook, 2003.

[153] See generally, The Lease-Purchase Applicant Handbook, April 1998.

Because they do not require districts to do anything beyond what is required by statutes and regulations and are not plans, they are not executive orders. They merely explain the programs that are 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. They do not add any additional requirements above what is required by the relevant statutes and regulations, but rather, provide a tool to make compliance easier. Local agencies and 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 complex school facility funding process to maximize the amount of state-grant money they receive, if that is their preference.

3. Health and Safety Code Section 25358.1 as Added By Statutes 1999, Chapter 23 Does Not Impose a State-Mandated Program On School Districts Subject to Article XIII B, Section 6 of the Constitution Because The Requirements It Imposes Are Not Unique to Government.

a. Health and Safety Code Section 25358.1 as Added by Statutes 1999, Chapter 23 May Require School Districts to Perform Specified Activities.

The Commission finds that Health and Safety Code section 25358.1 as added by Statutes 1999, chapter 23 imposes a requirement on school districts if they "[h]ave, or may have, acquired information relevant to [specified hazardous substance release related questions] in the course of commercial, ownership, or contractual relationship with any potentially responsible party." Health and Safety Code section 25358.1 as added by Statutes 1999, chapter 23 imposes several requirements on "any potentially responsible party, or any person who has or may have, acquired information relevant to any of the following matters [i.e. specified hazardous substance release related matters] in the course of commercial, ownership, or contractual relationship with any potentially responsible party."[154] Specifically, that potentially responsible party or person who has or may have such knowledge, at the request of DTSC, is required to:

- Furnish information about the release;
- Provide access to records and properties;
- Permit inspections and the collection of samples by DTSC;
- Allow the set up and monitoring of equipment by DTSC to assess or measure the actual or potential migration of hazardous substances;
- Permit DTSC to survey and determine topographic, geologic, and hydrogeologic features of the land;
- Permit DTSC to photograph any equipment, sample, activity, or environmental condition discovered through the inspections, samples, monitoring and surveys, described above. However, DTSC must protect trade secrets pursuant to Health and Safety section 25358.2.

Health and Safety Code section 25358.1 also provides a number of protections for the potentially responsible party or person and their property. Health and Safety Code section 25310 specifies that the definitions contained in CERCLA section 101 apply to the terms in the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health and Safety Code sections 25300-25395.40). A "person" is defined in CERCLA section 101(21) as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, state, municipality,

[154] Health and Safety Code section 25358.1, subdivision (b).

commission, political subdivision of a state, or any interstate body. Since a school district is a political subdivision of the state, it is a person under this definition. A "potentially responsible party" is a person that may be liable for CERCLA response costs, and as defined by section 107(a) of CERCLA includes:

- Current owners and operators regardless of whether they contaminated the site;
- Past owners and operators who owned or operated the facility at the time that hazardous substances were disposed;
- Persons who arranged for either the treatment or disposal, or the transportation for treatment or disposal of hazardous substances at the facility; and
- Persons who accepted hazardous substances for transport to disposal or treatment facilities that they selected.

Since a school district may be a current or past owner of contaminated property and may arrange for the treatment, disposal or transportation for treatment or disposal of hazardous substances found on its property, it may become a potentially responsible party in some instances. The Commission finds that because a school district is a person and may be a potentially responsible party, Health and Safety Code section 25358.1 imposes requirements on school districts where the district acquired information relevant to specified hazardous substance release related matters in the course of commercial, ownership, or contractual relationship with any potentially responsible party. Therefore, the Commission finds that Health and Safety Code section 25358.1, as added by Statutes 1999, chapter 23, imposes state-mandated duties on school districts within the meaning of article XIII B, section 6 of the California Constitution.

b. The Activities Required By Health and Safety Code Section 25358.1 Do Not Carry Out the Governmental Function of Providing a Service to the Public.

For Health and Safety Code section 25358.1 to be subject to article XIII B, section 6 of the California Constitution, it must constitute a new "program" or "higher level of service." The California Supreme Court, in the case of *County of Los Angeles v. State of California*,[155] defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[156]

Health and Safety Code section 25358.1 does not require school districts to provide any service to the public. Rather, it imposes disclosure and access requirements on parties who may be liable for the cleanup of hazardous substances released on or from a facility/property because they are:

- Past owners and operators who owned or operated the facility at the time that hazardous substances were disposed;
- Persons who arranged for either the treatment and/or disposal, or the transportation for treatment or disposal of hazardous substances at the facility; or

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

[156] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537, emphasis added.

- Persons who accepted hazardous substances for transport to disposal or treatment facilities that they selected.

County of Los Angeles v. Department of Industrial Relations,[157] addressed elevator safety requirements applicable to all elevators in the state. There, the court found that the regulations were not a program because "[p]roviding elevators equipped with fire and earthquake safety features simply is not 'a governmental function of providing services to the public.'"[158]

c. Health and Safety Code Section 25358.1 is Not Unique to Government.

Health and Safety Code section 25358.1 by its own terms applies to all potentially responsible parties, both private and public. As the *County of Los Angeles v. Department of Industrial Relations*[159] court explained, "[w]ere section 6 construed to require state subvention for the incidental cost to local governments of general law, the result would be far-reaching indeed."[160] There, the court found that the regulations were not a program because the regulations did not impose a unique requirement on local government and "[p]roviding elevators equipped with fire and earthquake safety features simply is not 'a governmental function of providing services to the public.'"[161] Likewise here, the Commission finds that the requirement that potentially responsible parties disclose information and provide access to DTSC or the applicable regional water quality control board is not unique to government but applies generally to all residents and entities in the state who find themselves in the position of being a potentially responsible party for purposes of CERCLA/Superfund.

As the requirements of Health and Safety Code section 25358.1 as added by Statutes 1999, chapter 23 applies to both public and private entities, it does not impose a "unique requirement" on local governments, and thus it does not meet the second definition of "program" established by *County of Los Angeles*.

Providing access to your facility and disclosure about the release of hazardous substances for which one may be liable is not "a governmental function of providing services to the public" and is not unique to government. Therefore, the Commission finds that Health and Safety Code section 25358.1 as added by Statutes 1999, chapter 23 does not impose a new program or higher level of service subject to reimbursement under Article XIII B, section 6 of the California Constitution.

4. Health and Safety Code Section 25358.7.1, as Added by Statutes 1999, Chapter 23, Does Not Impose Any Activities or State-Mandated Duties on School Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution.

Health and Safety Code section 25358.7.1, as added by Statutes 1999, chapter 23 allows a community to form a community advisory group (CAG) to review and comment on a response action being conducted in that community. Health and Safety Code section 25358.7.1 requires DTSC or the regional board that is conducting the response action to communicate and confer as appropriate with the CAG and to advise local regulatory and other appropriate local agencies of planned response actions so that they may review and comment.

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[157] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[158] *Id*, p. 1545.

[159] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[160] *County of Los Angeles v. State of California, supra,* p. 56.

[161] *County of Los Angeles v. Department of Industrial Relations, supra,* 214 Cal.App.3d 1538, 1545.

Based on the plain language of this statute, Health and Safety Code section 25358.7.1 requires DTSC to perform activities but does not mandate school districts to perform any activities. Therefore the Commission finds that Health and Safety Code section 25358.7.1, as added by Statutes 1999, chapter 23 does not impose state-mandated duties on school districts within the meaning of Article XIII B, section 6 of the California Constitution.

5. The Remaining Test Claim Statutes and Regulations Do Not Impose State-Mandated Duties on School Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution.

If a school district makes a decision to build or modernize a school, it must determine how to fund that construction. Generally, a school can seek grant funding from the state through the state school facility program (SFP), which is funded through state bonds and/or it may issue local bonds pursuant to one of several local bond acts. Usually, but not always, schools rely on a combination of state and local bond funding for facilities.

If a school district decides to issue local bonds, it must comply with the public disclosure and other accountability requirements contained within the act under which the district decides to issue bonds, some of which were required by the statewide bond initiatives specifying the voting requirements for the issuance of local bonds. If a school district decides to seek state bond funding through the SFP (i.e. grant funding), the district must comply with various planning, environmental, building safety, labor, public participation/disclosure and bond funding accountability requirements as a condition of receipt of that funding which includes preparation of hazardous materials assessments (HMA) and performing many of the other activities pled in this consolidated test claim.

HMAs are conducted to provide basic information for determining if there has been a release or there is a threatened release of a hazardous material or if there may be a naturally occurring hazardous material present at the site which may pose a risk to human health or the environment. A Phase I Assessment must be prepared to identify the potential for hazardous material release or the presence of naturally occurring hazardous materials. If such a potential is found then a Preliminary Endangerment Assessment (PEA) is required to evaluate the threat posed to public health or the environment. The California Education Code requires DTSC to review Phase I Assessments and PEAs, and to make a determination about the need for further action or remediation.[162] School districts may elect to proceed directly to a PEA without having first completed a Phase I Assessment which can reduce costs when there is a known hazardous material present.[163]

There are two other programs pled in this test claim that do not fit neatly into the state funding or local bond funding categories:

- The State Relocatable Classroom Law of 1979 under which claimant alleges costs for activities related to the lease of portable classrooms from the state; and
- The California School Finance Authority Act, under which a school district may borrow funds from the state which are generally repaid with future Proposition 98 funds.

[162] Education Code section 17213.2.

[163] Education Code section 17213.1.

The remaining statutes and regulations,[164] which generally require compliance with SFFRs[165] if a school district seeks state grant funding, local bond funding or elects to participate in one of the other programs pled pursuant to the test claim statutes and regulations, do not mandate school districts to perform any activities because:

a) School districts are not legally compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.

b) The evidence in the record does not support a finding that school districts are practically compelled to do any of the following activities which would trigger the requirement to

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[164] Education Code sections 15271, 15272, 15274, 15276, 15278, 15280, 15282, 15284, 15301, 15302, 15303, 15320, 15321, 15322, 15323, 15324, 15325, 15326, 15327, 15336, 15340, 15341, 15342, 15343, 15346, 15347, 15349, 15349.1, 15350, 15351, 15352, 15354, 15355, 15359.2, 15359.3, 15380, 15381, 15384, 15390, 15391, 17006, 17008.3, 17009, 17009.5, 17014, 17015, 17016, 17017, 17017.2, 17017.5, 17017.6, 17017.7, 17017.9, 17018, 17018.5, 17018.7, 17019.3, 17019.5, 17020, 17021.3, 17022, 17022.7, 17024, 17025, 17029, 17029.5, 17030, 17030.5, 17031, 17032, 17032.3, 17032.5, 17036, 17038, 17040, 17040.1, 17040.2, 17040.3, 17040.6, 17040.7, 17040.8, 17041.1, 17041.2, 17041.8, 17042.7, 17042.9, 17047, 17047.5, 17049, 17056, 17059, 17059.1, 17061, 17062, 17063, 17064, 17065, 17066, 17070.33, 17070.50, 17070.51, 17070.60, 17070.63, 17070.70, 17070.71, 17070.75, 17070.77, 17070.80, 17070.90, 17070.95, 17070.97, 17070.98, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.46, 17071.75, 17072.10, 17072.12, 17072.13, 17072.20, 17072.33, 17072.35, 17073.10, 17074.10, 17074.15, 17074.16, 17074.20, 17074.25, 17074.26, 17074.30, 17074.50, 17074.52, 17074.54, 17074.56, 17075.10, 17075.15, 17076.10, 17076.11, 17077.10, 17077.30, 17077.35, 17077.40, 17077.42, 17077.45, 17078.18, 17078.20, 17078.22, 17078.24, 17078.25, 17088.3, 17088.5, 17088.7, 17089, 17089.2, 17090, 17092, 17096, 17110, 17111, 17150, 17180, 17183.5, 17193.5, 17194, 17199.1, 17199.4, 17210, 17210.1, 17211, 17212, 17212.5, 17213, 17213.1, 17213.2, 17251, 17315, and 100620 as added or amended by Statutes 1976, Chapter 557; Statutes 1977, Chapter 242; Statutes 1978, Chapter 362; Statutes 1982, Chapter 735; Statutes 1990, Chapter 1602; Statutes 1991, Chapter 1183, Statutes 1996, Chapter 277; Statutes 1997, Chapters 513, 893, and 940; Statutes 1998, Chapters 407, 485, 691, 741, 848, 941, 957, and 1076; Statutes 1999, Chapters 133, 709, 858, 992; Statutes 2000, Chapters 44, 193, 443, 530, 590, and 753; Statutes 2001, Chapters 132, 159, 194, 422, 647, 725, 734 and 972; and Statutes, 2002, Chapters 33, 199, 935, 1075, and 1168;

Public Resources Code sections 21151.4 and 21151.8 as amended by Statutes 2003, Chapter 668; Statutes 2004, Chapter 689; Statutes 2007, Chapter 130: and Statutes 2008, Chapter 148; and

California Code of Regulations, Title 2, Sections 1859.20, 1859.21, 1859.22, 1859.30, 1859.31, 1859.32, 1859.33, 1859.35, 1859.40, 1859.41, 1859.50, 1859.60, 1859.70, 1859.72, 1859.74.1, 1859.75, 1859.75.1, 1859.76, 1859.77.1, 1859.77.2, 1859.79, 1859.79.2, 1859.79.3, 1859.81, 1859.81.1, 1859.82, 1859.90, 1859.100, 1859.102, 1859.104, 1859.104.1, 1859.104.2, 1859.104.3, 1859.105, 1859.105.1, 1859.106, 1859.107, 1862.52, 1862.53, 1865.3, 1865.8, 1865.32.5, 1865.33, 1865.39, 1865.42, 1865.43, 1865.50, 1865.70.

[165] i.e. the activities required as a condition of receipt of SFP funding, issuance of local bonds or participation in the other state programs pled which are discussed at length in the background at pages 6-23.

comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds. Rather, the requirement to comply with the SFFRs is triggered by a district's voluntary decisions to request and accept state matching funds under the SFP, to issue local bonds or to participate in one of the other voluntary programs pled.

a) *School districts are not legally compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.*

The decision to acquire a new school site, build a new school, undertake a school modernization project, add portable classrooms and accept SFP funding, issue local bonds or participate in one of the other voluntary programs pled in this test claim therefore, can arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters. Likewise, there are a number of funding sources that a school district might utilize to fund discretionary school construction projects and a number of alternatives to building a new school that a district might consider. When SFP funding is used to acquire a school site or for school construction, compliance with the applicable SFFRs including the preparation of HMAs and related activities is a condition of funding. Generally, the following requirements are imposed as a condition of SFP: various planning, environmental, building safety, labor, public participation/disclosure and bond funding accountability requirements. Likewise, when local bonds are issued, compliance with the requirements of the statutory scheme under which they are issued is required.[166] These requirements generally include disclosure, voting and fiscal accountability. Similarly the "other" programs referred to in this analysis, the State Relocatable Classroom Law and California School Finance Authority Act impose their own requirements. What all of these requirements have in common, however, is that they are all downstream requirements triggered by a school district's decision to participate in the overlying program in order to acquire, expand, or modernize school facilities.

As discussed in the background above, in California, school facilities historically have been funded exclusively by local tax and fee revenues. More recently, the funding scheme has evolved to include state grant funding and issuance of local bonds, both of which impose certain requirements on schools as a condition of funding. Nothing in article XIII B, section 6 requires the state to reimburse local government for its costs incurred to meet conditions of state grant funding or its costs incurred to meet the conditions of voluntary programs such as the issuance of local bonds, lease of portable classrooms, or loan or state funds for discretionary projects. Thus there has been no shift in program responsibility and costs from state to local government. Rather than shifting costs and responsibilities to local government, the state has in fact assumed a greater share of the costs of building schools over the past several decades.[167] The programs pled in this test claim, represent a portion of the myriad of programs

[166] Note that, as discussed in the background above, when a school district acquires land or builds exclusively with its own funds, which may include funds from the issuance of bonds under some of the test claim statutes, they are exempt from some of the SFFRs (in particular some of the HMA requirements) imposed on districts that build with state funds.

[167] See generally, *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, Cohen, *supra*, and Brunner, *supra*.

that the Legislature has enacted to provide school districts with a variety of funding options for school facilities projects that the districts chose to undertake.

None of the laws or regulations cited by claimant require districts to: acquire new school sites, undertake new school or modernization projects, add portable classrooms; or request SFP funding, issue local bonds, or participate in the other state programs pled for those purposes. In comments filed February 20, 2004, however, claimant argues that participation in the Leroy F. Green School Facilities Act is not voluntary.[168] In support of this contention, claimant cites to *Butt v. State of California*[169] for the propositions that the state has a responsibility to "provide for a system of common schools, by which a school shall be kept up and supported in each district" and that those schools are required to be "free."

The Commission disagrees with the claimant's argument that "obtaining [state] school facilities funding is not optional." With regard to new construction of school buildings, the Second District Court of Appeal has stated: "[w]here, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[170] It is true, as claimant states, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[171] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[172]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it has been and continues to be the legislative policy of the state to strengthen and encourage local responsibility for control of public education through local school districts.[173] The governing boards of K-12 school districts may hold and convey property for the use and benefit of the school district.[174] Governing boards of K-12 school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[175] Thus, under state law, the decision to construct a school facility lies with the governing boards of school districts, and is not legally compelled by the state.

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[168] Claimant, response to DOF comments on 02-TC-43, March 31, 2004, p. 2.

[169] *Butt v. State of California* (1992) 4 Cal.4th 688.

[170] *People v. Oken* (1958) 159 Cal.App.2d 456, 460.

[171] See *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1579, fn. 5; *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 (formerly known as *California Teachers Assn. v. Huff*); *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.

[172] *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, 1579, fn. 5.

[173] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[174] Education Code sections 35162.

[175] Education Code sections 17340, 17342.

Additionally, there are no statutes or regulations requiring the governing boards of school districts to construct new buildings or reconstruct unsafe buildings. The decision to reconstruct or even abandon an unsafe building is a decision left to the discretion of a school district. In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of reconstructing a new building, as part of its desegregation plan.[176] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[177] The court describes the facts and the district's decision as follows:

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[178]

Thus, school districts are not legally compelled to acquire new school sites or construct new school facilities, modernize school facilities, add portable classrooms or request and accept SFP funds, issue local bonds, or participate in the other state programs pled for those purposes. Based on the above analysis, the Commission finds that the SFFRs are triggered by the district's voluntary decision to acquire a new school site, build a school, modernize a school, add portable classrooms, and to request and accept SFP funds, issue local bonds, or participate in the other state programs pled for such projects. Participation in any one of the voluntary programs pled (i.e. SFP funding, issuance of local bonds or other programs pled) is conditioned on performance the SFFRs required by that program and thus, school districts are not legally compelled to comply with the SFFRs required by the test claim statutes and regulations, but rather make a discretionary decision to participate and thus assume the duty to comply.

As discussed in the background above, all of the requirements alleged in this test claim are imposed "as a condition of receiving funding" or are required if the district chooses to issue local bonds. Thus, if a school district wishes to receive state grant funding or issue local bonds for funding of a school facilities project, compliance with the relevant SFFRs is a prerequisite. For example, consistent with the Public Resource Code 21102 and 21150 requirements, Education Code section 17025, subdivision (b) requires certification of CEQA compliance as a condition of bond funding for K-12 school districts.

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[176] *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 337-338.

[177] *Id*, p. 338.

[178] *Id*, p. 337.

The test claim statutes make clear that state agencies must require compliance with the SFFRs (i.e. the requirements of the test claim statutes and regulations) as a condition of providing state funding for a school facility project and must require compliance with the requirement for local bond funding imposed under the test claim statutes. However, there is no legal requirement that a school district seek funding from the state or issue local bonds.

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The school district claimants in *Kern* participated in various funded programs each of which required the use of school site councils and other advisory committees. The claimants sought reimbursement for the costs from subsequent statutes which required that such councils and committees provide public notice of meetings, and post agendas for those meetings.[179]

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[180] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[181] The court also reviewed and affirmed the holding of *City of Merced*,[182] determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[183] The court stated the following:

> 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.[184] (Emphasis in original.)

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[185] (Emphasis added.)

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[179] *Kern* (2003) 30 Cal.4th 727.

[180] *Id.* at p. 737.

[181] *Ibid*.

[182] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

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

[184] *Ibid*.

[185] *Id.* at p. 731.

Based on the plain language of the statutes creating the underlying education programs in *Kern*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.[186] Similarly here, school districts are not legally compelled to request and accept state funds or issue local bonds for discretionary construction projects. However, if districts choose to receive SFP funds, issue local bonds or participate in the other voluntary programs pled then, based upon the plain language of the test claim statutes, certain activities are required as a condition of participation in those programs.

The financing of school facilities has traditionally been the responsibility of local government, with *assistance* provided by the state. In 1985, the California Supreme Court decided *Candid Enterprises, Inc. v. Grossmont Union High School District*, which provides a good historical summary of school facility funding up until that time as follows:[187]

> In California the financing of public school facilities has traditionally been the responsibility of local government. "Before the *Serrano v. Priest* decision in 1971, school districts supported their activities mainly by levying ad valorem taxes on real property within their districts." [Citation omitted.] Specifically, although school districts had received some state assistance since 1947, and especially since 1952 with the enactment of the State School Building Aid Law of 1952 (Educ. Code, § 16000 *et seq*.), they financed the construction and maintenance of school facilities through the issuance of local bonds repaid from real property taxes.
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> After the *Serrano* decision [citation omitted] and to the present day, local government remained primarily responsible for school facility financing, but has often been thrust into circumstances in which it has been able to discharge its responsibility, if at all, only with the greatest difficulty. In these years, the burden on different localities has been different: extremely heavy on those that have experienced growth in enrollment, light on those that have experienced decline, and somewhere in between on those that have remained stable.
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> In the early 1970's, because of resistance to increasing real property taxes, localities throughout the state began to experience greater difficulty in obtaining voter approval of bond issues to finance school facility construction and maintenance. As a result, a number of communities chose to impose on developers school-impact fees … in order to make new development cover the costs of school facilities attributable to it. [Citation omitted.]
>
> With the passage of Proposition 13 in 1978 the burden of school financing became even heavier. "Proposition 13 prohibits ad valorem property taxes in excess of 1% except to finance previously authorized indebtedness. Since most localities have reached this 1% limit, school districts cannot raise property taxes even if two-thirds of a district's voters wanted to finance school construction." [Citation omitted.] Moreover, although Proposition 13 authorizes the imposition of "special taxes" by a vote of two-thirds of the electorate, such special taxes have rarely been imposed, remain novel, and as

[186] *Id*. at pp. 744-745.

[187] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878.

> consequence are evidently not perceived as a practical method of school facility financing – especially in view of the need for a two-thirds vote of the electorate to approve them. [Citation omitted.]
>
> In the face of such difficulties besetting local governments, the state has not taken over any substantial part of the responsibility of financing school facilities, less still full responsibility. To be sure, in order to implement the *Serrano* decision the Legislature has significantly increased assistance to education. But it has channeled by far the greater part of such assistance into educational programs and the lesser part into school facilities; in fiscal year 1981-1982, for example, only 3.6 percent went for such facilities. [Citation omitted.][188]

State assistance for construction of school facilities comes almost exclusively from statewide general obligation bonds, and is implemented through the State Allocation Board.[189] Before Proposition 13, the state bond funds provided to school districts were provided through loan programs in which districts were required to repay their assistance with property tax revenues or local bond funds. After Proposition 13, the State Allocation Board shifted its policy of providing bond fund assistance from a loan-based program to a grant-based program.[190] Today, the grant funds are provided through the School Facility Program (SFP), under the provisions of the Leroy F. Greene School Facilities Act of 1998.[191] Under the SFP, state bond funding is provided in the form of per pupil grants, with supplemental grants for site development, site acquisition, and other project specific costs when warranted.[192] New construction grants provide funding on a 50/50 state and local match basis. Modernization grants provide funding on a 60/40 basis. Districts that are unable to provide local matching funds and are able to meet the financial hardship provisions may be eligible for state funding of up to 100 percent.[193]

Though there is substantial funding made available to school districts through state grants, not all school districts elect to receive assistance from state funds for construction of school buildings. The "School Facility Financing" handbook prepared in February 1999 states:

> If a school district wants state funding for construction or repair of a school, it must apply to the State Allocation Board for the money. *There are school districts that repair and construct school buildings without the assistance from the State Allocation Board* (i.e., San Diego Unified School District, San Luis Unified School District).[194] (Emphasis added.)

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[188] *Id*, pp. 881-882. See also "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," *supra*.

[189] See "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," *supra*.

[190] "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," *supra*, pp. 12, 13, 20.

[191] Education Code section 17170.10 *et seq*.

[192] School Facility Program Handbook, *supra*, p. 23.

[193] *Id*. p. 61.

[194] School Facility Program Handbook, *supra*, endnote 2, p. 39.

Therefore, the Commission finds that school districts are not legally compelled to request or accept state funding or issue local bonds thus triggering the SFFRs requirements under these circumstances.

b) There is no evidence in the record to support a finding that school districts are practically compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.

In comments filed March 31, 2004, claimant notes that "a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate" and cites to *Sacramento II* as controlling case law.[195] Claimant relies on a study and Proposition 55 ballot language, both of which state a need to build more schools in California, to demonstrate that school districts are practically compelled to construct new school facilities when existing facilities become inadequate.[196] However, the question before the Commission is not whether additional school facilities are needed, but whether school districts are legally compelled by a state statute or regulation or practically compelled to build them and use SFP funding, issue local bonds or participate in the otherwise voluntary programs pled in this test claim therefore. As discussed above, the Commission finds that school districts are not legally compelled to acquire new school sites, construct new facilities, use state funds or issue local bonds under the test claim statutes.

The proper standard for determining whether school districts and community college districts are practically compelled to undertake school construction projects is the *Kern*[197] standard as followed, and expanded upon to provide specific evidentiary requirements, in the recent decision *Department of Finance v. Commission on State Mandates* (*POBRA*).[198] Absent legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern*, the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[199] Rather, local entities

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[195] Claimant's response to DOF comments on 02-tc-43, *supra*, p. 4, citing C*ity of Sacramento v. State of California* (1990) 50 Cal.3d. 51 (*Sacramento II*).

[196] Claimant's response to DOF comments on 02-tc-30, *supra*, pp. 3-4, citing Cohen, *supra*, and the 2004 Proposition 55 Ballot Pamphlet which identified a need to construct schools to house one million pupils and modernize schools for an additional 1.1 million students.

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

[198] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, pp. 1365-1366, hereinafter "*POBRA*". Note that POBRA is the test claim statute that was formerly identified as "POBOR" by the Commission and Commission staff. However, as the POBRA Court pointed out at footnote 2, the statute's commonly used name is "Peace Officers Bill of Rights Act" and the acronym "POBRA" was used by the Supreme Court in *Mays v. City of Los Angeles* (2008) 43 Cal. 4th 313, 317. Therefore, this analysis will use the acronym POBRA.

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

that have discretion will make the choices that are ultimately the most beneficial for the entity and its community:

> 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.)[200]

Likewise, the state School Facilities Program (SFP) provides new construction grant funding on a 50/50 state and local match basis. Districts that are unable to provide local matching funds and are able to meet the financial hardship provisions may be eligible for state funding of up to 100 percent.[201] If a district decides not to acquire a new school site or build a new school with SFP funding, and hence not to comply with all the corresponding requirements including preparation of HMAs, there is no evidence of "draconian" consequences. Rather, the district will simply forgo the state matching funds for new construction and will need to figure out another way to house its students.

In *POBRA*, the court addressed the issue of the evidence needed to support a finding of practical compulsion. In that case, it was argued that districts "employ peace officers when necessary to carry out the essential obligations and functions established by law."[202] The Commission found that the POBRA statutes constituted a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.[203] In 2006, the Commission reconsidered the claim, as required by Government Code section 3313, and found that *San Diego Unified* supported the Commission's 1999 Statement of Decision. Specifically, with regard to schools, the Commission found that districts were practically compelled to employ peace officers based upon the district's "obligation to protect pupils from other children, and also to protect teachers themselves from the violence by the few students whose conduct in recent years has prompted national concern."[204]

The Commission's Statement of Decision on reconsideration pointed out that, like the decision on mandatory expulsions in the *San Diego Unified* case, its decision was supported by the fact that the California Supreme Court found that the state "fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I, § 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline."[205] The Commission relied on a general requirement in the law (i.e. to provide safe schools) to support a finding of practical compulsion to perform specific activities (i.e. to hire police officers and comply

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[200] *Id*, p. 753.

[201] School Facility Program Handbook, *supra*, p. 61.

[202] *POBRA*, *supra*, 170 Cal.App.4th 1355**,** 1368.

[203] See CSM-4499.

[204] CSM 05-RL-4499-01, p. 26, citing *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

[205] *Id*.

with the down-stream requirements of hiring those officers). This is precisely the line of reasoning that claimant urges the Commission to follow in this test claim.

However, the court in *POBRA* found that the superior court erred in concluding as a matter of law that, "'[a]s a practical matter,' the employment of peace officers by the local agencies is 'not an optional program' and 'they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement." Moreover, the *POBRA* court did not find any evidence in the record to support a finding of legal or practical compulsion and the court provided some guidance regarding the kind of evidentiary showing required to make such a finding. Specifically, the court stated:

> The 'necessity' that is required is facing 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.' That cannot be established in this case without a concrete showing that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences. [206]

Thus, practical compulsion must be demonstrated by specific facts in the record showing that unless the alleged activity is performed, here the activity of acquiring new school sites, building new school facilities or modernizing existing schools and accepting SFP funding, issuing local bonds or opting to participate in other state programs to further such projects, which would in turn trigger the requirement to comply with the SFFRs that are a condition of those funding programs, the district faces "certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.'" Only a showing that relying on alternative arrangements to house students would result in such severe consequences will meet the practical compulsion standard. Some alternatives that school districts can employ without requesting SFP funds, issuing local bonds or participating in the other voluntary programs pled in this test claim, thus triggering the requirement to comply with SFFRs, include but are not limited to:

- Transferring students to other schools;[207]
- Double session kindergarten classes;
- District boundary changes;
- Multi-track year round scheduling;
- Bussing; and,
- Reopening closed school sites in the district, where available.

Thus, the Commission finds that there has been no concrete showing, as required by the *POBRA* court, that reliance upon non-construction alternatives to house students would result in severe adverse consequences.

Thus, there is no evidence in the law or in the record that school districts that elect not to use SFP funds, issue local bonds, or participate in the other voluntary programs pled in this test claim, which would trigger the requirement to comply with the SFFRs, face certain and severe penalties such as double taxation or other draconian consequences.

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[206] *POBRA*, *supra*, 170 Cal.App.4th 1355, 1368, citing *Kern*, *supra*, 30 Cal.4th at p. 754, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[207] See California Code of Regulations, title 14, section 15301.

Instead, the seeking of SFP funding, issuance of local bonds or participation in other voluntary programs pled in this test claim are discretionary decisions of the district, analogous to the situation in *City of Merced*. There, the issue before the court was 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.[208] The court stated:

> Whether 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.[209]

The Supreme Court in *Kern* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> 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.[210] [211]

The holding in *City of Merced* applies in this instance. Any costs incurred under the SFFRs in the test claim statutes and regulations (excepting Health & Saf. Code § 25358.1) result from the school district's decision acquire new school sites, build new schools, undertake modernization projects, add portable classrooms or to request and accept SFP funding, issue local bonds or opt to participate in

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[208] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[209] *Id*. at 783.

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

[211] The Code of Civil Procedure provision that was cited in *City of Merced* states:

Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property. (Code Civ. Proc., § 1230.030.)

The Law Revision Commission's comment on this provision stated:

Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. … (California Law Revision Commission comment on Code of Civil Procedure section 1230.030, 2009 Thomson Reuters.)

other state programs therefore. Under such circumstances, reimbursement is not required.[212] Therefore, based on the above discussion, the Commission finds that school districts are not mandated by the state to undertake discretionary projects and participate in the voluntary funding programs pled in this test claim, which would subject them to SFFRs.

CONCLUSION

The Commission concludes that the test claim statutes do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution because:

1. Education Code sections 39003 and 39120 were repealed in 1993, prior to the beginning of the potential reimbursement period for this test claim and thus cannot be reimbursable.
2. The Commission does not have jurisdiction over Education Code section 17213.1, as added by Statutes of 1999, chapter 1002 (SB 62), because this statute was the subject of a final decision of the Commission, *Acquisition of Agricultural Land for a School Site* (98-TC-04 and 01-TC-03).
3. Health and Safety Code section 25358.1, as added by Statutes 1999, chapter 23 (SB 47) does not impose a "program" and thus is not subject to reimbursement under article XIII B, section 6 of the California Constitution.
4. The Substantial Progress and Expenditure Audit Guide of May 2003, the School Facility Program Guidebook of January 2003, the State Relocatable Classroom Program Handbook of January 2003, and the Lease-Purchase Applicant Handbook of April 1988 are not executive orders subject to Article XIII B, section 6.
5. Health and Safety Code section 25358.7.1, as added by Statutes 1999, chapter 23 (SB 47), imposes requirements on DTSC, not school districts.
6. The statutes below, which generally require compliance school facility funding requirements, do not mandate school districts to perform any activities because:
    a) School districts are not legally compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.
    b) There is no evidence in the record to support a finding that school districts are practically compelled to: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, request and accept SFP funding, issue local bonds, or opt to participate in other state programs to further such projects, which would trigger the requirement to comply with SFFRs contained in the test claim statutes and regulations.

Education Code Sections 15271, 15272, 15274, 15276, 15278, 15280, 15282, 15284, 15301, 15302, 15303, 15320, 15321, 15322, 15323, 15324, 15325, 15326, 15327, 15336, 15340, 15341, 15342, 15343, 15346, 15347, 15349, 15349.1, 15350, 15351, 15352, 15354, 15355, 15359.2, 15359.3, 15380, 15381, 15384, 15390, 15391, 17006, 17008.3, 17009, 17009.5, 17014, 17015, 17016, 17017, 17017.2, 17017.5, 17017.6, 17017.7, 17017.9, 17018, 17018.5, 17018.7, 17019.3, 17019.5, 17020, 17021.3, 17022, 17022.7, 17024, 17025, 17029, 17029.5, 17030, 17030.5, 17031, 17032, 17032.3, 17032.5,

[212] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 880.

17036, 17038, 17040, 17040.1, 17040.2, 17040.3, 17040.6, 17040.7, 17040.8, 17041.1, 17041.2, 17041.8, 17042.7, 17042.9, 17047, 17047.5, 17049, 17056, 17059, 17059.1, 17061, 17062, 17063, 17064, 17065, 17066, 17070.33, 17070.50, 17070.51, 17070.60, 17070.63, 17070.70, 17070.71, 17070.75, 17070.77, 17070.80, 17070.90, 17070.95, 17070.97, 17070.98, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.46, 17071.75, 17072.10, 17072.12, 17072.13, 17072.20, 17072.33, 17072.35, 17073.10, 17074.10, 17074.15, 17074.16, 17074.20, 17074.25, 17074.26, 17074.30, 17074.50, 17074.52, 17074.54, 17074.56, 17075.10, 17075.15, 17076.10, 17076.11, 17077.10, 17077.30, 17077.35, 17077.40, 17077.42, 17077.45, 17078.18, 17078.20, 17078.22, 17078.24, 17078.25, 17088.3, 17088.5, 17088.7, 17089, 17089.2, 17090, 17092, 17096, 17110, 17111, 17150, 17180, 17183.5, 17193.5, 17194, 17199.1, 17199.4, 17210, 17210.1, 17211, 17212, 17212.5, 17213, 17213.1, 17213.2, 17251, 17315, and 100620 as added or amended by Statutes 1976, Chapter 557; Statutes 1977, Chapter 242; Statutes 1978, Chapter 362; Statutes 1982, Chapter 735; Statutes 1990, Chapter 1602; Statutes 1991, Chapter 1183, Statutes 1996, Chapter 277; Statutes 1997, Chapters 513, 893, and 940; Statutes 1998, Chapters 407, 485, 691, 741, 848, 941, 957, and 1076; Statutes 1999, Chapters 133, 709, 858, 992; Statutes 2000, Chapters 44, 193, 443, 530, 590, and 753; Statutes 2001, Chapters 132, 159, 194, 422, 647, 725, 734 and 972; and Statutes, 2002, Chapters 33, 199, 935, 1075, and 1168;

Public Resources Code sections 21151.4 and 21151.8 as amended by Statutes 2003, Chapter 668; Statutes 2004, Chapter 689; Statutes 2007, Chapter 130: and Statutes 2008, Chapter 148; and

California Code of Regulations, Title 2, Sections 1859.20, 1859.21, 1859.22, 1859.30, 1859.31, 1859.32, 1859.33, 1859.35, 1859.40, 1859.41, 1859.50, 1859.60, 1859.70, 1859.72, 1859.74.1, 1859.75, 1859.75.1, 1859.76, 1859.77.1, 1859.77.2, 1859.79, 1859.79.2, 1859.79.3, 1859.81, 1859.81.1, 1859.82, 1859.90, 1859.100, 1859.102, 1859.104, 1859.104.1, 1859.104.2, 1859.104.3, 1859.105, 1859.105.1, 1859.106, 1859.107, 1862.52, 1862.53, 1865.3, 1865.8, 1865.32.5, 1865.33, 1865.39, 1865.42, 1865.43, 1865.50, 1865.70.

Glossary of Frequently Used SFFRs Related Terms and Acronyms:

CEQA: California Environmental Quality Act	An Act with the purposes of informing decision makers and the public about project impacts, identifying ways to avoid or significantly reduce environmental damage, preventing environmental damage by requiring feasible alternatives or mitigation measures, disclosing to the public reasons why an agency approved a project if significant environmental effects are involved, involving public agencies in the process, and increasing public participation in the environmental review and the planning processes.
CERCLA: federal Comprehensive Environmental Response, Compensation, and Liability Act	HSAA is a 1980 law passed to address the cleanup of abandoned toxic waste sites. DTSC administers CERCLA, commonly known as "Superfund", which is implemented in California through HSAA and related regulations.
DOE: California Department of Education	
DOF: California Department of Finance	
DTSC: California Department of Toxic Substances Control	
EIR: Environmental Impact Report	A detailed statement prepared in accordance with CEQA whenever it is established that a project may have a potentially significant effect on the environment. The EIR describes a proposed project, analyzes potentially significant environmental effects of the proposed project, identifies a reasonable range of alternatives, and discusses possible ways to mitigate or avoid the significant environmental effects. EIR can refer to the draft EIR (DEIR) or the final EIR (FEIR) depending on context. (Pub. Resources Code §§ 21061, 21100 and 21151; Cal. Code Regs., tit. 14, § 15362.)
HMAs: Hazardous Materials Assessments	Environmental studies conducted to provide basic information for determining if there has been a release or there is a threatened release of a hazardous material or if there may be a naturally occurring hazardous material present at the site which may pose a risk to human health or the environment.
HSAA: The Hazardous Substance Account Act	California's equivalent to CERCLA. HSAA funds the cleanup of toxic sites from a fund created from taxes and fines levied on the site's polluters, and imposes requirements on affected property owners and potentially responsible parties and a number of related requirements on state agencies.
ND: Negative Declaration	A written statement by the lead agency that briefly states why a project subject to CEQA will not have a significant effect on the

	environment. An ND precludes the need for an EIR. (Pub. Resources Code § 21064; Cal. Code Regs., tit. 14, § 15371.)
OPSC : Office of Public School Construction	The administrative arm of the SAB whose primary responsibilities include: allocating state funds for projects approved by the SAB, reviewing eligibility and funding applications, and providing information and assistance to school districts.
Phase I Assessment	HMA prepared to identify the potential for hazardous material release or the presence of naturally occurring hazardous materials.
PEA: Preliminary Endangerment Assessment	HMA prepared if the Phase I Assessment identified potential or actual hazardous materials to evaluate the threat posed to public health or the environment.
SAB: State Allocation Board	The board responsible for approving all state apportionments for new school construction and modernization projects.
SFP: State School Facility Program	A state grant program, funded with statewide bonds, to fund new school facilities and the modernization of existing school facilities.
SFFRs: School Facilities Funding Requirements	Activities required as a condition of funding or participation in state school facility programs.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

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

Filed on June 27, 2003 by

Clovis Unified School District, Claimant

Case No.: 02-TC-44

Deferred Maintenance Programs

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

(*Adopted: October 27, 2011*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on October 27, 2011. Art Palkowitz testified on behalf of claimant, Clovis Unified School District, and Susan Geanacou testified on behalf of Department of Finance.

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 the proposed statement of decision to deny the test claim at the hearing by a vote of 5-0.

Summary of the Findings

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.

The Commission 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 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.

COMMISSION FINDINGS

Chronology

06/27/2003	Claimant, Clovis Unified School District, filed the test claim with the Commission on State Mandates (Commission)[1]
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 (CDE) 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
08/29/2011	Commission staff issued the draft staff analysis

I. Background

This test claim addresses activities required as a condition of participation in a state grant program: the Deferred Maintenance Program (DMP). Statutes 1979, chapter 282 (AB 8) established the DMP to assist school districts in maintaining school buildings. 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

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

the district's total annual general fund budget exclusive of capital outlay or debt service. 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.[2]

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."

[2] 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.[3] 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.[4] 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.[5]

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.[6] DOF asserts that the cited state laws do not create a reimbursable program; therefore the test claim should be denied.[7] Specifically, DOF states:

> As noted in the CUSD's test claim, Education Code section 17582 states, "the governing board of each school may establish a restricted fund to be known as the

[3] Claimant, test claim, p. 55 (Exhibit A).

[4] *Ibid* (Exhibit A).

[5] Claimant, test claim, p.p. 55-68; for a detailed list of activities alleged see pages 55-68 of the test claim (Exhibit A).

[6] DOF, comments on the test claim, September 15, 2003, p. 1 (Exhibit E).

[7] *Ibid* (Exhibit E).

'district deferred maintenance fund' for the purpose of major repair and replacement of plumbing, heating, air conditioning, electrical, roofing…" (underlining added). 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>[8]

(Emphasis in the original.)

C. Department of Education's Position

CDE asserts that the test claim statutes do not impose a mandated program.[9] 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.[10] Any requirements regarding this program are applicable only after districts elect to participate in the program.[11]

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.[12]

Additionally, OPSC concludes that Government Code section 17556(d) precludes the Commission from finding costs mandated by the State because districts have the authority

[8] *Ibid*, underlining in the original (Exhibit E).

[9] CDE, comments on the test claim, August 11, 2003, p. 2.

[10] *Ibid*.

[11] *Ibid*.

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

to meet program costs through the passage of local bonds, developer fees for capital outlay needs, and other revenue sources.[13]

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

- Excess repayments from the State School Building Aid Program (SSBAP)
- State School Site Utilization Fund, and
- Appropriations in the Budget Act.[14]

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[15]

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."[16] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[17]

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[13] *Id*, p. 2.

[14] OPSC, comments on the test claim, *supra*, p. 3 (Exhibit B).

[15] *Ibid* (Exhibit B).

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

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

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.[18]
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.[19]
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.[20]
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. [21]

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.[22] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[23] 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."[24]

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

The Commission 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

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

[19] *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).

[20] *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.

[21] *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.

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

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

[24] *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.

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."[25] 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."[26] 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."[27]

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, the Commission 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, the Commission 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.

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[25] Office of Public School Construction, Deferred Maintenance Program Handbook, 2003, p. iii (Exhibit A).

[26] *Ibid* (Exhibit A).

[27] *Ibid* (Exhibit A).

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.[28] 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 existing school building components."[29] 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.[30]

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…;[31]
- …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*;[32]
- …*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

[28] California Code of Regulations, title 2, section 1866 (Exhibit A).

[29] Deferred Maintenance Program Handbook, Office of Public School Construction. January 2003 (Exhibit A).

[30] Education Code section 17582(a) (Exhibit A).

[31] Education Code section 17582 (Exhibit A).

[32] Education Code section 17583 (Exhibit A).

than ½ percent of the district's current-year revenue limit daily average attendance. . .;[33]

- *School districts may submit applications* to the State Allocation Board for deferred maintenance funding in addition to the amounts specified in Section 17584…;[34]
- *Each district desiring an apportionment* pursuant to Section [17584] shall file with the State Allocation Board and receive approval of a five-year plan…,[35]
- "*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";[36]

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.[37]

[33] Education Code section 17584(c) (Exhibit A).

[34] Education Code section 17585 (Exhibit A).

[35] Education Code section 17591 (Exhibit A).

[36] Education Code section 49410.2 (Exhibit A).

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.

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."[38] 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. . ."[39] 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. . . ."[40] 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."[41] The Article 3 (DMP Application Procedure) regulations include the introductory language "an eligible district seeking funding."[42] 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

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[37] Education Code section 17584.1 as added by Statutes 1999, chapter 390 (Exhibit A).

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

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

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

[41] Title 2, California Code of Regulations, section 1866.1 (Exhibit A).

[42] See Title 2, California Code of Regulations, sections 1866.2, 1866.2 (Exhibit A).

amount will trigger the report to the Legislature required by Education Code section 17854.1.[43] 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.

The comments submitted by DOF, CDE 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. . ."[44] The provision in the preface of the Handbook defining "district" supports

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[43] See Article 4 of the SAB regulations, 2, California Code of Regulations, sections 1866.4-1866.4.7 (Exhibit A).

[44] Deferred Maintenance Program Handbook, 2003, Appendix 5 (Exhibit A).

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."[45] 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.[46] Therefore, the Commission 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 and regulations do not qualify as a state-mandated program within the meaning of article XIII B, section 6.[47]

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. . ."[48]

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.[49] 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

[45] *Id*., Preface, p. iii (Exhibit A).

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

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

[48] *Id.* at page 731.

[49] *Id.* at page 754.

> 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.)[50]

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:

> [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.[51]

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.[52]

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[50] *Id.* at page 753.

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

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

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.[53] The Legislature enacted of the Leroy Greene State School Building Lease-Purchase Law in 1976 which provided school facility loans to school districts.[54] 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.[55] 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 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.[56] 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.[57]

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.[58]

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[53] 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) (Exhibit I).

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

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

[56] Education Code section 17070.75.

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

[58] Education Code section 15302.

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.[59]

The Commission 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

The Commission 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 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.

[59] 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) (Exhibit I.)

Adopted: October 27, 2011

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 84660 Statutes 1981, Chapter 764; Statutes 1990, Chapter 1372 California Code of Regulations, Title 5, Sections 57201, 57202, 57205 Register 82, No. 28 (July 10, 1982), Pages 677-678; Register 91, No. 23 (June 7, 1991) Pages 377-378; Register 95, No. 23 (June 9, 1995) Page 379 "Preparation Guidelines for Scheduled Maintenance and Hazardous Substances Project Funding Proposals" Chancellor's Office, California Community Colleges Filed on June 27, 2003 by Santa Monica Community College District, Claimant	Case No.: 02-TC-48 *Deferred Maintenance (CCD)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted on October 27, 2011*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on October 27, 2011. Keith Petersen appeared on behalf of the claimant. Susan Geanacou appeared on behalf of the Department of Finance.

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 the staff analysis to deny the test claim at the hearing by a vote of 5-0.

Summary of the Findings

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

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

The Commission disagrees with the claimant's argument that community colleges are practically compelled to participate in the program and comply with the requirements. The Supreme Court in the *Kern School Dist.* case described practical compulsion as "if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program…"[1] There is no such penalty in the test claim statutes, regulations, or manual, and no evidence that community college districts will suffer "certain and severe penalties" or other "draconian consequences" if they do not participate. Thus, the state has not imposed a state-mandated program on community college districts.

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

COMMISSION FINDINGS

Chronology

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

I. Background

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

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

which it was intended." (Ed. Code, § 84660(b)[2].) The Legislature stated the purpose of the test claim statute as follows:

> The Legislature finds and declares that it is in the interests of the people of the State of California to ensure that the facilities of the California Community Colleges are repaired and maintained on a timely basis in order to provide for the safe utilization of these facilities as well as providing for the prevention of further structural damage resulting in more costly repairs. The Legislature recognizes that in many community college districts high operating costs and limited district revenues have combined to restrict the ability of community college districts to provide for the periodic maintenance and timely repair of community college facilities.
>
> It is the intent of the Legislature in enacting this chapter that funds be allocated pursuant to the requirements of this chapter to provide for the deferred maintenance and special repair of community college facilities. However, the Legislature recognizes that there may not be sufficient revenues in future years to provide an annual appropriation for the program provided by this chapter. *Therefore, nothing in this chapter shall be construed to create an annual state obligation to fund this program.* (§ 84660, Stats. 1981, ch. 764, Stats. 1990, ch. 1372; emphasis added.)

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

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

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

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

[2] All statutory references are to the Education Code unless otherwise indicated.

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

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

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

> [D]istricts submit individual project proposals identifying the scope and justification for each project. For fiscal year 1999-2000 over 1,200 scheduled maintenance projects valued at over $210 million are identified in the individual project proposals. With the funds in this on-going program the state is able to address $78 million in projects for 1999-00. Some of the common types of problems that tend to plague the colleges are, in priority order: roof, mechanical, and utility repairs/replacement; infrastructure/land erosion control; replacement of doors, windows, floors, ceiling and hardware; exterior/interior refurbishing; and resurfacing of tennis courts, swimming pools, walkways, running tracks and roadways.[3]

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

The Chancellor's Office manual includes similar information on the Hazardous Substances program, a parallel "local assistance" program to help districts "in the control of environmental hazards such as asbestos materials, polychlorinated biphenyl (PCB), lead, chemical removal, radon, and underground tanks and their contents, which pose an immediate danger to human health and safety at California community college facilities."[4] According to the manual, "[a] Hazardous Substances Project Funding Proposal (241/HS/PFP) is used for requesting financial support for local assistance funds in the state program's budget for that project."[5] The manual's

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

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

[5] *Id.* at page 23.

instructions are "intended for districts who wish to participate in the state-assisted Hazardous Substances Program assuming availability of funds."[6]

II. Positions of the Parties and Interested Parties

A. Claimant's Position

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

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

[6] *Id.* at page 24.

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

- Clearly identify project type, facility type(s) involved, how long the problem existed, and the adverse effects if uncorrected (a safety hazard must be supported by valid documentation), pursuant to the Chancellor's Office manual, page 6.
- Include construction management costs (including expenditures for Architects, Engineering, Permit Fees, Plan Check Fees, as well as Construction Management) as a supplemental element of the project cost estimate in the "Permits and Fees" budget summary line item, pursuant to the Chancellor's Office manual, pages 6, 7.

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

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

- Clearly identify project type, facility type(s) involved, how long the problem existed, and the adverse effects if uncorrected (a safety hazard must be supported by valid documentation), pursuant to the Chancellor's Office manual, page 25.
- Include construction management costs (including expenditures for Architects, Engineering, Permit Fees, Plan Check Fees, as well as Construction Management) as a supplemental element of the project cost estimate in the "Permits and Fees" budget summary line item, pursuant to the Chancellor's Office manual, pages 25, 26.

- Use, as may be necessary, district staff for completion of projects if their staff performs these tasks on overtime or weekends, or temporary staff hired to perform tasks from the beginning to the completion of project, pursuant to the Chancellor's Office manual, page 26.
- Issue a written request to the Chancellor's Office Facilities Planning Unit identifying any revisions a district needs to make to the preliminary list of projects to ensure that the scope, costs and projected match requirements are still feasible, pursuant to the Chancellor's Office manual, page 26.
- Submit the final year claims by May 15th of the fourth year to the Chancellor's Office, pursuant to the Chancellor's Office manual, page 27.
- Notify the program monitor and supply information, if the bid amount is greater than the amount of the proposal, any information of why the bid is greater than the initial cost estimate and how the district plans on meeting the shortfall of funding while addressing the scope of the proposal, pursuant to the Chancellor's Office manual, page 27.
- Submit claims to the Chancellor's Office on a monthly basis for work complete or in progress, except for claims of less than $1,000 (unless it is the final claim), pursuant to the Chancellor's Office manual, page 28.
- Include in any claims containing district staff hourly charges, the detailed itemized records for the direct expenses showing work performed beyond the normal work period, pursuant to the Chancellor's Office manual, page 28.

Claimant argues that the comments of the Department of Finance and Chancellor's Office should be excluded from the record because they are not accompanied by a declaration under penalty of perjury that they are true and complete to the best of the representative's personal knowledge or information or belief.[7]

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

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

B. State Agencies' Positions

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

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

III. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[8] Thus, the subvention requirement of section 6 is "directed to state mandated increases in the services provided by [local government] …"[9]

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.[10]
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.[11]

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

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

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

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

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

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[12]

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. [13]

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.[14] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[15] 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."[16]

Issue 1 – Is the Chancellor's Office manual an "executive order" over which the Commission has jurisdiction?

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

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

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

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[12] *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.

[13] *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.

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

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

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

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

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

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

As indicated above, reimbursement under article XIII B, section 6 is required only when, among other requirements, the state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[17] The Commission finds that the test claim statute, regulations, and manual do not impose a state-mandated program on community college districts because all the activities are only required as a condition of seeking funds in the deferred maintenance program.

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

> It is the intent of the Legislature in enacting this chapter that *funds be allocated pursuant to the requirements of this chapter* to provide for the deferred maintenance and special repair[18] of community college facilities. However, the Legislature recognizes that there may not be sufficient revenues in future years to provide an annual appropriation for the program provided by this chapter. Therefore, *nothing in this chapter shall be construed to create an annual state obligation* to fund this program. (§ 84660, emphasis added.)
>
> No community college district *shall receive funds pursuant to this chapter* unless the district expends at least ½ percent of its current operating budget for ongoing maintenance. (§ 84660(c), emphasis added.)

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

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

[17] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874.

[18] "For the purpose of this chapter, 'deferred maintenance and special repair' means unusual, nonrecurring work to restore a facility to a safe and continually useable condition for which it was intended." (§ 84660(b).)

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

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

> Each community college district *applying to receive funds* pursuant to this chapter shall:
>
> (a) Prepare and submit to the Chancellor a current five-year maintenance plan. . . .
>
> (b) Maintain a level of ongoing maintenance during the year *for which funds are requested* commensurate with the level of activity in prior years. (§ 57201, emphasis added.)
>
> Districts shall *apply* to the Chancellor's Office for funding for deferred maintenance in the form and manner specified by the Chancellor. (§ 57202.)
>
> The Chancellor will allocate funds for only 50 percent of the costs for a deferred maintenance project. *In accepting funds under this chapter,* a district agrees to spend district funds necessary to complete the project. The Chancellor may waive this requirement . . . [under specified circumstances]. (§ 57205, emphasis added.)

And according to the Chancellor's Office manual:

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

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

Generally, a community college district has the discretionary authority to: 1) acquire property necessary to carry out the powers or functions of the district; 2) manage and control district property; 3) determine and control the district's operational and capital outlay budgets; and (4) receive and administer gifts and grants.[19] Although community college districts are required to repair school property,[20] they are not required to seek state funding assistance to pay for the repairs. The plain language of the program provides that any community college may submit a

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

[20] Education Code section 81601.

proposed project for review and approval, and "request" state funding assistance.[21] Thus, it is the decision of a community college district to seek state funding assistance for proposed deferred maintenance projects that triggers the activities identified in the test claim statute, regulations, and manual. Under these circumstances, the activities are not mandated by the state.[22]

A community college district is required by state law to apply for state funding assistance under the Community College Construction Act (§§ 81800 et seq.) whenever the district does not have the funds available to repair, reconstruct, or replace school buildings that have been determined by a licensed structural engineer or licensed architect to be unsafe for use.[23] The Deferred Maintenance program, however, is not part of the Community College Construction Act. Moreover, a community college district has other options to pursue projects, such as issuing bonds.[24] The claimant, in comments on the draft staff analysis, misconstrues this conclusion that the district has "a legal requirement to apply for funds." This is only true for funds under the Community College Construction Act and not for the Deferred Maintenance and Special Repair program.

The California Supreme Court declared: "The proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[25] This approach places the focus of inquiry on the local agency's (or community college district's) initial decision whether or not to participate in the underlying program. Accordingly, where decision-making authority is reserved to a local agency, school district, or community college district, and that entity chooses to participate in a voluntary underlying program, the Legislature may issue requirements directing consequent conduct concerning that program. These "downstream" requirements with which the community college district entity must comply do not constitute reimbursable state mandates, as the Supreme Court stated in *Kern School Dist*:

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

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

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

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

[24] Education Code section 81901 et seq.

[25] *Kern High School Dist., supra,* 30 Cal.4th 727, 743.

> even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[26]

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

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the . . . requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, on balance, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.[27]

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

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

The Commission disagrees. The Supreme Court in the *Kern* case described practical compulsion as "if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program…"[28] The penalty must be "certain and severe," such as a penalty imposing "double taxation" or "other draconian consequences" on the district.[29] There is no such penalty in the test claim statutes or regulations. In fact, the *Kern* court rejected a practical compulsion argument that was similar to claimant's by stating: "the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of various funded programs 'too good to refuse' even though, as a condition of program participation, they have been forced to incur some costs."[30]

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[26] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[27] *Kern High School Dist., supra*, 30 Cal.4th 727, 753.

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

[29] *Id*. at page 752.

[30] *Id.* at page 731.

IV. Conclusion

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Education Code Sections 39831.5 [Former Section 38048], 38047.5, 38047.6 Vehicle Code Sections 22112, 22454, 27316, 27316.5 Statutes 1999, Chapter 647 (AB 1573); Statutes 1999, Chapter 648 (AB 15); Statutes 2001, Chapter 581 (SB 568); Statutes 2002, Chapter 360 (AB 2681); Statutes 2002, Chapter 397 (SB 1685) Filed on July 2, 2003, By San Diego Unified School District, Claimant.	Case No.: 03-TC-01 *School Bus Safety III* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on May 26, 2011)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 26, 2011. Art Palkowitz appeared on behalf of San Diego Unified School District. Donna Ferebee appeared on behalf of the Department of Finance.

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 the staff analysis at the hearing by a vote of 5-1 to deny this test claim.

Summary of Findings

This test claim filed by San Diego Unified School District addresses statutes that impose activities on school districts, including giving school bus safety instructions to pupils, informing parents of school bus safety procedures, requiring specific duties of school bus drivers, and having pelvic and upper torso passenger restraint systems in school buses and school pupil activity buses.

The Commission finds that some of the test claim statutes do not impose any activities on school districts or do not impose new programs or higher levels of service on school districts. In addition, school districts are authorized, but not required, to provide school bus or school pupil activity bus transportation of pupils to and from school under state law. In addition, under federal law districts are not required to provide school bus or school pupil activity bus transportation of pupils with disabilities. As a result, the also Commission finds that the test claim statutes do not impose state-mandated activities on school districts.

The Commission findings are consistent with the court's judgment in *State of California Department of Finance v. Commission on State Mandates* (02CS00994), the Commission's decision on remand regarding the *School Bus Safety II* (97-TC-22) test claim, and the decision in

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

The Commission concludes that Education Code sections 39831.5 (former section 38048) (Stats. 1999, ch. 648), 38047.5 (Stats. 1999, ch. 648), and 38047.6 (Stats. 2002, ch. 360); and Vehicle Code sections 22112 (Stats. 1999, ch. 647, and Stats. 2002, ch. 397), 22454 (Stats. 1999, ch. 647), 27316 (Stats. 1999, ch. 648, and Stats. 2001, ch. 581), and 27316.5 (Stats. 2002, ch. 360), do not impose reimbursable state-mandated programs on school districts within the meaning of article XIII B, section 6 of the California Constitution.

BACKGROUND

This test claim filed by San Diego Unified School District alleges reimbursable state-mandated activities imposed on school districts, including giving school bus safety instructions to pupils, informing parents of school bus safety procedures, requiring specific duties of school bus drivers, and having pelvic and upper torso passenger restraint systems in school buses and school pupil activity buses.[1]

Prior to the filing of this test claim, the Commission heard the *School Bus Safety II* (97-TC-22) test claim, which was filed by Clovis Unified School District in 1997. The *School Bus Safety II* (97-TC-22) test claim addresses prior versions of some of the statutes in the current test claim. Specifically the test claim statutes pled in the *School Bus Safety II* (97-TC-22) test claim were Education Code sections 39831.5 (former section 38048) and 39831.3, and Vehicle Code section 22112, as added or amended by Statutes 1994, chapter 831, Statutes 1996, chapter 277, and Statutes 1997, chapter 739. In this test claim, the claimant has pled various statutes, including subsequent amendments that occurred in 1999 and 2002 to Education Code section 39831.5 (former section 38048), and Vehicle Code section 22112.[2]

On July 29, 1999, the Commission adopted a statement of decision for *School Bus Safety II* (97-TC-22), which concluded that the test claim legislation imposed the following reimbursable state-mandated activities:

- Instructing all prekindergarten and kindergarten pupils in school bus emergency procedures and passenger safety. (Ed. Code, § 39831.5, subd. (a); Ed. Code, § 38048, subd. (a).)
- Determining which pupils in prekindergarten, kindergarten, and grades 1 to 6, inclusive, have not been previously transported by a school bus or school pupil activity bus. (Ed. Code, § 39831.5, subd. (a)(1); Ed. Code, § 38048, subd. (a)(1).)

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[1] Education Code section 39830.1 defines "school pupil activity bus" as any motor vehicle, other than a school bus, operated by a carrier in business for the principal purpose of transporting members of the public on a commercial basis, which is used under a contractual agreement between a school and the carrier to transport school pupils at or below the 12th grade level to or from a public or private school activity, or used to transport pupils to or from residential schools, when the pupils are received and discharged at off-highway locations where a parent is present to accept the pupil or place the pupil on the bus.

[2] Education Code section 39831.5 and Vehicle Code section 22112, as amended by Statutes 1999, chapter 647; and Vehicle Code section 22112, as amended by Statutes 2002, chapter 397.

- Providing written information on school bus safety to the parents or guardians of pupils in prekindergarten, kindergarten, and grades 1 to 6, inclusive, who were not previously transported in a school bus or school pupil activity bus. (Ed. Code, § 39831.5, subd. (a)(1); Ed. Code, § 38048, subd. (a)(1).)
- Providing updates to all parents and guardians of pupils in prekindergarten, kindergarten, and grades 1 to 6, inclusive, on new school bus safety procedures as necessary. The information shall include, but is not limited to: (A) a list of school bus stops near each pupil's home; (B) general rules of conduct at school bus loading zones; (C) red light crossing instructions; (D) school bus danger zones; and (E) walking to and from school bus stops. (Ed. Code, § 39831.5, subd. (a)(1); Ed. Code, § 38048, subd. (a)(1).)
- Preparing and revising a school district transportation safety plan. (Ed. Code, § 39831.3, subds. (a), (a)(1), (a)(2)(A), (a)(3), and (b).)
- Determining which pupils require escort. (Vehicle Code section 22112, subd. (c)(3).)
- Ensuring pupil compliance with school bus boarding and exiting procedures. (Ed. Code, § 39831.3, subds. (a), (a)(1), (a)(2)(A), (a)(3), and (b).)
- Retaining a current copy of the school district's transportation safety plan and making the plan available upon request by an officer of the Department of the California Highway Patrol. (Ed. Code, § 39831.3, subds. (a), (a)(1), (a)(2)(A), (a)(3), and (b).)
- Informing district administrators, school site personnel, transportation services staff, school bus drivers, contract carriers, students, and parents of the new Vehicle Code requirements relating to the use of the flashing red signal lamps and stop signal arms. (Veh. Code, § 22112.)

However, in *State of California Department of Finance v. Commission on State Mandates* (02CS00994), the Commission's decision in *School Bus Safety II* was challenged in Sacramento County Superior Court. The petitioner, Department of Finance, sought a writ of mandate directing the Commission to set aside the prior decision and to issue a new decision denying the test claim, for the following legal reasons:

- The transportation of pupils to school and on field trips is an optional activity because the State does not require schools to transport pupils to school or to undertake school activity trips.
- Prior to the enactment of the test claim legislation, the courts determined that when schools undertook the responsibility for transporting pupils they were required to provide a reasonably safe transportation program.
- To the extent the test claim legislation requires schools to transport pupils in a safe manner and to develop, revise, and implement transportation safety plans, the test claim legislation does not impose a reimbursable state mandate because these activities are undertaken at the option of the school district and the legislation merely restates existing law, as determined by the courts, that schools that transport students

> do so in a reasonably safe manner. Therefore the test claim legislation does not require school districts to implement a new program or higher level of service.[3]

On December 22, 2003, the court entered judgment for Finance. By granting Finance's petition the court agreed that the *School Bus Safety II* test claim was not a reimbursable state-mandated program to the extent that the underlying school bus transportation services were discretionary. On February 3, 2004, the court ordered the Commission to set aside the prior statement of decision and to vacate the parameters and guidelines and statewide cost estimate issued with respect to the *School Bus Safety II* test claim. At the March 25, 2004 Commission hearing, the Commission set aside the original *School Bus Safety II* decision and vacated the applicable parameters and guidelines and statewide cost estimate.[4]

However, the court left one issue for remand: the Commission must reconsider the limited issue of whether the federal Individuals with Disabilities Education Act (IDEA) or any other federal law requires school districts to transport any students and, if so, whether the *School Bus Safety II* test claim statutes mandate a higher level of service or new program beyond federal requirements for which there are reimbursable state-mandated costs.

On remand, the Commission found that although federal law may require *transportation* of disabled children under certain circumstances, the law does not require school districts to provide a *school bus* transportation program. In addition, the Commission states, "even if school bus transportation is used for [students with disabilities], there is no evidence in the record that the state and federal funding provided for transporting children with disabilities is inadequate to cover any pro rata cost that may result from the test claim statutes."[5] Therefore the Commission found that the *School Bus Safety II* test claim statutes do not impose a new program or higher level of service beyond federal requirements for which there are reimbursable state-mandated costs.

Because the Commission has already made a mandate determination in its decision on *School Bus Safety II* (97-TC-22) regarding Education Code section 39831.5 (former section 38048), and Vehicle Code section 22112, as they existed prior to the 1999 amendments pled in this test claim, the Commission does not have jurisdiction to make a mandate determination on the activities contained in the prior versions of the code sections.[6] As a result, the discussion regarding these

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[3] Petition for Writ of Administrative Mandamus and Complaint for Declaratory Relief, dated July 9, 2002, pages 4-5.

[4] The original *School Bus Safety* (CSM-4433) statement of decision and parameters and guidelines were not part of the litigation.

[5] Commission statement of decision for *School Bus Safety II* (97-TC-22) (Remand), March 30, 2005, p. 9.

[6] Government Code section 17521 defines "test claim" as the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. On April 26, 1994, the Commission made a mandate determination on Education Code section 39831.5 (former section 38048) and Vehicle Code section 22112, as amended by Statutes 1992, chapter 624, which were pled in the *School Bus Safety* (CSM-4433). On March 30, 2005, the Commission made a mandate determination on Education Code section 39831.5 (former section 38048) and Vehicle Code section 22112, as amended by Statutes 1996, chapter 277 and Statutes 1997, chapter 739, which were pled in the *School Bus Safety II* (97-TC-22).

code sections will only address substantive amendments made to the code sections in Statutes 1999, chapters 647 and 648, and Statutes 2002, chapter 397.

The court's judgment in *State of California Department of Finance v. Commission on State Mandates* (02CS00994), and the Commission's subsequent decision on remand denying the *School Bus Safety II* (97-TC-22) test claim, were made after the filing of this test claim. The claimant has not withdrawn this test claim in light of the court's judgment and the Commission's decision. In addition, neither the claimant nor the Department of Education filed comments regarding the impact of the court's judgment and the Commission's decision on the current test claim.

A. Claimant's Position

Prior to the court's judgment and the Commission's decision regarding *School Bus Safety II* (97-TC-22), which found that the provision of school bus transportation services is discretionary, the claimant alleged that the test claim statutes impose reimbursable state-mandated activities, which include: providing instruction to pupils in school bus emergency procedures and passenger safety, providing information on school bus safety to parents, requiring the school bus driver to engage in specific activities when approaching specified areas and loading and unloading pupils, and purchasing or leasing buses equipped with pelvic and upper torso passenger restraint systems.[7]

The Commission has not received any comments from the claimant in response to the draft staff analysis.

B. Department of Education

Prior to the court's judgment and the Commission's decision, which denied the *School Bus Safety II* (97-TC-22) test claim and vacated the applicable parameters and guidelines, the Department of Education argued the following:

> In general, we note that because the test claim legislation builds upon existing mandated programs and training, the cost of the activities cited by the claimant would appear to be minimal. Especially, in light of the recent amended consolidated School Bus Safety Parameters and Guidelines, which are expected to substantially reduce the cost of the original mandate.
>
> On Page 17, Section D. Costs Incurred or Expected to be Incurred from Mandate, the claimant states that it will incur costs due to higher costs associated with increased school bus purchase prices due to new passenger restraint systems, additional buses due to decreased capacity as a result of new passenger restraint systems, additional drivers, additional maintenance, and additional storage costs. However, several manufacturers have developed or are developing seating systems that do not reduce school bus capacity and it is unclear what, if any, cost will actually be added to the price of school buses. Furthermore, the new requirements will apply to all school buses manufactured for use in California, not just those purchased by public school districts. Therefore, the requirements will apply equally to both public and private entities, which means that these requirements do not meet the test of imposing a requirement unique to

[7] Test Claim 03-TC-01, dated July 2, 2003, pgs. 11-17.

government. As a result, these requirements do not constitute a mandated program.[8]

The Commission has not received any comments from the Department of Education in response to the draft staff analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "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."[11] 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.[12] 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.[13]

The courts have defined a "program" that is subject to article XIII B, section 6 of the California Constitution 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.[14] 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

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[8] Department of Education Comments in Response to Test Claim 03-TC-01, dated August 11, 2003.

[9] 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."

[10] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735 (*Kern High School Dist.*).

[11] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[14] *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).

legislation.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16] 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.[17]

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.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

A. The test claim statutes do not impose reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution

The following discussion will introduce each test claim statute or groups of test claim statutes with a header that describes the content of the statutes. The discussion will then analyze whether each statute or groups of statutes under the headers impose reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution.

Adoption of Regulations (Ed. Code, §§ 38047.5 and 38047.6)

Interpreting statutes begins with examining the statutory language, giving the words their ordinary meaning, and if the words are unambiguous the plain meaning of the language governs.[20] Education Code sections 38047.5 and 38047.6 require the State Board of Education to adopt regulations requiring passengers of school buses and school pupil activity buses equipped with passenger restraint systems to use the passenger restraint system. The plain language of these code sections does not impose any requirements on school districts. Instead, the code sections address the duties of the State Board of Education. Thus, the Commission finds that Education Code sections 38047.5 and 38047.6 do not impose any reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution.

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[15] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, supra, 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

[17] *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.

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

[19] *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.

[20] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

Instruction in School Bus Emergency Procedure and Passenger Safety (Ed. Code, § 39831.5)

Education Code section 39831.5 was amended by Statutes 1999, chapter 648, as indicated by the following underlined provisions:

> (a) All pupils in prekindergarten, kindergarten, and grades 1 to 12, inclusive, in public or private school who are transported in a schoolbus or school pupil activity bus shall receive instruction in schoolbus emergency procedures and passenger safety. The county superintendent of schools, superintendent of the school district, or owner/operator of a private school, as applicable, shall ensure that the instruction is provided as follows:
>
> (1) Upon registration, the parents or guardians of all pupils not previously transported in a schoolbus or school pupil activity bus and who are in prekindergarten, kindergarten, and grades 1 to 6, inclusive, shall be provided with written information on schoolbus safety. The information shall include, but not be limited to, all of the following:
>
> (A) A list of schoolbus stops near each pupil's home.
>
> (B) General rules of conduct at schoolbus loading zones.
>
> (C) Red light crossing instructions.
>
> (D) Schoolbus danger zone.
>
> (E) Walking to and from schoolbus stops.
>
> (2) At least once in each school year, all pupils in prekindergarten, kindergarten, and grades 1 to 8, inclusive, who receive home-to-school transportation shall receive safety instruction that includes, but is not limited to, proper loading and unloading procedures, including escorting by the driver, how to safely cross the street, highway, or private road, instruction on the use of passenger restraint systems, as described in paragraph (3), proper passenger conduct, bus evacuation, and location of emergency equipment. Instruction also may include responsibilities of passengers seated next to an emergency exit. As part of the instruction, pupils shall evacuate the schoolbus through emergency exit doors.
>
> (3) Instruction on the use of passenger restraint systems shall include, but not be limited to, all of the following:
>
> (A) Proper fastening and release of the passenger restraint system.
>
> (B) Acceptable placement of passenger restraint systems on pupils.
>
> (C) Times at which the passenger restraint systems should be fastened and released.
>
> (D) Acceptable placement of the passenger restraint systems when not in use.
>
> (4) Prior to departure on a school activity trip, all pupils riding on a schoolbus or school pupil activity bus shall receive safety instruction that includes, but is not limited to, location of emergency exits, and location and use of emergency equipment. Instruction also may include responsibilities of passengers seated next to an emergency exit.

(b) The following information shall be documented each time the instruction required by paragraph (2) of subdivision (a) is given:

(1) Name of school district, county office of education, or private school.

(2) Name and location of school.

(3) Date of instruction.

(4) Names of supervising adults.

(5) Number of pupils participating.

(6) Grade levels of pupils.

(7) Subjects covered in instruction.

(8) Amount of time taken for instruction.

(9) Bus driver's name.

(10) Bus number.

(11) Additional remarks.

The information recorded pursuant to this subdivision shall remain on file at the district or county office, or at the school, for one year from the date of the instruction, and shall be subject to inspection by the Department of the California Highway Patrol.

As relevant to this test claim, Education Code section 39831.5 requires school districts to engage in the following activity:

> Include in the annual school bus passenger safety instructions given to pre-kindergarten through eighth grade students that are transported on school buses or school pupil activity buses for home-to-school transportation the following:
>
> a. how to safely cross the street, highway, or private road; and
>
> b. instruction on the use of passenger restraint systems, including: (1) proper fastening and release of the passenger restraint system; (2) acceptable placement of passenger restraint systems on pupils; (3) times at which the passenger restraint systems should be fastened and released; and (4) acceptable placement of the passenger restraint systems when not in use. (Ed. Code, § 39831.5 (Stats. 1999, ch. 648, § 2.5)).

In order to determine whether the above activity constitutes a state-mandated activity it is necessary to look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[21]

The activity of including information in annual school bus passenger safety instructions is triggered by a school district's decision to provide school bus or school pupil activity bus transportation to students. However, under state law, school districts are authorized but not required to provide school bus or school pupil activity bus transportation of pupils to and from

[21] *Kern High School Dist., supra,* 30 Cal.4th at p. 743.

school.[22] Districts are authorized to "provide for the transportation of pupils to and from school . . ." and are authorized to provide transportation in a variety of ways, including purchasing or renting a vehicle, contracting with a municipally owned transit system, or providing reimbursement to parents for the cost of transportation.[23] In *Arcadia Unified School Dist. v. State Dept. of Education*, a case in which the California Supreme Court found that an Education Code section that authorizes charging a fee for pupil transportation does not violate the free school guarantee or equal protection clause of the California Constitution, the Court confirmed that California schools need not provide bus transportation at all. Specifically, the Court states:

> Without doubt, school-provided transportation may enhance or be useful to school activity, but it is not a necessary element which each student must utilize or be denied the opportunity to receive an education.
>
> This conclusion is especially true in this state, since, as the Court of Appeal correctly noted, *school districts are permitted, but not required, to provide bus transportation*. ([Ed. Code,] § 39800.) If they choose, districts may dispense with bus transportation entirely and require students to make their own way to school. Bus transportation is a service which districts may provide at their option, but schools obviously can function without it. (Fns. omitted, emphasis added.)[24]

Likewise, federal law, specifically the Individuals with Disabilities Education Act (IDEA), does not require school districts to provide *school bus* or *school pupil activity bus* transportation for students with disabilities. In *State of California Department of Finance v. Commission on State Mandates* (02CS00994), discussed above, the court raised the issue of whether the IDEA requires school bus transportation for students with disabilities. On remand the Commission, found that the IDEA does not require school bus transportation of students.

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."[25] "Free appropriate public education" (FAPE) is defined to mean special education and related services that: (1) have been provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the State educational agency; (3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (4) are provided in conformity with the individualized education program (IEP).[26]

An IEP is a written statement, developed in a meeting between the school, teachers, and the parents of a child with a disability (IEP team), that includes a statement of the special education

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[22] Education Code section 39800.

[23] Education Code sections 39800 and 39806.

[24] *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 264.

[25] Title 20 United States Code section 1400(d)(1)(A) (as added by Pub.L. No. 105-17 (June 4, 1997) and reauthorized by Pub.L. No. 108-446 (Dec. 3, 2004)).

[26] Title 20 United States Code sections 1401(9) (as reauthorized by Pub.L. No. 108-446 (Dec. 3, 2004), formerly section 1401(8) (as added by Pub.L. No. 105-17) (June 4, 1997)).

and related services and supplementary aids and services that are to be provided to the child.[27] "Related services" is defined by the IDEA to mean "*transportation*, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . . ."[28] As a result, if transportation is included in a child's IEP, transportation would be a related service that must be provided to the child. However, *school bus* or *school pupil activity bus* transportation is not required in order to comply with the possible requirement to provide transportation under the IDEA.

As defined by the implementing regulations of the IDEA, "transportation" includes: (1) travel to and from school and between schools; (2) travel in and around school buildings; (3) specialized equipment (*such as* special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with disability.[29] Thus, under federal law the provision of bus transportation is a transportation option, but it is not a required option. Similarly guidelines issued by the California Department of Education for use by IEP teams when determining the need for and the provision of transportation services provide:

> Considering the identified needs of the pupil, transportation options may include, but not be limited to: walking, riding the regular school bus, utilizing available public transportation (any out-of-pocket costs to the pupil or parents are reimbursed by the local education agency), riding a special bus from a pick up point, and portal-to-portal special education transportation via a school bus, taxi, reimbursed parent's driving with a parent's voluntary participation, or other mode as determined by the IEP team.[30]

In addition, in regard to the provision of transportation in general (i.e. not specifically applicable to students with disabilities), in lieu of providing transportation school districts may pay parents of pupils a sum not to exceed the cost of actual and necessary travel incurred in transporting students to and from schools in the district or the cost of food and lodging of the student at a place convenient to the schools if the cost does not exceed the estimated cost of providing transportation of the student.[31] Thus, although school districts may provide school bus or school pupil activity bus transportation, along with a variety of other possible options, to fulfill the possible transportation requirements under the IDEA, neither state law nor the IDEA require school districts to provide school bus or school pupil activity bus transportation. As a result, consistent with the court's judgment in *State of California Department of Finance v. Commission on State Mandates* (02CS00994), the Commission's decision on remand regarding the *School Bus Safety II* (97-TC-22) test claim, and the *Kern High School Dist*. case, the Commission finds that Education Code section 39831.5 does not impose reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution.

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[27] Title 20 United States Code section 1414(d) (as added by Pub.L. No. 105-17 (June 4, 1997) and reauthorized by Pub.L. No. 108-446 (Dec. 3, 2004)).

[28] Title 20 United States Code section 1401(22) (emphasis added).

[29] 34 Code of Federal Regulations part 300.24(b)(15), as amended by 64 FR 12418 (March 12, 1999), and part 300.34(c)(16), as amended by 71 FR 46753 (Aug. 14, 2006).

[30] California Department of Education "Special Education Transportation Guidelines" at <http://www.cde.ca.gov/sp/se/lr/trnsprtgdlns.asp> as of February 23, 2011.

[31] Education Code sections 39806 and 39807.

Stopping to Load or Unload Pupils (Veh. Code, § 22112)

Vehicle Code section 22112 was amended by Statutes 1999, chapter 647, as shown by the underlined provisions that indicate additions or changes and ellipses that indicate deletions:

> (a) On approach to a schoolbus stop where pupils are loading or unloading from a schoolbus, the driver of the schoolbus shall activate an approved flashing amber light warning system, if the schoolbus is so equipped, beginning 200 feet before the schoolbus stop. The driver shall operate the flashing red signal lights and stop signal arm, as required on the schoolbus, at all times when the schoolbus is stopped for the purpose of loading or unloading pupils. The flashing red signal lights, amber warning lights, and stop signal arm system shall not be operated at any place where traffic is controlled by a traffic officer. The schoolbus flashing red signal lights, amber warning lights, and stop signal arm system shall not be operated at any other time.
>
> (b) The driver shall stop to load or unload pupils only at a schoolbus stop designated for pupils by the school district superintendent or authorized by the superintendent for school activity trips.
>
> (c) When a schoolbus is stopped on a highway or private road for the purpose of loading or unloading pupils, at a location where traffic is not controlled by a traffic officer, the driver shall do all of the following:
>
> > (1) Check for approaching traffic in all directions and activate the flashing red light signal system and stop signal arm, as defined in Section 25257, if equipped with a stop signal arm.
> >
> > (2) Before opening the door, ensure that the flashing red signal lights and stop signal arm are activated, and that it is safe to exit the schoolbus.
>
> (d) When a schoolbus is stopped on a highway or private road for the purpose of loading or unloading pupils, at a location where traffic is not controlled by a traffic officer or official traffic control signal, the driver shall do all of the following:
>
> > (1) Escort all pupils in prekindergarten, kindergarten, or any of grades 1 to 8, inclusive, who need to cross the highway or private road. The driver shall use an approved hand-held "STOP" sign while escorting all pupils.
> >
> > (2) Require all pupils to walk in front of the bus as they cross the highway or private road.
> >
> > (3) Ensure that all pupils who need to cross the highway or private road have crossed safely, and that all other unloaded pupils and pedestrians are a safe distance from the schoolbus and it is safe to move before setting the schoolbus in motion.
>
> (e) Except at a location where pupils are loading or unloading from a schoolbus and must cross a highway or private road upon which the schoolbus is stopped, the flashing red signal lights and stop signal arm requirements imposed by . . . this section do not apply to a schoolbus driver at any of the following locations . . . :
>
> > (1) Schoolbus loading zones on or adjacent to school grounds or during an activity trip, if the schoolbus is lawfully parked.

(2) Where the schoolbus is disabled due to mechanical breakdown.

(3) Where pupils require assistance to board or leave the schoolbus.

(4) Where the roadway surface on which the bus is stopped is partially or completely covered by snow or ice and requiring traffic to stop would pose a safety hazard.

(5) On a state highway with a posted speed limit of 55 miles per hour or higher where the schoolbus is completely off the main traveled portion of the highway.

(6) Any location determined by a school district, . . . with the approval of the Department of the California Highway Patrol, . . . to present a . . . traffic . . . or safety hazard.

(f) Notwithstanding subdivisions (a) to (d), inclusive, the Department of the California Highway Patrol may require the activation of an approved flashing amber light warning system, if the schoolbus is so equipped, or the flashing red signal light and stop signal arm, as required on the schoolbus, at any location where the department determines that the activation is necessary for the safety of school pupils loading or unloading from a schoolbus.

The amendments made to Vehicle Code section 22112 by Statutes 1999, chapter 647, do not add any activities to the code section. Instead, the amendments either reduce the instances in which a school bus driver must engage in an activity (i.e. Veh. Code, § 22112, subd. (d)) or specify when the duty of a school bus driver to use the flashing red signal lights and stop signal arm do not apply. In 2002, Vehicle Code section 22112 was amended again to make clarifying non-substantive changes to the code section.[32] As a result, Vehicle Code section 22112, as amended by Statutes 1999, chapter 647, and Statutes 2002, chapter 397, does not require school districts to engage in any activities.

In addition, even if the 1999 and 2002 amendments to Vehicle Code section 22112 imposed new activities on school districts, these activities are triggered by the underlying decision by school districts to provide school bus or school pupil activity bus transportation. As discussed above in the "Instruction in School Bus Emergency Procedure and Passenger Safety" section of this analysis, school districts are not required to provide school bus or school pupil activity bus transportation to students. Thus, any new activities required by Vehicle Code section 22112 are triggered by the local decision to provide school bus transportation, and would not be state-mandated activities.

Meeting or Overtaking School Buses (Veh. Code, § 22454)

Vehicle Code section 22454 addresses the duty of drivers to stop immediately before passing a school bus and to not pass a school bus if the bus is stopped and displays a flashing red light signal and stop signal arm. Section 22454 authorizes, but does not require, the bus driver to report a violation of section 22454 to the local law enforcement agency that has jurisdiction of the offense. If a school bus driver does report a violation of section 22454 to the local law enforcement agency, the law enforcement agency is required to issue a letter of warning to the registered owner of the vehicle.

[32] Statutes 2002, chapter 397.

Although the claimant has pled Vehicle Code section 22454, it is unclear from the test claim filing what activities are alleged to be mandated by this code section. As it applies to school districts, Vehicle Code section 22454 does not require school bus drivers to engage in any activities. In addition, the claimant does not have standing to claim for any costs incurred by local law enforcement agencies even if the district employs police officers because, as determined by the court in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 (*POBRA*), school districts are not required to employ peace officers.[33]

In addition, any activity contained in Vehicle Code section 22454 is triggered by the underlying decision by school districts to provide school bus or school pupil activity bus transportation. As discussed above in the "Instruction in School Bus Emergency Procedure and Passenger Safety" section of this analysis, school districts are not required to provide school bus or school pupil activity bus transportation to students. Thus, any possible activities required by Vehicle Code section 22454 would not be state-mandated activities. As a result, the Commission finds that Vehicle Code section 22454 does not impose reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution.

Pelvic and Upper Torso Passenger Restraint Systems for School Buses and School Pupil Activity Buses (Veh. Code, § 27316 and 27316.5)

Vehicle Code section 27316 requires school buses purchased or leased for use in California to be equipped at all designated seating positions with a combination pelvic and upper torso passenger restraint system if the school bus is: (1) designed to carry more than 16 passengers and the driver and is manufactured on or after July 1, 2005; or (2) designed to carry not more than 16 passengers and the driver, and is manufactured on or after July 1, 2004.[34] Similarly, Vehicle Code section 27316.5 requires school pupil activity buses purchased or leased for use in California to be equipped at all designated seating positions with a combination pelvic and upper torso passenger restraint system if the school pupil activity bus is designed to carry not more than 16 passengers and the driver and is manufactured on or after July 1, 2004. In summary, when school districts purchase or lease school buses or school pupil activity buses, the buses must be equipped with passenger restraint systems.

However, the activities required by Vehicle Code sections 27316 and 27316.5 are triggered by the underlying discretionary decision by school districts to provide school bus or school pupil

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[33] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1366-1369. Even if school districts had standing to claim reimbursement for requirements imposed on local law enforcement agencies by Vehicle Code section 22454, the activity is directly related to the enforcement of an infraction created by section 22454. Under Government Code section 17556, subdivision (g), activities directly related to the enforcement of an infraction do not impose costs mandated by the state subject to reimbursement under article XIII B, section 6 of the California Constitution. As a result, Vehicle Code section 22454 would not impose reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution.

[34] Vehicle Code sections 27316 and 27316.5 refer to "Type 1" or "Type 2" school buses or school pupil activity buses when addressing passenger restraint requirements. California Code of Regulations, title 13, section 1201, subdivision (b) (Register 2007, No. 41), defines "Type 1" as a school bus or school pupil activity bus that is designed to carry more than 16 passengers and the driver. As relevant to this test claim, "Type 2" is defined as a school bus or school pupil activity bus designed to carry not more than 16 passengers and the driver.

activity bus transportation. As discussed above in the "Instruction in School Bus Emergency Procedure and Passenger Safety" section of this analysis, school districts are not required to provide school bus or school pupil activity bus transportation to students. As a result, the Commission finds that Vehicle Code sections 27316 and 27316.5 do not impose reimbursable state-mandated activities subject to article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concludes that Education Code sections 39831.5 (former section 38048) (Stats. 1999, ch. 648), 38047.5 (Stats. 1999, ch. 648), and 38047.6 (Stats. 2002, ch. 360); and Vehicle Code sections 22112 (Stats. 1999, ch. 647, and Stats. 2002, ch. 397), 22454 (Stats. 1999, ch. 647), 27316 (Stats. 1999, ch. 648, and Stats. 2001, ch. 581), and 27316.5 (Stats. 2002, ch. 360), do not impose reimbursable state-mandated programs on school districts within the meaning of article XIII B, section 6 of the California Constitution.