BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 17387, 17388, 17389, 17390, 17391 Statutes 1982, Chapter 689, Statutes 1984, Chapter 584, Statutes 1986, Chapter 1124, Statutes 1987, Chapter 655, Statutes 1996, Chapter 277 Filed on June 25, 2003 by Clovis Unified School District, Claimant	Case Nos.: 02-TC-36 *Surplus Property Advisory Committees* 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 January 30, 2009*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on January 30, 2009. Art Palkowitz appeared on behalf of claimant Clovis Unified School District. 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 5-1.

Summary of Findings

The Commission finds that the test claim statutes (Ed. Code, §§ 17387, 17388, 17389, 17390, 17391; Statutes 1982, chapter 689, Statutes 1984, chapter 584, Statutes 1986, chapter 1124, Statutes 1987, chapter 655, Statutes 1996, chapter 277) are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Because there is no legal or practical compulsion to designate as surplus or transfer school district property, neither formation of the advisory committee (§ 17388), nor its activities (§ 17390), are state mandates imposed on a school district. As an alternative ground for denial, the Commission finds that section 17388 is not a new program or higher level of service because a statute provided for the formation of the advisory committee before Statutes 1982, chapter 689, the earliest test claim statute pled by claimant.

BACKGROUND

The test claim alleges a state-mandate for school districts to appoint, supervise, and consult with a surplus property advisory committee to assist in the adoption and implementation of policies and procedures governing the use or disposition of excess school property.

Test Claim Statutes

The intent behind the test claim statutes is expressed by the Legislature as follows:

> It is the intent of the Legislature that leases entered into pursuant to this chapter provide for community involvement by attendance area at the district level. This community involvement should facilitate making the best possible judgments about the use of excess school facilities in each individual situation.
>
> It is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict and assuring building use that is compatible with the community's needs and desires. (Ed. Code, § 17387.)[1]

The original 1976 legislation (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.),[2] in addition to creating the advisory committee, repealed a prohibition against joint occupancy of school buildings used for classroom purposes. The intent of the bill was to help districts offset revenue

---

[1] The original legislative intent language (Stats. 1976, ch. 606 & Stats. 1977, ch. 36)) stated: "(a) It is the intent of the Legislature that school districts be authorized under specified procedures to make vacant classrooms in operating schools available for rent or lease to other school districts, educational agencies, governmental units, nonprofit organizations, community agencies, professional agencies, commercial and noncommercial firms, corporations, partnerships, businesses and individuals. This will place students in close relationship to the world of work, thus facilitating career education opportunities.

(b) It is the intent of the Legislature that priority in leasing or renting vacant classroom space be given to educational agencies, particularly those conducting special education programs. It is the intent of the Legislature that such procedures provide for community involvement by attendance area and at the district level. This community involvement should facilitate making the best possible judgments about the use of excess school facilities in each individual situation. It is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict and assuring building use that is compatible with the community's needs and desires." (Former Ed. Code § 39384, Stats. 1977, ch. 36, § 448.)

[2] The test claim statutes were first enacted in 1976 (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.) but were not included in the 1976 reorganization of the Education Code (Stats. 1976, ch. 1010). They were enacted again in 1977 (Stats. 1977, ch. 36, § 448, Ed. Code, § 39384 et seq.) and were amended in 1980 (Stats. 1980, ch. 1354).

As pled by claimant, the test claim statutes were moved (to former §§ 39295 et seq.) and amended again in 1982 (Stats. 1982, ch. 689) and amended again by Statutes 1984, chapter 584, Statutes 1986, chapter 1124, and Statutes 1987, chapter 655. They were moved to their present location (§§ 17387 et seq.) in 1996 (Stats. 1996, ch. 277).

losses due to declining enrollment. The revenue from renting unused facilities could be used to supplement the school districts' regular educational program.[3]

The test claim statute that creates the advisory committee has changed very little since its first enactment.[4] It authorizes the school district to appoint a district advisory committee to help develop "districtwide policies and procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes." The school district is required to appoint the advisory committee "prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days."[5]

The advisory committee has seven to 11 members that represent the ethnic, age-group, and socioeconomic composition of the district, as well as the business community, landowners or renters, teachers, administrators, parents, and persons with expertise in specified areas (§ 17389).[6]

According to section 17390, the advisory committee shall perform the following duties:

> (a) Review the projected school enrollment and other data as provided by the district to determine the amount of surplus space and real property.
> (b) Establish a priority list of use of surplus space and real property that will be acceptable to the community.
> (c) Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Section 17458.
> (d) Make a final determination of limits of tolerance of use of space and real property.
> (e) Forward to the district governing board a report recommending uses of surplus space and real property.

Section 17391 states that the "governing board may elect not to appoint an advisory committee in the case of a lease or rental to a private educational institution for the purpose of offering summer school in a facility of the district."

---

[3] Assembly Office of Research, Analysis of Assembly Bill No. 2882 (1975-1976 Reg. Sess.) as amended June 9, 1976 (concurrence in Senate amendments).

[4] Education Code section 17388. The word "sale" was amended out of the 1980 version (Stats. 1980, ch. 1354, former Ed. Code, § 39384 et seq.) but was amended back in by Statutes 1982, chapter 689.

[5] *Ibid.*

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

The Advisory Committee in other Statutes

In addition to appointment of the advisory committee for the purpose stated in the test claim statutes ("prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days," § 17388) the committee may be used in acquiring property. Section 17211 provides:

> Prior to commencing the acquisition of real property for a new schoolsite or an addition to an existing schoolsite, the governing board of a school district shall evaluate the property at a public hearing using the site selection standards established by the State Department of Education pursuant to subdivision (b) of Section 17251. The governing board may direct the **district's advisory committee established pursuant to Section 17388** to evaluate the property pursuant to those site selection standards and to report its findings to the governing board at the public hearing. [Emphasis added.]

Additionally, a district governing board that seeks to sell or lease surplus real property may first offer the property to a "contracting agency" (§ 17458), which is an entity that is authorized to establish, maintain, or operate services pursuant to the Child Care and Development Services Act. (See § 8200 et seq., including the definition of "contracting agency" in § 8208, subd. (b).) Specified conditions must be met in order to offer the property under the Act, including hearings by the advisory committee: "No sale or lease of the real property of any school district, as authorized under subdivision (a), may occur until the school district advisory committee has held hearings pursuant to **subdivision (c) of Section 17390.**" (§ 17458, subd. (b)), emphasis added.)

School-District Surplus Property Law

The test claim statutes apply only to disposal of surplus or "excess real property"[7] so a discussion of school district surplus property law is warranted.

Generally, school district governing boards have power to sell or lease "any real property belonging to the school district … which is not or will not be needed by the district for school classroom buildings at the time of delivery of title or possession." (§ 17455.)

In addition to using surplus property for childcare facilities discussed above (§ 17458), the governing board may sell surplus property for less than fair market value to a park district, city or county for recreational purposes or open-space purposes under certain conditions (§ 17230).[8]

Most transfers of school-district surplus property fall under the Naylor Act,[9] which governs offers to sell or lease schoolsites[10] to public agencies ("Notwithstanding Section 54222 of the

---

[7] Education Code section 17388.

[8] Section 17230 states that it is in addition to requirements placed on school districts pursuant to Section 54222 of the Government Code, which requires making written offers to specified government entities when selling surplus land. The entities to which the offers are made depend on the intended or suitable purpose for the land.

[9] Education Code sections 17485-17500. For the Supreme Court's summary and interpretation of the Naylor Act, see *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921.

Government Code").[11] The Act also governs retention of part of a schoolsite, sales price or rate of lease, public agencies buying or leasing the land, maintenance by public agencies, uses of the land, reacquisition by the school district, and limitations on the right of acquisition or lease.

The legislative intent of the Naylor Act is "to allow school districts to recover their investment in surplus property while making it possible for other agencies of government to acquire the property and keep it available for playground, playing field or other outdoor recreational and open-space purposes."[12] In accordance with this intent, the Naylor Act applies to schoolsites in which all or part of the land is used for a school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes, and has been used for one of these purposes for at least eight years before the governing board decides to sell or lease the schoolsite (§ 17486). The Act also applies if no other available publicly owned land in the vicinity of the schoolsite would be adequate to meet the existing and foreseeable needs of the community for outdoor recreational and open-space purposes, as determined by the purchasing or leasing public agency (*Ibid).*

School districts with more than 400,000 pupils in average daily attendance are not included in the Naylor Act (§ 17500), and it does not apply if other public agencies do not wish to purchase the surplus land (§ 17493, subd. (b)). Also, a school district may exempt property from the Act under certain conditions (§ 17497).

Claimants' Position

Claimant alleges that the test claim statutes constitute a reimbursable mandate under article XIII B, section 6 of the California Constitution because they require claimant to:

A) Develop, adopt and implement policies and procedures for community involvement in the disposition of school buildings or space in school buildings which is not needed for school purposes prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, pursuant to Education Code Section 17388.

B) Appoint, supervise and consult with a district advisory committee established to advise the governing board in the use and disposition of surplus space and real property, pursuant to Education Code Section 17388.

C) Appoint an advisory committee consisting of not less than seven nor more than 11 members, and that is representative of each of the criteria required by Education Code Section 17389.

D) For the school district advisory committee appointed pursuant to Education Code Section 17388 to implement all of the following duties, pursuant to Education Code Section 17390:

---

[10] Schoolsite is defined in the Naylor Act as "a parcel of land, or two or more contiguous parcels, which is owned by a school district." (§ 17487.)

[11] Section 54222 of the Government Code requires, when selling surplus land, making written offers to specified government entities, depending on the land's intended or suitable purposes.

[12] Education Code section 17485.

1) Review the projected school enrollment and other data as provided by the district to determine the amount of surplus space and real property;
2) Establish a priority list of use of surplus space and real property that will be acceptable to the community;
3) Circulate throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Section 17458;
4) Make a final determination of limits of tolerance of use of space and real property; and
5) Forward to the district governing board a report recommending uses of surplus space and real property, pursuant to Education Code Section 17390 (e).

Claimant estimates that it will incur more than $1000 in staffing and other costs to implement these duties.

Claimant, in its August 2003 comments, argues that the July 25, 2003 comments by the Department of Finance should be excluded because they are not accompanied by a signed declaration that the comments are true and complete to the best of the representative's personal knowledge or information and belief, as required by section 1183.02(d) of the Commission's regulations.[13] Claimant also argues that (1) the appointment of an advisory committee is not discretionary; (2) a district does incur costs in appointing a committee; and (3) that Finance is incorrect in stating that the district may use the proceeds resulting from the sale, lease or rental of excess property to offset the costs of the committee.

State Agency Position

The Department of Finance, in its July 2003 comments, states:

> [W]e believe that a school district's appointment of a Surplus Property Advisory Committee is the result of a discretionary action taken by the governing board of the district. As a result, we conclude that the cited State laws do not create a State-mandated reimbursable activity; therefore the test claim should be denied.

---

[13] Section 1183.02, subdivision (d), requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief, and that any assertions of fact are to be supported by documentary evidence. Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109). Thus, factual allegations raised by a party regarding how a program is implemented are not relied on by the Commission when determining eligibility for reimbursement under article XIII B, section 6. Finance's comments as to whether the Commission should approve this test claim are thus not stricken from the administrative record.

Finance also asserts that nothing in the statute directs the governing board to sell, lease or rent excess real property, so that "even though a district is required to appoint an advisory board prior to the sale, lease or rental of excess property, it is a local discretionary action that caused the requirement of an advisory board, not a State-mandated activity."

Finance also states that it does not believe a district would incur any costs due to the statute, and that in the absence of the requirement for an advisory committee, a district facilities or business manager and staff would perform all or similar duties specified of the advisory committee in the normal conduct of good school district policies. Finally, Finance believes that should a district incur costs in complying with the test claim statutes, that it may use the proceeds from the sale, lease or rental of excess property to offset the costs.[14]

Finance filed comments on August 28, 2008, concurring with the draft staff analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[15] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[16] "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."[17] 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.[18]

---

[14] Education Code section 17462 requires the proceeds from the sale of surplus school district property to be used for "capital outlay or for costs of maintenance of school district property that the governing board of the school district determines will not recur within a five-year period."

[15] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

> (a) 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.

[16] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2004) 30 Cal.4th 727, 735.

[17] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[18] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

In addition, 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.[19]

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.[20] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[21] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[22]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[23]

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.[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]

I. Are the test claim statutes state mandates within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute 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.[26] The issue is whether the test

---

[19] *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*).

[20] *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; *Lucia Mar, supra*, 44 Cal.3d 830, 835).

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

[22] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[23] *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.

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

[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.

[26] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

claim statutes mandate a school district to form an advisory committee to perform specified duties.

As a preliminary matter, the Commission finds that the test claim statutes that require discussion are sections 17388, which forms the advisory committee, and 17390, which enumerates its duties (see pp. 3-4). The remaining statutes merely define the advisory committee's scope, in that they specify the membership of the advisory committee (§ 17389), and excuse its formation for a specified purpose (§ 17391). Thus, the sole issue is whether sections 17388 and 17390 constitute a state mandate. Section 17388 reads:

> The governing board of any school district may, and the governing board of each school district, prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, shall, appoint a district advisory committee to advise the governing board in the development of districtwide policies and procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes. (§ 17388.)

The plain language of this single-sentence statute indicates two things. First, that the governing board may form an advisory committee. And second, that prior to the sale, lease, or rental of any excess real property (except rentals not exceeding 30 days) the governing board shall appoint an advisory committee.

As to the first part of the sentence (formation of the committee when there is no excess property), the plain meaning of the word "may" indicates that section 17388 is not mandatory.[27] An appellate court decision confirms this interpretation. The case, *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley School Dist.*,[28] involved a school district accused of failing to comply with various statutes in closing two elementary schools. The court interpreted section 17388 as follows:

> Given the circumstances here-with no surplus property then proposed to be sold, leased, or rented within the meaning of the statute-the District's use of the committee was discretionary, not mandatory. (See § 75 ["may" is permissive; "shall" is mandatory].) Because the SPAC [surplus property advisory committee] was not a statutorily mandated committee, the District was not bound by the statutory requirements for its composition or duties.[29]

Based on the plain language of section 17388, and the interpretation of it by the *San Lorenzo Valley* court, the Commission finds section 17388 is not a state mandate within the meaning of article XIII B, section 6 if there is no surplus property involved.

---

[27] Education Code section 75: ""Shall' is mandatory and 'may' is permissive."

[28] *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley School Dist.* (2006) 139 Cal.App.4th 1356 ("*San Lorenzo Valley*").

[29] *San Lorenzo Valley*, *supra*, 139 Cal.App.4th 1356, 1419.

The second part of section 17388 states that before the sale, lease, or rental of any excess real property (except rentals not exceeding 30 days) the governing board shall appoint an advisory committee. The issue is whether this is a state mandate.

In 2003, the California Supreme Court, in the *Kern High School Dist.* case,[30] considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. In *Kern*, school districts participated in various education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and use school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.[31]

In analyzing the concept of "state mandate," the court reviewed the ballot materials for article XIII B, which defined state mandate as "something that a local government entity is required or forced to do" and "requirements imposed on local governments by legislation or executive orders."[32]

The *Kern* court also reviewed and affirmed the holding of *City of Merced v. State of California*,[33] where the city, under its eminent domain authority condemned privately owned real property and was required by statute to compensate the property owner for the loss of business goodwill. Upon review, the Supreme Court determined that, when analyzing state mandates, the underlying program must be reviewed to determine whether the claimant's participation in the underlying program is voluntary or legally compelled.[34] The *Kern* court stated:

> 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.[35] (Emphasis in original.)

---

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

[31] *Id.* at page 730.

[32] *Id.* at page 737.

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

[34] *Kern High School Dist., supra*, 30 Cal.4th 727, 743.

[35] *Ibid.*

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.*[36] [Emphasis added.]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, 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.

One of the underlying programs the Supreme Court discussed in *Kern* was the American Indian Early Childhood Education Program (Ed. Code § 52060 et seq.) which, as part of participation, requires a districtwide American Indian advisory committee for American Indian early childhood education. The court stated:

> Plainly, a school district's initial and continued participation in the program is voluntary, and the obligation to establish or maintain an advisory committee arises only if the district elects to participate in, or continue to participate in, the program. … [T]he obligation to establish or maintain a site council or advisory committee arises only if a district elects to participate in, or continue to participate in, the particular program.[37]

In this claim, as with the eminent domain in *City of Merced* and the advisory committee in *Kern High School Dist.,* there is no state requirement for the school district to declare property surplus or excess, or to participate in what the *Kern* court calls the "underlying program." It is the local school district officials who make the triggering decision to designate property as surplus or transfer it. Therefore, there is no legal compulsion that creates a state mandate.[38]

In addition to the test claim statutes, the other school district surplus property statutes do not legally compel property to be designated as surplus or excess, or to be transferred. For example, the Naylor Act (§§ 17485-17500) states that "The governing board of any school district may sell or lease any schoolsite containing land described in Section 17486, and, if the governing board decides to sell or lease such land, it shall do so in accordance with this article."[39] A second example is in Education Code section 17458, which requires the advisory committee to hold hearings before selling or leasing real property to contracting agencies under the Child Care and Development Services Act (see p. 5 above). But there is no requirement to sell or lease the

---

[36] *Id.* at 731.

[37] *Id.* at 744.

[38] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[39] Education Code section 17488.

property, as stated in part: "[T]he governing board of any school district … seeking to sell or lease any real property it deems to be surplus property **may** first offer that property for sale or lease to any contracting agency, as defined in Section 8208 of the Education Code, pursuant to the following conditions …"[40] One of the conditions is the advisory committee hearing, which is contingent on the initial decisions to deem the property surplus and offer it to a contracting agency.

Legal compulsion aside, in the *Kern High School Dist.* case, the California Supreme Court found that state mandates could be found in cases of practical compulsion on the local entity when a statute imposes "certain and severe penalties such as double taxation or other draconian consequences"[41] for not participating in the programs. The court also described practical compulsion as "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[42]

Claimant, in August 2003 rebuttal comments, argues that school districts are practically compelled to use the advisory committee as follows:

> This argument is pure nonsense and suggests that school districts should permit the underutilization of district assets. Migrating populations, changes in the population density of school age children, and other socio-economic conditions dictate the sale or disposal of surplus school property. The decision to act is not discretionary, demographic conditions beyond the control of governing boards dictate those decisions. And once the decision is dictated, the appointment of an advisory committee is a mandated activity for which reimbursement is required.[43]

Local governments could make the same argument about use of eminent domain at issue in *City of Merced*, i.e., that conditions beyond the control of local government make the use of eminent domain necessary. The *City of Merced* court, however, did not find this a compelling reason for making the cost of eminent domain reimbursable. The decision to invoke eminent domain, just like the decision to designate property as surplus, is made at the local level.[44]

There is no evidence in the record of practical compulsion, in that there are no "certain and severe penalties such as double taxation or other draconian consequences"[45] for school districts' failing to designate or transfer property as surplus or excess.

Therefore, the Commission finds that the reasoning of *City of Merced* and *Kern High School Dist.* control this claim. That is, because there is no legal or practical compulsion to designate as surplus or transfer (sell, lease, or rent) school district property, neither formation of the advisory

---

[40] Education Code section 17458. Emphasis added.

[41] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[42] *Id.* at p. 731.

[43] Letter from claimant, August 18, 2003, page 2.

[44] Cf. *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[45] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

committee (§ 17388), nor its activities (§ 17390), are state mandates imposed on a school district. Accordingly, the test claim statutes (§§ 17387-17389) do not constitute a state mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution.

II. Does Education Code section 17388 constitute a new program or higher level of service?

As an alternative ground for denial, the Commission finds that section 17388 is not a new program or higher level of service.[46] Claimant pled the test claim statutes starting with Statutes 1982, chapter 689. The advisory committee statute, however, was first enacted in 1976 (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.). Although it was not included in the 1976 reorganization of the Education Code (Stats. 1976, ch. 1010), it was enacted again in 1977 (Stats. 1977, ch. 36, § 448, Ed. Code, § 39384 et seq.) and amended in 1980 (Stats. 1980, ch. 1354).

The 1977 statute, former section 39384, subdivision (c), read as follows:

> The governing board of any school district may, and the governing board of each school district, prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, shall, appoint a district advisory committee to advise the governing board in the development of districtwide policies and procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes.

Because this statute provided for the formation of the advisory committee before the 1982 test claim statute pled by claimant, the Commission finds that section 17388 is not a new program or higher level of service.

CONCLUSION

For the reasons discussed above, the Commission finds that the test claim statutes (Ed. Code, §§ 17387, 17388, 17389, 17390, 17391; Statutes 1982, chapter 689, Statutes 1984, chapter 584, Statutes 1986, chapter 1124, Statutes 1987, chapter 655, Statutes 1996, chapter 277) are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, 69655 and 69656 as amended by Statutes 1984, Chapter 1178; Statutes 1985, Chapter 1586; Statutes 1990, Chapter 1352; Statutes 1990, Chapter 1455

California Code of Regulations, Title 5, Sections 56200, 56201, 56202, 56204, 56206, 56208, 56210, 56220, 56222, 56224, 56226, 56230, 56232, 56234, 56236, 56238, 56240, 56252, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56292, 56293, 56295, 56296, and 56298 (As added or amended by Register 76, No. 41, Register 77, No. 34, Register 79, No. 32, Register 80, No. 06, Register 81, Nos. 03 & 19, Register 83, No. 18, Register 87, No. 40, Register 90, No. 49, Register 91, No. 29, and Register 97, No 46

EOPS Implementing Guidelines, Chancellor of the California Community Colleges (January 2002)

Filed on June 13, 2003, by

West Kern Community College District, Claimant

Case No.: 02-TC-29

Extended Opportunities Programs and Services

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

(*Adopted on July 31, 2009*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Keith Petersen appeared for the claimant, West Kern Community College District and Donna Ferebee appeared for 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 July 31, 2009 to deny this test claim at the hearing by a vote of 6-0.

Summary of Findings

The Commission finds that many of the test claim statutes and executive orders require community college districts (districts) to perform a number of activities. However, the requirement to perform

those activities is triggered by a district's decision to establish an Extended Opportunities Programs and Services (EOPS) program and to request and accept state funding for that program. Therefore, those activities are not state-mandated activities. More specifically, pursuant to Education Code sections 69649 and 69650, the decisions to establish Extended Opportunities Programs or Extended Opportunities Services are discretionary decisions of the district which must be approved by the Board of Governors of the California Community Colleges (BOG). Similarly, if the districts decide to establish an EOPS program, they also make a discretionary decision regarding whether to apply to the BOG for a state grant to fund all or a portion of the costs of establishing and operating an EOPS program. (Ed. Code § 69652.) The Commission finds that because the districts are not compelled to establish an EOPS program or to accept EOPS funding, the activities required by the test claim statutes are not state-mandated and thus are not reimbursable.

With regard to Education Code section 69656; California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56220, 56222, 56224, 56226, 56252, 56292; and the EOPS Implementing Guidelines (Guidelines), the Commission finds that these sections do not require districts to perform any activities because:

- Education Code section 69656 states the intent of the Legislature for the California State University (CSU) and the University of California (UC) to provide fee waivers for admissions applications for EOPS transfer students who provide waiver forms signed by a community college EOPS director and, by its plain language, requires no specific action on the part of districts or community college.
- California Code of Regulations, title 5, sections 56220-56226 relate to student eligibility and responsibility and do not require districts to perform any activities.
- California Code of Regulations, title 5, section 56252 is a statement of purpose for EOPS financial aid and does not require districts to perform any activities.
- California Code of Regulations, title 5, section 56292 states that the Chancellor may adjust allocations to correct for an over or under allocation or utilization of EOPS funds, but does not require any district to perform any activities.
- The Guidelines are permissive, and use the modifier "should" throughout. Moreover, any requirements that might be imposed on the districts by the Guidelines would be requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus would not be state-mandated activities.

The Commission concludes that the test claim should be denied because the test claim statutes and executive orders do not require the community colleges to perform any state-mandated activities and thus do not impose a state-mandated program on community college districts because:

1. Downstream activities delineated by Education Code sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, and 69655, as added or amended by the test claim statutes, California Code of Regulations, title 5 sections 56206, 56208, 56210, 56230, 56232, 56234, 56236, 56238, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56293, 56295, 56296, 56298 are requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus are not state-mandated activities.

2. Education Code Section 69656, California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56220, 56222, 56224, 56226, 56540, 56252, 56292 and the Guidelines do not require districts to perform any activities and, even if they did, they would be requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus would not be state-mandated activities.

BACKGROUND

This test claim addresses the Community College Extended Opportunity Programs and Services program (EOPS).

In 1969, SB 164 added Article 8 to the Education Code establishing EOPS.[1] Article 8 contains all of the code sections pled in this test claim. The intent of the Legislature in establishing EOPS was to "encourage local community colleges to establish and implement programs to identify those students affected by language, social, and economic handicaps, to increase the number of eligible EOPS students served, and to assist those students to achieve their educational objectives and goals, including, but not limited, to, obtaining job skills, occupational certificates, or associate degrees, and transferring to four-year institutions." (Ed. Code § 69640.)

The community college districts (districts) are encouraged to participate in EOPS by both legislative intent language and state (and potentially federal) funding that is provided specifically for EOPS. In exchange for state funding, the district generally must meet minimum standards that are specified in the test claim statutes and executive orders.[2]

EOPS provides academic and financial support to community college students whose educational and socioeconomic backgrounds might otherwise prevent them from successfully attending college. Services are specifically designed for at-risk students and their special needs. Counseling contacts are required and a Student Educational Plan is developed for each student to assist the student in achieving their individual goals. Today, approximately 107,000 community college students are served by EOPS annually. The appropriation in the 2007-2008 state budget for EOPS was $106.78 million (Prop 98 state funds - local assistance) while the districts contributed $22.7 million to the program.

Importantly, as is reflected throughout the statutory and regulatory framework, the Legislature stated its intent that EOPS not be viewed as the only means of providing services to nontraditional and disadvantaged students or of meeting student and employee affirmative action objectives. (See Ed. Code § 69640.) Rather, EOPS is intended as a supplement to the other programs and services available to community college students.

To be eligible for EOPS a student must:

(1) Be a resident of California

(2) Be enrolled full-time when accepted into the EOPS program (the EOPS director may authorize up to 10% of EOPS students accepted to be enrolled for 9 units).

---

[1] Statutes 1969, chapter 1579.

[2] The regulations pled are collectively referred to as the test claim executive orders throughout this Statement of Decision.

(3) Not have completed more than 70 units of degree applicable credit coursework in any combination of post-secondary higher education institutions.

(4) Qualify to receive a Board of Governors (BOG) Grant.[3]

The Role of the Board of Governors of the California Community Colleges

The BOG is required to consider adopting regulations which include all of the following objectives:

(a) That the EOPS provided by a community college shall include, but not be limited to, staff qualified to counsel all EOPS students regarding their individual educational objectives and the specific academic or vocational training program necessary to achieve those objectives, and that each EOPS student receives that counseling upon his or her initial enrollment in the community college, and at least every six months thereafter.

(b) That in assisting all EOPS students to identify their educational objectives, the EOPS provided by a community college identifies those students who want to transfer to a four-year institution, and those who have the potential to transfer successfully, and that the EOPS director at each community college disseminates the names and addresses of these potential transfer students to admissions staff at public universities throughout the state at least once a year.

(c) That the EOPS director at each community college shall work with other community college staff to encourage all interested EOPS students to enroll in existing community college classes designed to develop skills necessary for successful study at a university, including, but not limited to, time management, research and study skills, classroom note-taking skills, and writing skills, and that these classes be developed if they are not already established. (Ed. Code § 69641.5.)

The BOG is required to adopt rules and regulations necessary to implement Education Code Chapter 2, Article 8, including rules and regulations which do all of the following:

(a) Prescribe the procedure by which a district shall identify a student eligible for EOPS on the basis of the student's language, social, or economic disadvantages.

(b) Establish minimum standards for the establishment and conduct of EOPS. The standards may include, but shall not be limited to, guidelines for all of the following:

(1) The provision of staffing and program management.

---

[3] A BOG Grant is a community college fee waiver provided to California residents who either:

A. Are recipients or dependants of recipients of: TANF/CalWORKs; SSI/SSP (Supplemental Security Income/State Supplemental Program); General Assistance, the Congressional Medal of Honor or who have certification from the California Department of Veterans Affairs or are a dependant of a victim of the September 11, 2001 terrorist attack; or,

B. Have an income (or are a dependant of someone with an income) at or below 150% of the federal poverty guidelines, ($15,600 for a family of one for 2009/2010).

(2) The establishment of a documentation and data collection system.

(3) The establishment of an EOPS advisory committee.

(4) The provision of recruitment and outreach services.

(5) The provision of cognitive and noncognitive assessment, advising, and orientation services.

(6) The provision of college registration.

(7) The provision of basic skills instruction, seminars, and tutorial assistance.

(8) The provision of counseling and retention services.

(9) The provision of transfer services.

(10) The provision of direct aid.

(11) The establishment of objectives to achieve the goals specified in Education Code section 69640, and objectives to be applied in implementing EOPS.

(c) Subject to approval of the Chancellor, establish procedures for the review and evaluation of the districts' EOPS.

(d) Require the submission of the reports by districts that will permit the evaluation of the program and services offered. (Ed. Code § 69648.)

The BOG is also required to determine the elements of a statewide database for EOPS, pursuant to Education Code section 69648, which shall be used for periodic evaluation of the programs and services. The data base shall include all information necessary to demonstrate the statewide progress towards achieving the program goals identified in Education Code section 69640, and program objectives adopted pursuant to Education Code section 69648 including, but not limited to, all of the following:

(1) The annual number of EOPS students and non-EOPS students who complete degree or certificate programs, transfer programs, or other programs, as determined by state and local matriculation policies.

(2) The annual number of EOPS and non-EOPS students who transfer to institutions which award the baccalaureate degree. In implementing this paragraph, the BOG shall work in cooperation with the California Postsecondary Education Commission, the President of the University of California, the Chancellor of the California State University, and the Association of Independent Colleges and Universities to establish methods for obtaining the necessary data.

(3) The annual number of EOPS and non-EOPS students completing occupational programs who find career employment. In implementing this paragraph, the board of governors shall integrate the data collection with existing data collection requirements pertaining to vocational education.

Since January 1987, the BOG has been required to annually report to the Legislature regarding the number of students served by community college EOPS and the number of EOPS students who achieve their educational objectives. [Ed. Code § 69655 (b).]

State Funding of EOPS

The BOG is required to review the need for state funds for state financial aid programs, including EOPS, and to include an estimate of such need in its budget for each year. (Ed. Code, § 69654.) The BOG may use up to one percent of the funds appropriated for the EOPS program by the annual Budget Act to monitor program activities and to conduct the evaluation of EOPS offered by districts. (Ed. Code § 69648.5.) As mentioned above, for budget year 2007-2008, the state provided $106.78 million to community college EOPS programs while the districts contributed a combined $22.7 million to their own EOPS programs.

COMMISSION 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."[4] 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.[5] In addition, 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.[6]

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.[7] To determine if the program is new or imposes a higher level of service, the test claim statutes and/or executive orders must be compared with the legal requirements in effect immediately before the enactment.[8] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[9] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[10]

---

[4] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[5] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[6] *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)*.

[7] *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,*

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

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[10] *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.

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.[11] 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."[12]

Issue: **Do Education Code sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, 69655 and 69656, as added or amended by the test claim statutes, California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56206, 56208, 56210, 56220, 56222, 56224, 56226, 56230, 56232, 56234, 56236, 56238, 56240, 56252, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56292, 56293, 56295, 56296, or, 56298, or the Guidelines published by the Chancellor of the California Community Colleges in January 2002 require community colleges to perform state-mandated activities?**

Claimant alleges reimbursable state-mandated costs for districts to "provide certified directors, instructors and counselors; to provide counselors for students; to comply with new minimum standards; petition for waivers of minimum standards and staffing requirements; to enter into education plans and mutual responsibility contracts; verify student eligibility and compliance; and utilize specific accounting standards and procedures in order to implement the EOPS program."[13]

Claimant also argues that districts are practically compelled to provide EOPS because "in order to receive state funding, the program shall meet the minimum standards established pursuant to subdivision (b) of section 69648."[14] Claimant cites to the *Sacramento II* and *Kern* cases to support its practical compulsion arguments.[15]

The Commission concludes that the test claim should be denied because the test claim statutes and executive orders do not require the community colleges to perform any state-mandated activities and thus do not impose a state-mandated program on community college districts because:

- Downstream activities delineated by Education Code sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, and 69655, as added or amended by the test claim statutes, California Code of Regulations, Title 5 sections 56206, 56208, 56210, 56230, 56232, 56234, 56236, 56238, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56293, 56295, 56296, 56298 are requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus are not state-mandated activities.
- Education Code section 69656, California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56220, 56222, 56224, 56226, 56540, 56252, and 56292 and the Guidelines do

---

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

[12] *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.

[13] Test Claim, p. 2.

[14] Claimant's March 4, 2004 response to DOF's comments on the test claim, supra, pp. 2-3.

[15] Id., p. 3-6, citing *City of Sacramento v. State of California* (1990) 50 Cal. 3rd 51 (*Sacramento II*) and *Department of Finance v. Commission on State Mandates* (2003) 30 Cal. 4th 727 (*Kern*).

not require districts to perform any activities and, even if they did, they would be requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus would not be state-mandated activities.[16]

I. Downstream activities delineated by Education Code sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, 69655 and 69656, as added or amended by the test claim statutes, California Code of Regulations, title 5, sections 56206, 56208, 56210, 56230, 56232, 56234, 56236, 56238, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56293, 56295, 56296, 56298, and Guidelines section 56252 are requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus are not state-mandated activities.

The decision to establish an EOP or EOS is a discretionary decision of the district which must be approved by the BOG. There is no requirement in law for establishment of EOPS programs. Education Code section 69649 states:

> (a) [t]he governing board of a community college district *may*, with the approval of the board, establish an EOP. 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.
>
> (b) The board of governors may waive any or all of the minimum standards established pursuant to subdivision (b) of section 69648 if the board of governors determines that unusual circumstances which merit a waiver exist. (Emphasis added.)

Likewise Education Code section 69650 provides:

> The governing board of a community college district *may*, with the approval of the board, establish EOS. Such services *may* include, but need not be limited to:
>
> (a) Loans or grants to meet living costs or a portion thereof.
>
> (b) Loans or grants to meet the cost of student fees.
>
> (c) Loans or grants to meet cost of transportation between home and college.
>
> (d) The provision of scholarships.
>
> (e) Work-experience programs.
>
> (f) Job placement programs. (Emphasis added.)

Similarly, if the districts decide to establish an EOPS program, they may also apply to the BOG for a state grant to fund all or a portion of the costs of establishing and operating an EOPS program. (Ed. Code, § 69652.) Education Code section 69652 provides:

---

[16] Staff notes that Guidelines page 40, interpreting California Code of Regulations, title 5, section 56252, requires the EOPS program to notify the college's financial aid office when EOPS students receive book services. However, this fact does not change the staff analysis since it is a downstream requirement of an elective program.

> The governing board of a community college district may apply to the board for an allowance to meet all or a portion of the cost of establishing and operating EOPS. The application must contain a detailed plan for use of the allowance and be submitted in accordance with rules and regulations adopted by the BOG.

The use of funds provided by the state for EOPS is restricted as follows:

> The governing board of a community college district shall not use any funds received from the state for the operation and administration of [EOPS] to supplant district resources, programs, or services authorized by section 69649 and 69650. The governing board may use those funds to meet the matching requirements to receive federal funds, or funds granted by nonprofit foundations, designated for the same purposes, for EOPS, as defined by section 69641. (Ed. Code, § 69651)[17].

Consistent with the prohibition against supplanting district resources, programs or services with EOPS funds, is the requirement that the district must supplement the regular educational programs of the district to encourage the enrollment of students handicapped by language, social, and economic disadvantages, and to facilitate the successful completion of their educational goals and objectives. (Ed. Code, § 69641.) In other words, EOPS resources, programs and funds are required to supplement the existing resources, programs and funds of the district in order to increase the likelihood that EOPS students, who by definition are disadvantaged and less likely to succeed in college than other students without such assistance, will reach their academic and career goals. It is up to each district to choose whether to establish an EOPS program and take advantage of the additional funds provided by the state to meet this important need.

Activities Required of Districts as a Condition of State Funding

If a district exercises its discretion to establish EOP and/or EOS and applies for state funding for its EOPS program, those decisions trigger a number of planning, funding and expenditure, staffing, student services, financial aid and program evaluation activities. These activities are listed below:

1. EOPS Plan

A. **A District's submittal of an EOPS Plan is a condition of participation in the EOPS program**: Districts wishing to participate in EOPS shall submit for approval by the Chancellor a plan which conforms to the provisions of California Code of Regulations, title 5, Chapter 7 for each college within the district which intends to conduct an EOPS program. A college plan approved by the Chancellor shall constitute a contract between the district which operates the college and the Chancellor. Changes to the program may be made only with the prior written approval of the Chancellor. (Cal. Code Regs., tit.5, § 56270.) Each plan shall contain the following:

(1) The long-term goals of the EOPS program in supporting the goals of the college and the goals adopted for EOPS by the BOG.

(2) The objectives of the EOPS program to be attained in the fiscal year for which EOPS funds are allocated.

[17] See also California Code of Regulations, title 5, section 56210 which was adopted to implement the requirements of this section.

(3) The activities to be undertaken to achieve the objectives, including how the college plans to meet the program standards, EOPS financial aid standards and the staffing standards imposed by California Code of Regulations, title 5, Chapter 7.

(4) An operating budget which indicates the planned expenditures of EOPS funds, and other district funds to be used to finance EOPS activities.

(5) The number of students to be served.

(6) An evaluation of the results achieved in the prior year of funding. (Cal. Code Regs., tit.5, § 56272.)

B. **EOPS Plan Deadlines and Procedures**:

(1) The Chancellor's Office shall annually set a final date for submission of EOPS plans and provide at least 90-days notice of that date. Applications and plans received after that date shall be returned to the district without evaluation or consideration. (Cal. Code Regs., tit.5, § 56274.) Plans and requests for funding that are submitted on time shall be reviewed, evaluated. Requests for funding shall be approved in whole or in part. (Cal. Code Regs., tit.5, § 56276.)

(2) Each plan shall incorporate the priorities in California Code of Regulations, Title 5, section 56280 in the order presented when serving eligible EOPS students:

a. Priority in outreach and recruitment services shall be directed towards correcting the greatest underrepresentation among students served. Additional priority among underrepresented students shall be given to serving individuals who are the first in their family to attend college.

b. Priority in serving students enrolled at the college shall be:

1. Serving continuing EOPS students with the lowest income.

2. Serving continuing EOPS students with the lowest income who have transferred from another community college EOPS program.

3. Serving first-time EOPS students with the lowest income. (Cal. Code Regs., tit.5, § 56280.)

2. Funding and Expenditures

A. Districts shall maintain separate accounts for monies provided for, and expended in, support of EOPS activities by specific line item. (Cal. Code Regs., tit.5, § 56290.)

B. Districts shall insure that colleges under their jurisdiction conducting EOPS programs provide the same programs and services it offers to all of its credit enrolled students to EOPS students. The district shall fund the cost of such programs and services from resources available to it, except EOPS funds, at a rate per EOPS student that is at least equal to the average cost per student served (including EOPS students) in these programs and services. (Cal. Code Regs., tit.5, § 56293.)

C. Districts accepting EOPS funds will be required to pay the 100% of the salary of the EOPS director. (Cal. Code Regs., tit.5, § 56293.)

D. Colleges shall expend EOPS funds only for programs and services that are over, above, and in addition to the costs which are the district's responsibility as defined in California Code of Regulations, title 5, section 56293 (i.e. supplemental costs). (Cal. Code Regs., tit.5, § 56294.)

E. Colleges may expend EOPS funds to meet the supplemental costs as defined in section 56294 for personnel and other expenses approved in the EOPS annual plan. Expenditures for other expenses in object categories 4000-6000 (except for EOPS financial aid) in the Budget and Accounting Manual shall not exceed 10% of the EOPS allocation or $50,000, whichever is less. (Cal. Code Regs., tit.5, § 56295.)

F. Requests to purchase computer hardware and/or software shall be approved by the district superintendant/president prior to transmittal for approval by the Chancellor. (Cal. Code Regs., tit.5, § 56295.)

G. EOPS funds shall not be expended for the following:

(1) College administrative support costs (e.g. staff of business office, bookstore, reproduction, staff at the dean salary level and above).

(2) Indirect costs (e.g. heat, lights, power, janitorial service).

(3) Costs of furniture (chairs, desks coat hangers, etc.). (Cal. Code Regs., tit. 5 § 56296.)

H. In each fiscal year the colleges shall expend for EOPS grants and work-study, an amount equal to that expended in the prior fiscal year, unless waived by the chancellor for the following reasons:

(1) To establish a book service program.

(2) The college allocation was corrected pursuant to section 56292.

(3) To meet the requirements of Article 3 (i.e. Program Standards) (Cal. Code Regs., tit.5, § 56298.)

I. The college shall maintain the same dollar level of services supported with non-EOPS funds as the average reported in its final budget report in the previous three academic years. At minimum, this amount shall equal the three year average or 15% of the average EOPS allocation to that college for the same three base years, whichever is greater. The Chancellor may approve reductions in the required amount if enrollments in the EOPS program decline. (Cal. Code Regs., tit.5, § 56210; see also Ed. Code, § 69651, discussed above.)

3. Staffing Standards

A. **Certified directors and instructors and board approval of counselors and support staff:** EOPS shall be provided by certificated directors and instructors, as well as by counselors and other support staff approved by the governing board of the community college district. (Ed. Code § 69641.)

B. **Full-time EOPS director**: Each college receiving EOPS funds shall employ a full-time EOPS director. Colleges having less than full-time EOPS director positions may continue such position upon approval by the Chancellor who shall consider the number of students

served, size of the EOPS staff and budget and the scope and level of services offered when approving requests for less than full-time EOPS director positions. (Cal. Code Regs., tit.5, § 56230.)

C. **Director qualifications**: The EOPS director must meet the minimum qualifications for a student services administrator as specified in California Code of Regulations, title 5, section 53420 or possess a Community College Supervisor Credential. In addition, an EOPS director must have:

(1) within the last four years, two years experience or the equivalent:

a. in the management or administration of educational programs, community organizations, government programs, or private industry in which the applicant dealt predominantly with ethnic minorities or persons handicapped by language, social or economic disadvantages or,

b. as a community college EOPS counselor or EOPS instructor, or have a comparable experience working with disadvantaged clientele, and,

(2) two years of occupational experience in work relating to ethnic minorities or persons handicapped by language, social or economic disadvantages. (Cal. Code Regs., tit.5, § 56262.)

D. **Staff**: EOPS shall be provided by a certificated director, instructors and counselors and other support staff employed by the governing board of the district. (Cal. Code Regs., tit.5, § 56260.)

E. **Counselor qualifications**: EOPS counselors are those persons designated by the community college to serve as certificated counselors in the EOPS program and must possess the Community College Counselor Credential or a master's degree in counseling, rehabilitation counseling, clinical psychology, counseling psychology, guidance counseling, educational counseling, social work, or career development, or the equivalent, and:

(1) have completed a minimum of nine semester units of college course work predominantly relating to ethnic minorities or persons handicapped by language, social or economic disadvantages, or

(2) have completed six semester units or the equivalent of a college-level counseling practicum or counseling field-work courses in a community college EOPS program, or in a program dealing predominantly with ethnic minorities or persons handicapped by language, social or economic disadvantages, and,

(3) have two years of occupational experience in work relating to predominantly with ethnic minorities or persons handicapped by language, social or economic disadvantages. (Cal. Code Regs., tit.5, § 56264.)

4. Student Services

A. **Outreach, orientation, and registration services:** Each college receiving EOPS funds shall provide access to services to identify EOPS eligible students and facilitate their enrollment in the college. Access services shall include at minimum:

(1) Outreach and recruitment to increase the number of potential EOPS eligible students who enroll at the college.

(2) Orientation to familiarize EOPS eligible students with: the location and function of college and EOPS programs and services; the college catalog, application, and registration process, with emphasis on academic and grading standards, college terminology, (e.g., grade points, units) course add and drop procedures; and transfer procedures to four-year institutions.

(3) Registration assistance for priority enrollment pursuant to Title 5 California Code of Regulations section 58108. (Cal. Code Regs., tit.5, § 56232.)

B. **Assessments**: Each college receiving EOPS funds shall assess EOPS eligible students using instruments and methods which the college president certifies are reliable, valid, and appropriate for the students being assessed and for the purpose of the assessment. All assessment results which make use of standardized scoring shall be explained and interpreted to EOPS students by counselors trained in the use and meaning of such assessments. Assessments shall, at minimum include:

(1) Course and placement tests in reading, comprehension, vocabulary, writing, and computations.

(2) Diagnostic tests to determine the specific academic skill deficiencies in areas in which placement tests indicate that the student has a low probability of success in degree applicable courses as defined by college policies.

(3) Study skill assessment which determines how well the student is able to take lecture notes, outline written material, use library services, and use effective study techniques.

(4) Support service assessment which determines what services the student may need to attend regularly and participate in campus life (such as the need for financial aid, child care, part-time employment, or extra-curricular pursuits).

(5) Assessment instruments that are not culturally or linguistically biased. (Cal. Code Regs., tit. 5, § 56234.)

C. **Counseling and advisement**: Each college receiving EOPS funds shall provide counseling and advisement to EOPS-eligible students of at least three contact sessions per term for each student as follows:

(1) A contact session which combines interview and interpretation of assessment results to prepare a student educational plan and a mutual responsibility contract specifying what programs and services the student shall receive and what the student is expected to accomplish.

(2) An in-term contact session to ensure the student is succeeding adequately, that the programs and services are being provided effectively, and to plan changes as soon as may be needed to enhance student success.

(3) A term-end or program exit contact session to assess the success of students in reaching the objectives of that term, the success of the programs and services provided in meeting student needs, and to assist students to prepare for the next term

of classes, or to make future plans if students are leaving the EOPS program or the college. (Cal. Code Regs., tit.5, § 56236.)

D. **Basic skills instruction and tutoring services**: Colleges receiving EOPS funds shall provide basic skills instruction and tutoring services to EOPS eligible students who, on the basis of assessments and counseling, need such services to succeed in reaching their educational goals. (Cal. Code Regs., tit.5, § 56238.)

E. **Transfer and career employment services**: Colleges receiving EOPS funds shall provide assistance to EOPS eligible students to transfer to four-year institutions and/or to find career employment in their field of training. Appropriate colleges and EOPS staff shall attempt to articulate coursework and support services needed by EOPS students with four-year institutional staff, particularly four-year institutional staff who are responsible for programs and services that are similar to EOPS. (Cal. Code Regs., tit.5, § 56240.)

5. Financial Aid

A. **Award procedures**:

(1) Financial aid offices shall award and disburse EOPS grant and workstudy funds according to college procedures upon the authorization of the EOPS office.

(2) EOPS office shall authorize EOPS grant and workstudy awards such that:

a. Awards are distributed as evenly as possible between dependant and independent students.

b. Priority in awards is given to dependant or independent students having the lowest family or personal incomes, respectively.

(3) EOPS may authorize an EOPS grant to reduce packaged student employment awards on a case by case basis. (Cal. Code Regs., tit.5, § 56256.)

B. **EOPS grants and workstudy awards**: EOPS grants are required to be distributed to each student equally among terms in the college academic year. The provision of grants and workstudy awards is at the discretion of the colleges so long as workstudy awards do not exceed $1,800 per academic year and EOPS grants do not exceed $900 per academic year. However, the amount of the combined EOPS grant and workstudy award is limited to a maximum of $1,800 or the student's unmet need, whichever is less. (Cal. Code Regs., tit.5, § 56254.)

C. **Emergency loans**: EOPS programs may establish an emergency loan program for EOPS students to meet the unexpected or untimely costs for books, college supplies, transportation and housing, subject to the following requirements:

(1) Loans may not exceed $300 in a single academic year and must be repaid within the academic year in which the loan was made.

(2) Loan funds shall be held in a separate account established by the district for that purpose; collected funds and interest earned shall be credited to the loan account and all loan funds may be carried over fiscal years for the life of the loan program.

(3) The total amount held for the loan program may not exceed three times the amount originally set aside to establish the program. Amounts in excess of this limit, or the

total amount held when the program is terminated, shall be returned to the Chancellor. (Cal. Code Regs., tit.5, § 56258.)

6. Program Evaluation

A. The Chancellor shall require districts receiving EOPS funds to identify students served and the level and type of programs and services each student received. (Cal. Code Regs., tit.5, § 56206.)

B. Each college having an approved plan shall participate annually in an evaluation of the effectiveness of the program which shall be conducted by the Chancellor. The annual evaluation may include on-site operational reviews, audits, and measurements of student success in achieving their educational objectives. (Cal. Code Regs., tit.5, § 56278.)

7. Advisory Committee

Each EOPS program shall have an Advisory Committee appointed by the president of the college upon recommendation of the EOPS Director. The committee shall consist of no fewer members than the local Board of Trustees. Members serve without compensation but may be reimbursed for necessary expenses incurred in performing their duties. (Cal. Code Regs., tit.5, § 56208.)

Community College Districts are Not Legally Compelled to Establish and Maintain an EOPS Program

The Commission finds that the requirement to perform the above outlined activities is triggered by the claimant's voluntary participation in the underlying EOPS program and acceptance of state funding for that program and that therefore, none of the required activities are state-mandated.

Claimant maintains that even if the EOPS was originally an optional program, beginning with the 1987-1988 academic year Title 5 California Code of Regulations, section 56210 required each college to maintain EOPS programs at a minimum level.[18] Claimant states that therefore, the provisions of Government Code section 17565 apply in this case. Government Code section 17565 provides that if a district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the district for those costs incurred after the operative date of the mandate. In further clarification of this issue, claimant states that this is more than a maintenance of effort and that colleges may not discontinue the program.[19] Claimant focuses on the "shall maintain" language of Title 5 California Code of Regulations, section 56210 in finding a state mandate prohibiting the discontinuance the EOPS program. Title 5 California Code of Regulations section 56210 provides:

> Beginning with the 1987-88 academic year and every year thereafter, the college shall maintain the same dollar level of services supported with non-EOPS funds as the average reported in its final budget report in the previous three academic years. At minimum, this amount shall equal the three year average or 15% of the average EOPS allocation to that college for the same three base years, whichever is greater.

[18] Claimant's March 4, 2004 response to DOF's comments on the test claim, p. 2.

[19] Claimant's July 6, 2004 response to DOF's response dated June 9, 2004, pp. 2-3.

> The Chancellor may approve reductions in the required amount if enrollments in the EOPS program decline.

When an administrative agency adopts regulations, California law requires that it also adopt what is known as a "Statement of Reasons."[20] The Final Statement of Reasons (Amended) for section 56210 states that "[t]his Section was adopted to implement Education Code Section 69651, and to identify a base year for purposes of establishing the level of district resources which would be required by this statute."[21] Section 69651, as discussed above, prohibits districts using any funds received from the state for the operation and administration of [EOPS] to supplant district resources, programs, or services authorized by sections 69649 and 69650. Section 69650 requires compliance with the regulations adopted by the BOG as a condition of receiving EOPS funding from the state.

The method adopted in California Code of Regulations, title 5, section 56210 to ensure that EOPS funds do not supplant district resources, programs, or services authorized by sections 69649 and 69650 was derived from testimony of presidents and superintendents of community colleges.[22] Specifically, "the colleges stated that using a percentage would give them more flexibility in the use of their general funds."[23] "Jack Randell, President of the Chief Executive Officers Association, testified that it would be advantageous to colleges to be able to move funds to those areas of the program with the greatest need."[24] Similarly the averaging of the previous three academic years was adopted "to insure that one abnormal year will not distort the non-EOPS monies made available to EOPS programs through services provided by colleges."[25] Finally, the fifteen percent minimum contribution provides "EOPS programs a minimum contribution figure in order for programs to budget for the upcoming year"[26] There is nothing in the regulatory history to indicate that anyone thought section 56210 would make the EOPS program mandatory.

---

[20] The Administrative Procedure Act imposes a procedure and conditions on the adoption of regulations [see Gov. Code Ch. 3.5 (commencing with Sec. 11340).] The Act requires, among other things, that every agency maintain a file of each rulemaking that shall be deemed the record for that rulemaking proceeding and that the file must include a final statement of reasons. The statement of reasons of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, "why" a regulation is needed and "how" this regulation fills that need. (Gov. Code, § 11346.2(b)(I).) The final statement of reasons also includes a summary of each objection or recommendation made on the proposed regulation and the agency's response to those comments. (Gov. Code, § 11346.9.)

[21] Final Statement of Reasons (Amended), Register 83, No. 18, 4-30-83, p. 4.

[22] Final Statement of Reasons (Amended), Register 83, No. 18, supra, p. 4.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Ibid. Note that historically, districts have received a minimum of $50,000 and a guarantee of at least 95% of the prior year funding from the state.

Claimant, in its comments submitted on the draft staff analysis, argued further that "[t]he adoption of section 56210 removed the voluntary aspect of the program for those community colleges that had provided an EOPS program in any of the three years preceding the 1987-88 fiscal year, while leaving the program voluntary for those community college districts that had not provided a program during that period of time."[27] Claimant maintains that "this maintenance of effort is similar to that seen in the Health Fee Elimination mandate, which was approved by the Commission on November 20, 1986."[28]

At the outset, with regard to the *Health Fee Elimination* mandate, this test claim is distinguishable on its facts because EOPS is not a mandatory program. Moreover, even if this test claim were similar, it is important to note that prior decisions of the Commission do not have precedential value. The California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[29] In *Weiss*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did not act arbitrarily. The Court stated in pertinent part: "[n]ot only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis."[30] In addition, the Attorney General's Office has issued an opinion, citing the *Weiss* case, agreeing that the claims previously approved by the Commission on State Mandates have no precedential value. Rather "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable"[31] While Attorney General Opinions are not binding; they are entitled to great weight.[32]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution must be analyzed individually. Commission decisions are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute and does not apply section 6 as an equitable remedy.[33]

Claimant has failed to consider the rules of statutory interpretation and thus interprets Title 5 California Code of Regulations, section 56210 as making the EOPS program mandatory. Looking at section 56210 in isolation, claimant's interpretation is understandable. However, in determining

---

[27] Claimant comments on the draft staff analysis, supra, pp. 3-4.

[28] Id, p.4.

[29] *Weiss v. State Board of Equalization* (1953) 40 Cal. 2d 772, p.p. 776-777.

[30] Id, p. 776.

[31] 72 Ops.Cal.Atty.Gen.173, p. 178 fn.2 (1989).

[32] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, p. 227.

[33] *City of San Jose,* supra, 45 Cal.App.4th, pp. 1816-1817; *County of Sonoma,* supra, 84 Cal.App.4th, pp. 1280-1281.

what a statute requires, the Commission must look at the whole act.[34] Its words must be construed in context,[35] so as to make sense of the entire statutory scheme.[36] Here, though it is true that section 56210 says "the college shall maintain," this language must be read within the context of the whole statutory and regulatory scheme. As discussed above, the decision to establish an EOPS program and request funding for that program is a discretionary decision of the district which must be approved by the BOG.[37] The statutory scheme makes clear that compliance with the requirements of the test claim statutes and executive orders is a condition of receiving funding for the EOPS program.[38] There is no penalty for refusal to comply with the statutory and regulatory provisions other than a loss of EOPS funding from the state. Moreover, there is nothing in the law which prohibits a district from eliminating its EOPS program. Nor is there any requirement that specific opt-out provisions be provided in statute or regulation in order for a district to discontinue a discretionary program.

Furthermore, the Third District Court of Appeal has discussed regulatory interpretation principles at great length and has said "the interpretation of an administrative regulation is subject to the same principles as the interpretation of a statute."[39] However, unlike statutory interpretation, the court stated, "where the language of the regulation is ambiguous, it is appropriate to consider the agency's interpretation. [Citation] Indeed, we defer to an agency's interpretation of a regulation involving its area of expertise, "'unless the interpretation flies in the face of the clear language and purpose of the interpretive provision' [Citation.]'"[40] Moreover, [t]he language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute [citation], and where possible the language should be read so as to conform to the spirit of the enactment. [Citation.]' [Citation.] [¶] Where statutory provisions are unclear, they should be interpreted to achieve the purpose of the statutory scheme and the public policy underlying the legislation. [Citation.]"[41]

Here, the plain language of the test claim statutes makes clear with its "may" language, the requirement for approval of the program by the BOG, and the requirement that the district request the funding; that EOPS was intended to be a voluntary grant program which provides *supplemental*

---

[34] *People v. Hammer* (2003) 30 Cal. 4th 756; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Ca. 4th 1106; *Teresa J. v. Superior Court* (3d Dist. 2002) 102 Cal. App. 4th 366.

[35] *People v. Thomas* (1992) 4 Cal. 4th 206; *Seidler v. Municipal Court* (2d Dist.1993) 12 Cal. App. 4th 1229.

[36] *Flannery v. Prentice* (2001) 26 Cal. 4th 572.

[37] See Education Code sections 69649, 69650, 69652 and 69553.

[38] Education Code section 69649 which requires the districts to meet the minimum standards in the regulations adopted by the BOG as a condition of eligibility for state funding.

[39] *County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, p. 1586 (citing *Blumenfeld v. San Francisco Bay Conservation etc. Com.* (1974) 43 Cal. App.3d 50, p. 59).

[40] Id, p. 1587, (citing *Divers' Environmental Conservation Organization v. State Water Resources Control Bd.* (2006) 145 Cal.App.4th 246, p. 252).

[41] Id, p. 1588 (citing *Conrad v. Medical Bd. of California* (1996) 48 Cal.App.4th 1038, p. 1046.)

services and financial assistance to the most disadvantaged students. The Legislature has encouraged the districts to participate in EOPS through the provision of substantial funding for the program.

Based on the principles of regulatory construction outlined above, the Commission should read California Code of Regulations, Title 5, section 56210 to conform to the spirit of the test claim statutes and in the context of the statutory framework as a whole. In fact, there is nothing in the regulatory package for section 56210 that even hints at Claimant's interpretation of this regulation. Moreover, the comments submitted by the Chancellor's Office on this test claim make clear that the Chancellor's interpretation is that EOPS is a voluntary program.[42]

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.[43]

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B. The ballot materials defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[44] The court also reviewed and affirmed the holding of *City of Merced*,[45] 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.[46] 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.[47] (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

---

[42] CCC, Chancellor's Office, comments on test claim, supra, p. 2.

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

[44] California Ballot Pamphlet, Special Statewide Election, November 6, 1979, p. 16.

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

[46] *Kern High School Dist., supra*, 30 Cal.4th 727, 743.

[47] Ibid.

> 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.* (Emphasis added.)[48]

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.[49]

Claimant asserts that this EOPS test claim and the *Merced* and *Kern* case are factually dissimilar and are not legally determinative.[50] The Commission disagrees. Just as the court did in *Kern*, the draft staff analysis cited *Merced* for the general proposition that downstream activities which are requirements of an ongoing elective program are not state-mandated activities. Here, districts are not legally compelled to establish an EOPS program or to request and accept state EOPS funds for that program. Similarly in *Kern*, districts were not required to establish school site councils or receive funding for the various programs that required such councils.

The plain language of Education Code sections 69649, subdivision (a) and 69650, state that compliance with the EOPS rules and regulations is a condition of receiving state EOPS funding. Education Code section 69649, subdivision (a) states: "[t]he governing board of a community college district *may*, with the approval of the [BOG], 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." (Emphasis added.) Likewise, section 69650, subdivision (a) provides: "[t]he governing board of a community college district *may*, with the approval of the [BOG], establish extended opportunity services. . . ." Moreover, the requirements imposed by title 5, sections 56232, 56234, 56236, 56238 are only imposed on those districts electing to establish an EOPS program and receiving state funding as is evidenced by the fact that each of those sections begins with the phrase: "[e]ach college receiving EOPS funds shall . . . ." Therefore, districts are not legally compelled by the state to comply with the requirements of the test claim statutes and executive orders.

<u>Claimant Has Not Demonstrated by Evidence in the Record That it is Practically Compelled to Establish and Maintain an EOPS Program</u>

Claimant also argues that districts are practically compelled to provide EOPS because "in order to receive state funding, the program shall meet the minimum standards established pursuant to subdivision (b) of section 69648."[51] Specifically, Claimant states, that:

> [t]he Legislature has challenged California community colleges to recognize the need and accept the responsibility for extending opportunities to all who may profit therefrom regardless of economic, social, and educational status. To ignore available

[48] Id. at p. 731.

[49] Id. at pp. 744-745.

[50] Claimant comments on the draft staff analysis, supra, p. 2.

[51] Claimant's March 4, 2004 response to DOF's comments on the test claim, supra, pp. 2-3.

> funding to help recognize these needs and to ignore their responsibility is so far beyond the realm of practical reality, that it leaves community college districts without any rational discretion.

Claimant cites to the *Sacramento II* and *Kern* cases to support its practical compulsion arguments.[52]

In *Kern,* the school districts made similar arguments and urged the court to define "state mandate" broadly to include situations where participation in the program is practically compelled; where the absence of a reasonable alternative to participation creates a "de facto" mandate.[53] The court previously applied such a construction to the definition of a federal mandate in the case of *Sacramento II,* where the court considered whether state statutes enacted as a result of various federal "incentives" for states to extend unemployment insurance coverage to public employees constituted a reimbursable state-mandated program under article XIII B, section 6.[54] The court in *Sacramento II,* concluded that the costs resulted from a federal mandate because the financial consequences to the state and its residents of failing to participate in the federal plan (full, double unemployment taxation by both state and federal governments) were so onerous and punitive; amounting to "certain and severe federal penalties" including "double taxation" and "other "draconian" measures.[55]

The court in *Kern* stated that although it analyzed the legal compulsion issue, it found it "unnecessary in this case to decide whether a finding of legal compulsion is necessary in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate."[56] The court did provide language addressing what might constitute practical compulsion, for instance if the state were to impose a substantial penalty for nonparticipation in a program, as follows:

> Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur notice- and agenda-related costs. Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion — 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 — claimants here faced no such practical compulsion. Instead, although claimants argue that they have had "no true option or choice" other than to participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have

---

[52] Id., p. 3-6, citing *City of Sacramento v. State of California* (1990) 50 Cal. 3rd 51 (*Sacramento II*) and *Department of Finance v. Commission on State Mandates* (2003) 30 Cal. 4th 727 (*Kern*).

[53] *Kern High School Dist., supra,* 30 Cal.4th 727, 748.

[54] *City of Sacramento, supra,* 50 Cal.3d 51, 74

[55] *City of Sacramento, supra,* 50 Cal.3d 51, 74; *Kern High School Dist., supra,* 30 Cal.4th 727, 750.

[56] Id. at p. 736.

> 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. On the facts presented, the cost of compliance with conditions of participation in these funded programs does not amount to a reimbursable state mandate. (Emphasis in original.)[57]

Although the court in *Kern* declined to apply the reasoning in *City of Sacramento II* that a state mandate may be found in the absence of strict legal compulsion, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies – the court stated: "In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[58]

However, the court in *Kern* found that the facts before it failed to amount to such a "de facto" mandate, since a school district that elects to discontinue participation in one of the educational programs at issue did not face "certain and severe" penalties (independent of the program funds at issue)[59] such as "double … taxation" or other "draconian" consequences. The court concluded that:

> [T]he circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants' phrasing, a "de facto" reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento* … a claimant that elects to discontinue participation in one of the programs here at issue does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences … but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of article XIII B, section 6.[60]

The court acknowledged that a participant in a funded program may be disappointed when additional requirements are imposed as a condition of continued participation in the program. Such conditions, however, do not make the program mandatory or reimbursable under article XIII B, section 6:

> Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstances that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's

---

[57] Id. at 731.

[58] *Kern High School Dist., supra,* 30 Cal.4th 727, 752.

[59] Id. at page 731.

[60] Id. at page 754.

decision whether to continue its participation in the modified program any less voluntary.[61]

The result of the cases discussed above is that, if a local government participates "voluntarily," i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement. Though *Kern* suggests "involuntarily" can extend beyond "legal compulsion" to "compelled as a practical matter to participate." the latter phrase means facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences" and not merely having to "adjust to the withdrawal of grant money along with the lifting of program obligations."[62]

In this case, pursuant to the analysis put forward in the *Kern* case, during the course of the reimbursement period, claimant has not been practically compelled to perform the activities required by the test claim statutes and regulations, since the test claim statutes authorized but did not require establishment of an EOPS program, and no "substantial penalties" would be imposed for the district's failure to establish or decision to dismantle an EOPS program. Moreover, claimant has put no evidence into the record to show that the districts are practically compelled to establish and maintain EOPS programs.

The state has imposed some regulatory requirements upon districts receiving EOPS funds. The incentive, or "carrot," for community colleges to comply with the regulatory requirements of the EOPS program is the availability of funding to cover the costs of providing educational services to EOPS eligible students; the only consequence is the removal of the funds. There are no other "certain and severe" penalties imposed by law, or evidenced in the record, such as double taxation, or the removal of other, unrelated funding sources, if a district declines to participate in the EOPS program. Like the Court in *Kern*, a "district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits."[63] Under *Kern*, when additional requirements are imposed as a condition of participating in a funded program, those conditions do not make the program mandatory or reimbursable under article XIII B, section 6.

Additionally, in the *DOF v. Commission* case, the court expanded on the issue of what is required to support a finding of practical compulsion.[64] That case had to do (in part) with whether school districts were practically compelled to hire public safety officers, thus making compliance with the provisions of the Public Safety Officers Procedural Bill of Rights a reimbursable state-mandated program or higher level of service.

Like the record in this test claim, in *DOF v. Commission* there was no evidence in the record of practical compulsion - that school districts or special districts were not able to rely on the general law enforcement resources of cities and counties or that exercising their statutory authority to hire peace officers was the only reasonable alternative to carrying out their core functions. There, the

---

[61] Id. at pages 753-754.

[62] Id.

[63] *Kern High School Dist., supra,* 30 Cal.4th 727, 753.

[64] *Department of Finance v. Commission on State Mandates (DOF v. Commission*) (2009) 170 Cal.App.4th 1355.

trial court held the school districts and special districts employ peace officers in order to perform their basic and essential function to provide a service to the public. The Court of Appeal reversed and held that in cases of practical compulsion, there must be a "concrete" showing in the record that a local entity is facing certain and severe penalties, such as double taxation or other draconian consequences, if it fails to exercise the discretionary authority and comply with the downstream requirements imposed by a test claim statute.[65]

These cases support the conclusion that evidence in the record is required to show practical compulsion. Absent such a showing by the claimant, the Commission does not find substantial evidence to support a finding of practical compulsion. Accordingly, the Commission finds that there are no state-mandated activities practically compelled by the test claim statutes and regulations.

II. Education Code section 69656 and California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56220, 56222, 56224, 56226, 56540, 56252, 56292 and the Guidelines do not require districts to perform any activities

Education Code section 69656 states the intent of the Legislature for the California State University and the University of California to provide fee waivers for admissions applications for EOPS transfer students who provide waiver forms signed by a community college EOPS director. Education Code section 69656, by its plain language, requires no specific action on the part of districts or community colleges.

With regard to California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56220, 56222, 56224, 56226, 56252, 56292 and the Guidelines, the Commission finds that these sections do not require districts to perform any activities because:

- California Code of Regulations, title 5, sections 56200-56204 are general provisions and definitions not requiring districts to perform any activities.
- California Code of Regulations, title 5, sections 56220-56226 relate to student eligibility and responsibility and do not require districts to perform any activities.
- California Code of Regulations, title 5, section 56252 is a statement of purpose for EOPS financial aid and does not require districts to perform any activities.
- California Code of Regulations, title 5, section 56292 states that the Chancellor may adjust allocations to correct for an over or under allocation or utilization of EOPS funds, but does not require any district to perform any activities.
- The Guidelines are merely the Chancellor's Offices' interpretation of the regulations that are the subject of this test claim.[66] The Guidelines specifically state that they "are not regulations" and that "college staff are *encouraged* to utilize the [G]uidelines in the administration of EOPS program activities."[67]

---

[65] Ibid.

[66] EOPS Implementing Guidelines for Title 5 Regulations, p. ii.

[67] EOPS Implementing Guidelines for Title 5 Regulations, p. ii. Note that staff acknowledges that the EOPS Guidelines also say ". . .it is the responsibility of individual colleges to establish local programs, policies and procedures in accordance with the *requirements of these policies* and other

However, assuming arguendo, that the Guidelines are executive orders, they do not add additional requirements as is evidenced by the use of the modifier "should" throughout. Moreover, even if required activities could be identified in the Guidelines, such activities would be requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus would not be reimbursable state-mandated activities.[68]

CONCLUSION

The Commission concludes that the test claim should be denied because the test claim statutes and executive orders do not require the community colleges to perform any state-mandated activities and thus do not impose a state-mandated program on community college districts because:

1. Downstream activities delineated by Education Code sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, and 69655, as added or amended by the test claim statutes, California Code of Regulations, title 5 sections 56206, 56208, 56210, 56230, 56232, 56234, 56236, 56238, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56293, 56295, 56296, 56298 are requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus are not state-mandated activities.

2. Education Code Section 69656, California Code of Regulations, title 5, sections 56200, 56201, 56202, 56204, 56220, 56222, 56224, 56226, 56540, 56252, 56292 and the Guidelines do not require districts to perform any activities and, even if they did, they would be requirements of an ongoing elective program which the districts participate in on a voluntary basis and thus would not be state-mandated activities.

---

relevant statutes and state regulations." (Emphasis added.) This language is confusing since it appears in a technical assistance/guidance document and all other language in the document is permissive.

[68] Staff notes that Guidelines page 40, interpreting California Code of Regulations, Title 5, section 56252, requires the EOPS program to notify the college's financial aid office when EOPS students receive book services. This fact does not change the staff analysis since this activity is a downstream activity required as a condition of participation in an ongoing elective program.